Approved
No Redactions Required

THE COURT OF APPEAL

CIVIL

Neutral Citation: [2020] IECA 319

Court of Appeal Record Number: 2019/352

Edwards J.

Ní Raifeartaigh J.

Collins J.

BETWEEN

DARRAGH GALVIN

Applicant/Appellant

AND

DIRECTOR OF PUBLIC PROSECUTIONS,

ATTORNEY GENERAL & IRELAND

Respondents

JUDGMENT of Mr Justice Maurice Collins delivered on 18 November 2020

1. I agree with Ní Raifeartaigh J that this appeal should be dismissed.

2. I gratefully adopt the summary of the background facts and procedural history set out in her judgment.

3. While the proceedings here are in the form of Order 84 judicial review proceedings, the Applicant does not seek to challenge any administrative decision or order made by a decision-maker that is subject to judicial review. Rather, the sole substantive reliefs sought by the Applicant are declarations to the effect that section 78(3) of the Finance Act 2005 (as amended)[1] and section 126 of the Finance Act 2001[2], and/or those sections in combination, are inconsistent with the Constitution and/or incompatible with the European Convention on Human Rights (read with the European Social Charter). While the Applicant seeks an order of prohibition against the DPP restraining his further prosecution in respect of the alleged section 78(3) offence (and an injunction in the alternative), it is evident from the Applicant's Amended Statement of Grounds that these reliefs have no independent basis and rest entirely on the Applicant's challenge to the validity of section 78(3).

[1] Section 78(3) provides that, subject to certain immaterial exceptions, it is an offence (*inter alia*) to offer for sale *"specified tobacco products otherwise than in a pack or packs to which a tax stamp .. is affixed in the prescribed manner."*

[2] Section 126(6) excludes the application of section 1 of the Probation of Offenders Act 1907 to offences relating to excise duties and/or to the management of such duties and it appears to be common-case that this operates to exclude the application of section 1 in respect of an offence under section 78(3).

4. This is not, therefore, a case such as that envisaged by Barrington J in *Riordan v An Taoiseach (No 2)* [1999] 4 IR 343, where judicial review proceedings commencing with an attack on a particular order or administrative decision "*may, as the proceedings unfold, raise constitutional issues and develop into an attack on a particular Act of the Oireachtas"*: at page 350. *State (Lynch) v Cooney* [1982] IR 337, to which Barrington J referred, was such a case. It began as a challenge to a Ministerial order made under section 31 of the Broadcasting Authority Act 1960 but, largely because of the manner in which the State met that challenge in the High Court, ended up as a challenge to both the order and to section 31 itself.

5. While noting that "*no rigid rule*" should be laid down, Barrington J observed that "*when the primary relief claimed by an applicant for judicial review is the validity of an Act or the repugnancy of a Bill, having regard to the Constitution, this Court considers that the case is not an appropriate one for judicial review, and that the applicant ought to be left to claim relief, if any, in a plenary action*": at page 351.

6. Subsequent decisions of the Supreme Court have consistently affirmed the approach articulated by Barrington J in *Riordan (No 2*).

7. In *SM v Ireland* [2007] IESC 11, [2007] 3 IR 283, the Supreme Court overturned the decision of the High Court to dismiss as an abuse of process proceedings in which the plaintiff challenged the constitutionality of section 62 of the Offences Against the Person Act 1861. The plaintiff had previously brought judicial review proceedings to restrain his prosecution on various counts of indecent assault and the State defendants

argued that any challenge to section 62 ought to have been made in those judicial review proceedings. The plaintiff countered that it would not have been possible to accommodate the constitutional challenge within the earlier judicial review proceedings. That argument was accepted by the Supreme Court. Giving the only judgment in the Supreme Court, Kearns J referred to *Riordan (No 2)* and stated that:

> *"it is by now well established that a statutory provision should only be challenged on grounds of unconstitutionality in judicial review proceedings if there is an underlying administrative or judicial decision which is being attacked. One can then "tack on" a challenge to the validity of particular legislation."*[3]

8. *CC v Ireland* [2005] IESC 48 & [2006] IESC 33, [2006] 4 IR 1 may seem a departure from that "*well-established"* principle. However, no issue as to the form of the proceedings (as opposed to their timing) appears to have been raised in *CC* and it is evident that, when the appeals came before it for hearing, the Supreme Court considered that it had no practical option but to address them substantively, even though it was clearly of the view that the issue of statutory interpretation raised by the applicants (on which the constitutional issue was contingent) ought properly to have been left for determination by the trial judge: see per Geoghegan J at para 95 and per Fennelly J at para 134.

[3] At para 30. See also para 48 where Kearns J stated that the dictum of Barrington J in *Riordan (No 2*) "*makes it clear that this [the declaration that section 62 of the 1861 Act is unconstitutional] was not a relief to be claimed appropriately in the judicial review proceedings*."

9. In *Damache v Director of Public Prosecutions* [2012] IESC 11, [2012] 2 IR 266 the proceedings were judicial review proceedings, even though the sole substantive relief sought was a declaration that section 29(1) of the Offences against the State Act 1939 (as amended) was unconstitutional. The High Court decided the substantive issue on the merits, even though it considered that the application had not been brought in a timely manner. On appeal, the Supreme Court considered that it was appropriate to determine the appeal on the merits, as otherwise there would be significant delay in having the issue finally determined. That was clearly a pragmatic approach but the Court nonetheless was careful to re-affirm the correct position, observing (at para 11 of the judgment delivered by Denham CJ) that it was "*most unfortunate that the proceedings were not brought correctly, by way of plenary proceedings"*.

10. In *Nawaz v Minister for Justice* [2012] IESC 58, [2013] 1 IR 142, the State argued – and the Supreme Court agreed – that section 5 of the Illegal Immigrants (Trafficking) Act 2000 required that a challenge to the constitutionality of section 3 of the Immigration Act 1999 be brought by way of judicial review proceedings, on the basis that the challenge involved, in substance, an attack on the validity of an individual deportation order made by the Minister. Giving the only judgment, Clarke J stated his agreement with the views expressed in *Riordan (No 2).* Absent a statutory provision to the contrary, "*the normal procedure by which a case, in which the primary relief claimed concerns a declaration of invalidity of an Act having regard to the Constitution, should be brought is by plenary summons rather than judicial review*" : para 47. As Barrington J had pointed out, however, "*there is no rigid rule to that effect"*

and "*any such practice would have to yield to a contrary statutory regime"*, such as section 5 of the 2000 Act. However, Clarke J noted that, on the granting of leave, Order 84, Rule 22(1) RSC enabled the High Court to direct that the application for judicial review be made by plenary summons: at para 50.

11. Section 3 of the Immigration Act 1999 was once again at issue in *Sivsivadze v Minister for Justice* [2015] IESC 53, [2016] 2 IR 403, though (unlike the position in *Nawaz*) the challenge to that provision did not involve an attack on any specific deportation decision made the Minister. Section 5 of the Illegal Immigrants (Trafficking) Act 2000 therefore had no application. In a judgment with which the other members of the Court (including Clarke J) agreed, Murray J noted that the constitutional issue had been raised in previous judicial proceedings and stated that "*[a]s a matter of principle, parties are not permitted to use judicial review proceedings for the purposes of challenging the constitutional validity of an Act of the Oireachtas. Such a challenge must be initiated by way of plenary proceedings*": at para 8.

12. The language in this passage is, perhaps, more hard-edged than in the earlier cases but I do not think it would be right to read *Sivsivadze* as indicating a departure from the approach of Barrington J in *Riordan (No 2).* This appeal must therefore be approached on the basis that there is "*no rigid rule*". At the same time, however, *Riordan (No 2)* clearly indicates that "*when the primary relief claimed by an applicant for judicial review is the validity of an Act ... having regard to the Constitution"* – and such is the position here – *"the case is not an appropriate one for judicial review, and ... the applicant ought to be left to claim relief, if any, in a plenary action.*" In the language of

the subsequent case-law, plenary proceedings constitute the "*well-established*" "*correct*" and "*normal"* procedure. That is the "*rule*", even if it is not rigid or absolute. I do not share the High Court's view that the message from the jurisprudence is to allow constitutional challenges to proceed by way of judicial review proceedings "*in any event."*

13. While *Riordan (No 2)* and the subsequent decisions referred to above were concerned with constitutional challenges, it appears to me that the same principles apply with equal force to claims for a declaration of incompatibility pursuant to section 5 of the European Convention on Human Rights Act 2003, at least where (as here) the declaration or declarations sought relate to primary legislation enacted by the Oireachtas.

14. In my opinion, there can be no question of there being any burden on the Respondents to justify the application of the general rule here. To the contrary, any departure from the default position requires sufficient justification by Mr Galvin.

15. None of the exceptional factors that induced the Supreme Court in *CC* and *Damache* to entertain and determine constitutional challenges brought in Order 84 judicial review proceedings are present here. The proceedings here are at a preliminary stage. No statement of opposition/defence has been delivered by the Respondents.

16. What, therefore, is the basis on which this Court is asked to sanction a departure from the "*well-established*" "*correct*" and "*normal"* procedure here? Two arguments are

made on Mr Galvin's behalf. It is said, firstly, that it would be wrong for Mr Galvin to be exposed to cross-examination at trial. Secondly, it is said that it is premature to direct a plenary hearing at this stage, having regard to the terms of Order 84, Rules 22 and 27 RSC.

17. I will address the second argument first. Mr Galvin argues that the power given by Order 84, Rule 27(5) RSC[4] is exercisable only at the hearing of an application for judicial review. If that is so, it would appear to follow that proceedings within the scope of Rule 27(5) have to be permitted to proceed to a hearing even if, after the grant of leave, the High Court formed the view that the proceedings should have been commenced by summons. In other words, on Mr Galvin's argument, if on the application for leave the Court does not exercise its power under Order 84, Rule 22(1) RSC to direct that the application for leave be made by plenary summons (the power referenced by Clarke J in *Nawaz*), the Court will then be powerless to intervene until the proceedings come on for hearing, at which point it can *"order the proceedings to continue as if they had been begun by plenary summons."* Such an order would presumably necessitate the abandonment of the hearing, with all the wasted time and costs such a course would necessarily involve. That being so, I would be very slow indeed to construe Rule 27(5) in the manner suggested by Mr Galvin.

[4] Rule 27(5) provides that where "*the relief sought is a declaration, an injunction or damages and the Court considers that it should not be granted on an application for judicial review but might have been granted if it had been sought in a civil action against any respondent or respondents begun by plenary summons by the applicant at the time of making his application, the Court may, instead of refusing the application, order the proceedings to continue as if they had been begun by plenary summons."*

18. The decision of Finnegan J in *DP v Governor of the Training Unit* [2001] 1 IR 492, on which Mr Galvin relied in this context, appears to have been concerned with a different issue, namely whether what is now Rule 27(5) was applicable at the application for leave stage. The applicant in *DP* had contended that no leave was required to challenge the constitutionality of a statute by way of judicial review and had, it seems, invoked Rule 27(5) in support of that contention. Finnegan J held that leave was required and went to refuse leave on all the grounds advanced.

19. There is, in my view, much to be said for the argument made by the Respondents to the effect that Rule 27(5) can and should be read as being engaged as and from the first return date of the motion seeking judicial review. Nothing in the language of the sub-rule (5) expressly compels a contrary conclusion. However, it does not appear necessary to express a concluded view on that point. Although the perfected Order does not say so in terms, it appears that the High Court Judge made her Order pursuant to Order 84, Rule 27(7). [5] That was intended to be in ease of Mr Galvin, it having been suggested that making an order for plenary hearing under Rule 27(7), rather than Rule 27(5), would strengthen Mr Galvin's case that the proceedings continued to be within the scope of the Attorney General's Scheme. Whatever the reason, it is clear that Rule 27(7) was applicable, given that prohibition was one of the reliefs being sought by Mr Galvin,

[5] Rule 27(7) provides that "*At any stage in proceedings in prohibition, or in the nature of quo warranto, the Court on the application of any party or of its own motion may direct a plenary hearing with such directions as to pleadings, discovery, or otherwise as may be appropriate, and thereupon all further proceedings shall be conducted as in an action originated by plenary summons and the Court may give such judgement and make such order as if the trial were the hearing of an application to make absolute a conditional order to show cause."*

and it is clear from its terms that it permits an order to be made "*at any stage in proceedings in prohibition*".

20. More fundamentally, I accept the argument made by the Respondents that the High Court could have simply struck out the proceedings. An order in those terms was, in fact, the primary relief sought by the Respondents. Permitting the conversion of the proceedings into plenary proceedings was a concession to Mr Galvin. I do not think that it lies in Mr Galvin's mouth to challenge the basis for the High Court's Order in circumstances where the alternative was that his judicial review proceedings would be struck out and he would have had to start afresh with a plenary summons.

21. The other point made by Mr Galvin is that it would be wrong for him to be exposed to cross-examination at trial, as that would or could trench on his right to a fair trial on the section 78(3) charge. Mr Galvin expresses concern at the prospect that, at the trial of these proceedings, he will be cross-examined in relation to the credibility of his defence to the criminal charge. He says that the Respondents' purpose in seeking a plenary hearing was to cross-examine him on that basis and, in directing such a hearing, "*the High Court has placed the onus on the applicant to prove his defence as a precondition to having standing to raise the constitutional issues."*[6] Such a course, if permitted, "*would usurp the function of the trial judge and/or sentencing judge on the remittal, contrary to the applicant's right to trial in due course of law under Article 38.1 of the Constitution."*[7]

[6] Written submissions, at para 21.

[7] *Ibid*, at para 35.

22. In response to questioning from the Court, Counsel placed very significant emphasis on the *reasons* given by the High Court Judge for directing a plenary hearing and in particular her apparent acceptance that the Respondents were entitled to maintain a broad challenge to the credibility of her client in cross-examination. It was (so it was suggested) the basis for that direction, rather than the direction in itself, that had prompted Mr Galvin's appeal.

23. The first point to be made here is that it is Mr Galvin that has brought this challenge and it was Mr Galvin that has sought to have it determined in advance of a trial of the alleged section 78(3) offence in the District Court. When he applied for leave to seek judicial review, he sought and obtained a stay on his further prosecution pending the determination of these proceedings. As a general principle, a person facing criminal prosecution who challenges the constitutionality of the legislation founding their prosecution has no automatic entitlement to have their constitutional challenge determined first: see, for example, *MD v Ireland* [2009] 3 IR 690, at paras 17 & 18. Here, however, the Respondents do not take issue with the proposition that these proceedings should be heard first. But, having sought and achieved such a sequencing, Mr Galvin cannot be heard to complain that it is somehow unfair that he should have to make out his case in advance of the criminal trial.

24. Secondly, whatever the form of the proceedings, it is a matter for Mr Galvin to adduce whatever evidence may be necessary to establish his entitlement to the reliefs sought by him. The Respondents are entitled to challenge such evidence. That is so whether or

not the proceedings are converted into plenary proceedings. While some of the rhetoric in the Respondent's submissions – with its references to "*sanitised facts*" and *"[men] of straw*" – is certainly over-heated, the fundamental point as to the importance of evidence in this context is, in my view, correctly made: see the discussion in *Sweeney v Ireland* [2019] IESC 39, [2019] 2 ILRM 457. Even if these proceedings were permitted to proceed as judicial review proceedings, it is, in my opinion, inconceivable that the Respondents would not be permitted to challenge Mr Galvin's affidavit evidence on cross-examination (though only insofar as that evidence was relevant to the actual issues to be decided in the proceedings).

25. Thirdly, and significantly, the High Court Order here simply directs a plenary hearing of these proceedings (as well as fixing a timetable for further pleadings). It does not (and could not) direct or determine what evidence can or should be called by the parties at trial or purport to fix the parameters of the evidential inquiry that the judge hearing the action should undertake. At paragraphs 8 – 11 of her judgment, Ní Raifeartaigh J sets out in detail the grounds relied on by Mr Galvin. It will be a matter for the judge hearing the action to decide, in light of the pleadings and the submissions of the parties, what evidence is relevant in relation to those grounds.

26. Accordingly, the High Court Order does not dictate or prescribe what evidence Mr Galvin can or must give or fix the parameters of any cross-examination of him. Whatever the reasons advanced by the Respondents for seeking the Order, the scope of any permissible cross-examination of Mr Galvin has not been determined and, in the event that any dispute arises at trial about his evidence, it will be determined on the

basis of the materials before the Court, and the arguments made to it, at that point and not by reference to anything that may have been said by the High Court in dealing with this application.

27. As to the issue of standing, Mr Galvin clearly has standing in a general sense, given that he is in peril of conviction for a section 78(3) offence and that, in the event that he is convicted, he may be adversely affected by the operation of section 126. He is clearly not that bogeyman of constitutional litigation, the "*man of straw*".[8] But that does not necessarily foreclose all further inquiry or debate. Closely related to, but conceptually distinct from, the issue of standing is the *ius tertii* rule, "*the rule against advancing claims based on the rights of others*": *Mohan v Ireland* [2019] IESC 18, [2019] 2 ILRM 1. It appears to be the *ius tertii* rule, rather than any issue of standing as such, that exercises the Respondents here. However, arguments about *ius tertii* and any associated evidential disputes do not arise at this stage and the Order made by the High Court Judge does not dictate in any way how any such issues should be addressed at trial. What may be said at this stage, however, is that there is nothing inherently unfair or objectionable in Mr Galvin being required to establish his entitlement to challenge the constitutionality of legislation enacted by the Oireachtas in the same way, and to the same extent, as other litigants are required to do.

[8] Or, to give him his full title, *"the officious man of straw"* (per Henchy J in *Cahill v Sutton* [1980] IR 269, at 284).

28. The Amended Statement of Grounds complains that, as a matter of Irish law, the principle that "*ignorance of the law is no excuse*" applies even to *"complex regulatory offences*".[9] Complaint is also made that section 78(3) does not have "*a clear mens rea element such as to soften the impact of the principle."*[10] It appears from these pleas that Mr Galvin's subjective awareness and/or understanding of section 78(3) *may* be an issue at trial.

29. In his written submissions, Mr Galvin argues by reference to *CC* that he does not have to satisfy the court "*that he was not aware that selling 14 packs of tobacco without an Irish revenue stamp was illegal"*.[11] It is said that the applicant in *CC* did not have to prove to the Supreme Court that he was not aware of the age of the complainant in that case and, like *CC*, all Mr Galvin need do (so it is said) "*is to bring himself within a category of persons who might reasonably be entitled to raise the issue as a defence. Having done so, having established standing, the applicant is now entitled – just as CC was – to challenge the legislation on the basis that the defence he wishes to raise is not open to him in circumstances where it should be*."[12]

30. It will be a matter for the High Court, in the first instance, to determine whether that argument is correct. Apart from *CC* itself, the subsequent judgment of Hardiman J in *A v Government of Arbour Hill Prison* [2006] IESC 45, [2006] 4 IR 88, at para 195 as

[9] Para (f)(8)(v).

[10] Para (f)(8)(vi).

[11] At para 34.

[12] *Ibid*

well as the decisions of the High Court (Murphy J) in *JP v Director of Public Prosecutions* [2008] IEHC 426, [2009] 3 IR 215 and *ZS v Director of Public Prosecutions* [2008] IEHC 427 may be relevant in this context.

31. I would observe that where constitutional challenges revolve around the nature of a statutory offence and/or the defences available in relation to such an offence – as in *CC* – the assessment of disputed questions of standing and/or *ius tertii* must be sensitive to that context. As a general principle, the prosecution bears the burden of proving, to the criminal standard, all elements of a criminal offence. Even where some burden rests on an accused, it will generally be an evidential burden only.[13] A statute may impose a legal burden on an accused in relation to a specified element of an offence but that is comparatively rare.[14]

32. The fact that a statutory provision creating a criminal offence is challenged on the basis that it wrongly excludes a particular form of defence does not imply that, in order to maintain such a challenge, a plaintiff must establish that defence affirmatively. That is well-illustrated by *CC* and its aftermath. The kernel of the constitutional argument advanced in *CC* was that section 1(1) of Criminal Law (Amendment) Act 1935 was

[13] An evidential burden is *"the burden borne by a party who contends that a particular issue should be put before the decision-maker. It is discharged by adducing (or by pointing to relevant evidence adduced by the other party) sufficient evidence for that purpose, to the point that the trial judge is satisfied that it should be left for consideration"*: *People (DPP) v Forsey* [2018] IESC 55, [2019] 1 ILRM 73, per O' Malley J, at para 83. The *"decision-maker*" (the jury where there is a jury, the judge where there is not) must then decide whether the prosecution has proved its case beyond reasonable doubt.

[14] *"The "legal burden" is a burden of proof "properly so called" and is the burden fixed by law on a party to satisfy the tribunal of fact as to the existence or non-existence of a fact or matter"*: *Forsey*, at para 81.

inconsistent with the Constitution because it excluded *any* defence of mistake. The Court upheld that complaint, finding that section 1(1)*"wholly remove[d] the mental element and expressly criminalise[d] the mentally innocent"*[15] and provided for a "*form of absolute liability".*[16] As Hardiman J explained in *A*, section 1(1) unconstitutionally prevented CC "*from putting his version of the facts before the jury at all."*

33. Precisely how the necessary "*mental element*" ought to be accommodated was a matter for the Oireachtas, rather than the Court, for the reasons explained by Hardiman J when he came to discuss the form of declaration to be made. The State had argued for a limited form of declaration, to the effect that the subsection had ceased to have force and effect "*to the extent that it precluded an accused from advancing a defence of reasonable mistake …*". Hardiman J rejected that argument, as follows:

> *"69 The difficulty with the form of limitation on a declaration to that effect that counsel for the respondents proposes is that it appears to involve the court in a process akin to legislation. Counsel for the respondents posits a 'reasonable belief' defence on the basis that the existence of such an defence would save the section from unconstitutionality. But so too would a defence which left the defendant's knowledge of age to be proved by the prosecution as part of the mens rea of the offence, very likely a defence based on presumptions and perhaps other forms of defence. It might, for example, be thought desirable to have a law on this subject along the lines proposed by the Law Reform*

[15] Per Hardiman J, at para 40.

[16] *Ibid*, at para 68.

Commission in 1990. But for present purposes it is sufficient to say that there is, obviously, more than one form of statutory rape provision which would pass constitutional muster, and it does not appear to be appropriate for the court, as opposed to the legislature, to choose between them."

34. In the immediate aftermath of *CC*, the Oireachtas legislated for a defence of "*honest belief*": sections 2 and 3 of the Criminal Law (Sexual Offences) Act 2006.[17] The Criminal Law (Sexual Offences) Act 2017 substituted new provisions, providing for a defence of "*reasonable mistake*", which the accused has the burden of establishing as a matter of probability i.e. a legal burden.[18]

35. The constitutional frailty asserted in *CC* was not the absence of a defence of reasonable mistake, proof of which rested on the accused. It was not the absence of a defence of honest belief. The frailty was more fundamental: the impugned provision provided for "*a form of absolute liability*" that excluded *any* defence of mistake. Some plausible evidence of mistake was therefore sufficient to entitle CC to challenge section 1(1). On his own facts, he was prejudiced by the operation of section 1(1), because the section excluded a defence of mistake going to the jury in *any* form.

[17] Sections 2 and 3 created new offences of defilement of children under the age of 15 and under the age of 17 respectively. Each section provided that it was "*a defence to proceedings for an offence under this section for the defendant to prove that he or she honestly believed that, at the time of the alleged commission of the offence, the child against whom the offence is alleged to have been committed had attained the age of [15/17] years."* The 2006 Act was not explicit as to the nature of the burden on an accused to "*prove*" honest belief and while that issue was discussed by the Court of Criminal Appeal in *People (DPP) v Egan* [2010] IECCA 28, [2010] 3 IR 561, it was not necessary for the Court to reach any decision on it.

[18] Sections 16 and 17, substituting new provisions for sections 2 and 3 of the 2006 Act.

36. It appears to me that CC could not properly have been required, as a condition of establishing an entitlement to challenge section 1(1), to establish affirmatively a form of defence that in fact section 1(1) excluded, on the basis that, if section 1(1) were declared unconstitutional, the Oireachtas *might* in response legislate for such a defence. Such an approach would involve the court effectively predicting what the legislative response would be and then, on the basis of that prediction, acting as if it were the jury or fact-finder in a criminal trial. That would appear to be a wholly inappropriate exercise. If it was not "*appropriate for the court, as opposed to the legislature, to choose between"* the available legislative responses after it had held section 1(1) to be inconsistent with the Constitution, then *a fortiori* it could not have been appropriate for the court to exercise its gatekeeper function (and that is what, in my view, the rules relating to standing and *ius tertii* involve) based on a prediction or assumption as to the choice that might be made by the legislature

37. Whether and to what extent the same considerations apply here was not the subject of any significant debate in this appeal. The grounds for challenging section 78(3) here appear to have some parallels with the grounds of challenge in *CC* but they are not the same. As I have said, any issues of standing/*ius tertii* that may arise here are properly matters for the High Court to adjudicate on in light of the pleadings and the submissions of the parties. The High Court will be fully aware that the guilt or innocence of Mr Galvin is not at issue in these proceedings and will no doubt be mindful of the need to avoid prejudicing any criminal trial that may take place subsequently. Any legitimate concerns about the scope of Mr Galvin's cross-examination can be dealt with by the

High Court judge. Mr Galvin cannot, in any event, be compelled to give evidence of an incriminating character.

38. In the circumstances, I am not persuaded that any unfairness to Mr Galvin arises from the fact that, if he gives evidence at trial, he will be liable to be cross-examined.

39. For these reasons, as well as the additional reasons set out in the judgment of Ní Raifeartaigh J with which I agree, I would dismiss this appeal.