Criminal Judicial Review
Removing Criminal Cases from Judicial Review

Mícheál P O’Higgins SC 18 May 2011

Introduction

The process of cleansing the Four Courts of criminals and criminal practitioners is at an advanced stage. The locating of the Criminal Courts Building far away in another part of Dublin has, as might have been expected, sundered the Irish Bar. New entrants who chose to devil in the CCJ may never see practice in the Gandon building, and vice versa. This is not a good thing.

The cross-pollination that came with civil and criminal lawyers practising in the same Courts, and chatting in the same canteen, will be a thing of the past.

Now that criminal practitioners have been safely herded up to Infirmary Road, there remains the problem of what to do with the sub-species remaining, criminal judicial review practitioners. Like a contaminant in the water supply, these creatures require to be filtered out.

For reasons that remain unclear, criminal judicial review is being discouraged. This discouragement takes a number of forms: procedural, fiscal and substantive.

In a recent case a High Court Judge had this to say about bringing criminal judicial review actions:

“The High Court has expressed great disturbance at the increasing occurrence of criminal cases being delayed by applications being brought to the Supreme Court. The proper place for these proceedings is in the criminal courts save for in exceptional circumstances. The District Court order was made on ample evidence. I am not satisfied that there is any injustice here. Stay refused”. 

This was an ex-tempore judgment of Hedigan J. in a Certiorari action entitled O’Connell –v– District Judge Collins and the DPP1. The applicant’s two main points were that the prosecution had failed, in a theft prosecution, to prove the legal status of the Tesco Company from which the goods had allegedly been stolen. This ground was based on an earlier ruling of Birmingham J. in DPP –v– Valentine2. The second ground of challenge concerned the alleged failure of the District Judge to give reasons for her decision to refuse a defence application to dismiss the charge. In ruling on the defence application, the District Judge offered the following rationale:

“I am not accepting the submissions in this matter”.

1 Unreported, High Court (Hedigan J.) 18th February, 2011.
The High Court refused to grant Certiorari, taking the view that the case was no more than a challenge to the District Judge’s finding as to the sufficiency of prosecution evidence. That being so, it was held, the appropriate remedy was an appeal. In making the remarks quoted above, the Learned High Court Judge, having dismissed the application, ruled that the applicant was not entitled to a stay on the trial, pending an appeal to the Supreme Court.

It is difficult to avoid the impression that some of the recent developments on the judicial review side have been connected with list management objectives. For instance, the grounds for bringing “lost evidence” cases based upon the Supreme Court’s own ruling in Braddish – v- DPP have been tightened to such an extent that they no longer feature as a distinct area.\(^3\)

One High Court Judge referred to the bringing of such cases as a “cottage industry”. This epitaph was not intended as a compliment.\(^5\)

**Procedural Discouragement**

Before we move to the main focus of this paper, namely a consideration of some emerging trends in the case law, it is appropriate to consider some changes that have been effected on the procedural side in relation to judicial reviews. It is possible to identify some subtle and not so subtle developments, showing a reduced affection for criminal judicial review type cases. First, habeas corpus or Article 40 applications used to have a somewhat hallowed place in judicial thinking. There used to be a convention whereby habeas corpus applications took precedence over all other types of application and were dealt with at the top of the list, at the commencement of the legal day. This is no longer the case. This is regrettable. It is also not in keeping with the express constitutional recognition accorded to such applications under our Constitution.

No less unfortunate is the failure to give Article 40 appeals immediate priority in the Supreme Court waiting list.

Second, the lack of a dedicated system for after-hours Article 40 applications is unacceptable. The Bar Council has taken this matter up with the Courts Service, but it remains close to impossible to organise an evening time Article 40. When a solicitor rings the number that is provided, the phone rings out. There is no excuse for this. In days gone by, it used to be possible to bring urgent applications in the evening time, sometimes at a Judge’s home. One would have thought, with the advent of the Courts Service and other organisational improvements, it would be possible to have in place a dedicated after-hours facility to enable emergency applications take place. The prospect of a citizen remaining in unlawful custody overnight is apparently not a sufficient reason to put such a facility in place.

Third, the removal of the Wednesday leave application facility in the CCJ is an unfortunate development and one that it is difficult to understand. The facility was promised at the time of the proposed move to Infirmary Road and the facility was put in place and was working. Mr. Justice Peart took the list on a Wednesday afternoon after lunchtime and it proved to be

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\(^3\) (2001) 3 IR 127

\(^4\) See the critical comments of Fennelly J. for the Supreme Court in CD –v- DPP (2009) IESC 70, Kearns P. in Irwin –v- DPP and Hedigan J. in .

\(^5\) It is now required that applications for prohibition based on missing evidence grounds be heard on notice to the DPP. This unusual step is at odds with the normal *ex-parte* process for obtaining leave. The appropriateness of this departure is questionable in that it creates a degree of confusion as to the threshold to be applied, whether that of an arguable case (applicable to *ex-parte* applications) or some higher standard, applicable to *inter-partes* applications. At a minimum there is a danger there will be a doubling up of hearings, with both sides represented at both stages.
a very useful facility. It has now been discontinued. The Judge who took over the extradition list had no problem with its continuance so the reasons for the suspension of the service are not clear. The Bar Council’s request for its restoration has thus far gone unheeded.

Fourth, a rather odd practice has developed on the costs side, affecting Article 40 applications and criminal judicial reviews. The State has taken to inviting the High Court to bypass the normal system of agreeing or taxing costs, in favour of the Judge measuring an all-in sum which the Director asserts is the appropriate figure. This practice is not confined to exceptional cases and seems to have become the norm. The appropriateness of heaping the tawdry fiscal issue onto the judicial plate is questionable. Quite apart from the fact that Judges have more to be doing, what is the Taxing Master for? And if a High Court Judge is to sit as a sort of upper house Taxing Master, what does that mean for the carefully tiered taxation appeal system?

It is questionable whether confidence in the legal system is enhanced by practitioners being forced to row about quantum in a public forum, as an adjunct to substantive litigation. It is uncomfortable for practitioners – and possibly in breach of article 3.13 (a) of the Bar Code - for advocates to act in a cause in which they have a pecuniary interest.

Whilst it is perhaps overly conspiratorial to connect these procedural trends, it is difficult to avoid the impression the current climate for criminal judicial reviews is rather wintery.

**Substantive Changes in the Case Law – Narrowing of the Goalposts**

Those claiming that, in recent times, there has been a deliberate narrowing of the judicial review goalposts point to the following trends in the case law.

On the delay side, there have been a number of important developments which have had the effect of narrowing the parameters within which prohibition actions can be brought, seeking orders restraining criminal trials. These developments include the following:

1. The softening of prosecutorial delay principles as illustrated in cases such as *PM –v- DPP*, *McFarlane (No.2)* and *Devoy –v- DPP*.
2. The sex abuse delay jurisprudence and the Supreme Court’s restatement of the threshold test to be met by an applicant for prohibition, as evidenced by that Court’s important judgment in *H –v- DPP*.
3. The overturning of *Arthurs –v- DPP* relating to the level of delay to be tolerated in summary prosecutions.
4. The overarching requirement for an applicant for prohibition to show the delay complained of has caused actual prejudice, such as a dead witness or unavailable evidence, so as to impair the accused’s ability to defend the charge.

While there have been some interesting and positive developments on the *Certiorari* side, on the *prohibition* side the picture is quite bleak. This can be seen from a number of themes emerging from the case law:

1. The raising of the prohibition bar by requiring applicants seeking to restrain their trial to meet a heightened threshold of establishing that, because of the loss of the

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6 [2006] 3 IR 174
7 Unreported, Supreme Court, 5th March, 2008
8 Unreported, Supreme Court, 7th April, 2008.
9 *H –v- DPP* [2006] 3 IR 575. It is suggested that the judgment gives ground for optimism for the future of judicial review, rather than the reverse.
evidence, or because of the delay, or because of whatever the complaint is, there is now a real and serious risk of an unfair trial, not capable of being cured by trial judge’s warnings or directions.  

2. The re-emergence of the doctrine of curial deference in prohibition cases, and the reassertion of the idea that it is the job of the Director of Public Prosecutions to decide whether criminal charges should be brought in a given case, and the Director’s view will not ordinarily be subject to review.  

3. The reassertion of the DPP’s right to change his mind in decisions whether to bring criminal charges and what criminal charges to bring, and the confinement of Eviston –v– DPP to its own special facts.

4. The reassertion of the supremacy of the role of the Trial Judge in criminal cases and the marked disapproval of litigating, in judicial review proceedings, points which should properly be taken at trial.

5. The hardening of the requirement that litigants seeking judicial review first exhaust all remedies, particularly any appeal that might be available before moving for relief before the judicial review Court.

6. The emergence of a growing blanket “discretionary policy” with respect to criminal judicial review cases, and the idea that relief can be withheld on generalised discretionary grounds unrelated to the procedural validity of the conviction or decision under review.

7. A growing tendency for judicial review Judges to look at the underlying substantive merits of an application and to factor this into the decision in the case, notwithstanding the traditional understanding that judicial review should be concerned with the decision making process and not with the correctness or otherwise of the decision.

8. An emerging distaste for so called legal formalism or “technical” points, as evidenced very recently in the recent decision of O’Donnell J. on search warrants, People (DPP) –v– Mallon.

9. The emergence of a view that the doctrine of precedent known as stare decisis may not be as readily applicable to criminal cases, or judicial reviews involving criminal cases, as opposed to other forms of proceedings.

10. A softening of the requirement that District Judges give reasons for their decisions in criminal cases. It is difficult to reconcile the clarity of the Supreme Court’s decision in O’Mahony –v– Ballagh with some recent High Court decisions declining to condemn a failure to give proper reasons – McMahon J’s decision in Delaney –v– Judge O’Buchuala and the DPP, Kearns P’s decision in Sisk –v– Judge O’Neill and Charleton J’s decision in Lyndon –v– Collins. A case on the other side of the coin is McCarthy J’s decision in Foley –v– Murphy.

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13 [2002] IESC 62


18 See the decision of Geoghegan J. in Gormley –v– Smyth and the DPP, Unreported, Supreme Court, 28th January, 2010.

19 (2002) 2 IR 410

20 (2011) IEHC 138

21 (2010) IEHC 96


Abuse of Process Cases

As for abuse of process cases, a recent decision of the Supreme Court in *Warren Higgins – v- DPP* shows that the bar is high in an abuse of process action and there are very limited circumstances in which a Court will prohibit a trial on the ground that the prosecutor has been guilty of an abuse of process. The concluding remarks of O'Donnell J. in *Higgins* show this to be so:

*There may have been unthinking adherence to a standard procedure, a lack of communication and general clumsiness, but that in my judgment falls far short of rendering a trial on the s.4 charge so deficient in justice that it should be prohibited as an abuse of the process.*

Elsewhere O'Donnell J. opined that:

"...I cannot accept that clumsiness or lack of forethought or simple error on the part of the prosecution can, without more, amount to an abuse of the process. A trial of the Appellant on the s.4 charge could not remotely be said to be something less than a trial in due course of law as required under Article 38 of the Constitution. On the contrary, to prevent a trial on the charge obviously appropriate to a serious incident would be to afford to the people of Ireland something less than they are entitled to expect from the criminal justice system...”

Discretionary Bars to Relief

A view that seems to be gaining ground is the idea that judicial reviews brought on so called technical points, although legal sound, can be defeated on generalised discretionary grounds. This is heresy. According to this thesis, even though a person is able to identify a breach of a statutory procedure or a failure to accord natural justice, judicial review relief may be withheld where a Judge dislikes the overall merits of the application and decides there is a residual and generalised discretion to refuse judicial review.

Discretionary bars to relief are very much in fashion. In recent times *Certiorari* applications have been lost on account of alternative remedies being available and on the basis of discretionary bars such as futility, waiver and acquiescence, applicant delay, lack of candour, “errors within jurisdiction” and failures to raise a complaint at the earliest opportunity in the Court below.

In the case of the last mentioned requirement, it is contended there is nothing wrong with the rule which requires a litigant, where he is aggrieved with a Judge's decision or ruling in a point of law, to make his complaint known at the time, so that the Judge has an opportunity to deal with the point and field the complaint. There are few things less edifying than a practitioner spotting a mistake on the trial Judge's part, remaining silent, pocketing the point and then marching off to the judicial review Court to seek *Certiorari* on account of the mistake.

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In a recent decision called *Lynch –v- DPP*\(^{25}\) Kearns P. deprecated this practice of “hoarding” legal points, for later deployment in the judicial review Court, without the trial judge being given some opportunity to deal with the complaint.

Of course, it is not the law that trial judges must be requisitioned to death or made listen to endless and repetitive submissions. Once a practitioner has made his point to a District Judge and it has been ruled against, he must be entitled to pursue the point before the High Court, whether in a case stated or in a judicial review.

A rule that has been heavily policed in recent times is the stricture that judicial review cannot be used for the purposes of challenging a lower Court’s assessment of the prosecution’s evidence. The proper remedy for that is an appeal. See O’Hanlon J’s dictum to this effect in *Lennon –v- District Judge Clifford*\(^{26}\).

Similarly in *Doyle –v- Judge Connellan and the DPP*\(^{27}\) Kearns P. held that where a case revolves around the question of the adequacy of the evidence, judicial review should not be granted except in cases where the proceedings are fundamentally flawed by reason of some inherent unfairness or impropriety in the hearing taken in its entirety.

Similar sentiments were expressed by Dunne J. in *Grodzicka –v- Ni Chonduin*\(^{28}\) wherein she held that decisions relating to the amendment of charges are not amenable to judicial review since ordinarily they can only consist of errors within jurisdiction.

A distinction might properly be made where there is no evidence to ground, or no consideration of, an essential ingredient in a criminal charge, in which case it is submitted the Trial Judge’s ruling may well be susceptible to challenge by judicial review. For this to happen, the complaint should of course be raised in submission in the court of trial.

In practice, it can often be difficult to mark the dividing line between errors of law which fall within jurisdiction (and therefore according to strict theory, not susceptible to judicial review) and errors of law which bring the decision maker outside jurisdiction, and therefore susceptible to relief by way of *Certiorari*. Quite where the line falls, is difficult to say. Gannon J. drew an interesting distinction in the 1989 case of *Flynn –v- District Judge Ruane and the DPP*\(^{29}\). In that case Gannon J. held that it was wrong for a District Justice to decide that a person should not be given legal representation if it is asked for, by refusing to grant an adjournment when such adjournment is sought by the accused so that he might secure legal representation. Gannon J. held that a District Judge is acting within his jurisdiction in deciding whether or not to grant an adjournment. However, having regard to the well known decision of the Supreme Court in *State (Healy) –v- Donoghue*\(^{30}\) about the importance of legal representation in criminal matters, he held that it must be wrong for a District Justice to decide that a person should not be given legal representation if it is asked for, by refusing to grant an adjournment which has as its purpose an opportunity to secure legal representation. What is interesting about the case for present purposes is that Gannon J. held the decision of the District Justice to go on with the hearing and not to grant the adjournment was an error made *within* jurisdiction. However, he found that the order of conviction which followed the hearing in which one side only was heard, could not stand, because the refusal to grant an adjournment although within jurisdiction had led to an order which was not grounded on the valid exercise of jurisdiction by the District Court. Accordingly, an order of *Certiorari* was granted to set aside the conviction.

\(^{26}\) (1992) 1 IR 382.
\(^{27}\) (2010) IEHC 287
\(^{28}\) (2009) IEHC 475
\(^{29}\) [1989] ILRM 690.
\(^{30}\) [1976] IR 325.
Aggressive Pleadings

Perhaps emboldened by some recent developments, one sees in pleadings an increasing tendency for State respondents to plead, and sometimes over-plead, discretionary bars to relief. This sometimes takes the form of introducing irrelevant and prejudicial material for the purposes of showing the particular applicant in a bad light to do down the application for judicial review. In a recent case the State sought to resist a Certiorari application brought on fair procedures grounds by listing the applicant’s previous convictions and asserting that it was not in the public interest to have the conviction concerned quashed. This necessitated a motion to redact the State’s opposition papers to remove the portions that were scandalous and irrelevant.

The Supreme Court has deprecated the practice of adducing irrelevant and prejudicial material in the case of O’Keeffe –v- Connellan and the DPP31.

Elsewhere, one sees in pleadings a growing tendency for some respondents to plead “lack of candour” or a failure to disclose material facts in criminal judicial review cases, sometimes where the evidence for such dramatic allegations is thin or non-existent. This is presumably a further consequence of the inclement judicial review climate, in which it is thought such arguments will prove persuasive.

That said, practitioners will be live to the necessity to ensure that leave Judges are not mislead or under-informed as to material facts. Even without male fides, cases can be derailed where it is shown the leave Judge was not shown the full picture. The helpful comments of Hedigan J. in Dean –v- DPP32 are instructive in this regard. The message is clear, adopt a warts and all approach. If in doubt, put it in.

The current tendency to focus on discretionary bars with a view to non-suiting an applicant at the threshold or, if he gets through the gate, withholding relief at the final stage, is unfortunate and not in accordance with the spirit of some recent Supreme Court authorities eschewing this discretionary approach. Obsessing about whether an application is slightly out of time or whether legal errors are within or without jurisdiction, sometimes results in the core point being missed. Since one of the objectives of judicial review is to ensure the highest standard of primary decision making, less focus on discretionary checklists, and more focus on whether an application has substantive merit, may well be the way to proceed.

Three contemporary examples from the Supreme Court make the point I am trying to make. First, in Tomlinson –v- Criminal Injuries Compensation Tribunal33 the applicant’s husband had died following a criminal assault. She made a claim for compensation to the Criminal Injuries Tribunal. At first instance, a single member of the Tribunal had found for her on the issue of liability, but had deducted over half the award to take account of the financial benefits coming from other sources which had been paid to the family on her husband’s death. The only issue in the judicial review proceedings was whether the Tribunal member had acted ultra vires in making such deductions. Kelly J. in the High Court held the applicant ought to have exhausted her internal appellate remedy by way of an appeal to a three member panel. On appeal, the Supreme Court took a different view. Denham J. observed that a decision of the single member on the deductions issue was in line with established practice of the Tribunal, so insisting on the exhaustion requirement seemed unnecessarily rigid. In addition, any such appeal would be an appeal de novo, thus potentially re-opening the issue of liability to the applicant’s prejudice. Most significantly of all, because the case raised a net issue of law going to jurisdiction, this was “a factor in favour of a decision by a Court”.

31 (2009) 3 IR 643.
32 (2008) IEHC 87
33 (2005) 1 ILRM 394
I suggest that is an important statement – if a case involves a net issue of law, that in and of itself constitutes an important factor tending in favour of proceeding by way of judicial review.

The exhaustion of an appeal requirement featured in another judgment of Denham J. in *Stefan v Minister for Justice*. In this case material information in an asylum application had been omitted by mistake from the translation of certain documents which had been in place before the authorised officer. When the applicant sought to quash the refusal by reason of this error, the State contends that an appeal should have been taken to the Independent Appeals Authority. Denham J. in the Supreme Court rejected this argument in the following terms:

"The original decision was made in circumstances which were in breach of fair procedures and which resulted in a decision against the appellant on information which was incomplete. The appeals authority process would not be appropriate or adequate so as to withhold certiorari. The applicant is entitled to a primary decision in accordance with fair procedures and an appeal from that decision. A fair appeal does not cure an unfair hearing." (emphasis added)

The third contemporary example of *Certiorari* being granted in the teeth of discretionary arguments is the important decision of the Supreme Court in *O’Keeffe v Connellan and the DPP*. In that case the Supreme Court expressly rejected the argument that the doctrine of relief *ex debito justitiae* no longer formed part of Irish law. In *O’Keeffe* the accused was tried on Indictment in the Circuit Court. The trial proceeded and he was convicted by a jury and the case was put back for sentence. In between the date of conviction and the date of sentence, the Supreme Court delivered judgment in the case of *Zambra v McNulty*. The effect of that decision was to impugn a number of return for trial orders, including the order on foot of which Mr. O’Keeffe had been returned to the Circuit Court. However, Mr. O’Keeffe had submitted to the jurisdiction of the Court and had never taken the point. Mr. O’Keeffe brought a judicial review to quash the return for trial. The DPP opposed the proceedings, arguing that the applicant had waived his right to challenge the validity of the return for trial, in circumstances where he had submitted to the Court’s jurisdiction to hear the case and to the jury’s jurisdiction to return the verdict on the charges before them. It was argued that, whilst the order returning the applicant for trial may have been bad, having been made without the conduct of any preliminary examination, the applicant was not entitled to any relief *ex debito justitiae* because that principle, it was said, had fallen out of favour in recent years and the trend of public law in recent times had been to move from absolutism to discretion.

This submission was rejected by the Supreme Court. Giving the judgment of the Court, Hardiman J. held that a subsisting conviction, imposed without jurisdiction was a classic instance of something that should be quashed by the High Court when absence of jurisdiction is shown. Hardiman J. conducted a detailed review of Supreme Court authorities on the subject including *de Roiste v Minister for Defence* (in particular the judgment of Fennelly J.) and the leading case of *State (Abenglen Properties Limited) v Dublin Corporation*. He held that in the absence of specific facts disentitling an applicant to relief, a remedy will ordinarily be granted without more, to an applicant who has successfully

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34 (2001) 4 IR 203
36 (2009) 3 IR 643
37 (2002) 2 IR 351.
38 (2001) 1 IR 190
impugned a criminal conviction for want of jurisdiction. The Supreme Court expressly disagreed with the proposition that the *de Roiste* case established that the “*ex debito justitiae*” principle had fallen out of favour.

Whilst the current climate for criminal judicial review may be wintery, there are undoubtedly signs of some green shoots emerging. Like all delicate plants, these flowers require careful nurturing. These positive developments include the reassertion of the principle that Certiorari is a relief to be granted *ex debito justitiae*\(^{40}\), the requirement to construe criminal statutes strictly and the rule of construction leaning against the creation of criminal liability by implication\(^{41}\), some recent successful challenges to return for trial orders\(^{42}\) and a number of recent cases from the High Court examining a citizen’s rights when confronted with a policeman exercising a compulsory power\(^{43}\).

To return to the theme with which we started, namely the question whether criminal cases belong in the judicial review list at all, the answer is to be found by returning to some old cases. Many of the great cases in the Law Reports are criminal judicial reviews. What follows is no more than a gentle sampling, and isn’t intended in any way to be comprehensive:

- **Maguire C.J. in *State (Vozza) –v- O’Floinn*\(^{44}\):**
  
  "While I am prepared to agree that in strictness, except where it goes as of course, the granting of an order of certiorari is in all cases a matter of discretion, I am of opinion that in cases where there is conviction on record, made without jurisdiction, the Court can only exercise that discretion in one way, viz., by quashing the order."

- **Gannon J. in the High Court in *State (Healy) –v- Donoghue*\(^{45}\):**

  "Before dealing with the submissions on the grounds on which the conditional orders were made, I think I should say at the outset that it appears to me that the determination of the question of whether or not a court of local and limited jurisdiction is acting within its jurisdiction is not confined to an examination of the statutory limits of jurisdiction imposed on the court. It appears to me that this question involves also an examination of whether or not the court is performing the basic function for which it is established—the administration of justice. Even if all the

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\(^{40}\) *O’Keeffe –v- Connell and the DPP* (2009) 3 IR 643


\(^{44}\) (1957) IR 227

\(^{45}\) (1976) IR 325 at p.333
formalities of the statutory limitation of the court be complied with and if the court procedures are formally satisfied, it is my opinion that the court in such instance is not acting within its jurisdiction if, at the same time, the person accused is deprived of any of his basic rights of justice at a criminal trial”.

... “It is a phrase of very wide import which includes in its scope not merely matters of constitutional and statutory jurisdiction, the range of legislation with respect to criminal offences, and matters of practice and procedure, but also the application of basic principles of justice which are inherent in the proper course of the exercise of the judicial function.”  

... “Among the natural rights of an individual whose conduct is impugned and whose freedom is put in jeopardy are the rights to be adequately informed of the nature and substance of the accusation, to have the matter tried in his presence by an impartial and independent court or arbitrator, to hear and test by examination the evidence offered by or on behalf of his accuser, to be allowed to give or call evidence in his defence, and to be heard in argument or submission before judgment be given. By mentioning these I am not to be taken as giving a complete summary, or as excluding other rights such as the right to reasonable expedition and the right to have an opportunity for preparation of the defence. The rights I have mentioned are such as would necessarily have a bearing on the result of a trial. In my view, they are rights which are anterior to and do not merely derive from the Constitution, but the duty to protect them is cast upon the Courts by the Constitution.”

O'Higgins CJ. expressly approved of Gannon J’s sentiments at p.348 of the report, where he observed:

... “this concept of justice must import not only fairness, and fair procedures, but also regard to the dignity of the individual. No court under the Constitution has jurisdiction to act contrary to justice...”

- Henchy J. in State (Holland) –v- Kennedy:

“The respondent District Justice undoubtedly had jurisdiction to enter on the hearing of this prosecution. But it does not necessarily follow that a court or a tribunal, vested with powers of a judicial nature, which commences a hearing within jurisdiction will be treated as continuing to act within jurisdiction. For any one of a number of reasons it may exceed jurisdiction and thereby make its decisions liable to be quashed on certiorari. For instance, it may fall into an unconstitutionality, or it may breach the requirements of natural justice, or it may fail to stay within the bounds of the jurisdiction conferred on it by statute. It is an error of the latter kind that prevents the impugned order in this case from being held to have been made within jurisdiction.

46 (1976) IR 325 at 335.
47 (1976) IR 325 at 335.
48 (1977) IR 193
...In so far as The State (Smyth) v. Fawsitt (1950) IR JUR REP 25 determined that an order which is good on its face but which was made in disregard of a statutory prerequisite may not be quashed on certiorari, it was wrongly decided."

Kenny J. in the same case:

"As a question of jurisdiction arises, in my opinion the High Court may enquire whether there was evidence upon which such a certificate could have been given and, if there was not, the certificate is invalid and so the respondent went outside her jurisdiction when she sentenced the prosecutor to imprisonment. It follows that there was no jurisdiction to impose the sentence which was given and an order of certiorari should be granted.

What is in question is the punishment imposed, not the guilt or innocence of the accused of the offence charged. I reserve for future consideration the question whether the decision in R. (Martin) v. Mahony 13 (that the High Court will not grant certiorari when there was no evidence upon which the accused could be found guilty) is still the law in criminal trials having regard to Article 38 of the Constitution.

In my opinion the decision of the High Court in The State (Smyth) v. Fawsitt was incorrect and should not now be followed. If the statute giving jurisdiction to the inferior court requires that certain matters be proved to give power to make the order and there is no evidence to support a finding that these statutory conditions precedent existed, then the order should be quashed by certiorari."

• Finlay CJ. in State (O’Connell) – v- Fawsitt49:

"I have come to the conclusion that, in this portion of his judgment, the learned trial judge was in error. I am satisfied that if a person’s trial has been excessively delayed so as to prejudice his chance of obtaining a fair trial, then the appropriate remedy by which the constitutional rights of such an individual can be defended and protected is by an order of prohibition. It may well be that an equal remedy or alternative remedy in summary cases is an application to the justice concerned to dismiss because of the delay. In the case of a trial on an indictable charge, however, I am not satisfied that it is correct to leave to the trial judge a discretion as to whether, as it were, to prohibit himself from letting the indictment go forward or whether to let the indictment go forward. A person charged with an indictable offence and whose chances of a fair trial have been prejudiced by excessive delay should not be put to the risk of being arraigned and pleading before the jury."

This was a unanimous 5 Judge Court. Walsh, Henchy, Griffin and McCarthy JJ. all agreed with Finlay CJ.

49 (1986) IR 362 at 379.
• Denham J. in *B –v- DPP*<sup>50</sup>

“The community’s right to have offences prosecuted is not absolute but is to be exercised constitutionally, with due process. If there is a real risk that the applicant would not receive a fair trial then, on the balance of these constitutional rights, the applicant’s right would prevail.”

• Walsh J. in *McDonald –v- Bord na gCon*<sup>51</sup>:

> In the context of the Constitution natural justice might be more appropriately termed constitutional justice and must be understood to import more than the two well established principles that no man shall be judge in his own cause and audi alteram partem.

• Henchy J. in *Kiely –v- Minister for Social Welfare*<sup>52</sup>

> "This Court has held, in cases such as *In re Haughey*, that Article 40, s. 3, of the Constitution implies a guarantee to the citizen of basic fairness of procedures. The rules of natural justice must be construed accordingly. Tribunals exercising quasi-judicial functions are frequently allowed to act informally—to receive unsworn evidence, to act on hearsay, to depart from the rules of evidence, to ignore courtroom procedures, and the like—but they may not act in such a way as to imperil a fair hearing or a fair result. I do not attempt an exposition of what they may not do for, to quote the frequently-cited dictum of Tucker L.J. in *Russell v. Duke of Norfolk*, "There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth."

Of one thing I feel certain, that natural justice is not observed if the scales of justice are tilted against one side all through the proceedings. Audi alteram partem means that both sides must be fairly heard. That is not done if one party is allowed to send in his evidence in writing, free from the truth-eliciting processes of a confrontation which are inherent in an oral hearing, while his opponent is compelled to run the gauntlet of oral

<sup>50</sup> (1997) 3 IR 140 at 196.  
<sup>51</sup> (1965) IR 217 at 242.  
<sup>52</sup> (1977) IR 267
examination and cross-examination. The dispensation of justice, in order to achieve its ends, must be even-handed in form as well as in content. Any lawyer of experience could readily recall cases where injustice would certainly have been done if a party or a witness who had committed his evidence to writing had been allowed to stay away from the hearing, and the opposing party had been confined to controverting him simply by adducing his own evidence. In such cases it would be cold comfort to the party who had been thus unjustly vanquished to be told that the tribunal’s conduct was beyond review because it had acted on logically probative evidence and had not stooped to the level of spinning a coin or consulting an astrologer. Where essential facts are in controversy, a hearing which is required to be oral and confrontational for one side but which is allowed to be based on written and, therefore, effectively unquestionable evidence on the other side has neither the semblance nor the substance of a fair hearing. It is contrary to natural justice.”

- Henchy J. in State (Lynch) –v- Cooney53:

"I conceive the present state of evolution of administrative law in the Courts on this topic to be that when a statute confers on a nonjudicial person or body a decision-making power affecting personal rights, conditional on that person or body reaching a prescribed opinion or conclusion based on a subjective assessment, a person who shows that a personal right of his has been breached or is liable to be breached by a decision purporting to be made in exercise of that power has standing to seek, and the High Court has jurisdiction to give, a ruling as to whether the pre-condition for the valid exercise of the power has been complied with in a way that brings the decision within the express, or necessarily implied, range of the power conferred by the statute. It is to be presumed that, when it conferred the power, Parliament intended the power to be exercised only in a manner that would be in conformity with the Constitution and within the limitations of the power as they are to be gathered from the statutory scheme or design. This means, amongst other things, not only that the power must be exercised in good faith but that the opinion or other subjective conclusion set as a precondition for the valid exercise of the power must be reached by a route that does not make the exercise unlawful — such as by misinterpreting the law, or by misapplying it through taking into consideration irrelevant matters of fact, or through ignoring relevant matters. Otherwise, the exercise of the power will be held to be invalid for being ultra vires.

With the exception of Kiely (which was commenced by special summons), all of these cases were criminal judicial reviews.

It might be said that the current hostility to criminal judicial reviews finds some justification in the Supreme Court’s decision in CC –v- Ireland54 in which the Supreme Court queried the propriety of seeking a declaration, by means of judicial review, as to the constitutionality of s.1 (1) of the Criminal Law (Amendment) Act, 1935. The Supreme Court indicated the view that the Courts should not generally approve of applications for judicial review which seek “to have rulings made in advance of (a) trial as to the interpretation of the applicable statutory

53 (1982) IR 337 at 380/381
54 (2006) 4 IR 1
provisions” because “the forum for ruling on the law applicable in criminal cases is the trial court itself”.

This principle, I would contend, should not be taken too far. The stricture in CC deprecates the usage of judicial review for the purposes of obtaining, in advance of a criminal trial, a ruling on a point of statutory interpretation. Very few criminal judicial reviews have this as their objective. It is contended that where an applicant’s case for judicial review does not depend on a body of facts that has yet to be determined, there is nothing in principle wrong with a judicial review which has as its core an issue of law or fairness.

Points of statutory interpretation aside, the Courts have made clear that other issues concerning the legality of criminal proceedings – for instance delay – can only be raised by means of an application for judicial review. In People (DPP) –v- POC the Supreme Court held that a Trial Judge did not have jurisdiction to hear an application to stay or quash an indictment on grounds of delay as such an application could only relate to technical legal issues on the indictment. The issue of delay required considerable fact finding by a Court and could not, therefore, be dealt with on an application to quash the indictment at the start of a trial. The appropriate procedure was a separate application for judicial review. Whilst a trial Court had a general and inherent power to protect its process from abuse which included a power to safeguard a person from oppression or prejudice, this applied during the course of the trial and did not allow for the holding of a discreet preliminary process at the commencement of the trial to enquire into issues of delay.

So the Supreme Court has held that, far from doing away with criminal judicial reviews, for certain types of legal issues going to the legality of criminal proceedings, the proper and only method litigating such issues is by means of an application for judicial review.

The Supreme Court has also made it clear that Certiorari applications to quash criminal convictions remain in a special category and should continue to be regarded as relief to which an applicant is entitled as of right, that is to say ex debito justitiae.

Conclusion

One of the main objectives of criminal judicial review is to ensure a high quality of primary decision making and, where that is absent, a means of access to the High Court to secure an order of Certiorari or whatever other type of judicial review relief may be appropriate. The supervisory jurisdiction which the High Court enjoys over the lower Courts is an important facility. It is there to correct errors of law, to correct mistakes of fact, to restore rationality and to remedy injustice. The area where such eventualities are most likely to arise is the criminal law sphere. To remove from the scope of judicial review all cases emerging from the criminal courts, would be to overlook the main objectives of judicial review, would leaves errors of law and fact uncorrected, irrationality undisturbed and injustice un-remedied. Criminal cases have always been at the heart of the development of judicial review principle. That is where they belong.

ENDS

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55 CC –v- Ireland (2006) 4 IR 1 at 54 per Fennelly J.
56 People (DPP) –v- POC (2006) 3 IR 238
57 See the recent decision of the Supreme Court (O’Donnell J.) in Paul Byrne –v- DPP, Unreported, Supreme Court, 17th November, 2010.