**THE HIGH COURT**

[2022] IEHC 81

**[Record No. 2021/657 JR]**

**BETWEEN**

**JONATHAN DOWDALL**

**APPLICANT**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS, THE MINISTER FOR JUSTICE AND EQUALITY, DÁIL ÉIREANN, IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**THE HIGH COURT**

**[Record No. 2021/898 JR]**

**BETWEEN**

**GERARD HUTCH**

**APPLICANT**

**AND**

**THE DIRECTOR OF PUBLIC PROSECUTIONS, THE MINISTER FOR JUSTICE AND EQUALITY, DÁIL ÉIREANN, SEANAD ÉIREANN, IRELAND AND THE ATTORNEY GENERAL**

**RESPONDENTS**

**JUDGMENT of Mr. Justice Barr delivered electronically on the 11th day of February, 2022**

**Introduction**

1. These two cases were heard together as they raised identical challenges to the continued existence of the Special Criminal Court.

2. Each of the applicants were brought before Special Criminal Court No. 1 on different dates and were there charged with the murder of one David Byrne, contrary to common law, at the Regency Hotel, Swords Road, Whitehall, Dublin 9 on 9th February, 2016.

3. On each occasion, a solicitor for the first respondent informed the Special Criminal Court that the first respondent had certified pursuant to s.47(2) of the Offences Against the State Act 1939 (hereafter "the 1939 Act"), that the ordinary courts were in her opinion inadequate to secure the administration of justice and the preservation of public peace in relation to the trial of the applicants and that it was intended to try the applicants before the Special Criminal Court.

4. Books of evidence were served on the applicants and a trial date has been set for their trial before the Special Criminal Court for 3rd October, 2022.

5. In essence, the applicants challenge their return for trial before the Special Criminal Court on the basis that that court was brought into existence by a proclamation of the government made on 26th May, 1972, bringing Part V of the 1939 Act into force. The current Special Criminal Court was brought into existence on the following day. The applicants submit that s.35(2) of the 1939 Act only permits a proclamation to be made for a temporary period of time to cater for a particular state of emergency.

6. The applicants submit that as the present Special Criminal Court established under the proclamation made in 1972, has been in existence for fifty years, it cannot be seen as

being temporary. It is submitted that the court is of a permanent character and is therefore ultra vires the provisions of the 1939 Act.

7. The applicants also submit that the executive and Dáil Éireann are under a duty to keep under review the necessity for the continued existence of the proclamation and the Special Criminal Court. They assert that the respondents and each of them, have failed to carry out any periodic review of the necessity of maintaining in force the provisions of Part V of the 1939 Act.

8. In response, the State respondents submitted that s.35(2) of the 1939 Act, does not contain any temporal limitation on the duration of a proclamation, or the Special Criminal Court brought into existence on foot of it. They submit that the only condition concerning the lawfulness of the making of the proclamation, and its continuance in existence, is that the executive should be of opinion that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order, and that it is necessary that Part V of the 1939 Act should be continued in force. It was submitted that as long as the government continue to be of that opinion, they are entitled to maintain Part V in force.

9. Insofar as it was argued that the 1972 proclamation was made by the executive to cater for subversive criminal activity at that time, such that the continued use of the Special Criminal Court to try offences loosely described as being connected to "gangland crime" or "subversive crime" was unlawful, it was submitted that the case law of the Supreme Court has made it clear that once a proclamation is lawfully in force, the provisions provided for in Part V of the 1939 Act, can be utilised for any scheduled offences, or for any non-scheduled offence once certified by the DPP pursuant to s.47(2), irrespective of whether the offence was connected to subversive activity or not.

10. The respondents submitted that the issue of whether the ordinary courts were inadequate to secure the effective administration of justice and the preservation of public peace and order, was a question of opinion that resided solely within the political domain. As such, it was submitted that the holding of such opinion by the executive, was not a matter that was justiciable before the courts. Similarly, in relation to the issue of the duty to review the necessity for the continuance in operation of Part V of the Act, or the Special Criminal Court; it was submitted that that was not a matter that was justiciable before the courts, as it resided within the sphere of competence of the executive.

11. On behalf of the third named respondent, being Dáil Éireann, it was submitted that insofar as any case was made against it, there was no duty on Dáil Éireann to carry out any periodic review of the necessity for the continuance in operation of the proclamation; s.35(5) did not create a duty but created a right, which was exercisable by Dáil Éireann in the event that they reached a certain opinion, whereby they could pass a resolution annulling the proclamation. It was submitted that it was not a justiciable issue that could be determined by the courts, as to whether Dáil Éireann should or should not pass such a resolution.

12. Without prejudice to that submission, counsel submitted that in passing annual resolutions under the Offences Against the State (Amendment) Act 1998 and in passing resolutions pursuant to the Criminal Justice (Amendment) Act 2009, it was clear that the third named respondent had in fact reviewed the question of the necessity for the continued existence of the Special Criminal Court. Accordingly, it was submitted that there was no case made out of any breach of duty on the part of the third named respondent.

13. The submissions of the parties will be set out in more detail later in the judgment.

**Relevant provisions of the Constitution and the Offences Against the State Act 1939 (as amended).**

14. It will be helpful to set out the relevant provisions of the Constitution and of the Offences Against the State Act 1939 (as amended). The most relevant provisions of Art. 38 of the Constitution are subs. (1), (3), (5) and (6). However, for completeness, the entire article is set out hereunder: -

*"(1) No person shall be tried on any criminal charge save in due course of law.*

*(2) Minor offences may be tried by courts of summary jurisdiction.*

*(3) 1° Special courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order.*

*2° The constitution, powers, jurisdiction and procedure of such special courts shall be prescribed by law.*

*(4) 1° Military tribunals may be established for the trial of offences against military law alleged to have been committed by persons while subject to military law and also to deal with a state of war or armed rebellion*

*2° A member of the Defence Forces not on active service shall not be tried by any courtmartial or other military tribunal for an offence cognisable by the civil courts unless such offence is within the jurisdiction of any courtmartial or other military tribunal under any law for the enforcement of military discipline.*

*(5) Save in the case of the trial of offences under section 2, section 3 or section 4 of this Article no person shall be tried on any criminal charge without a jury.*

*(6) The provisions of Articles 34 and 35 of this Constitution shall not apply to any court or tribunal set up under section 3 or section 4 of this Article."*

15. Part V of the 1939 Act is of relevance to this application; of which s.35 is the most relevant. It is in the following terms:

*"(1) This Part of this Act shall not come into or be in force save as and when and for so long as is provided by the subsequent sub-sections of this section.*

*(2) If and whenever and so often as the Government is satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order and that it is therefore necessary that this Part of this Act should come into force, the Government may make and publish a proclamation declaring that the Government is satisfied as aforesaid and ordering that this Part of this Act shall come into force.*

*(3) Whenever the Government makes and publishes, under the next preceding sub-section of this section, such proclamation as is mentioned in that sub-section, this Part of this Act shall come into force forthwith.*

*(4) If at any time while this Part of this Act is in force the Government is satisfied that the ordinary courts are adequate to secure the effective administration of justice and the preservation of public peace and order, the Government shall make and publish a proclamation declaring that this Part of this Act shall cease to be in force, and thereupon this Part of this Act shall forthwith cease to be in force.*

*(5) It shall be lawful for Dáil Eireann, at any time while this Part of this Act is in force, to pass a resolution annulling the proclamation by virtue of which this Part of this Act is then in force, and thereupon such proclamation shall be annulled and this Part of this Act shall cease to be in force, but without prejudice to the validity of anything done under this Part of this Act after the making of such proclamation and before the passing of such resolution.*

*(6) A proclamation made by the Government under this section shall be published by publishing a copy thereof in the Iris Oifigiúil and may also be published in any other manner which the Government shall think proper."*

16. Section 47 of the 1939 Act, is also of relevance, it provides as follows: -

*"(1) Whenever it is intended to charge a person with a scheduled offence, the Attorney-General may, if he so thinks proper, direct that such person shall, in lieu of being charged with such offence before a justice of the District Court, be brought before a Special Criminal Court and there charged with such offence and, upon such direction being so given, such person shall be brought before a Special Criminal Court and shall be charged before that Court with such offence and shall be tried by such Court on such charge.*

*(2) Whenever it is intended to charge a person with an offence which is not a scheduled offence and the Attorney-General certifies that the ordinary Courts are, in his opinion, inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to the trial of such person on such charge, the foregoing sub-section of this section shall apply and have effect as if*

*the offence with which such person is so intended to be charged were a scheduled offence."*

17. On 26th May, 1972, the government made a proclamation pursuant to s. 35(2), bringing Part V of the 1939 Act into force. The relevant portion of the proclamation reads as follows:

> *"The Government, in exercise of the powers conferred on them by s. 35, sub-s 2 of the Offences against the State Act, 1939 (No. 13 of 1939), hereby declare that they are satisfied that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order and that it is therefore necessary that Part V of the said Offences against the State Act, 1939, should come into force, and they hereby order that the said Part V of the said Act should come into force."*

**Submissions on behalf of the Applicants.**

18. It is appropriate to take the submissions made on behalf of the applicants together, as Mr. O'Higgins SC for Mr. Dowdall and Mr. Grehan SC for Mr. Hutch, adopted a unified approach to their applications, whereby the submissions made by each, were adopted by the other.

19. While a number of reliefs had been sought in the respective notices of motion, at the hearing, the arguments focused on the following reliefs that were sought by each of the applicants:

    (i) A declaration that Part V of the Offences Against the State Act 1939 is temporary and emergency legislation that does not permit the establishment of a permanent Special Criminal Court;

    (ii) a declaration that the present iteration of the Special Criminal Court pursuant to a proclamation made in May 1972 is *de facto* a permanent court and in the premises is no longer operating as a temporary and emergency measure;

    (iii) a declaration that the proclamation made and published by the government pursuant to s.35(2) of the Offences Against the State Act 1939 on 26th May, 1972 was intended only to set up a temporary Special Criminal Court and that the Special Criminal Court which is sitting pursuant to that proclamation is in a permanent form and in the premises is unlawful and ultra vires the 1939 Act;

    (iv) a declaration that the failure by the Oireachtas to enact anything other than temporary measures in respect of procedures for the trial of persons coming before special criminal courts amounts to a breach of the constitutional rights of the applicant under Article 38.1 of the Constitution of Ireland;

    (v) each of the applicants sought a declaration prohibiting their trial before the Special Criminal Court in respect of the charge of murder outlined above.

20. At the outset of their submissions, counsel on behalf of the applicants made clear that a number of matters were not in dispute. Firstly, it was accepted that the Constitution provides that special courts may be established by law for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of justice, and the preservation of public peace and order. Secondly, it was accepted that the Constitution did not mandate that such special courts be established on either a permanent, or a temporary basis. Thirdly, the applicants did not challenge the making of the proclamation by the government in 1972 bringing Part V of the 1939 Act into effect, nor the establishment of the Special Criminal Court consequent thereon.

21. The applicants submitted that the wording of s.35 made it clear that the Oireachtas had opted to give the government a mandate to activate Part V of the Act and establish a Special Criminal Court thereunder, on a temporary basis only, to deal with a particular situation of emergency that may exist at the relevant time.

22. It was submitted that such intention on the part of the Oireachtas, was supported by the fact that previous iterations of the Special Criminal Court had only been of limited duration. In the affidavit sworn by Ms. Jenny McKeever on 8th July, 2021, who is the solicitor acting on behalf of one of the applicants, she set out the operation of the current Special Criminal Court and its predecessors at para. 9 *et seq.* By a proclamation made on 22nd August, 1939, Part V of the 1939 Act was brought into force and established the Special Criminal Court for the first time. That Special Criminal Court operated until December 1946. During that time, it dealt with a wide range of offences, including 200 "black market" cases, concerning prosecutions in respect of breach of provisions relating to the rationing of food.

23. The Special Criminal Court was brought back into existence from 27th November, 1961 until February 1962. That was primarily to deal with an escalation in subversive activity on the part of the IRA. The third iteration of the court, was the present Special Criminal Court, which was established pursuant to the proclamation made in May 1972.

24. In support of the submission that the provisions of Part V of the 1939 Act were only temporary in nature, counsel relied heavily on a number of dicta in two decisions of the Supreme Court in *DPP v. Quilligan & O'Reilly* [1986] IR 495 and *Kavanagh v. Ireland* [1996] 1 IR 321.

25. In *DPP v. Quilligan & O'Reilly,* the Supreme Court had to consider whether the provisions of Part V of the 1939 Act, and in particular the provisions for arrest and detention pursuant to s.30 of the Act, could be used where the offences in question did not have any connection to subversive activity. In the course of his judgment, Walsh J. carried out a detailed analysis of the provisions of the 1939 Act. Counsel for the applicants laid considerable emphasis on the following dicta at p.506: -

> *"Thus it would be seen that the first four Parts of the Act of 1939 are always in force and are intended to be complementary to the constitutional provisions already*

*referred to. Parts V and VI of the Act may be regarded as emergency provisions because they only come into force and remain in force for so long as the necessary proclamations are in force and the other requirements of the Act are complied with."*

26. Counsel also referred to the following dicta at p.509:

> *"One can see the logic of the learned trial judge's views in that Part V of the Act only comes into force in the emergency conditions already referred to and while it may be said that the Act is in general intended to deal with what might be generally called the internal enemies of the State, it does not follow that its application is necessarily confined to persons who are engaged in what are generally known as subversive activities which in common parlance appear to be activities endangering the institutions and the security of the State itself."*

27. Counsel submitted that from these dicta of Walsh J., it was clear that Part V of the 1939 Act was only ever intended to contain emergency provisions, that could only come into force and remain in force for so long as the necessary proclamations were in force and the circumstances giving rise to the introduction of the proclamation persisted.

28. It was submitted that the temporary and emergency nature of the provisions of Part V of the Act, was confirmed by the Supreme Court in its subsequent decision in Kavanagh v. Ireland. In that case the applicant had been charged with a number of offences connected with the kidnapping of one James Lacey. Some of the offences with which the applicant was charged were scheduled offences, while others were non-scheduled offences, in respect of which a certificate had been issued by the DPP pursuant to s.47(2) of the 1939 Act. The applicant claimed that the offences with which he had been charged, had no subversive or paramilitary connection, and his solicitor had averred that, in his opinion, the ordinary courts were adequate to try the applicant. The applicant challenged the continuation in force of the proclamation of 26th May, 1972, on the grounds that there was no longer a reasonably plausible factual basis for the opinion on which it was grounded. He also sought to quash the certificate of the second named respondent relating to the non-scheduled offences, on the grounds that the second named respondent was not entitled to certify non-scheduled offences which did not have a subversive connection.

29. In the Supreme Court, two judgments were given by Barrington J. and Keane J. (as he then was); with the remaining judges: Hamilton C.J., O'Flaherty J. and Blayney J., agreeing with both of the judgments delivered. In the course of his judgment, Barrington J. analysed the provisions of the 1939 Act and referred to the earlier decision in *DPP v. Quilligan & O'Reilly* and stated as follows at p.357: -

> *"In The People v. Quilligan [1986] I.R. 495, Walsh J. pointed out that there was a marked contrast between Parts II, III and IV of the Offences against the State Act, on the one hand, and Part V on the other. Parts II, III and IV were permanent in nature and dealt with activities which were self-evidently subversive. These*

*included, for instance, usurping the functions of Government, the activities of unlawful organisations, and the publication of treasonable or seditious matter. Part V of the Act, by contrast, was in the nature of temporary emergency legislation and dealt with the adequacy of the ordinary courts to secure the effective administration of justice and a preservation of public peace and order either generally or in relation to a specific kind of crime."*

30. It was submitted that these dicta of Barrington J. supported the interpretation contended for by the applicants, that the provisions of Part V of the 1939 Act, were only intended to be temporary provisions to cater for a particular state of emergency, or threat to the ability of the ordinary courts to adequately ensure the effective administration of justice.

31. Counsel submitted that the effect of bringing Part V into force and establishing the Special Criminal Court thereunder, was to deprive an accused of his constitutional right to trial by jury. It was submitted that the Supreme Court had held in *Murphy v. Ireland* [2014] IR 198, that in the circumstances provided for in the Constitution, trial by jury was not just a fundamental right of the citizen, it was a vital constitutional obligation on the State (see p.213/215 of the judgment).

32. It was submitted that where such a fundamental right was to be removed, the Oireachtas had opted in the 1939 Act, to adopt a formula whereby that state of affairs could only be on a temporary basis to cater for a particular state of emergency. It was accepted that the Oireachtas could have provided for the power to establish special courts on a permanent basis, but it had deliberately not done so by virtue of the provisions of s.35 of the 1939 Act. As had been recognised in the cases cited, Part V of the 1939 Act had to be seen as temporary emergency legislative provisions.

33. Counsel accepted that the concept of a thing being temporary, was not synonymous with it being of short duration. It was accepted that the word temporary was not per se to be equated to a period of time of short duration, or even in a broad sense to a defined period of time. Counsel noted that a glacier had a temporary existence, but may last ten thousand years; whereas an ice cream, would melt within minutes. Both are temporary in nature. Counsel further acknowledged that a defined state of affairs may last for decades, or longer. In this regard, it was submitted that the troubles were generally said to have lasted from 1969 to 1998.

34. It was submitted that while the prosecution of what may be termed "subversive offences" may have reduced since the time when the proclamation was first introduced, it was undoubtedly true that there had been a significant rise in what may be termed offences connected with "organised crime". Counsel submitted that while both the *Quilligan* and *Kavanagh* cases made it clear that non-subversive offences could be prosecuted before the Special Criminal Court, it was dubious that a whole genus of offences could be prosecuted without the Oireachtas making a fresh proclamation to that effect. Otherwise, the right to trial by jury would be further abridged without the government of the day sanctioning that course. The result of that deficit in the present case, was that the original purpose for which the proclamation had been made, having effectively expired; the

Special Criminal Court was now engaged in trying non-subversive offences and new organised crime offences, without any government proclamation to the effect that that was necessary. It was an illustration of how and why something temporary had become permanent.

35. It was submitted that what had happened in relation to the present iteration of the Special Criminal Court, was that it had been established pursuant to the proclamation in 1972, which was designed to deal with the breakdown of law and order in the State caused by the ongoing subversive activity both within the State and in Northern Ireland, but that over time and in particular, subsequent to the two IRA ceasefires and the signing of the Good Friday Agreement, the usage of the Special Criminal Court had changed from being one designed to deal with subversive offences, into the court primarily dealing with what could be termed offences connected to "organised crime".

36. It was submitted that when one considered that the current Special Criminal Court had been in existence for fifty years, which was half the time that the State itself had been in existence, and where there was no sign of the rationale for the court's continued existence, ceasing; the reality was that the court had to be seen as being permanent in nature.

37. It was submitted that the permanent nature of the court was demonstrated by the following four factors: firstly, one could have regard to the fact that it had been in existence for fifty years; secondly, the court had outlasted the emergency situation which had prompted its introduction, being the threat posed by subversive activity. It was submitted that where Part V had remained in force beyond the situation of emergency that it had been intended to deal with, suggested that it was no longer a temporary measure, but had instead taken on a permanent existence. Thirdly, the rationale for the use of the court in relation to offences connected with "organised crime", was based on a fear that jurors and witnesses may be intimidated if the matter were to be tried before the ordinary courts. It was submitted that this risk was not likely to be of temporary duration. In reality, given the increased sophistication of criminal organisations, it was a risk that was likely to persist on a permanent basis. Accordingly, the court must be seen as also being necessary on a permanent basis to counter that threat.

38. Fourthly, it was noteworthy that a second Special Criminal Court had been established by order made on 14th December, 2004. The court was brought into operation in April 2016. It was submitted that these developments suggested that the use of Special Criminal Courts was becoming more entrenched; without any sign of a cessation of their use in the near future.

39. It was submitted that these factors suggested that Part V of the 1939 Act was, in effect, operating on a *de facto* permanent basis and that the current Special Criminal Courts would continue to operate in perpetuity. It was submitted that that was *ultra vires* the 1939 Act, which only permitted the operation of Part V and the Special Criminal Courts established thereunder, on an emergency and temporary basis.

40. In conclusion on this aspect of their challenge, it was submitted on behalf of the applicants that it was not appropriate to use Part V of the 1939 Act as a permanent measure to deal with concerns which were not transient, or of an emergency nature. It was submitted that insofar as there might be any considerations justifying the continued use of Special Criminal Courts, the proper course was to rescind the 1972 proclamation and introduce legislation that would allow for courts to be established on a permanent basis.

41. It was further submitted on behalf of the applicants that there was a duty on the executive and on Dáil Éireann to review the continued operation of Part V of the 1939 Act. This duty arose from the provisions of s.35(4) and (5). It was submitted that these provisions made it clear that in order to effectively carry out the statutory duty that was imposed by those subsections, the executive and Dáil Éireann had to keep under review the factual basis giving rise to the necessity to continue Part V and the Special Criminal Court in operation.

42. In support of that submission, counsel referred to the dicta of Barrington J. in the *Kavanagh* case where under the heading "Duty of government to keep situation under review", he stated as follows at p.358: -

> *"One could accept the submission of the applicant that once the Government has made a proclamation under s. 35, sub-s. 2 of the Offences Against the State Act, 1939, declaring the ordinary courts to be inadequate to secure the effective administration of justice and bringing Part V of the Act into force, it has a duty to keep the situation under review and to publish a further proclamation declaring that Part V should cease to be in force in the event of being satisfied that the ordinary courts were adequate to secure the effective administration of justice and the preservation of public peace and order. Likewise Dáil Éireann would have a similar duty under s. 35, sub-s. 5 to pass a resolution annulling the Government's proclamation bringing Part V of the Act into force should Dáil Éireann be of the opinion that this proclamation was not necessary."*

43. It was submitted that no review of any substance had been carried out into the necessity for the continued existence of the provisions of Part V of the 1939 Act, by either the executive, or the third respondent. Counsel pointed out that the report of the committee to review the Offences Against the State Acts, 1939-1998 by Hederman J. *et al* [2002], contained recommendations in relation to the periodic review of the necessity to maintain the provisions of Part V in force, but these had not been carried into effect by the executive.

44. Insofar as the respondents had sought to rely on some implicit review due to the fact that annual resolutions had been passed under the 1998 Act and resolutions had been passed pursuant to the Criminal Justice (Amendment) Act 2009, it was submitted that that was not sufficient to establish that any review of the necessity for the continued use of Part V and of the Special Criminal Court had been carried out by any of the respondents.

45. It was submitted that on the basis of the matters set out above, the applicants were entitled to the reliefs sought in their respective notices of motion.

**Submissions on behalf of the Respondents.**

46. On behalf of the first, second and fourth named respondents, Mr. Farrell SC, submitted that this was first and foremost a case about statutory interpretation; in particular, the correct interpretation of s.35 of the 1939 Act.

47. It was submitted that there was no temporal limitation on the power of the government to make a proclamation, or continue it in existence, in the wording of the section. It was submitted that the words "*if, so often and whenever*", made it clear that there was no time limit on the duration of a proclamation.

48. By analogy, counsel stated that the provisions of the Act were analogous to switching on a light, which could be left on for an indefinite period, or could be switched off within a short period, depending on the circumstances. As long as the executive was of the opinion that the ordinary courts were inadequate to secure the effective administration of justice, the executive was entitled to keep the provisions of Part V in place.

49. It was submitted that what the applicants were seeking to do was to "read in" a requirement into the section that the proclamation had to be temporary in nature. The applicants were not able to say for how long the proclamation should last. It was an attempt to introduce an ambiguous and unworkable condition into the legislation, which was not contained in the wording of the statute.

50. Counsel submitted that the decision to make a proclamation and the decision to continue it in being, were political decisions that had been entrusted to the executive. It was submitted that it was well settled that the courts had little, if any, scope to interfere with the making of political decisions by the executive. That had been very clearly stated by Barrington J. in the *Kavanagh* case where he had stated as follows at p.354: -

> *"It is clear therefore that under our system the question of whether special criminal courts should be established is a matter for the legislature and the question of whether the Part of the Offences Against the State Act, 1939, providing for the establishment of special criminal courts should be brought into force or should cease to be in force is a matter for the Government.*
>
> *Provided these powers have been exercised in a bona fide manner the ordinary courts have no function in relation to them. There is a certain logic in this as the question under consideration is the adequacy or otherwise of the ordinary courts to secure the effective administration of justice and the preservation of public peace and order.*
>
> *The question of whether the ordinary courts are or are not adequate to secure the effective administration of justice and the preservation of public peace and order is primarily a political question, and, for that reason, is left to the legislature and the executive. The fact that the control intended is primarily a political control is*

*underlined by s. 35, sub-s. 5 which provides that it shall be lawful for Dáil Éireann, at anytime where Part V of the Act is in force, to pass a resolution annulling the proclamation by virtue of which Part V was brought into force and that thereupon such proclamation shall be annulled and Part V shall cease to be in force but without prejudice to the validity of anything previously done thereunder."*

51. It was submitted that the rationale for why that decision was a political decision to be made by the executive, was clear: it was not a legal question whether the ordinary courts were adequate to secure the effective administration of justice. That was a question of opinion, on which the executive had to make a decision based on all the information available to it, through its members and through its civil servants and through their contacts with the relevant state agencies. In particular, the executive would be privy to confidential information gathered by An Garda Síochána, which would enable it to make an informed decision on the matter. Similar considerations applied in relation to the decisions taken by the DPP under s.47(2) of the Act.

52. Counsel accepted that the right to trial by jury was a fundamental constitutional right, but the Constitution itself envisaged circumstances arising when that right may have to be curtailed so as to achieve a fair trial. It was important to appreciate that not only an accused person had a constitutional right to a fair trial. The people, as represented by the DPP, also had a right to expect that the trial would be fair. If it was carried out in circumstances where there was a significant risk that a fair trial could not be achieved due to interference with the jury or witnesses, to proceed in such a forum would constitute the denial of a fair trial to the prosecution.

53. Counsel stated that it was also necessary to remember that even where a person was tried before the Special Criminal Court, he or she enjoyed all the rules of evidence and fair procedures that applied in a jury trial.

54. Counsel pointed out that it was noteworthy that the government was under a duty under s.35(4) to rescind the proclamation if it became satisfied that the ordinary courts were adequate to secure the effective administration of justice and the preservation of public peace and order. Section 35(5) provided a further safeguard, because it provided that it would be lawful for Dáil Éireann at any time during which Part V of the Act was in force, to pass a resolution annulling the proclamation.

55. In relation to the assertion that the provisions of Part V were only capable of being temporary in nature; insofar as the applicants had relied on the decisions in *DPP v. Quilligan & O'Reilly* and *Kavanagh v. Ireland*, counsel submitted that a number of matters had to be noted: firstly, the dicta relied on were obiter dicta; they did not form part of the ratio in either case. Secondly, the word temporary was not used in the two judgments given in the *Quilligan & O'Reilly* case. Thirdly, insofar as the descriptive terms "emergency provisions" and "temporary emergency legislation" had been used in the cases cited by the applicants, they had been used solely in the context of contrasting Parts I-IV of the Act, which formed part of the permanent legislative structure of the State, and Parts V and VI, which were not so intended, as they only came into force as and when activated

by the government by the making of a proclamation, which could be rescinded and be followed by further proclamations on an unlimited number of occasions.

56. Counsel submitted that the essential ratio of the two decisions, was that once a proclamation had been made, it was not confined to prosecutions for what could be termed "subversive crime". The Special Criminal Court could be used whenever the government and/or the DPP, as appropriate, were of opinion that the ordinary courts were not adequate to secure the effective administration of justice, either because a scheduled offence was involved, or where the DPP was of that opinion in relation to a non-scheduled offence.

57. Notwithstanding the fact that the proclamation of 1972 may have been made against a backdrop of a deteriorating security situation due to subversive criminal activity in Northern Ireland and the Republic, it was clear from the decisions in *Quilligan & O'Reilly* and *Kavanagh* that once Part V was in existence, the Special Criminal Court could be used to prosecute any crime where the condition as to the inadequacy of the ordinary courts to secure the effective administration of justice was satisfied, notwithstanding that the crime did not have any subversive connotations.

58. In summary, it was submitted that there was no temporal limitation on the duration of a proclamation in s.35 of the Act. The only condition that had to be complied with was that the government was of the opinion that the ordinary courts were inadequate to secure the effective administration of justice. As long as the government was of that opinion, the proclamation could lawfully remain in force.

59. In relation to the argument based upon an alleged lack of review of the provisions of Part V by the executive, it was pointed out that that was not provided for in the Statute. The applicants had to rely on obiter dicta to mount that argument. In response thereto, counsel submitted that the applicants had not provided any evidence of a lack of review by the government. The applicants bore the burden of proof and they had not discharged that burden in the affidavits sworn on their behalf.

60. The State respondents had provided evidence of an ongoing review. The Hederman report had noted that there had been reviews carried out up to the year 2000. An amendment had been carried out to the Offences Against the State Act by virtue of the 1998 Act. That, of itself, showed that the government continued to view the provisions of Part V and the continued existence of the Special Criminal Court, as being necessary. Furthermore, resolutions had been passed as required pursuant to s.18 of the 1998 Act and pursuant to s.8 of the Criminal Justice (Amendment) Act 2009. The making of such resolutions showed that the necessity for the continued existence of the Special Criminal Court had been recognised by both the executive and Dáil Éireann.

61. The fact that provision had been made for a second Special Criminal Court in 2004, which had become operational in 2016, showed that the question of the necessity for Part V and the Special Criminal Court had been reviewed and indeed it had been found necessary to have an additional court provided under the provisions of Part V of the 1939 Act.

62. Finally, counsel pointed out that in February 2021, the Minister for Justice had established a review into all aspects of the 1939 Act by an expert group, under the chairmanship of Mr. Justice Peart, a retired judge of the Court of Appeal.

63. In conclusion, counsel submitted that even if there was a duty to carry out any review, the adequacy of any such review was a political question, which was not justiciable before the courts. Even if it was, it was submitted that the evidence set out in the affidavit sworn by Ms. Deirdre Meenan on 14th September, 2021, clearly showed that the necessity for the continued operation of Part V of the 1939 Act had been kept under review and had been endorsed by means of the various resolutions and measures set out above. It was submitted that in all the circumstances, the applicants had not established an entitlement to any of the reliefs sought in their notices of motion.

**Submissions on behalf of the third named Respondent.**

64. In the course of comprehensive, but admirably concise submissions, Mr. Kieran BL pointed out that no relief had been sought in either of the applicants' statement of grounds against the third respondent. Secondly, counsel submitted that s.35(5) merely conferred a right on Dáil Éireann to pass a resolution annulling the proclamation in the event that the majority of its members reached a conclusion that the provisions of Part V of the 1939 Act were no longer required to be kept in force. It was submitted that this provision did not cast any duty on them to review the operation of Part V of the 1939 Act in any particular way.

65. Counsel accepted that it could be inferred from the dicta of Barrington J. in the *Kavanagh* case that a situation could arise, whereby the third respondent would have to act, however those dicta merely provided that Dáil Éireann would have to pass the necessary resolution, should it be of opinion that the provisions of Part V were no longer necessary to be kept in force. That duty only arose once Dáil Éireann was of a particular opinion. While various members of that body may have held varying views as to the necessity for the continuance in operation of the Special Criminal Court over the years, there was no evidence before the court that the majority of Dáil Éireann held that opinion at any stage in relation to the 1972 proclamation.

66. It was submitted that the forming of any such opinion, which would trigger the duty to act pursuant to s.35(5), was entirely a political question, into which the court could not enquire. It was submitted that it would be improper for this court to direct Dáil Éireann to form any such opinion.

67. Furthermore, the question as to whether the ordinary courts were adequate to ensure the proper administration of justice, was itself a political question into which the courts could not enquire. In support of the proposition that the courts will not interfere with policy or other decisions that lie within the competence of the executive generally, counsel referred to the decisions in: *Moore v. Minister for Arts, Heritage and the Gaeltacht* [2018] 3 IR 265; *O'Donoghue v. AIB and The Minister for Finance* [2017] IECA 177; *Sherry v. Minister for Education* [2021] IEHC 128; *Sinnott v. Minister for Education* [2001] 2 IR 545 and *TD v. Minister for Education* [2001] 4 IR 259.

68. Counsel further submitted that what the applicants had invited the court to do was to inquire into the internal workings of the Houses of the Oireachtas. It was submitted that that was not possible. In this regard, counsel referred to the decision of Kelly J. (as he then was) in *Controller of Patents v. Ireland* [2001] 4 IR 229; *O'Beolain v. Fahy* [2001] 2 IR 279 and *O'Doherty v. Minister for Health* [2021] IECA 59.

69. Without prejudice to those submissions, counsel submitted that even if such a duty to carry out a review was held to exist, and it was held to be justiciable before the courts; there was clear evidence before the court that in passing the resolutions necessary under the 1998 Act and the Criminal Justice (Amendment) Act 2009, Dáil Éireann had considered and endorsed the continued operation of the Special Criminal Court.

70. Finally, it was submitted that there was no case to be made against the fourth named respondent in the proceedings brought by Mr. Hutch, being Seanad Éireann. That was accepted by counsel appearing on behalf of that applicant.

**Conclusions.**

71. At its heart, this is a case about the proper interpretation of s.35 of the Offences Against the State Act 1939 (as amended). Having considered all of the papers in this case, together with the oral and written submissions of counsel on behalf of the parties, the court has reached the conclusion that the various forms of declaratory and other relief sought by the applicants herein, must be refused.

72. The court is not persuaded that on a true interpretation of s.35 of the 1939 Act, there is any temporal limitation on the length of time for which a proclamation bringing Part V of the Act into force, can last. Insofar as the applicants suggested that the section only provides that a proclamation must be of temporary duration, it is noteworthy that the word temporary, or any similar limiting word, does not appear in the section. Had the Oireachtas intended to limit the duration of a proclamation, it could have said so in plain language. It did not do so.

73. Furthermore, there is no sunset clause in the section, whereby it could only exist beyond a given date after its inception, upon a resolution of either the executive or Dáil Éireann.

74. The court is satisfied that the use of the words *"if, and whenever and so often as the government is satisfied…"* in s.35(2), does not indicate any finite lifespan of a proclamation once made by the government.

75. The court is satisfied that on a correct interpretation of the section, these words merely indicate that it was the clear intention of the Oireachtas that Part V could be brought into operation on such occasions as the government felt it was necessary to do so, because it had reached the opinion set out in that section. The words envisage that Part V may be brought into effect and out of effect, from time to time. These words do not indicate that once a proclamation has been made by a government, it can only last for a temporary period, whatever that may mean.

76. The court accepts the submission made by Mr. Farrell SC that were it held that the words used in s.35(2) in some way mandated that the proclamation, and the Special Criminal Court brought into operation on foot of it, could only be temporary, that would introduce into the legislation a condition whereby the legality of the continued existence of those provisions, would be incapable of being objectively ascertained. This is due to the fact that it is almost impossible to state when a thing ceases to be temporary and must be regarded as being permanent. The court is satisfied that to read in the word "temporary" as a requirement in the section, would be to read in a condition that would render the section almost unworkable, because it would make it impossible to know when the proclamation had to come to an end.

77. In support of the contention that s.35(2) had a condition that the proclamation could only be of temporary duration, the applicants relied on the dicta of Walsh J. in *DPP v. Quilligan & O'Reilly* and the dicta of Barrington J. in *Kavanagh v. Ireland*. The court is not satisfied that these dicta support the submissions made on behalf of the applicants. Firstly, the dicta were clearly obiter in relation to the issues that were then under consideration by the Supreme Court in each case. Secondly, when one reads the judgments in their entirety, it is clear that the phrases used were merely contrasting the legal nature of Parts I-IV and Parts V and VI in the 1939 Act; the essential difference being that the first four parts of the statute were intended to form part of the permanent legislative structure. They would remain in place until repealed or amended. Whereas, Parts V and VI were specifically designed to come into existence as and when deemed necessary by the government. I do not think that in pronouncing those dicta, the judges concerned were intending to state that a proclamation could only lawfully persist for a limited period.

78. The reason why the judges would not have done that, is because the right to bring Part V into existence was entrusted by the Oireachtas to the executive. The question as to whether the ordinary courts are adequate to secure the effective administration of justice is a purely political question. It is not appropriate for the courts to encroach upon matters that are within the realm of decision making of the executive. The reason for that is partly due to the fact that such issue is a matter of opinion which the Oireachtas has entrusted to the executive and secondly, that in reaching that opinion, the executive, and the DPP when exercising the power pursuant to s.47(2), will have available to them a wide range of information, including confidential information that is not available to the public. It would not be possible or appropriate for this Court to give a declaration, or make a ruling to the effect that the circumstances no longer warrant the holding of the opinion that the ordinary courts are not adequate to secure the effective administration of justice and therefore that the proclamation must be rescinded.

79. That is a political decision, which lies with the government. As long as the government *bona fide* holds the requisite opinion as to the inadequacy of the ordinary courts, they are entitled to maintain the proclamation in place. In the absence of a specific provision in the statute, in the form of a sunset clause, or a similar limiting clause, this court cannot make a declaration that the proclamation is temporary and that its time is spent.

80. In argument at the bar, when counsel for the applicants were asked when did they propose that the 1972 proclamation should have been rescinded, neither of them could suggest a particular date. All they could do was to state that their interpretation of s.35(2), as supported by the dicta referred to in *DPP v. Quilligan & O'Reilly* and *Kavanagh v. Ireland*, supported the contention that the proclamation could only be of some temporary, though unspecified duration, and that because the present proclamation had been in existence for fifty years, it had to be seen as a permanent, rather than a temporary, measure.

81. The court does not agree. Fifty years is certainly a substantial period of time, but temporary does not mean short. At one point, there was the somewhat surreal experience that in the written submissions, reference was made to the definition of "temporary" in the Oxford English Dictionary and to the distinction between temporary and permanent legislation as set out in Bennion, Bailey and Norbury on Statutory Interpretation, 8th Edition, at p. 261. The court found this somewhat surreal, given that the word "temporary" does not appear in the section that is being interpreted in this application.

82. In argument at the bar, Mr. Grehan SC suggested that a temporal aspect to the continuance of a proclamation made under s.35(2) could be implied by the use of the word "*whenever".* He stated that the use of this word was as a type of subordinating conjunction, which was the only limitation on government action, but nonetheless, it was a vital one. It was submitted that it introduced a temporal element to the making of the proclamation, in that it presupposed a temporary state of affairs, which was expected to pass. The court is unable to agree with this linguistic analysis. A conjunction is merely a linking word between two clauses in a sentence. A subordinate conjunction is a word which links a subordinate clause to the main clause in the sentence. For example in the sentence, "John got angry, when the train stopped". The word "when" is the conjunction, which links the subordinate clause "the train stopped", with the main clause, "John got angry". The use of the word "whenever", rather than the word "when", tends to show that the occasions on which the proclamation can be made are without limit. The court is not satisfied that the word "whenever", as used in s.35(2), indicates any limitation on the duration of a proclamation made under that section.

83. It was also submitted on behalf of the applicants that because the current proclamation may have been made by the government in 1972, primarily to deal with offences connected to subversive organisations, while today the workload of the Special Criminal Court primarily relates to circumstances connected to what may be loosely referred to as "gangland or organised crime", that the government should have rescinded the 1972 proclamation and replaced it with a fresh one, if they thought that necessary.

84. That submission seems to misunderstand the nature of a proclamation and the effect of the decisions in *DPP v. Quilligan & O'Reilly* and *Kavanagh v. Ireland*. A proclamation is made in circumstances where for a variety of reasons the executive is of the opinion that the ordinary courts are inadequate to secure the effective administration of justice. It is clear from the case law of the Supreme Court, that while a proclamation may have been

made against a backdrop of subversive activity within the State and the difficulty of obtaining a fair trial in respect of such offences before the ordinary courts; once made, the proclamation will cover those scheduled offences that are stipulated under the Act and the trial of non-scheduled offences, when certified by the DPP pursuant to s.47(2), irrespective of whether the offences concerned have any connection with subversive activity or not. That was made clear in the *Quilligan & O'Reilly* and *Kavanagh* cases.

85. Thus, as long as the DPP is of opinion that the ordinary courts are inadequate to secure the effective administration of justice, she can utilise the structures put in place pursuant to the proclamation and the activation of Part V of the Act. The fact that she may be certifying non-scheduled offences under s.47(2) in circumstances which do not have any subversive connotations, is neither here nor there, as long as she holds the required opinion in relation the inadequacy of the ordinary courts to deal with the matter.

86. The court is satisfied that once a proclamation is in place, the DPP is entitled to certify that certain offences be tried before the Special Criminal Court once she holds the requisite opinion that the ordinary courts are inadequate to secure the effective administration of justice. The applicants have not persuaded the court that there is any basis in law to prevent the first respondent certifying that their trials on the charge of murder should be tried before the Special Criminal Court.

87. A further difficulty with the solution proposed by the applicants, to the effect that the government should withdraw the present proclamation and replace it with a fresh one, or in the alternative introduce amending legislation providing for special courts on a permanent basis; ignores the fact that in order to do so, the government would have to hold simultaneous contradictory opinions. On the one hand, they would have to hold the opinion that the ordinary courts were once again adequate to secure the effective administration of justice and on that basis, hold the opinion that it was appropriate to withdraw the 1972 proclamation, while at the same time holding the opinion that the ordinary courts were not adequate to secure the effective administration of justice and therefore it was necessary to introduce a fresh proclamation, on the basis that that state of affairs was due to the existence of the threat posed by gangland or organised crime. It would not be possible for the executive, as human beings, to simultaneously hold those contradictory opinions as to the adequacy of the ordinary courts to secure the effective administration of justice.

88. Turning to the issue in relation to the alleged lack of review of the provisions provided for under Part V of the 1939 Act, the court is satisfied that both the decision made by the government in 1972 to introduce the proclamation and the decision made by successive governments thereafter to continue the proclamation and the provisions of Part V of the 1939 Act in force, is a political question, which is not justiciable before the courts. While this Court would not state that there are no circumstances in which the court could ever review actions on the part of the executive, the court is satisfied that no basis has been established in this case which would warrant the court trespassing into the sphere that is essentially the business of the executive. There is ample case law to support the

proposition that the courts will recognise the separation of powers between the three great institutions of government provided for under the Constitution and will not interfere with matters that are peculiarly within the remit of the executive: see *Moore v. Minister for Arts, Heritage and the Gaeltacht; O'Donoghue v. AIB and the Minister for Finance; Sherry v. Minister for Education; Sinnott v. Minister for Education and TD v. Minister for Education*, supra.

89. However, even if the court is wrong in holding that the decision made by the executive that the ordinary courts are inadequate to secure the effective administration of justice and that it is necessary to continue in existence Part V of the 1939 Act, is beyond review by this Court; the court is satisfied that the evidence before the court clearly establishes that there has been continuing review of the necessity to maintain Part V, and in particular the Special Criminal Court, in existence down to the present time. As already noted, the matter was reviewed by the Hederman committee in their report of 2002. The fact that the Offences Against the State Act 1939 was amended by legislation in 1998, shows that the executive and Dáil Éireann were of opinion that it was necessary to bring in legislation which implicitly recognised the ongoing need for the Special Criminal Court. The resolutions that have been passed pursuant to s.18 of that Act and pursuant to s.8 of the Criminal Justice (Amendment) Act 2009, whereby certain offences are certified as being proper to be proceeded with before the Special Criminal Court, implicitly recognises the need for the continuance of the Special Criminal Court.

90. Furthermore, the creation of a second Special Criminal Court in 2004, which was brought into operation in 2016, of itself discloses that the government and the Oireachtas were of the view that it was necessary to continue the Special Criminal Court in existence and to make provision for a second one. Finally, the court notes that there is an ongoing review under the chairmanship of Mr. Justice Peart, which was established in February 2021, which will review the entirety of the legislation encompassed within the Offences Against the State Acts. In these circumstances, the court is satisfied that the executive has reviewed the ongoing necessity for the proclamation and the operation of Part V of the 1939 Act, including the operation of the Special Criminal Court.

91. In relation to the third named respondent, being Dáil Éireann, the court is satisfied that there is no basis upon which to make any declaration against that body. Firstly, the court notes that there is no specific relief pleaded in relation to this respondent. Secondly, the court is satisfied that s.35(5) confers a right on Dáil Éireann and does not specifically confer any duty upon it. Thirdly, the court is satisfied that insofar as the third respondent could be held to be under a duty to review the necessity for the continuance of the proclamation, the court is satisfied that that question is essentially a political question within the competence of the third respondent and is not a matter that is justiciable before this Court.

92. Fourthly, for the reasons set out above, the court is satisfied that in passing the resolutions pursuant to the 1998 Act and the 2009 Act, the third respondent has in fact of necessity confirmed its opinion that the continuance of the Special Criminal Court in

existence is necessary. It would not have been possible for the Dáil to pass those resolutions certifying that certain offences can be tried before the Special Criminal Court, if they were not of opinion that the existence of the Special Criminal Court was warranted. For these reasons, the court is satisfied that there is no basis on which to grant any relief against the third respondent.

93. It was agreed at the hearing that there is no case to be made against the fourth respondent named in the proceedings brought by Mr. Hutch, being Seanad Éireann.

94. For the reasons set out herein, the court refuses all of the reliefs sought by the applicants in their respective notices of motion.

95. As this judgment is being delivered electronically, the parties will have two weeks within which to furnish brief written submissions on the terms of the final order and on costs and on any other matters that may arise.