

**THE HIGH COURT
JUDICIAL REVIEW**

[2005 No. 337 J.R.]

GAMA ENDUSTRI TESISLERI IMALAT MONTAJ A.S.

APPLICANT

**AND
THE MINISTER FOR ENTERPRISE, TRADE AND EMPLOYMENT
AND EDWARD NOLAN**

**RESPONDENTS
[2005 No. 374 J.R.]**

GAMA CONSTRUCTION IRELAND LIMITED

APPLICANT

**AND
THE MINISTER FOR ENTERPRISE, TRADE AND EMPLOYMENT
AND EDWARD NOLAN**

RESPONDENTS

Judgment of Ms. Justice Finlay Geoghegan delivered the 14th day of June 2005.

1. This judgment is given in two separate applications for judicial review which seek similar reliefs, raise similar issues, involve the same respondents and were heard together. The applicant in the proceedings first in time (2005 No. 337 J.R.) is a company incorporated in Turkey to which I will refer as Gama Turkey. In those proceedings leave was granted by the High Court (Clarke J.) on 1st April, 2005, to seek the relief sought in the statement of grounds therein. In the second set of proceedings (2005 No. 374 J.R.) the applicant is a company incorporated in Ireland to which I will refer as Gama Ireland. Leave was granted in those proceedings by the High Court (Clarke J.) to seek the relief sought in the statement of grounds therein on 12th April, 2005.

2. In the Gama Turkey proceedings an interim order was made on 1st April, 2005, restraining the release of a then draft report prepared by the second named respondent. In both sets of proceedings there were interlocutory hearings following which an order was made by the High Court (Kelly J.) on 22nd April, 2005, restraining, until further order, the publication or circulation of the proposed report of the second named respondent to persons other than the first named respondent and five named persons or bodies.

3. The hearing before me commenced on 3rd May, 2005. In the course of the hearing an affidavit of the second named respondent was filed exhibiting the final version of the proposed report dated 4th May, 2005, which had been given to the first named respondent. By agreement, the reliefs now sought relate to that version of the report of the second named respondent and except where otherwise indicated referred to in this judgment as "the Report".

Background facts

4. Gama Turkey and Gama Ireland are connected companies. Gama Ireland was incorporated in 1999. It carries on business as a turnkey construction contractor for power and industrial plants, dams, buildings and roads. Gama Ireland is ultimately owned by Gama Holding A.S., a Turkish company. Gama Ireland has a number of Irish subsidiary and related companies. Collectively they have carried out significant contracts with public authorities in Ireland since 1999. The value of work carried out by Gama Ireland and its related companies in the calendar year 2003 was of the order of €89 million.

5. On 8th February, 2005, Deputy Joe Higgins, in Dáil Éireann, made the following statement:

"There is a major foreign-based multinational construction company, employing approximately 10,000 people, 2,000 approximately in this State, which has secured massive local authority and State contracts here. This company imports workers from its home base, who do not speak English, controls their passports and work permits, accommodates them often in company barracks, demands an extent of hours worked that can only be called grotesque and, incredibly, pays unskilled construction workers between €2 and €3 per hour basic pay and skilled workers somewhere over €3 per hour. In short, this is a modern version of bonded labour. The instigator is Turkish-based GAMA Construction Ireland Limited."

6. The evidence from the affidavit of the second named respondent is that on the same day the first named respondent, the Minister for Enterprise, Trade and Employment ("the Minister") "directed that the Labour Inspectorate of his Department carry out an investigation into the matter as a matter of priority".

7. The second named respondent ("the Inspector") is the head of the Labour Inspectorate and he and his colleagues in the Labour Inspectorate are appointed as Inspectors by the Minister to exercise all the powers and duties and perform all the duties conferred or imposed on an Inspector under, *inter alia*, the Industrial Relations Acts, 1946 to 1990, the National Minimum Wage Act, 2000, and the Organisation of Working Time Act, 1997. They are also appointed as Authorised Officers under other employment related statutes which are not directly relevant to the issues herein.

8. The investigation commenced on 9th February, 2005. On the same day Mr. Karaalioglu, the Managing Director of Gama Ireland, wrote to the Minister expressing its willingness to co-operate with the investigation and indicating a willingness to produce all documents requested to facilitate the investigation. He also offered that if the Minister's officials wished to meet with or interview any employees that they would facilitate such meetings and ensure that the workers would be paid whilst attending same.

9. In the initial stages of the investigation all contact was between the Inspector and Gama Ireland either through Mr. Karaalioglu or its then solicitor, Mr. Grogan of P.C. Moore & Co., Solicitors. Certain documents were requested in writing and site visits were held.

10. On 4th March, 2005, Murray Consultants issued a statement on behalf of Gama Ireland in which they stated, *inter alia*,

"An internal review of payroll procedures at Gama Construction has found errors in the calculation of payments to expatriate employees in Ireland. On average this has resulted in employees receiving 8% less than their entitlement over a limited period of time.

... The review has also examined other aspects of payment procedures for expatriate employees and a number of improvements have been introduced."

11. Following this, further information was sought by the Inspector in a letter dated 7th March, 2005. In response thereto Mr. Karaalioglu in a letter of 9th March indicated that items 1 to 10 in the letter of 7th March should be addressed to Gama Turkey. He gave as his reason:

"Gama Construction Ireland Limited has an agreement with Gama Industri Inc. for the provision of services. These services are paid for by the Irish Company and accounted for in the records of the Irish company. The Irish company does not directly employ any Turkish workers covered by the REA Agreement and therefore could only respond to these questions on the basis of my understanding of matters. I think it is better that the Turkish Company would respond directly itself as they can give definitive answers which I could not."

12. The respondents allege that this was the first time in the course of the investigation that reference was made to the fact that certain persons working on the Gama sites in Ireland were employed by Gama Turkey.

13. Subsequent to this letter, the Inspector communicated also with Messrs. Matheson, Ormsby & Prentice, solicitors for Gama Turkey.

14. In the week commencing 14th March, 2005, an interview was sought by the Inspector with Mr. Karaalioglu. Communications between the Inspector and the former solicitor to Gama Ireland in relation to the timing of that meeting became fraught. Ultimately the Inspector, in a letter of 16th March, indicated that he was required by the Minister to complete the report of the investigation by that weekend. He also reminded Mr. Karaalioglu of his statutory powers in the following terms:

"I must remind you that this Investigation is being carried out at the direction of the Minister of Enterprise, Trade and Employment and that it has full statutory authority. If you persist in refusing to meet with me this week, I will regard that as an offence – see section 12.2 of the Industrial Relations Act, 1969."

15. On 18th March the Inspector was informed that Gama Ireland were now represented by Kilroys Solicitors.

16. On 19th March the interview with Mr. Karaalioglu took place, albeit "under protest" by reason of certain alleged lack of information from the Inspector set out in a note handed over at the commencement of the meeting.

17. In the same period, there were negotiations between the Inspector and the solicitors for Gama Ireland and Gama Turkey in relation to their entitlement to see and comment upon the draft Report and ultimately the timeframe within which that might be done. The draft Report was furnished on 21st and 22nd March, 2005. Ultimately the time for commenting thereon was extended to 30th March, 2005.

18. On 31st March, 2005, Gama Turkey sent a long letter alleging the investigation and Report were *ultra vires* the Minister and the Inspector. It sought immediate undertakings of non-publication in default of which proceedings were threatened.

19. On 31st March, 2005, Kilroys Solicitors on behalf of Gama Ireland wrote to the Inspector making many objections to the Report and seeking undertakings as to non-publication. They sought in particular details of evidence taken by the Inspector from certain current and former employees of Gama which alleged breaches by Gama of its statutory obligations.

20. On 1st April, 2005, leave was granted to Gama Turkey to apply for judicial review and interim relief granted precluding publication.

21. Alongside the proceedings referred to above the Inspector furnished a revised version of the draft Report to the applicants and other parties to whom the draft Report had previously been furnished and invited any further observations, with a deadline of 1 p.m. on Friday 15th April, 2005. Thereafter that timeframe appears to have been extended from time to time and ultimately the final version of the Report dated 4th May, 2005, was produced.

22. At the date of the hearing before me my findings on the relevant facts (many of which were not in dispute) are as follows:

1. The allegations of Deputy Higgins raised potential breaches by the applicants, as employers of persons working in the State, of statutory obligations imposed on them *inter alia* by the National Minimum Wages Act, 2000, the Industrial Relations Acts 1946 – 2000 in respect of Registered Employment Agreements and the Organisation of Working Time Act, 1997.

2. The Minister directed that an investigation of the above allegations be carried out by the Labour Inspectorate which is headed by the Inspector.

3. The investigation directed by the Minister on 9th February, 2005, has been completed and a final Report prepared by the Inspector dated 4th May, 2005.

4. The procedure followed by the Inspector with the applicants in relation to the investigation and Report included giving to the applicants and their legal advisers a draft version of the Report and allowing them to comment on same.

5. The applicants requested and were refused details of evidence taken from certain current and former employees of Gama in Ireland which is adverse to the applicants, includes allegations of breach of statutory obligations and is referred to in summary form in the Report.

6. A public statement issued on 4th March, 2005, on behalf of Gama Ireland acknowledged underpayments to employees during a certain period. In correspondence with the Inspector there were also acknowledged breaches of statutory requirements in relation to furnishing of payslips and keeping of time records.

7. The Report (and an earlier version thereof) has been given to the Minister and in accordance with the order of Kelly J. of 22nd April, 2005 to:

- (i) the Garda National Immigration Bureau
- (ii) the Competition Authority
- (iii) the Director of Corporate Enforcement
- (iv) the Garda Fraud Squad

(v) the Revenue Commissioners

8. Many public statements have been made in relation to the allegations of Deputy Higgins and the investigations being conducted.

9. It is not disputed on the affidavits that the first occasion in the course of this investigation that there was reference to Gama Turkey was the letter of 9th March, 2005. However, it is alleged on behalf of Gama Ireland and deposed to by Mr. Karaalioglu on affidavit with relevant exhibits, that the Department of Enterprise, Trade and Employment was made aware in 2002, in connection with applications for work permits, of the secondment arrangements between Gama Turkey and Gama Ireland.

10. The Report, together with its 19 appendices, comprises 279 pages. It is a Report of the Inspector.

11. Counsel for the respondents informed the court that it was the intention of the Minister, subject to the decision of the court, to publish the Report. The court was also informed by counsel for the respondents that he was instructed that the Minister has decided he will only publish the Report on the authority of a decision of the Government.

Reliefs

23. Multiple reliefs are sought in the statements of grounds. However, partly by reason of the interlocutory order of Kelly J. of 22nd April, 2005, and the narrowing of certain issues, the reliefs being pursued at the hearing may be summarised as:

1. An injunction restraining publication of the Report of the Inspector or its further circulation
2. Declarations as to the unlawfulness of the conduct of the investigation and preparation of the Report
3. In the application by Gama Ireland an order quashing the Report

Primary Issue

24. The substantive relief sought by the applicants is to restrain the publication or further circulation of the Report. Wide-ranging submissions on multiple issues were made in the course of the hearing. In particular the respondents laid emphasis upon the entitlement of the Minister to publish the Report as part of the executive power of the State.

25. Counsel for the applicants submitted that notwithstanding the wide-ranging issues addressed the core issue in the proceedings is a classic judicial review issue namely the *vires* of the Inspector to prepare the Report which is the subject matter of these proceedings. I have concluded that this issue is central to the proceedings.

26. Prior to considering this core issue it is necessary to consider the nature of the power exercised by the Inspector in carrying out the Investigation and preparing the Report and the nature of the Report.

Powers exercised by Inspector

27. It is common case that the Inspector in carrying out the inspection and preparing the Report was exercising powers conferred on him by The Industrial Relations Acts 1946 to 2000; the National Minimum Wage Acts 2000; the Organisation of Working Time Act 1997 and possibly the Payment of Wages Act 1991 (all of which I will refer to collectively as the Relevant Employment Acts"). The only issue in dispute is whether in addition to exercising such statutory powers the Inspector can be considered to have conducted the Investigation or prepared the Report as part of the exercise of the executive power of the State pursuant to the direction given him by the Minister.

28. It is also common case that the Minister was not exercising statutory power in directing the Investigation of the matters raised by the allegations of Deputy Higgins. The Minister in directing the Investigation was exercising executive power. The Minister is the Minister of government responsible for the implementation of the employment legislation, the breaches of which were alleged by Deputy Higgins. This analysis is supported by the views expressed by Costello J. (as he then was) in *Goodman International v. Mr. Justice Hamilton* [1992] 2 I.R. 542. In that case Costello J. was considering constitutional issues relating to the establishment of a Tribunal of Inquiry into alleged wrongdoing in the beef industry. At p. 554 he stated:

"1. There is no statutory provision which empowers the establishment of this Tribunal either by the two Houses or the Minister. It is established by an administrative act, that is by the order of the Minister of the 31st May, 1991. The Government or any Minister can inquire into matters of public interest as part of the exercise of its executive powers, but if this done without reference to parliament then the inquiry will not have statutory powers which are to be found in the Tribunals of Inquiry (Evidence) Act, 1921, and the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979."

29. Costello J. in the above extract envisages two distinct types of tribunals of inquiry which may be established by a Minister as part of the exercise of executive power. First, a tribunal of inquiry in respect of which there is a resolution passed by both Houses of the Oireachtas and which can then invoke for its conduct the statutory provisions of the Tribunals of Inquiry (Evidence) Act, 1921, and the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979. Second, a commission or tribunal of inquiry which is established in exercise of the executive power of the State but which does not invoke any statutory power. In such instances, the conduct of the commission or tribunal of inquiry would appear to continue to be an exercise of the executive power of the State. Such commissions or tribunals of inquiry depend upon the voluntary co-operation of all concerned and have no powers of compulsion. Professor Casey in *Constitutional Law in Ireland*, 3rd Ed. (Dublin, 2000) at p. 235 explains the limitations on the manner in which the executive power of the State may be exercised in domestic matters in the following terms:

"In certain circumstances the constitutional grant of the executive power may enable the Government to act without statutory authority in domestic affairs. It seems clear, however, that it could not, without statutory warrant, take action imposing obligations or burdens on any citizen. The absence of any Irish judicial authority on this point doubtless reflects consistent legal advice to Governments that statutory authority is essential for such action . . ."

30. Professor Casey comments specifically on commissions established under executive power at p.236:

"It is presumably under its executive power that the Government establishes commissions and committees to inquire into some subject (e.g. industrial relations, itinerancy, taxation) and report thereon. Such bodies, of course, function on the basis of evidence voluntarily tendered: and it would not be possible to clothe them with authority to compel the attendance of witnesses or the production of documents."

31. On the facts herein I have concluded that the Minister did not establish either of the foregoing types of tribunal of inquiry or any commission or tribunal of inquiry. Rather, he directed that an investigation into the allegations made by Deputy Higgins be carried out by the Labour Inspectorate, i.e. by an Inspector or possibly a group of Inspectors appointed pursuant to and for the purposes of the Relevant Employment Acts. In doing so, whilst the Minister may have given the direction as part of the executive power of the State he invoked an existing statutory scheme for the conduct of the Investigation. The consequences of the direction given was that the Investigation was to be conducted by an Inspector, i.e. a statutory officer in accordance with the relevant statutory scheme. There is no basis upon which it can be considered that the Inspector in investigating the allegations was exercising any executive power of the State. The Inspector was conducting the Investigation as a statutory officer with the backing of the relevant statutory powers pursuant to a statutory scheme or schemes established by the Oireachtas in the Relevant Employment Acts. There is no factual basis for, nor indeed was any submission made on behalf of the respondents to the effect that the Inspector was conducting this Investigation as a civil servant on behalf of the Minister.

32. It must also be recalled that the allegations of Deputy Higgins were allegations of breaches by the applicants of statutory obligations imposed on them by the Relevant Employment Acts. The Oireachtas in those Acts provided a statutory scheme both for investigation of alleged breaches and enforcement of the Acts. I have concluded that the Minister in giving the direction to the Labour Inspectorate sought to invoke the statutory scheme established by the Oireachtas in the relevant Employment Acts for investigation (and presumably if necessary) enforcement of those Acts.

33. The Inspector expressly conducted the Investigation pursuant to and in reliance upon the statutory powers given him by the relevant Employment Acts. As appears from the facts recited, the applicants to a large extent voluntarily co-operated with the Inspector and produced the relevant books, records and other documents; permitted inspections and interviews of employees and participated by giving interviews as requested. However, as noted, when there appeared a reluctance to co-operate within the required time scale, the Inspector, by a letter dated the 16th March, 2005, to the Managing Director of Gama Ireland, reminded him of the offence he might be committing under s.12(2) of the Industrial Relations Act, 1969, if he refused to meet within the time-scale sought.

34. The Report is the result of the Investigation. Accordingly, I have concluded that the Inspector in both conducting the Investigation and preparing the Report must be considered to be exclusively exercising the statutory powers conferred on him by the relevant Employment Acts and is constrained to act within the limits of those powers and for the purposes for which they are conferred.

The Nature of the Report

35. I have had the opportunity of reading the Report. As an issue before the court is the entitlement to publish the Report it is not appropriate to refer to it in great detail.

36. The Inspector describes the Report in the following terms at paragraph 1.1.2:

"An investigation into the said matters was commenced by the Labour Inspectorate on February 9th 2005. This Report is the product of that investigation. At the outset, I wish to emphasize that the Report does not make findings of fact and is not comprehensive or conclusive regarding the issues which were raised during the course of the said investigation. Rather, The Report seeks to highlight the core issues which arise in attempting to determine the accuracy of the allegations made by Deputy Higgins in respect of alleged breaches of Irish employment law. In this context, it is also appropriate to mention that a number of issues were raised during the course of the investigation which I considered should be brought to the attention of the appropriate regulatory authorities by the Minister. Those issues concern, *inter alia*, . . . I wish to emphasize, however, that reference is only made to these issues so that they may be considered by the appropriate regulatory authorities and the Report does not make any findings of fact in this regard. "

37. The issues referred to in the portion deleted above are external to alleged breaches of the Relevant Employment Acts.

38. I agree with the assessment of the Inspector that the Report does not make findings of fact. However it does assess the evidence and information obtained and makes qualitative observations on differing version of events given by or on behalf of the applicants, certain unidentified employees and former employees of the applicants and other specified persons or bodies. The Report also contains a number of general observations and recommendations. The latter include, *inter alia*, holding a further independent review, seeking certain undertakings from the applicants and the circulation of the Report to a number of regulatory bodies which are not concerned with the enforcement of the Relevant Employment Acts.

39. It was not disputed on behalf of the respondents that the Report was prepared for the purposes of publication. This is confirmed by the correspondence passing between the Inspector and solicitors for the applicants and by the nature of the Report. In his affidavit sworn on the 18th April, 2005, in the Gama Ireland proceedings, the Inspector states at para. 31:

"I also advised Mr. Heron [solicitor for Gama Turkey] of my intention to publish the Report of my investigation on Monday 21st March 2005."

40. It appears that, at that time, the Inspector intended publishing the Report. At the date of the hearing before me the intention was that the Minister with the authority of a decision of the Government would subject to any order of the Courts publish the Report.

41. In relation to the nature of the Report, I agree with the observation of counsel for the applicants that the Report contains none of the detailed information in relation to the identity of potential witnesses or the contents of their proposed evidence which one might expect in a report prepared for a prosecutor or persons concerned with civil enforcement of relevant statutory obligations.

42. I find that the Report is a report intended for general publication and one which, whilst not making findings of facts in relation to alleged breaches of the relevant Employment Acts, contains an assessment of and makes qualitative observations on differing versions of factual events given by or on behalf of the applicants and others (some of whom are unidentified) in relation to the alleged breaches of the relevant Employment Acts. Further, I find that the Report cannot be considered as a report of the information, documents and potential evidence collected by the Inspector in the course of the investigation and intended for a prosecutor or a person involved in the enforcement of the applicants' statutory obligations under the relevant Employment Acts

through the civil procedures established by those Acts.

Vires of Report

43. It is common case that the Inspector has no express statutory power under the relevant Employment Acts to prepare a report of the results of an investigation for publication. The only question is whether such a power may be regarded as incidental to or consequential upon the express powers given to the Inspector.

44. The principles according to which the court should determine this issue are well established. Counsel for the respondents in their written submissions refer to the manner in which such principles were clearly addressed by Kelly J. in *Director of Consumer Affairs v. Bank of Ireland* [2003] 2 I.R. 217 in considering the powers of the Director of Consumer Affairs pursuant to s. 149 of the Consumer Credit Act, 1995. Kelly J. at pp. 237-238 stated:

"The purpose of statutory interpretation is to ascertain the intention of the legislature as expressed in the statute, considering it as a whole and in its context. The intention, and therefore the meaning of the statute, is primarily to be sought in the words used in it.

The plaintiff is a statutory officer and is therefore strictly confined to the functions and powers conferred upon her under the Act. She has no inherent power. But she may have powers which, although not expressly conferred, may be regarded as incidental to or consequential upon those which the legislature has expressly authorised."

45. Reference was also made to *Keane v. An Bord Pleanála* [1997] 1 I.R. 184 where Hamilton C.J., in considering the powers conferred on the Commissioners of Irish Lights under the Merchant Shipping Act, 1894, stated at p. 212:

"The powers of the Commissioners, being a body created by statute, are limited by the statute which created it and extend no further than is expressly stated therein or is reasonably necessarily and properly required for carrying into effect the purposes of incorporation or may fairly be regarded as incidental to or consequential upon those things which the legislation has authorised."

46. The powers conferred on an Inspector by each of the relevant Employment Acts are similar. They are to:

- Enter premises at reasonable times.
- Require the production of, examine and take copies of records.
- Examine and take statements from persons.
- Initiate prosecution of certain offences under the Acts.
- Initiate civil proceedings on behalf of a worker in specified circumstances.

47. See for example s. 12 of the Industrial Relations Act, 1969, s. 8 of the Organisation of Working Time Act, 1997 and s. 33 of the Minimum Wages Act, 2000.

48. The only reference to the preparation of a report by an Inspector is in s. 34(4) of the National Minimum Wage Act, 2000. This provides:

"34 (4) Where after investigating an allegation or matter under this section an inspector is satisfied that an offence under this Act has been committed, or when so requested by the Minister, the inspector shall furnish a report on his or her investigation to the Minister."

50. The respondents, correctly in my view, did not assert that the above subsection authorises the preparation of the Report herein nor of a report for publication. It was not submitted that the Investigation herein was an Investigation carried out under s. 34 of the Act of 2000. Also it must be noted that the obligation to furnish a report under the section is confined to circumstances where the Inspector is satisfied that an offence under the Act has been committed. The Minister has the power to prosecute offences under each of the above Acts. The power to furnish a report to the Minister in s. 34 of the Act of 2000 appears linked to that purpose. This section was relied upon by counsel for the applicants as an example of the Oireachtas authorising the inspector to furnish a report to the Minister in certain specified circumstances which is absent elsewhere in the relevant Employment Acts.

51. In accordance with the above principles, any implicit powers of the Inspector must also be construed in the context of the purposes for which powers are expressly given under each of the Acts. Such purposes are differently expressed in the Industrial Relations Acts 1946-2004 as against the other relevant Employment Acts. The Inspector relied on and made reference to s. 12 of the Industrial Relations Act, 1969. The powers given the Inspector under that section are expressly "for the purpose of enforcing the provisions of ss. 10 and 11 of this Act". Section 10 of the Act of 1969 provides for the enforcement of a Registered Employment Agreement (which is the matter under the Industrial Relations Acts stated to be at issue in the investigation) through a procedure before the Labour Court. It also creates offences for failing to comply with an order of the Labour Court or a Registered Employment Agreement. Section 11 provides for the making by the Labour Court of fair employment rules which were not stated to be relevant to the facts of this Investigation.

52. Section 52 of the Industrial Relations Act, 1990, extends the purposes for which the powers of inspection given to inspectors under s. 12 of the Act of 1969 are exercisable to include the purposes of enforcing the provisions of s. 32 of the Industrial Relations Act, 1946 and s. 51 of the Act of 1990. Both of these provisions also relate to the enforcement of obligations under Registered Employment Agreements and the keeping of records in relation to same.

53. The purposes for which the power available to the Inspector under s. 12 of the Act of 1969 may be exercised are very specific and limited. They cannot be construed as including any incidental or consequential power to prepare a report for publication of the results of an investigation conducted pursuant to the power given to an Inspector by s. 12 of the Act of 1969.

54. The powers given by s. 8 of the Organisation of Working Time Act, 1997, and s. 33 of the Minimum Wages Act, 2000, are each expressed to be "for the purposes of this Act". Each of those Acts contains broadly similar enforcement procedures. The Acts create offences for breaches of certain provisions. Such offences are prosecutable by the Minister. They also contain civil procedures for enforcement of the obligations imposed by the Act. Those procedures involve a complaint to the Rights Commissioner; an appeal to

the Labour Court, an appeal to the High Court on a point of law and enforcement of a determination of the Labour Court through the Circuit Court. Section 39 of the Act of 2000 authorises the Minister to take civil proceedings on behalf of an employee in certain limited circumstances. The Minister also has a power to make regulations and orders declaring codes of practice under the Act of 1997 and a role in certain of the civil procedures. An Inspector is not expressly given a role in the civil procedures.

55. Having regard to the schemes created by the Organisation of Working Time Act, 1997, and the National Minimum Wage Act, 2000, and the powers expressly conferred on an Inspector for the purposes of the Acts, I have also concluded that there is nothing in either the express powers nor the purposes for which those powers are conferred which permits me to conclude that an Inspector has an incidental or consequential power under any of the Acts to prepare a report intended for publication of the results of an investigation into alleged breaches by an employer of statutory obligations.

56. An Inspector must also have an implicit or consequential power under the relevant Employment Acts to pass to the Minister and persons concerned with the civil enforcement procedures information, documents or evidence gathered pursuant to the Inspector's express statutory powers for the purposes of those persons enforcing the obligations imposed by the Acts on employers either by way of civil procedures or by prosecuting alleged offences. I have reached such conclusion by reason of the very limited role for an Inspector provided in the civil enforcement procedures and the limited offences which an Inspector may prosecute. It would render almost useless the express powers conferred on an Inspector to gather and obtain information for the purposes of enforcing the obligations imposed by the Acts unless he had a power to pass on the information gathered.

57. Whilst, on behalf of the applicants no express concession was made that it was *intra vires* the powers of the Inspector to pass to the Minister the information obtained pursuant to the investigation conducted, nevertheless at the hearing before me no relief was pursued which would prevent the Inspector furnishing the Report to the Minister or the other bodies referred to in the interlocutory order of Kelly J. This was explained by the fact that the Minister and such bodies already had the Report and therefore it did not make sense to seek an order restraining the Inspector from furnishing the Report to such persons.

58. Notwithstanding, it was submitted that, even if it was *intra vires* the Inspector to furnish to the Minister, for purposes authorised by the relevant Employment Acts, some, if not all, of the information now in the Report, as the Report was in fact a report prepared for the purpose of publication its preparation was *ultra vires* the Inspector. Reliance for this submission was placed by the applicants upon the decision of the Supreme Court in *Kennedy v. The Law Society of Ireland (No. 3)* [2002] 2 I.R. 458 and in particular the principles set out by Fennelly J. at pp. 486-487:

"The issue is essentially one of *ultra vires*. The delegates of statutory power cannot be allowed to exceed the limits of the statute or, as here, the secondary legislation conferring the power. The rationale for this is simple and clear. The Oireachtas may, by law, while respecting the constitutional limits, delegate powers to be exercised for stated purposes. Any excessive exercise of the delegated discretion will defeat the legislative intent and may tend to undermine the democratic principle and, ultimately, the rule of law itself. Secondly, the courts have the function of review of the exercise of powers. They are bound to ensure respect for the laws passed by the Oireachtas. A delegatee of power which pursues, though in good faith, a purpose not permitted by the legislation by, for example, combining it with other permitted purposes, is enlarging by stealth the range of its own powers. These principles, in my view, must inform any test for deciding whether a power has been exercised *ultra vires*. Henchy J. stated in *Cassidy v. Minister for Industry and Commerce* [1978] 1 I. R. 297 at p. 310:-

"The general rule of law is that where Parliament has by statute delegated a power of subordinate legislation, the power must be exercised within the limitations of that power as they are expressed or necessarily implied in the statutory delegation. Otherwise it will be held to have been invalidly exercised for being *ultra vires*."

59. The present case is not one where some secondary or incidental advantage follows from the decision made. The impermissible aim or purpose was clearly intrinsic from the outset. It is not necessary that it be dominant. The matter was well put in a passage from de Smith's *Judicial Review of Administrative Action* (5th ed) at p. 330, quoted by the learned trial judge at [2000] 2 I.R. 104 at p. 123:-

"If power granted for one purpose is exercised for a different purpose, that power has not been validly exercised. ... [T]he person so authorised cannot be allowed to exercise the powers conferred on them for any collateral object; that is, for any purposes except those for which the legislature has invested them with extraordinary powers."

60. Counsel for the respondents sought to distinguish the facts pertaining to this investigation and the preparation of the Report from those at issue in *Kennedy v. The Law Society of Ireland (No. 3)*. In *Kennedy v. The Law Society* at issue was a decision to appoint an accountant to investigate the books of the plaintiff who was a practising solicitor. On the facts, it had been concluded by the High Court that the Society was pursuing two purposes of equal importance in appointing the accountant. One purpose was *intra vires* the Solicitors' Regulations and the other purpose was *ultra vires* the Solicitors' Regulations.

61. Counsel for the respondents laid emphasis upon the fact that at all stages the Inspector in conducting this investigation was doing so only for a permitted statutory purpose, namely investigating alleged breaches of the Relevant Employment Acts. That is so. However, I have concluded that the principles in *Kennedy v. The Law Society (No. 3)* apply to the preparation of the Report by the Inspector.

62. As already concluded, the Inspector has an implicit statutory power to collate and pass to the Minister and other relevant civil and criminal enforcement authorities information, documents and potential evidence obtained in exercise of his express statutory powers for the purpose of those authorities enforcing by the authorised civil procedures obligations imposed on the applicants by the relevant Employment Acts or to prosecute alleged breaches thereof. Such information might be put together in a document called "a report". The name of the document does not appear important. What is important is the purpose for which the report is prepared. It must be a purpose authorised by one of the relevant Employment Acts.

63. I have already concluded, as a fact, that the Inspector has not prepared a report as described in the preceding paragraph but rather a report for publication. Applying the principles set out by Fennelly J. in *Kennedy v. The Law Society of Ireland (No. 3)* [2002] 2 I.R. 458, notwithstanding the implicit power of an inspector to prepare a report of the results of an investigation conducted pursuant to express statutory powers for purposes authorised by statute the preparation of the Report by the Inspector for a purpose not authorised by statute is *ultra vires* the powers of the Inspector.

Further circulation and publication of the Report.

64. The applicants seek an injunction restraining the further circulation and publication of the Report. Prima facie, having regard to my

conclusion that the preparation of the Report by the Inspector is *ultra vires* the powers conferred on him by the relevant Employment Acts, it would appear to follow that the applicants are entitled to such an order.

65. It is important to note in relation to this aspect of the case that at issue was only the question of the further circulation and publication of the Report of the Inspector as a single and entire document. My conclusions only relate to the further circulation and the publication of that document. In determining these issues I am not considering nor seeking to determine the entitlement of the Minister to further circulate or to publish any specific information which emanates from the applicants and/or third parties, has been communicated lawfully to him either in the course of or as a result of the Investigation by the Inspector and which may also be contained in the Report.

66. Counsel for the respondents submitted in reliance upon the decision of the Supreme Court in *Desmond v. Glackin* (No. 2) [1993] 3 I.R. 67 that the Minister is entitled to circulate to the other Ministers in the Government the Report and also to other authorities who may have a legitimate interest in the information contained therein. Reliance was placed upon the decision in the Supreme Court of McCarthy J. In that judgment at p. 132 he stated as follows:

"I am satisfied that there is no principle of law, nor indeed is there any principle of common sense, which would prohibit a Minister of State who properly has obtained from an agent carrying out on his behalf a statutory power vested in him, information which may be of assistance to another Minister of State in carrying out a statutory duty imposed on him, such as the investigation by an inspector appointed under s. 14 of the Act of 1990, from assisting that investigation. I would affirm with approval the statement contained in the judgment of O'Hanlon J., in respect of this particular issue, that the foundation of freedom in our society must surely have a sounder base than the possible concept of government activity carried out, of necessity, in watertight compartments. I am, therefore, satisfied that the learned trial judge was correct in rejecting the application for a declaration and hold that there was nothing illegal or improper in any way in the obtaining, which was done with full disclosure by the inspector, through the Minister for Industry and Commerce from the Minister for Finance, of the information supplied by the Central Bank."

67. It is to be noted that the above statement of principle by McCarthy J. relates to information which has been obtained "properly" by a Minister of State "from an agent carrying out on his behalf a statutory power vested in him". It follows from the earlier conclusion in this judgment that even insofar as the Minister has received the Report it cannot be said that he has "properly" received the Report as it is a report prepared without lawful authority. Accordingly, on that basis alone I am satisfied that the Minister is not now entitled to further circulate the Report in reliance upon the decision in *Desmond v. Glackin*, and it is unnecessary for me to consider the further submissions made seeking to distinguish the present circumstances from those pertaining in *Desmond v. Glackin*.

68. The Minister is seeking to circulate the Report of the Inspector, a statutory officer, prepared exclusively pursuant to the purported exercise of statutory power but found to be *ultra vires* such power. Unless, consequent on such finding, further circulation of the Report even to members of the Government is restrained, it appears that this court would be failing in its duty described by Fennelly J. in *Kennedy v. The Law Society of Ireland* (No. 3) [2002] 2 I.R. 458 "to ensure respect for the laws passed by the Oireachtas".

69. Counsel for the respondents in asserting the right of the Minister to publish the Report submitted he was entitled to do so pursuant to the executive power of the State. He referred in particular to what appears to have been an unchallenged power to publish reports of Tribunals of Inquiry conducted in accordance with the Act of 1921 and the Act of 1979 and Commissions of Inquiry conducted under the executive power of the State. It was submitted that the Minister has a power to publish, as part of the executive powers of the State, a report prepared at his direction provided any relevant Act does not prohibit publication and that the Relevant Employment Acts did not do so.

70. The applicants submitted, *inter alia*, that even if such a general executive power to publish reports exists it could not extend to a document prepared by a statutory officer without lawful authority. I accept that submission. There does not appear any legal basis for concluding that a Minister may as part of the executive power of the State publish a report prepared by a statutory officer purportedly pursuant exclusively to statutory powers but *ultra vires* those powers. To so conclude appears contrary to the relevant principles set out above in relation to the exercise of statutory powers within the limits of the powers as expressed in or necessarily implied from the relevant Acts of the Oireachtas and also contrary to the duty to ensure respect for such Acts.

71. In reaching this conclusion on publication, I have considered the submissions on behalf of the respondents in relation to the public importance of the subject matter of the investigation and freedom of expression but do not consider they can alter the consequences for the publication of the Report of the finding of *ultra vires*. However, I wish to make clear that in deciding that the Minister has no power to publish the Report produced *ultra vires* I am not seeking to determine any issue as to the Minister's entitlement or not to publish any specific information of which he may have become aware lawfully in the course of or as a result of this investigation. As already stated the only issue raised by the relief sought by the applicants is the publication of the document which is the Report of the Inspector.

72. Finally, it does not appear that a decision of the Government can alter the above conclusions. The same reasoning must apply to the publication pursuant to an exercise of executive power by Government of a document of a statutory officer produced *ultra vires* his powers.

Fair procedures

73. The second major issue in the proceedings was the allegation on behalf of the applicants that the investigation had been conducted and the Report prepared in breach of their entitlement to fair procedures.

74. The allegations related principally to two matters:

(i) The failure by the Inspector to give to the applicants the identity of certain employees and former employees who were interviewed and the precise factual information obtained from such employees insofar as they alleged breaches of statutory obligations by the applicants.

(ii) The failure to permit the applicants to cross-examine such employees and former employees.

75. The submissions were primarily made in a context where the Report of the investigation might be published. On behalf of Gama Ireland it was accepted that if the Inspector was confined to providing the information which he obtained in the course of the Investigation and his observations thereon to the Minister and other civil or criminal enforcement authorities for permitted statutory purposes under the relevant Employment Acts that the investigation was not conducted in breach of fair procedures.

76. On behalf of Gama Turkey it was accepted that in such circumstances no right of cross-examination existed but it was submitted an entitlement did exist to be furnished with the identity of persons interviewed and details of adverse evidence obtained for the purpose of commenting thereon prior to the production of any report even for statutorily permitted purposes.

77. It is well established in accordance with the principles set out in *Kiely v. Minister for Social Welfare* [1977] IR 267 that the requirements of fair procedures depend upon the particular legal and factual context. Having regard to the conclusions which I have reached, these include the preliminary nature of the Inspector's powers; the limited purposes for which they may be used; the purpose of the relevant Employment Acts in protecting and enforcing statutory rights of employees; and the fears expressed by employees if their identities were disclosed. Also, it is implicit in the conclusions I have reached that at this stage there will not be a public adjudication by the Inspector or even public disclosure of any preliminary assessment by the Inspector of the alleged breaches of statutory obligations. Finally, if any complaints are pursued in relation to such employees or former employees either through a civil procedure or a criminal prosecution then their identity will have to be disclosed and the applicants accorded opportunities of both dealing with and contesting if they considered it necessary the evidence to be given.

78. Gama Turkey rely upon the decision in *The State (Shannon Atlantic Fisheries Limited) v. The Minister for Transport and Power* [1976] IR 93. However, that case is distinguishable both in relation to the statutory framework and on the facts. The report in that case included findings of fact and Shannon Atlantic Fisheries Limited was given no opportunity of commenting on any material obtained.

79. Provided the results of the investigation are confined to statutorily permitted purposes, I have concluded that there has not been a breach of fair procedures in not disclosing at this stage the identity of certain employees or former employees or the detailed information obtained from them.

Applicants' entitlement to relief

80. The respondents submit that, even if the preparation of the Report for publication was *ultra vires* the Inspector, the applicants should be denied any relief by reason of acquiescence in the investigation, preparation and proposed publication of the Report; or by reason of their conduct in the course of the proceedings; or because of their failure to apply promptly for judicial review.

81. The first ground is primarily based upon the letters sent by Mr. Karaalioglu at the outset indicating a willingness to cooperate with the investigation, and certain statements made by the former legal advisor of the applicants, Mr. Grogan, on the 4th March, 2004, on radio which envisaged that the Report of the investigation would be published.

82. Insofar as Mr. Karaalioglu agreed to cooperate fully with the Investigation on a voluntary basis it does not appear to me that such agreement could be considered to preclude the applicants seeking to restrain an act by the second named respondent either in the course of the investigation or as a result of the investigation which is *ultra vires* his powers under the relevant Employment Acts.

83. It does not appear to me that the statements made by Mr. Grogan, even if authorised, could be considered to be acquiescence by the applicants to the publication of the Report. They were made prior to the draft Report being furnished to the applicants or their legal advisors. Each of the applicants objected to the publication of the Report within approximately 10 days of receipt of the first draft of same. Further, at no stage after sight of the first draft of the Report do the respondents allege that either of the applicants agreed to the publication thereof.

84. The respondents next submit that the applicants by reason of the conduct which was the subject matter of the investigation; the acknowledgment of breaches of certain of the statutory obligations; and their failure to deal in full in the affidavits in these proceedings with the allegations under investigation, deprived themselves of their entitlement to the relief sought in the judicial review proceedings. They also rely upon the alleged failure of Gama Ireland and Gama Turkey to set out a detailed account of their mutual relationship and the delay in informing the Inspector of the alleged secondment arrangements between Gama Turkey and Gama Ireland.

85. Such facts do not constitute the type of factual grounds upon which a court will or should refuse discretionary relief in judicial review proceedings. It confuses the subject matter of the investigation and the right of the applicants to have the investigation conducted and its results dealt with in accordance with law. Even a person who admits to a serious crime is entitled to have any relevant criminal proceedings conducted in accordance with law. Similarly it appears to me that a person who is alleged to be in breach of statutory obligations is entitled to have any investigation carried out in accordance with the relevant statutory scheme. The fact that the applicants have admitted to breaches of statutory obligations does not deprive them of the entitlement to have an investigation conducted in accordance with law.

86. Finally, it does not appear to that the applicants herein were in breach of any obligation to apply promptly for relief by way of judicial review. Further in each proceedings an order granting leave was made with no reservation of a time point.

Conclusions

87. I have reached the following conclusions on the issues herein:

- (1) The Minister, in exercise of the executive power of the State directed the Labour Inspectorate headed by the Inspector to investigate the allegations made by Deputy Higgins in the Dáil on the 8th February, 2005.
- (2) The Inspector in conducting the investigation and preparing the Report did so exclusively pursuant to the statutory powers conferred on him by the Industrial Relations Acts, 1946 – 2004; the Organisation of Working Time Act, 1997; the National Minimum Wage Act, 2000 and other relevant Employment Acts for which he was appointed an Inspector or Authorised Officer.
- (3) The Inspector prepared the Report dated the 4th May, 2005, as a Report intended for general publication.
- (4) The preparation of the Report dated the 4th May, 2005, was *ultra vires* the statutory powers of the Inspector.
- (5) The Minister is not entitled to circulate the Report as its preparation was *ultra vires* the statutory powers of the Inspector.
- (6) The Minister is not entitled to publish the Report as its preparation was *ultra vires* the statutory powers of the Inspector.

(7) That there was no breach of fair procedures in the manner in which the investigation was conducted provided that the use of the results thereof are confined to the permitted statutory purposes under the relevant Employment Acts.

(8) The Inspector has implicit statutory power to report to the Minister and other enforcement bodies following an investigation conducted pursuant to express statutory powers under the relevant Employment Acts for purposes authorised by those Acts.

(9) The applicants should not be refused relief as a matter of discretion.

Relief

88. I would propose granting the following reliefs:

(1) A declaration that the preparation of the Report of the Inspector dated 4th May, 2005, was *ultra vires* the powers of the Inspector under the Industrial Relations Acts, 1946 – 2004, the Organisation of Working Time Act, 1997, the Minimum Wage Act 2000 and other relevant Employment Acts.

(2) An injunction restraining the respondents or any person having notice of the making of the order from further circulating or publishing the Report of the Inspector of the 4th May, 2005, or any earlier version of the said Report.

89. I will hear counsel as to the necessity for any different or other relief in the light of the findings and conclusions in this judgment.