Neutral Citation [2008] IEHC 144

THE HIGH COURT
JUDICIAL REVIEW

2007 No. 50 J.R.

BETWEEN

AHP MANUFACTURING B.V.
TRADING AS WYETH MEDICA IRELAND

APPLICANT

AND
THE DIRECTOR OF PUBLIC PROSECUTIONS
THE ENVIRONMENTAL PROTECTION AGENCY, IRELAND
AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment of Mr. Justice Kevin O'Higgins delivered the 8th day of May, 2008.

The applicant has operated a pharmaceutical production facility in County Kildare pursuant to Integrated Pollution Control licences ("IPC licences") granted by the Environment Protection Agency ("E.P.A.") since January, 1997. The Agency first granted a licence to the applicant on the 14th January, 1997 and issued a revised licence registered number 309 on 27th March, 1998. The Agency then issued further revised licence registered number 581 on the 15th February, 2002. Conditions 7.1 and 7.2 of the IPC licences registered numbers 309 and 581 (the impugned conditions) essentially provided that waste sent off the site for recovery could only be conveyed by a waste contractor approved by the E.P.A.

On the 28th November, 2006, the applicant was served with eighteen summonses charging a series of alleged offences in relation to the disposal of waste on various dates between the 18th September, 2000 and 31st May, 2001. Five of the eighteen summonses alleged offences breaching the terms of the impugned conditions. In the case of each of the five summonses the same breach is alleged to have occurred on different dates.

On the 22nd January, 2007, the applicant was granted leave to apply for judicial review seeking a number of reliefs against the respondents:-

> (a) In respect of the Director of Public Prosecutions ("D.P.P."), the applicant was granted leave to seek an order of prohibition or an injunction to restrain the prosecution of the five charges in the summonses alleging breach of the conditions in the licences granted to the applicant.
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> (b) In respect of the Environmental Protection Agency ("E.P.A."), the applicant was granted leave to challenge the validity of the certain conditions in the licences granted to the applicant by the E.P.A.
>
> (c) In respect of the third named respondent, the State, the applicant was given leave to seek a declaration to the effect that the statutory provisions under which the licences were granted and the impugned conditions attached thereto were unconstitutional.

On the 13th April, 2007, the E.P.A. issued a motion to have the grant of leave set aside. On the 19th April, 2007, the Attorney General issued a motion to have the grant of leave set aside and on the 15th May, 2007, the Director of Public Prosecutions brought a motion *inter alia* to have the leave set aside as being out of time. There was a discrete issue between the Director of Public Prosecutions and the application but that issue is now resolved and does not require adjudication by the Court. On the 18th May, 2007, the applicant brought a motion to amend the grounds to include an argument that the statutory time limit provided for in s. 87(10) of the Environmental Protection Agency Act, 1992 (as inserted by s. 15 of the Protection of the Environment Act, 2003) is unconstitutional. The Court is concerned with these four motions.

The reliefs sought.

The relief sought against the E.P.A. is a declaration that the conditions in respect of the alleged breach to which the summonses relate are ultra vires the (E.P.A.) and unlawful, void and of no effect. The applicant seeks an order of certiorari quashing such conditions.

The applicant seeks a declaration that sections of the Environmental Protection Agency Act, 1992 are repugnant to Article 15.2.1 of the Constitution in that the said provisions allow an impermissible delegation of the sole and exclusive law making power of the Oireachtas to the authority of the E.P.A. This argument is primarily a matter to be dealt with by the State.

As has been already noted, the applicant also brings a motion seeking to amend its statement of ground so as to challenge the constitutionality of the time limits contained in the Environmental Protection Agency Act, 1992 (as amended).

The applicant seeks an order of prohibition or an injunction restraining the Director of Public Prosecutions from further proceeding with his prosecution on five of the summonses, the subject matter of these proceedings. No specific argument is directed specifically at the Director of Public Prosecutions separately. However a successful application for relief against the other respondents would have the consequence that the applicant would also succeed in his application against the Director of Public Prosecutions.

This hearing is not concerned with the substantive issues but only with the motions brought by the various parties. The Environmental Protection Agency, Ireland and the Attorney General, and the Director of Public Prosecutions all maintain that the applicant's application should be dismissed at this stage without going to a full hearing for the reasons argued in Court, and the applicant seeks to amend his grounds to include a new constitutional claim.

The issues.

The issues for the decision of the Court are as follows:

> (1) Is the applicant precluded from obtaining relief because of the provisions of s. 87(10) of the Act of 1992 (as amended)?
>
> (2) Is the applicant precluded from obtaining the relief sought by virtue of the delay, either pursuant to the inherent jurisdiction of the Court or the provisions of Order 84 of the Rules of the Superior Courts, 1986?

(3) Has the applicant the requisite *locus standi* to pursue the constitutional claim in respect of the contention that the conditions imposed on the applicant by the Environmental Protection Agency were *ultra vires* the Agency?

(4) Is the applicant precluded, by reason of lack of *locus standi*, from seeking to pursue a new constitutional argument that the time limits imposed in the Act of 1992 (as amended) are unconstitutional?

1. The provisons of the Environmental Protection Agency Act (as amended)
Section 87(10) of the Environmental Protection Agency Act, 1992 (as amended) is clear. It provides as follows:-

> *"A person shall not by any application for judicial review or in any other legal proceedings whatsoever question the validity of a decision of the Agency to grant or refuse a licence or revised licence (including a decision of it to grant or not to grant such a licence on foot of a review conducted by it of its own volition) unless the proceedings are instituted within the period of 8 weeks beginning on the date on which the licence or revised licence is granted or the date on which the decision to refuse or not to grant the licence or revised licence is made."*

The applicant contends that the above provisions do not apply in the present case and asserts that it is not challenging the grant of a licence but only the conditions attached to such a licence. The applicant argues that, because it faces the possibility of a penal sanction in the present case, s. 87(10) of the Act must be strictly construed in its favour. It contends that because s 87(10) refers to a licence and not to the conditions attached thereto, the provisions of s. 87(10) are not applicable to it.

I was referred to the fourth edition of Bennion, *Statutory Interpretation A Code*, 4th Ed., (Butterworths, 2002) at p. 729 under section 281, where the following passage appears:-

> "One aspect of the principle against doubtful penalisation is that by the exercise of state power the rights of a person in relation to the law and legal proceedings should not be removed or impaired, except under clear authority of law."

I was also referred to a decision of my own in the case of *Mullins v. Hartnett* [1998] 4 I.R. 424 and where under the heading "The Principle Against Doubtful Penalisation", the Court said (at p. 434):-

> "According to this principle nobody suffers a detriment by application of a doubtful law"

The Court went on to quote a passage from Bennion, *Statutory Interpretation*, 2nd Ed., (Butterworths, 1992) at p. 572 as follows (on p. 434):-

> "Whenever it can be argued that an enactment has a meaning requiring infliction of a detriment of any kind, the principle against doubtful penalisation comes into play. If the detriment is minor, the principle will carry little weight. If the detriment is severe, the principle will be correspondingly powerful. As Staughton L.J. said in relation to penalisation through retro-respectivity it is a matter of degree – the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended. However it operates, the principle requires that persons should not be subjected by law to any sort of detriment unless this is imposed by clear words".

In relying on the above passages the applicant contends that its situation is not covered by time limits imposed by s. 87(10), as they apply to a challenge to "a decision to grant a licence" of a licence but not to a challenge to the conditions thereof. Ms. Butler S.C. for the E.P.A., however, argues that the licence and its conditions are not separable and that the decision in relation to the licence is also the decision concerning the conditions. She argues that the conditions do not have free standing existence outside the grant of licence. Moreover, it is submitted on behalf of the E.P.A. that the disjunctive interpretation of the licence from the conditions contended for by the applicant is highly artificial and clearly contrary to the purposes of the statute. While accepting the principle of doubtful penalisation, Counsel for the E.P.A., pointed out that the power of the E.P.A. to grant a licence and attach conditions to it in s. 83 of the Act of 1992 (as amended) is a decision without any criminal consequences. The section makes no reference at all to criminal proceedings other than in the context of giving false information to the E.P.A. The provisions authorising the E.P.A. to grant a licence and attach conditions to it are not penal provisions. Moreover, it is submitted that insofar as the principle applies to statutory interpretation, it is an aid to interpreting a statute along with other principles of statutory interpretation, and counsel for the E.P.A. contends that the principle does not operate so as to disapply statutory provisions in ease of a person that is facing criminal sanctions under provisions of an Act.

It is clear that the intention of the legislature as expressed in s. 87(10) is to establish a strict time limit for challenging decisions. It states as follows:-

> "a person shall not by any application for judicial review or in any other legal proceedings whatsoever question the validity of a decision of the Agency."

The purpose of the Environment Protection Agency Act 1992, as stated by Herbert J. in *O'Connell v. Environmental Protection Agency* [2001] 4 I.R. 494 at p. 500 is pertinent and applicable also to the amended legislation. He described the purpose of the time limit provisions as being (at p. 500):-

> "…the proper protection of the environment and the right of individuals and organisations to be involved in that process but with a limitation placed upon the time in which the validity of a licence or revised licence might be challenged, so as to give some measure of certainty to developers without excluding objectors with a genuinely perceived and formulated grievance…".

The policy consideration behind comparable time restrictions in the planning code were expressed by Finlay C.J. in *K.S.K. Enterprises Ltd. v. An Bord Pleanála* [1991] 2 I.R. 129 where he observed that the holder of a planning permission would (p. 135):-

> "…at a very short interval of time after the date of such decision, in the absence of a judicial review, be entirely legally protected against subsequent challenges to the decision that was made and therefore presumably left in the position to act with safety on the basis of that decision."

If the licence and conditions were taken disjunctively as contended for by the applicant, the clear intention of the legislature as expressed in s. 87(10) would be entirely thwarted. The certainty and security of benefit both to the developer and to the objectors

would simply not exist if the conditions to a licence were open to challenge many years later. A person who had the benefit of a licence and knowledge of the conditions attached to that licence could be open to risk of a condition being struck down many years after the grant of a licence. A licensee who on the basis of the conditions in the licence decided to incur to heavy financial investiture to comply with the conditions of the licence would have no certainty that the conditions, on the basis of which he made his investment, might not be the subject of a successful challenge many years later. As noted earlier, there is a high degree of artificiality in the applicant's submissions. Moreover, it is almost inconceivable that a grantee of a licence would challenge the grant of a licence as opposed to the conditions thereto. The decision to grant a licence is one and the same decision as that to impose new conditions under which the activity may be carried. The conditions do not have any independent existence from the activity which is permitted. The contention by the applicant that a licence would still subsist, even if the conditions were breached, does not aid the applicant in this case. The licence and the conditions have an independent continued existence even in the event of a breach of condition (hence it is permissible to allege breaches of a condition of a licence on separate dates).

I am not convinced that there is any ambiguity or uncertainty posed by the wording of the Act of 1992 (as amended) even taking into account the principle of statutory interpretation contended for by the applicant.

It follows from that finding of the Court that the applicant is precluded from bringing these proceedings as he is clearly many years outside the time limits set out in s. 87(10) of the Environmental Protection Agency Act, 1992 (as amended)

2. The effect of Order 84 rule 21 of the Rules of the Superior Courts
If, however, I am wrong in my conclusion that the provisions of s. 87(10) of the Act of 1992 (as amended) are applicable in this case and preclude the applicant from pursuing these proceedings, and if, contrary to what I have concluded, s. 87(10) does not apply to conditions as opposed to the decision to grant the licence, the applicant is still faced with a difficulty by virtue of the Order 84 of the Rules of the Superior Courts, 1986.

Order 84, rule 21 reads as follows:-

> "(1) An application for leave to apply for judicial review should be made promptly and in any case within three months from the date when grounds for the application first arose, or six months where the reliefs sought is certiorari unless the Court considers that there is good reason for extending the period within which the application shall be made.
>
> (2) Where the relief sought is an order of certiorari in respect of any judgment order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgement order, conviction or other proceeding.
>
> (3) The preceding paragraphs are without prejudice to any statutory provision which has the effect of limiting time within which an application for judicial review may be made."

The respondents submit that the application was not made either promptly or within the time limits prescribed by Order 84, rule 21 nor has there been any reason advanced for the extension of the period in which the application should be made and in those circumstances the application for leave should be set aside.

The applicant however, contends that it is within time for the bringing of this application. The relevant summonses dated the 16th November, 2006, were served on the applicant on the 28th November, 2006, and were returnable for the District Court at Naas, Co. Kildare on the 10th January, 2007, at which date the applicant was sent forward for trial to the Circuit Criminal Court. Leave to seek for a judicial review was sought and granted by the High Court (Peart J.) on the 22nd January, 2007. The applicant argues that the time began to run when it was placed in potential jeopardy by virtue of the return for trial, and that there was no delay on its part. The respondents, however, contend that the time to challenge the conditions has to be reckoned from the time when those conditions were imposed.

I agree with the arguments of the respondents in this regard. The applicant applied for, obtained and used a licence subject to conditions for many years. It was given an opportunity to be heard on the matter prior to the granting of the licence. It was free not to accept the licence if any of the conditions were unacceptable. The licence was renewed. The argument is not and cannot be made that the applicant was unaware of any of the relevant matters in the licence. The applicant was aware for many years of the possibility of serious penal sanctions in the event that conditions of the licence were breached. I cannot accept the contention of the applicant that the requisite time to be reckoned to challenge the validity of the licence was only when the summons were served and he was returned for trial. Moreover Order 84 specifically provides that the application be made within the time stipulated in the order to be reckoned from when the "grounds for the application first arose". I cannot construe that as being from the time of the institution of the current criminal proceedings. The fact that the circumstances have changed and that the applicant is now facing criminal charges does not serve either to alter the statutory provisions of s. 87(10) of the Act of 1992 (as amended) nor does it relieve the applicant of its obligations to comply with the requirements of Order 84 rule 21 of the Rules of the Superior Courts, 1986. The applicant has clearly failed to do that.

Collateral Challenge
The applicant argues that there is nothing to suggest that s. 87(10) of the Act of 1992 (as amended) is intended to preclude collateral, as opposed to direct challenges to the licence whether by means of judicial review proceedings or in other proceedings. It argues that the challenge to the conditions of the licence is collateral to the subject matter in this case which is the seeking of an order prohibiting the trial of the applicant. I was referred to the case of *Blanchfield v. Hartnett* [2002] 3 I.R. 207. In that case the applicant argued that in order to seek the quashing of an order made by the District Judge he must seek *certiorari* by way of judicial review in the High Court and contended the Circuit Court did not have requisite jurisdiction to rule that the orders were invalid before deciding on the question of how its discretion would be exercised. The Supreme Court disagreed with that proposition and decided that it was not necessary for a party to apply by way of judicial review in advance of a trial to have orders quashed. It was held that the overwhelming responsibility imposed by law and the Constitution on the trial judge was to ensure fairness of the trial and an exceptionally important part of this function was to adjudicate on the evidence to be placed before the jury. The need for the Court of trial to have any jurisdiction appropriate for the disposal of such problems is underlined by the undesirability of interrupting criminal trials to enable judicial review applications to be made.

It is clear from the judgment in that case that there is no general rule against collateral challenges such as would deprive a trial court of such powers are inherent in the process of deciding on the legality of steps taken to enable the prosecuting authorities or the State to gather evidence for the case. The Court was looking at issues integral to the investigation and the bringing of charges in the context of the criminal procedure adopted in that case. In the present proceedings, the licence in question and its conditions have an existence entirely independent of the criminal proceedings. Apart from the factual differences between *Blanchfield v. Hartnett* and the

present case, however, there is a specific statutory provision providing a time limit for the institution of challenge to the licence, not only in cases of judicial review but in "any other legal proceedings whatsoever". Even if the Court were to hold that the challenges to the licence and its conditions is a collateral challenge in the present case it would not aid the applicant.

I was also referred to certain passages in *Wandsworth London Borough Council v. Winder* [1985] A.C. 461, where the question of collateral charges in the context of the English equivalent of Order 84 was discussed. In his speech Lord Fraser said at p. 509 of the report:-

> "I find it impossible to accept that the right to challenge the decision of a local authority in the course of defending an action for non-payment can be swept away by Order 53, which was directed to introducing a procedural form."

He went on at p. 510:-

> "I would adopt the words of Viscount Simonds in *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government* [1960] A.C. 260, 286 as follows:
>
> > 'It is a principle not by any means to be whittled down that the subject's recourse to her Majesty's courts for the determination of his rights is not to be excluded except by clear words'……If the public interest requires that persons should not be entitled to defend actions brought against them by public authorities where the defence rests on a challenge to a decision by the public authority, then it is for the parliament to change the law."

The applicant argues that the foregoing passages offers support for his contention. That case decided that the existence of a judicial review procedure did not per se preclude persons from validly raising issues collaterally in other proceedings. This is not an issue in the present case. It does not address the argument advanced by the applicant that s. 87(10) of the Act of 1992 (as amended) does not apply to collateral challenges. In my view the words of the statute are clear and unambiguous and specifically preclude the applicant from challenging the decision in judicial review proceedings such as the proceedings before this Court.

The second named respondent further argues that the question of the impugned licence conditions is not collateral in the present case. Although the relief is sought against by way of prohibition against the Director of Public Prosecutions, if the challenge in these proceedings to the validity of the licence conditions is successful, the prohibition would follow. There is no argument addressed specifically to the Director of Public Prosecutions. The challenge has nothing to do with any steps taken by or on behalf or invoked by the Director of Public Prosecutions or any body or agency acting on its behalf with a view to criminal prosecution. This contrasts with the case of *Blanchfield v. Hartnett* which considered the Bankers' Books Evidence Act, 1879. The licence and its conditions existed for many years prior to the institution of criminal proceedings. It was granted by the E.P.A. on foot of an application for a licence to carry on a particular application. The substance of these proceedings is to attack a decision of the E.P.A. to impose conditions of a particular nature to the licence, together with a follow on challenge to the constitutionality of the provisions under which those conditions were imposed. The substance of the applicant's argument is that the decision to attach conditions was invalid. I agree with the E.P.A.'s contention that it is mischaracterisation of the proceedings to describe the challenge to the conditions of the licence as a collateral issue in these proceedings. In my view, the central issue is this case is the challenge to the licence and its conditions and to s. 87(10) of the Act. The fact that the challenge is taken in the context against the background of criminal proceedings does not change the central issue.

3. and 4. *Locus standi* to argue constitutionality of Act, and to argue other constitutional grounds
The respondent was given leave to challenge s. 80(1), 83(1), 84(1) or s. 84(2) of the Act of 1992 (as amended)as being contrary or repugnant to the Constitution and, in particular, Article 15.2.1 thereof:-

> "in that the said provisions or either of them allow impermissible delegation of the sole and exclusive law making power of the Oireachtas to another purported legislative authority namely the Environmental Protection Agency".

The respondent also seeks leave to amend the grounds of the application in order to argue that the time limits provided by "time limits provided for in s. 87(10) of the Act of 1992 (as amended) (formerly in s. 85(8) of the Act of Act of 1992)" or both, amounts to an unconstitutional infringement on the applicant's rights of access to the courts or its entitlement to a trial in due course of law, or both.

It is submitted by the respondent that the applicant has not got the requisite locus standi to make either constitutional challenge and, furthermore, that there is no good reason to allow the amendments sought in respect of the motion of the 18th May, 2007.

The resistance to allowing both constitutional challenges to be heard by the Court (as opposed to the reasons for not permitting the amendment on the issue in relation to the time limits) is on the basis that the courts will not decide cases on the basis of a constitutional challenge if the matter can be otherwise disposed of. As Fennelly J. observed at p. 556 in the case of *White v. Dublin County Council* [2004] 1 I.R. 545:-

> "It is well established in the case law of this court that a challenge to the constitutionality of a statute will not normally be addressed until the person mounting the challenge shows that he is affected by the provisions".

It is submitted that even if the constitutional issues were determined in favour of the applicant, they would not be of any assistance to its case and that therefore, their determination would be a moot point. It is submitted that the applicant has, therefore, no interest in the constitutional issues such as would give it the requisite *locus standi* to argue the constitutional case. The basis for such submissions is the contention that the time limits provided in Order 84, rule 21 of the Rules of the Superior Courts, 1986 are an insurmountable barrier to the applicant, preventing him from "arguing" the constitutional point. The third named respondent relies on the well established principles laid down in *Cahill v. Sutton* [1980] I.R. 269.

In that case the constitutionality of s. (2)(b) of the Statute of Limitations Act 1957, was challenged on the basis that it did not contain an exception in favour of an injured person who did not become aware of the relevant facts on which his claim was based until after the expiration of the period of limitations or until a short time before its expiration. The Supreme Court declined to entertain this constitutional point on the basis that the constitutional claim was based solely on the absence of statutory provisions which, if present, would not be applicable to the facts of the applicant's claim, that she could not establish that any right of hers had been infringed or threatened by the absence of such a provision and that, accordingly, she lacked *locus standi* to invoke the jurisdiction of the courts to determine the validity of s. (2)(b) of the Statute of Limitations Act 1957.

Mr. Connolly, for Ireland and the Attorney General, submits that the Court should not allow the applicant to argue that the provisions

of the legislation giving the Environmental Protection Agency the right to impose conditions are unconstitutional. He submits that because of the time limits imposed by the Rules of the Superior Courts, 1986, it is not possible for the applicant to show that he is prejudiced by the existence of the conditions alleged to be unconstitutional. In circumstances where even a finding that conditions were unconstitutional would not avail the applicant, it is submitted that he should be precluded from seeking such a finding by the Court. The applicant also relies on certain passages in the case of *White v. Dublin County Council,* [2004] 1 I.R. 545 where an unqualified period of two months provided for under the planning code was struck down as being impermissible because the rigidity of the period could lead to an injustice for the plaintiffs. It was submitted by Mr. Connolly for the State that the salient factor in that case was that the plaintiffs, through no fault of their own, were prejudiced by the existence of a rigid two month period and this could lead to an injustice. The following passage appears at p. 575 of the report:-

> "The applicants through no fault of their own but through the unlawful act of the decision maker, were deprived of any genuine opportunity to challenge the legality of the decision within the permitted time".

Mr. Connolly points out that the position in the *White* case contrasts with the position of the applicant in these proceedings who was at all relevant times aware of the conditions and time limits which he now seeks to challenge.

Counsel for Ireland and the Attorney General submits that the applicant has *no locus standi* to argue the constitutional position and relies strongly on the decision of the Supreme Court in *Cahill v. Sutton* and in particular the passages contained at p. 282 of the judgment where Henchy J. stated:-

> "… in other jurisdictions the widely accepted practice of courts which are invested with comparable powers of reviewing legislation in the light of constitutional provisions is to require the person who challenges a particular legislative provision to show either that he has been personally affected injuriously by it or that he is in imminent danger of becoming a victim of it".

At page 286 of the judgment, Henchy J. further stated:-

> "The primary rule as to standing in constitutional matters is that the person challenging the constitutionality of the statute, or some other person for whom he is deemed by the court to be entitled to speak, must be able to assert that, because of the alleged unconstitutionality, his or that other person's interests have been adversely affected or stand in real or imminent danger of being adversely affected, by the operation of the statute".

The State argues that the effect of the decision is that the applicant is precluded from arguing the constitutional issues because they would only arise to be decided if the applicant's interest were in real and imminent danger of being adversely affected by them. It submits that, because of the existence of the time limits in the Environmental Protection Agency Act, 1992 (as amended) which would in any event prevent the applicant from succeeding, it should not be allowed to argue the constitutional issues which are quoted in the circumstances.

The applicant, however, points out that there are substantial factual differences between its position and that of the plaintiff in *Cahill v. Sutton* (notwithstanding that both cases are concerned with the validity of time limits). It submits that in contrast to the plaintiff in *Cahill v. Sutton*, it has a vital interest in the constitutional argument which it wishes to make. It points out that if successful in the constitutional claim the serious criminal charges which it now faces would fall. The applicant also relies on *Cahill v. Sutton* and in particular the passage at p. 285 of the report where Henchy J. stated as follows:

> "Since the paramount consideration in the exercise of the jurisdiction of the Courts to review legislation in the light of the Constitution is to ensure that persons entitled to the benefit of a constitutional right will not be prejudiced through being wrongly deprived of it, there will be cases where the want of the normal *locus standi* on the part of the person questioning the constitutionality of the statute may be overlooked if, in the circumstances of the case, there is a transcendent need to assert against the statute the constitutional provision that has been invoked".

In applying the principles set out in the authorities open to me, it is clear that it is necessary for the applicant to show that he is prejudiced by the existence of the sections of the legislation which he wishes to challenge or is in imminent danger of becoming a victim of them. In my view the applicant cannot show that he has been so prejudiced. In view of the finding of the Court that the time for taking these proceedings commenced at the time of the grant of the licences, the applicant is out of time by a period of many years either under the statutory provisions of the Act of 1992 (as amended) or under the Rules of the Superior Courts, 1986. No reason is proffered to explain or justify this delay. The applicant argued that the time limits under the rules only began to run at the time when the criminal proceedings were commenced. This argument has been rejected by the Court. In view of those findings, it follows that the applicant has no *locus standi* to argue the constitutional point concerning the conditions of the licence. He runs foul of both the statute and the Rules of the Superior Courts.

In relation to the applicant's motion to amend grounds to include a challenge to the constitutionality of the time statutory limits, I was referred to the case of *Ni Eílí v. Environmental Protection Agency* [1997] 2 I.L.R.M. 458, where Kelly J. with customary clarity set out some of the factors which were relevant to the exercise of his discretion to refuse an amendment of procedures. In that case he took into account the following at page 466:-

> "(1) The applicant has been fully *au fait* with the circumstances surrounding the grant of this licence. She participated in the oral hearing which took place prior to the decision which it is now sought to impugn.
>
> (2) Although her legal representation has changed since the order of Morris J., that in itself is not a good reason to allow the alteration.
>
> (3) The expansion sought is a major one and really involves an entirely new and different relief to that already contended for. It is in effect a new cause of action.
>
> (4) If granted, the new reliefs would inevitably involve the joinder f the additional party, namely the Attorney General [that is different from the position in this case where the Attorney General is already a party to the action].
>
> (5) Even if a rigid time limit of two months is not imposed by the Act, nonetheless the view of the legislature as to the desirability of such a period being adhered to is of significance. Here four and a half months went by without these new claims being advanced. [In the present case a number of years went by before the claims being advanced].

(6) No satisfactory explanation has been given for the failure to apply for the leave stage for the reliefs now sought to be introduced. I do not consider any disputes which the applicant may have had with the Legal Aid Board subsequent to the order of Morris J. to be of any relevance in this regard. [No explanation at all has been given for the failure to apply that the leave stay should now sought to be introduced].

(7) The new reliefs, by their very nature, can only fall for consideration when all the other existing grounds have been adjudicated on and decided against the applicants. They are therefore discrete reliefs and their joinder now can only give rise to additional cost and expense.

Having regard to the considerations set out by Kelly J. which are applicable to this case, I should exercise my discretion by not allowing the applicant to amend his grounds.

In view of the findings I have made above the following orders should be made:-

The motion to set aside by the EPA, the motion to set aside by Ireland and the Attorney General and the motion of the Director of Public Prosecutions to set aside the leave granted on 22nd January, 2007, must succeed and the application dated the 18th May, 2007, to amend the grounds, must be refused.