Neutral Citation Number [2006] IEHC 312

THE HIGH COURT
DUBLIN

RECORD NO. 2003 13256P

DENIS RIORDAN

PLAINTIFF

GOVERNMENT OF IRELAND, OIREACHTAS NA HÉIREANN
AND
ATTORNEY GENERAL

DEFENDANTS

Judgement of Mr. Justice T.C. Smyth Delivered On 6 October 2006.

1. The judgment of the Supreme Court (Keane C.J., Murphy, Hardiman J.J.) in Denis Riordan, Applicant, an Taoiseach Bertie Ahern, the Government of Ireland, Dáil Éireann, the Minister for the Environment, the Attorney General and Ireland (No.4) [2001] 3IR 365 at 370 concluded as follows:

2. "This Court is extremely reluctant, as the High Court has been, to restrain the access of any citizen to the courts. The stage has clearly been reached, however, where the proper administration of justice requires the making of such an order as against the Applicant. Accordingly, in addition to dismissing the present motion the Court will, in exercise of its inherent jurisdiction, order that the Applicant be restrained from instituting any proceedings, whether by way of appeal or otherwise, against any of the parties to these proceedings or the holders of any of the offices named as Defendants or against the Oireachtas, the Government, or any member thereof or Ireland (other than in relation to the taxation of costs), whether in the High Court or the Supreme Court, except with the prior leave of this Court, such leave to be sought by application in writing addressed to the Registrar of the Supreme Court."

3. This judgment delivered on 19 October 2001 by the Chief Justice was agreed to by the other two members of the Court.

4. An order dated 21 November 2003 was made by the Supreme Court (McGuinness, Geoghegan and Fennelly, JJ) in respect of these proceedings (which were then intended) granting the Plaintiff leave to institute proceedings in this Court in respect of reliefs 1, 2, 3, 11 and 12 of the draft plenary summons, which was enclosed with a letter of 30 June 2003 addressed to the Supreme Court or its Registrar. From the order it is clear that the application was advanced on foot of the letter aforesaid and a further letter of 3 November 2003 (no affidavit is referred to). The order recites that the said letters were read as was:

> "The Judgment and Order of this Court given and made on the 23rd day of October, 2001 and upon hearing the intended Plaintiff."

5. No written judgment of the Supreme Court was available to me to understand any of the following:

> (i) The discrepancy in the date of the judgment in October 2001 (the official Irish Reports refer to the date as 19 October 2001). It may be as simple as a judgment delivered and dated 19 October 2001 was signed a few days later or that the Order on foot of the judgment was officially perfected on 23 October 2001.
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> (ii) What reasons were given by the Court for its departure from its judgment of 19 October 2001 on an application first made in less than two years against parties intended to be protected from unnecessary harassment.
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> (iii) When I raised the issue in Court, the Plaintiff originally said he had not appeared before the Supreme Court, but when the wording of the Order was pointed out to him he agreed that he must have been present. (T1 p.60/61)
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> (iv) Why the Supreme Court permitted these proceedings to issue on an ex parte application basis when the parties intended to be protected from vexatious litigation by the earlier decision of 19 October 2001 were parties to this litigation. It is both customary and proper in the generality of cases that an application in the matter of an intended action can and should be on an *ex-parte* basis. In this case, however, the Supreme Court in the judgment of 19 October 2001 per Keane, C.J. stated:
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> > "... there is in the High Court an inherent jurisdiction to restrain the institution of proceedings by named persons in order to ensure that the process of the Court is not abused by repeated attempts to re-open litigation or to pursue litigation which is plainly groundless and vexatious. The Court is bound to uphold the rights of other citizens, including their right to be protected from unnecessary harassment and expense, rights which are enjoyed by the holders of public offices as well as by private citizens. This Court would be failing in its duty, as would the High Court, if it allowed its processes to be repeatedly invoked in order to re-open issues already determined or to pursue groundless and vexatious litigation."
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> > The Applicant has not merely repeatedly sought to re-open decisions of this Court, he has also persistently abused the *locus standi* he has been afforded by the High Court and this Court in cases in which he has no direct personal interest, in order to make scandalous allegations, not merely against members of the judiciary, but other persons whom he chose to join as defendants in his proceedings."
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> > [Emphasis added]

6. I do not presume to consider that the Supreme Court, if the decision of 19 October 2001 was brought to their attention as would have been the obligation of the good faith of an Applicant "moving" *ex parte*, took the obiter, in the judgment --

> "No proceedings have come before the High Court or this Court claiming a declaration that these provisions. [S.1(4) and S.7(3), (4) and (5) of the Courts (Establishment and Constitution) Act, 1961 and S.7 of the Courts and Court Officers Act, 1995] are invalid having regard to the provisions of the Constitution, and they must be presumed by this Court to be valid."
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> as some form of "classified advertisement" or open invitation to initiate and embark on needless litigation.

7. It would appear that emboldened by having got his foot inside the door of the Court by virtue of the order of 21 November 2003, the Plaintiff made a further application within a month (again of which the Defendants had no notice) to expand the range of

constitutional challenges. The determination of the Supreme Court (McGuinness, Hardiman and Fennelly JJ) is stated to be based on a letter (not an affidavit) and a reading of the judgment and Order of 23 October 2001 and the Court Order of 21 November 2003. There is no reference to any attendance or appearance before the Court of the Plaintiff in person or anyone appearing on his behalf.

8. In fact the Plaintiff has previously sought to institute proceedings making a similar constitutional challenge (to that permitted to be made by the Order of the Supreme Court on 17 December 2003) to Section 1(3) and (4) and Section 2(3), (4) and (5) of the Courts (Establishment and Constitution) Act, 1961. The Plaintiff made an application for leave to institute proceedings in the High Court before Ó Caoimh, J., which was substantially refused by judgment dated 11 May 2001. No appeal (so far as I am made aware or was disclosed to the Court) was taken against that decision. I have no evidence or advices or confirmation at the hearing that the decision of Ó Caoimh J refusing leave to institute proceedings on the same points was brought to the attention of the Supreme Court. The Defendants were unaware if such decision had been brought to the attention of the Supreme Court. The decision of Ó Caoimh J was and is a reported decision: *Riordan -v- an Taoiseach & Others* (No.5) [2001] 4IR 463. Ó Caoimh J. determined that the (then intended) now actual Plaintiff had not shown the necessary locus standi to impugn the constitutionality of SS.1(3) and 2(3),(4) and (5) of the Courts (Establishment and Constitution) Act, 1961 (applying *Cahill -v- Sutton* [1980] IR 269) and that the proposed constitutional claim against the division of the Supreme Court, which heard earlier proceedings, was vexatious as it sought to determine an issue previously determined by a Court of competent jurisdiction, and was one which obviously could not succeed and was an action from which no reasonable person could reasonably expect to obtain relief.

9. In the course of a detailed and considered judgment Ó Caoimh J. stated as follows at p.473 of the report:

> "With reference to the proposed claim that Section 1(3) of the Act of 1961 is repugnant to the Constitution Mr. Riordan has advanced no basis upon which he has any locus standi to attack the provision. Furthermore, I am satisfied that the proposed action seeking this relief can only be considered to be vexatious as it is clear that the provisions of the section are enabled by the provisions of the Constitution itself and in particular Article 36. With regard to the second heading of claim, namely that Section 1(4) of the Act of 1961 is repugnant to the Constitution, the purpose of this attack is clearly to assist the Applicant in his sixth area of proposed claim, namely to re-open the proceedings which were the subject matter of a decision of the Supreme Court on the appeals bearing record number 175 and 181/2000. In relation to this heading of claim for relief it is obvious that the action cannot succeed having regard to the provisions of Article 36 of the Constitution.
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> Furthermore, I believe that the action can lead to no possible good and that no reasonable person would reasonably expect to obtain relief. I am further of the view that the purpose for which this proposed action is sought to be brought is an improper purpose, namely the harassment and oppression of the various parties referred to in the proceedings already determined by the Supreme Court and that the proposed action is other than the assertion of a legitimate right. Accordingly, I consider the bringing of this claim would be vexatious.
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> Insofar as the proposed action is one seeking to impugn the provisions of Section 2(3), (4) and (5) of the Act of 1961, no basis has been shown by Mr. Riordan whereby he can advance any claim under subsection 3 as no facts have been indicated by him to support the bringing by him of any such claim whereby he can demonstrate any *locus standi*. I am also satisfied that the provision in question is such as to be enabled by the Constitution and therefore that the proposed action in this regard cannot succeed and that no reasonable person could reasonably expect to obtain relief under this heading. I take the same view in relation to the proposed action impugning the provisions of s.2(4) and furthermore of s.2(5)."

10. The reference to the fact that no possible good could come of the proposed action and that no person could reasonably expect to obtain relief therefrom and that the action was brought for an improper purpose refer back to the earlier consideration in the judgment of Ó Caoimh of the nature and effect of the Isaac Wunder Order under which the application was brought before him. The judge clearly considered this element of the claim to be entirely without merit and unlikely to succeed.

11. These provisions of the Act of 1961 dealing with ex-officio and additional judges referable to the grounds advanced by the Plaintiff in support of allegations of unconstitutionality derive from Articles 34.5 and Article 35.1 of the Constitution. Article 34.5 requires judges appointed under the Constitution to make and subscribe to a particular declaration in a particular form prior to entering upon their duties as a judge. Article 35.1 requires that all judges of the Supreme Court, the High Court and other courts established pursuant to Article 34 shall be appointed by the President. The real issue raised by the Plaintiff appears is as whether the appointment of judges by the President to the Supreme Court or the High Court and the making of a declaration by persons so appointed prohibits a person so validly appointed to one court from sitting in a temporary capacity as an additional judge of another court. The issue would appear to be the same whether the judge moves up a jurisdiction (i.e. from Circuit to High or from High to Supreme) or down a jurisdiction (from Supreme to High).

12. The declaration in Article 34.5.1 is identical for all judges of the High and Supreme Court save, presumably, that the office to which they are being appointed is specified. However, there is no difference in the promise made by such persons to execute their judicial office "without fear or favour, affection or ill-will towards any man" and to "uphold the Constitution and the laws".

13. In my judgment the Plaintiff's case is based on a purely theoretical interpretation of the relevant constitutional provisions. Judges are clearly appointed to a particular court and make a declaration as required by the Constitution before entering upon their duties as a judge of such court. However, Article 36.iii allows for statutory regulation not only of the constitution and organisation of the courts but also "the distribution of jurisdiction and business among the said courts and judges".

14. Even when a judge of the High Court acts as an additional judge of the Supreme Court pursuant to the provisions of s.1(4) of the Act of 1961, he or she does not cease to be a judge of the High Court. The permission afforded by these sections to move judges between the High and the Supreme Court on a temporary basis is an element of "the distribution of jurisdiction and business among the said courts and judges".

15. These statutory provisions (on their terms) are only intended to operate where there is an insufficient number of judges available through illness or any other reason (presumably another equivalent reason). They may also be seen as necessary to ensure, in the words of Keane CJ, in *Riordan -v- Ireland* (No.4), "the reasonably expeditious and economic dispatch" of Court business in the interests of the proper administration of justice.

16. The Plaintiff is a lay litigant who has instituted a series of constitutional challenges against the organs of the State, all of which challenges have been unsuccessful (counsel informed the Court that a search in the relevant records indicates 19 reserved judgments of the High and Supreme Courts in constitutional actions and applications in which the Plaintiff was the unsuccessful moving party).

17. It is clear that the Plaintiff on past occasions has indicated an unwillingness to accept judgments of the Supreme Court dismissing his appeals and has repeatedly attempted to re-open such appeals (e.g. *Riordan -v-Ireland* (No. 4) already referred to).

18. The principal object of these proceedings would appear to seek declarations to the effect that the "Supreme Court" as established under the Constitution must mean the full Supreme Court consisting of seven judges -none of which may be High Court judges sitting as Supreme Court judges. The Plaintiff's submissions were that the decisions on his earlier appeals, which were determined by divisions of the Supreme Court consisting of five or three judges, (as may have been required under statute) were not decisions of "the Supreme Court" in its constitutional role as the court of final appeal. Consequently, he claims to be entitled to appeal these decisions of divisions of the Supreme Court to a full sitting of the Supreme Court. While this is the main thrust of the case of the Plaintiff, the matter does not rest there. Claims made by him may be conveniently broken down as follows:

> 1. Challenges to section 1(2)(b) of the Courts (Establishment and Constitution Act) 1961 as amended by section 6(1) of the Court and Court Officers Act 1995.This provides that there shall be "not more than seven" ordinary judges of the Supreme Court in addition to the Chief Justice. The Plaintiff contends that this is unconstitutional as Article 36(i) of the Constitution requires the number of judges of the Supreme Court to be regulated in accordance with law, and he asserts that the fixing of a maximum number of judges rather than the actual number of judges delegates to the Supreme Court itself a function vested in the Oireachtas by the Constitution.
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> 2. The provisions of section 7(3), (4) and (5) of the Courts Supplemental (Provisions) Act, 1961 as amended in 1995 provide that the Supreme Court may sit in divisions: That the Chief Justice may determine whether an appeal is to be heard by a division of three or five judges and require that an appeal as to the constitutional validity of any law or reference under Article 12 or Article 26 of the Constitution must be heard by a court of at least five judges. This is the Plaintiff's central challenge to the effect that a divisional court of three or five Supreme Court judges is not the Supreme Court as the court of final appeal under the Constitution and, consequently, the decisions of such divisional court may be appealed to the Supreme Court itself.
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> 3. The Plaintiff challenges the constitutionality of section 1(3) and (4) and of the Courts (Establishment and Constitution) Act, 1961 and section 2(3), (4) and (5) of the same Act. These provisions may be considered together in that they make similar regulatory arrangements. Section 1(3) provides that the President of the High Court is ex-officio a member of the Supreme Court and subsection 4 provides that where there are an insufficient number of Supreme Court judges the Chief Justice can request an ordinary judge of the High Court to act as an additional judge of the Supreme Court. Section 2 makes similar provision in respect of the High Court in providing at subsection 2(3) that the Chief Justice is ex-officio a member of the High Court and at (4) that the President of the Circuit Court is ex-officio an additional judge of the High Court and, finally, that where there are an insufficient number of High Court judges available the Chief Justice, at the request of the President of the High Court, can request the Supreme Court judges to sit as additional High Court judges. The Plaintiff's argument in this case is that the Supreme Court and the High Court judges are appointed by the President under Article 35(1) of the Constitution to these specific courts and to none other and, accordingly, it does not rest with either the Chief Justice or the President of the High Court to make judges from their respective courts available to the higher or lower courts, as the case may be, or to sit in divisions of the Supreme Court. This is said to arise from the declaration made by those assuming judicial office under Article 34(5), consequently, they cannot sit in any court as they have not been appointed as required by the President under the Constitution. These grounds relate to the appointment of judges to the High Court and Supreme Court and the organisation and Constitution of those courts and the distribution of business therein.
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> 4. This specifically relates to the Court of Criminal Appeal and the Plaintiff's case is a challenge to the constitutionality of section 3(2) of the Courts (Establishment and Constitution) Act, 1961 which provides that the Court of Criminal Appeal, which is established by section 3(1), shall consist of three judges one of whom is a Supreme Court judge and the other two of whom are High Court judges. The Plaintiff contends that this is unconstitutional for reasons similar to his argument in relation to section 1(3) and (4) and section 2(3), (4) and (5) of the Courts (Establishment and Constitution) Act, 1961. He accepts that the Court of Criminal Appeal is a court properly established under Article 34 of the Constitution, but argues that judges of the High Court and Supreme Court may not sit therein as they have not been lawfully appointed to the Court of Criminal Appeal.

19. This ground of challenge appears to arise from the Plaintiff attempting to intervene or intermeddle in an appeal taken by the accused in *DPP -v- Gilligan*. (T1 p23-25 inclusive)

20. In his submissions at the hearing to this Court the Plaintiff stated that the judges on that occasion were acting "in an unconstitutional manner" and "in direct violation of their judicial law or declaration of office to uphold the Constitution" and "as a consequence of their deliberate violation and their ongoing violation of the Constitution." He claimed he had *locus standi* to seek the court's assistance to terminate "this deliberate violation and subversion of the Constitution by individuals holding judicial office who have acted as judges in his cases (i.e. the Plaintiff's) or who may have acted as judges in his cases."

21. I am satisfied on the information and facts placed before me that the Plaintiff had no *locus standi* to address the Court of Criminal Appeal or to maintain 08:49 what is described in the Statement of Claim as "claim 2" in that the Plaintiff has not appeared before the Court of Criminal Appeal and the plea in paragraph 3 of the Statement of Claim that the Plaintiff has the necessary *locus standi* to bring the action is unfounded.

22. Further, the Plaintiff was not a party to the proceedings referred to in paragraph 44 of the Statement of Claim and was no part of or party to the appeal before the Court of Criminal Appeal. He was not entitled to intervene in the said proceedings and his attempted intervention in those proceedings does not give him *locus standi* in these proceedings to make the claim described in the Statement of Claim as Claim 2.

23. Furthermore, in my judgment he is not entitled to raise in these proceedings any issue in relation to the matter which the Court of Criminal Appeal conducted itself in the proceedings referred to in the Statement of Claim or in any other proceedings to which the Plaintiff was not a party.

24. It would appear that in the case of the Gilligan appeal the Court of Criminal Appeal refused to entertain the Plaintiff (quite properly so in my mind) presumably as he did not have a right of audience in that case.

25. This matter came before the Court by way of a plenary summons and Statement of Claim and defence. In the course of the opening of the case I enquired as to whether it was a case that called for oral evidence and it was indicated by the Defendant that

they did not propose to call any oral evidence, that the case was essentially one of legal argument. It was agreed that the matter was purely a matter of law and if the Plaintiff were to give oral evidence it would be in the terms of the Statement of Claim which had been the subject of a traverse in the defence. (T1 p62/63)

26. The early paragraphs of the Statement of Claim merely assert that the Plaintiff is a citizen of Ireland, that he is a lay litigant and has appeared in person in both the High Court and Supreme Court and has a direct interest in ensuring that the courts are properly constituted in accordance with the Constitution and the law and the laws as enacted by the Oireachtas as concerning the courts and the judiciary are in accordance with the Constitution. He asserted that he had the necessary *locus stand*i to bring the actions seeking the determination of the constitutionality of the legislation referred to in the case, furthermore that he had brought the alleged unconstitutionality to the attention of the constitutional office holders and that they ignored the information and made no attempt to investigate the matter. In the final analysis, that it was the duty of the citizen to protect the Constitution from infringement such as those contained in this particular case.

Constitutional Provisions
27. The Plaintiff's submissions were based on the provisions of the texts of Articles 34 and 36 of the Constitution which is headed "the Courts". It is unnecessary to set out in this judgment the relevant provision of the articles which are set out in *Riordan -v- An Taoiseach and Others* (No.4) already referred to.

28. The constitutional provisions do not in fact set out any imperative as to the number of judges of either the High or the Supreme Court. Furthermore, neither do Articles 34 or 36 impose any obligation or requirement that the Supreme Court sit as a multi-judge court in all instances or preclude the High Court from sitting in a multi-judge court in any instance. The only specification as to the number of judges which must sit in the Supreme Court are to be found in Articles 12.3.1 and Article 26. The thrust of these articles provide that in a situation where the President is unable to serve a full term of office or resigns or is removed from office or "becomes permanently incapacitated (such incapacity being established to the satisfaction of the Supreme Court consisting of not less than five judges" a given number of judges must sit. Under Article 26 provision is made for the reference for bills to the Supreme Court by the President in order to determine the constitutionality and in that situation also not less than five judges shall consider any question referred to it by the President under the Article for a decision. Neither Article requires or specifies or stipulates that these five judges shall or do comprise "the full Supreme Court". In fact, the terms of the articles whereby it is envisaged that these matters will be determined by a Supreme Court consisting of "not less than five judges" implicitly envisage that the Supreme Court as a body may well consist of more than five judges.

29. The next matter has already been considered by the Supreme Court in *Riordan -v- An Taoiseach* (No.4) at p369 of the report. It held that:

> "Those are the only provisions to be found in the Constitution which require that a decision of the court is to be given by not less than a specified number of the members of the court. Their existence is wholly irreconcilable with any alleged requirement that every matter coming before the Court in the exercise of its appellate jurisdiction may only be decided by a court consisting of all the members of the court for the time being. No such provision exists either in the Constitution or in statute law, and given the extent of the court's appellate jurisdiction and the necessity to ensure, in the interests of the proper administration of justice, its reasonably expeditious and economic dispatch, it would be remarkable if any such provision existed."

30. That is the state of the law as determined by the Supreme Court and no more need be said in my judgment.

31. However, notwithstanding my view in this regard the Plaintiff in this case submitted that the provisions of section 1(2)(b) of the Act of 1961 which fixes the number of judges on the Supreme Court as being "not more than seven ordinary judges" in addition to the Chief Justice is repugnant to the requirements of Article 36.i in that it fails to regulate the number of judges. The gist of this argument is that the article requires specific legislation to fix the actual number of judges rather than a maximum number of judges. Accordingly, he advanced the case that any decision determining the number of judges to sit on a particular case is a matter which requires to be "regulated in accordance with law" by the Oireachtas and cannot be delegated to the Supreme Court itself. Assuming the Plaintiff to be correct in this regard, the Constitution requires the actual number of judges to be fixed rather than the setting of a maximum number, this would still not constitute a delegation of power from the Oireachtas to the Supreme Court since the Supreme Court does not have any power to appoint judges, even up to the maximum number as fixed by statute. The task of appointing judges is conferred by the Constitution on the President acting on advice of the Government and it is essentially a matter for the executive branch of government to determine whether to appoint judges up to the maximum number permitted. The only function of the Supreme Court in this regard is the administrative power of the Chief Justice to determine in accordance with such rules as are prescribed in the Constitution or under statute the number of judges to sit on any particular appeal or to assign particular judges to hear appeals from amongst those who have been appointed by the President.

32. This argument of the Plaintiff is to contend that where he was a party to an action determined by a panel of three or five judges of the Supreme Court such determination was not a determination by "the Supreme Court" as the final court of appeal established under the Constitution. Accordingly, he asserted that he has a constitutional right to have all these appeals heard by the full Supreme Court consisting of the Chief Justice and seven ordinary judges.

33. It is difficult to see any basis for this contention in light of the text of the articles themselves. Article 34 is silent as to the number of judges to be assigned to that court and the number in which the court must sit. Although the Supreme Court has traditionally since the foundation of the State sat as a multi-judge court, this does not appear to be a constitutional requirement save in the limited circumstances specified in Articles 12 and 26.

34. In my judgment there is a fundamental misunderstanding by the Plaintiff as to the nature and meaning of "Court". The Plaintiff equates or appears to equate the Supreme Court with all the judges appointed to that Court at any particular time. However, "Court" is more commonly understood to mean a body of judges appointed to exercise a particular jurisdiction, which can be exercised by any of them or any division of them as provided by law in any particular circumstance. The Plaintiff does not appear to make the argument that the High Court must sit as a multi-judge court of all 28 judges in order to exercise "the full original jurisdiction" of that court conferred upon it by the Constitution. The establishment of the courts High and Supreme mandated by the Constitution is expressed in similar terms except that one is a court of full original jurisdiction and the other is a court of final appeal. The provisions of Article 34 apply equally to both courts which allow for the appointment of judges and the regulation of court business in accordance with the law.

35. The Plaintiff's position is that he seeks to rely on the text of the Constitution to impose a mandatory régime on the Supreme Court under which it may not exercise its jurisdiction unless all members sit whereas he does not seek to impose the same régime on the

High Court and the applicable provisions are similar if not identical in relation to both courts.

36. It is ironic that in both of the orders obtained by the Plaintiff in this case he was happy and content to take the orders of the Supreme Court consisting of panels of three.

Divisional Courts
37. The Plaintiff submitted in sections 7(3), (4) and (5) of the Act of 1961 as amended did not permit of the Court sitting in the form of divisions. The provisions of the section and the various subsections were considered in Riordan -v- Ireland (No.4) as already referred to. I have cited passages from the judgment of the court in that instance which are binding on me. Notwithstanding that there was no express constitutional challenge in respect of the provisions in question, the Court went on to consider both the statutory provisions and the articles of the Constitution and decided as already indicated in this judgment. The comments of the Chief Justice at p369 of the judgment, although exclusively stated to be made in the circumstances where there was no constitutional challenge to the relevant provision, are in my judgment equally applicable to a constitutional challenge to the provisions in question in this case. There is no constitutional basis for his assertion that the court of final appeal can consist only of all members of the Supreme Court sitting together as the Supreme Court.

38. As there is no constitutional prohibition on the Supreme Court sitting in divisions, a division of the Supreme Court is exercising the full jurisdiction of that court as the court of final appeal and therefore no appeal lies therefrom.

39. Prior to the provisions of section 7 and their amendment in 1995 such had been considered on two previous occasions, however on neither occasion was the constitutionality in issue (i.e. *the State (Williams) -v- Kelly* [1970] IR 259 where the prosecutor claimed to be entitled to a right to have his appeal heard before a five-judge Supreme Court) and also in *Peilow -v- French O'Carroll* (1971) 105 ILTR 21. However, in the latter case the appeal did not raise any constitutional issue, but the Supreme Court decided that the provisions of section 7 gave the Chief Justice an absolute discretion to have an appeal of that nature dealt with by a court comprising three members.

Ex Officio and Additional Judges
40. The real issue raised under this heading (altogether from the earlier matter referred to in this judgment) is as to whether on the appointment of judges by the President of the Supreme Court or the High Court and the matter is already dealt with earlier in this judgment and need not be dwelt upon again.

Court of Criminal Appeal
41. The Plaintiff structured his case in such a way as not to so much take issue with the establishment of this court as a court under Article 34 of the Constitution, the thrust of his argument was focused upon the arguments that High and Supreme Court judges have not been appointed as judges of this court and have not made any appropriate declarations in that regard. Similar arguments are made by him against the Constitutional validity of section 1(3) and (4) and section 2(3), (4) and (5) of the same Act, the Act of 1961.

42. It is conceded by the Defendants that the Plaintiff had sufficient *locus standi* to challenge the statutory provisions concerning the distribution of business in the Supreme Court, the number of judges assigned to that court and the movement of judges between the Supreme and High Court as he has had a number of appeals determined by divisions of the Supreme Court which do not comprise the full court and he also had at least on one occasion an appeal determined by a five-judge division of the Supreme Court which including one member of the High Court. However, I found it difficult to see or hold how he can have sufficient locus standi to make a challenge to the constitution of the Court of Criminal Appeal. He has not appeared before that court (other than in an attempt to intervene in the Gilligan appeal) and consequently has no direct or personal interest in the matters which he seeks to challenge. In my judgment the case made by the Defendants that the Plaintiff has no *locus standi* to challenge the constitution of this court is unanswerable.

43. The Plaintiff in this case is in a position more akin to that of the Plaintiff in Cahill -V- Sutton [1980] IR269 where the Supreme Court refused the Plaintiff her entitlement to maintain the proceedings in order to "champion the putative constitutional rights of a hypothetical third party." The requirements emerging from that decision is that a Plaintiff must have a personal standing in the sense of being able to show that the impugned statutory provisions adversely affect or threaten his or her personal interest. There is no evidence submitted in this case that leads me to in any way dissent from the views expressed by Ó Caoimh J. in R*iordan -v- An Taoiseach and Others* (No. 5) already referred to notwithstanding the different standard of proof required on a leave to apply for judicial review and on a plenary action.

44. *The People (Attorney-General) -v- Conmey* [1975] IR341 considered the appointment of judges to the Court of Criminal Appeal as part of a constitutional challenge to the establishment of that court. While the central feature of the case was whether a right of appeal from the Court of Criminal Appeal to the Supreme Court could exist or whether the creation in the Court of Criminal Appeal usurped the full appellate jurisdiction of the Supreme Court as a court of final appeal was considered. Nonetheless, the Supreme Court went on to hold that the establishment of the Court of Criminal Appeal did not preclude the possibility of an appeal from the Central Criminal Court i.e. the High Court exercising its criminal jurisdiction to the Supreme Court, such jurisdiction existing concurrently with that of the Court of Criminal Appeal. Issue was also taken with the constitution of the Court of Criminal Appeal and it was held that the Court of Criminal Appeal was validly established pursuant to Article 34.3 of the Constitution which contemplated the establishment of courts of first instance other than the High Court and courts with appellate jurisdiction from such courts of first instance. O'Higgins CJ in delivering the judgment of the court on this point stated *inter alia* as follows:

> "So far as the question of the judges is concerned, the Constitution requires that justice administered in any court established by law pursuant to Article 34 of the Constitution shall be administered in those courts by judges appointed in the manner provided by the Constitution. The judges who sit on the Court of Criminal Appeal are judges appointed in a manner provided by the Constitution. It is not necessary that they should be appointed judges of that court. The statute which set up that court regulates this matter by providing that the Court of Criminal Appeal shall be constituted if it consists of judges of the Supreme Court and the High Court as provided for in section 3 of the Courts (Establishment and Constitution) Act, 1961."

45. In that case the Supreme Court ruled that the judges who sit in the Court of Criminal Appeal are not being appointed as judges to that court. The court is established by statute and the judges who are validly appointed to sit in the High Court and the Supreme Court are allocated to sit there as may be required from time to time, but they are sitting as High Court and Supreme Court judges on the Court of Criminal Appeal. There is no constitutional prohibition on judges of either court sitting as judges on any other court provided that in doing so they do not breach the provisions of Article 35.3 of the Constitution to the effect that no judge shall be eligible to hold any other office or position of emolument. The effect of the Article of the Constitution on the ability of judges to

perform functions other than their constitutional role of judges of the courts to which they have been appointed has already been considered by the Supreme Court in other proceedings taken by Mr. Riordan challenging the entitlement of a High Court judge to sit as the Chairperson of a Commission or as the sole member of Tribunal of Inquiry (see *Riordan -v- An Taoiseach* (No.1) [1999] 4IR 321 per judgment of Barrington J at p337."

Determination

1. The Plaintiff lacks locus standi to challenge the various claims referable to the Court of Criminal Appeal.

2. I reject as without foundation the contention that the Supreme Court as the court of final appeal established under the Constitution has not convened since December 1995 and has never heard an appeal or issued a determination since that time. This finding is referable as to whether the judges sat on a court of appeal comprising three or more judges at any time since that date.

3. The allegations made against the Court of Criminal Appeal referable to *DPP -v- Gilligan* are scandalous and unwarranted.

4. The Plaintiff has abused the *locus standi* which he has been afforded by the Supreme Court in seeking to litigate before this court cases and decisions already made by the courts of which there is no evidence that he brought to the attention of the Supreme Court in late 2003.

5. In my judgment none of the statutory provisions in suit are repugnant to the provisions of the Constitution.

6. It is not the function of the courts to make decisions on academic issues of law where there is no dispute to resolve. It is undesirable that important constitutional provisions requiring decision should be imported into litigation in a dispute which no longer exists for the purpose of determining who pays the cost for litigation which has otherwise come to an end.

7. A court system that becomes preoccupied with how it is perceived, and is intent to permit, in an anxiety to ensure the right of access to the courts, any person who may benefit from a declaration of the unconstitutionality of a statute indirectly or consequently; is in danger of fostering or encouraging needless litigation at the whim of every and any citizen.

46. The right of access to the courts is to be protected, but it is not an absolute automatic right in all and every case and circumstance. In the context of this case the words of Henchy J in *Cahill -V- Sutton* [1980] IR 269 at p286 have a particular relevance:

> "It would be contrary to precedent, constitutional propriety and the common good for the High Court or this Court to proclaim itself an open house for the reception of such claims"

47. In vindicating the constitutional rights of any person it is of importance that the rights of the community as a whole or identifiable persons or officers or offices in it are not disregarded (e.g. by being open to harassment, oppression or scandalous or vexatious litigation). The common good and the respect of society and of the community for a justice system is not served or ensured by a disproportionate concern for the rights of the individual at the almost inevitable expense of a disregard for the rights of society by an over indulgence of every or any complaint of an individual. The courts in respecting the rights of all those who seek access to the court must also have some self-respect. Otherwise there is the real possibility, nay probability, that the justice system will be abused and/or manipulated for unworthy purposes.

48. Accordingly, in addition to dismissing this action I will (as did the Supreme Court in Riordan -v- Ireland No.4) in exercise of inherent jurisdiction, order the Plaintiff be restrained from instituting any proceedings whatsoever whether by summons or notice of motion or otherwise against any of the parties to these proceedings or the holders of any of the offices named as Defendants or against the Oireachtas, the Government or any member thereof or Ireland (other than in relation to any issue as to the amount of costs and an appeal on this instant decision) except with prior leave of this court, or only if appropriate (as determined in the first instance by this court) by the Supreme Court: Such leave to be sought by application in writing on notice to the intended defendant(s)/respondent(s) supported by affidavit referring in full and complete detail to all earlier applications, motions, actions or proceedings of any nature whatsoever and the status, result or determination thereof and vouching the payment in full of all costs and expenses referable to such directions as the Plaintiff may have been liable by order or orders of the court or the Supreme Court in all and every earlier application, motion, action or proceedings of any nature whatsoever. Notwithstanding that this foregoing element of this judgment may in isolation and devoid of context appear as imposing an impermissible price on the rights of access to the courts under the Constitution or in common law going back to Magna Carta, it is not such. It is an affront to the principle that not only must justice be done, but seen to be done if the public purse is to be regarded as a full indemnity fund to permit the Plaintiff to continue what, in this instance is, under the guise of constitutional concern, vexatious litigation.