Neutral Citation Number: [2007] IEHC 3

THE HIGH COURT

JUDICIAL REVIEW

[2006 No. 245 J.R.]

BETWEEN

JOHN KENNEDY

APPLICANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment of Mr. Justice John MacMenamin dated the 11th day of January 2007.

1. At the time relevant to these proceedings the applicant was a Clerical Officer in the Department of Justice Equality and Law Reform, working in the Immigration Section. In the course of that employment he is alleged to have committed a number of offences between the months of November 2002 and January 2003. In outline the charges against him are that he corruptly accepted gifts of money in the sum of €500, bottles of wine, or meal vouchers, as an inducement to showing favour to four different persons who had recourse to the Immigration Section, and that the applicant, who had responsibility for issuing certain residency permits to foreign nationals, did so in a corrupt manner.

2. Chronology

Because one issue raised by the respondents herein is delay, it is necessary to set out a chronology of events.

The applicant was returned for trial on 16th March, 2004. The case was first mentioned in the Circuit Criminal court on 2nd April of that year. It was also mentioned on 18th May, 2004 and 13th July, 2004. An issue of disclosure of documents arose. Thereafter the matter was listed for mention on five occasions between 16th July, 2004 and 4th February, 2005.

3. On the latter date, submissions were made to the Circuit Court in respect of this outstanding issue of disclosure. That matter was again adjourned to the 11th February, 2005. There were four further adjournments between the 11th March, 2005 and 11th July, 2005 inclusive. The case was then adjourned to 3rd October, 2005 for arraignment, when, five months in advance, a trial date was set for 9th March, 2006. Between October 2005 and March 2006 there were two interim dates that is 17th and 24th February, 2006 where the matter was listed for mention.

4. On 6th March, 2006, at a time when as seen the trial date had been fixed for five months, and just three days before the trial date, the applicant sought leave to bring judicial review proceedings. It does not appear from the High Court order made on that day whether an extension of time for leave was sought or granted.

5. While the actual offences with which the applicant is charged are under s. 1(1) and (4) of the Prevention of Corruption Act 1906, as inserted by s. 2 of the Prevention of Corruption Act, 2001, the declaration sought relates to s. 4 of the latter Act.

6. The applicant seeks a declaration that s. 4 of the Act of 2001 is invalid, having regard to the provisions of the Constitution of Ireland. He also seeks a declaration that the aforesaid section is incompatible with the State's obligations under the European Convention on Human Rights, for reasons discussed below.

However the issues which arise for consideration herein are not confined to these reliefs; in that other issues, raised by the respondents also arise for consideration. These include the appropriateness of judicial review proceedings in seeking relief of the type sought; whether the application is premature or moot in that the matters in contention have not been the subject matter of a ruling from the trial judge in the Circuit Court; and whether the applicant has been guilty of delay in the initiation of these proceedings.

7. The Section sought to be impugned

Section 4 of the Prevention of Corruption (Amendment) Act 2001 provides:-

> 4-(1) "Where in any proceedings against a person referred to in subs. (5)(b) of s. 1 (inserted by s. 2 of this Act) of the Act of 1906, as amended, it is proved that-
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> (a) any gift consideration or advantage has been received by any person
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> (b) the person who gave the gift, consideration or advantage or on whose behalf the gift consideration or advantage was given had an interest in the discharge by the person of any of the functions specified in this section,
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> the gift or consideration or advantage *shall be deemed to have been given and received corruptly as an inducement* to or reward for the person performing or omitting to perform any of the functions aforesaid unless the contrary is proved." (emphasis added).

8. The applicant seeks declarations that the section in question is invalid having regard to Article 38(1) of the Constitution of Ireland (which generates a trial in due course of law) and that the section is incompatible with the State's obligations under the European Convention on Human rights as provided for under the European Convention of Human Rights Act 2003 (ECHRA). *Inter alia* these contentions are made upon the basis of an alleged shifting of the legal burden of proof to an accused, and an alleged abrogation of the right to silence by virtue of the terms of s.4 of the Act of 2001 which emphasis has been added.

9. The Procedural Issues

A number of procedural issues are raised by the respondents including allegations of delay in bringing these proceedings, and prematurity or mootness by reason of the fact that the issues are raised herein appropriately lie in the domain of the trial judge. The court must consider whether if, a sustainable allegation of delay has occurred, should it then nonetheless proceed to deliver judgment on the remainder of the substantial constitutional or convention issues? Similar questions arise were the court to conclude that the issue is hypothetical or premature, or if the court were to hold that the application should have been brought by way of plenary proceedings seeking declarations under the Constitution and the ECHRA.

10. Procedural and Substantive Issues
Recent authority, discussed below, shows the guarded approach the Supreme Court has adopted in dealing with substantive issues when important procedural questions also arise.

In *C.C v. Ireland and the Attorney General and the Director of Public Prosecutions* (12th July 2005, Unreported), in view of the importance of the issues raised, and in the light of a decision on constitutionality and statutory interpretation having been made by the trial judge in High Court judicial review proceedings, the Supreme Court considered it necessary to deal with the constitutionality of the provision impugned, in that case the availability of the defences of mistake of age on a charge of unlawful carnal knowledge of a minor, under s. (1) of the Criminal Amendment Act 1935 and the proper interpretation of that provision.

For the applicant herein just as for the applicant in C.C. the issue raised is of importance. The question here also, appertains to the interpretation of the section in issue, its constitutional validity or compatibility with the Convention. If this court were to deal with the constitutional and legal substance of the application it may be suggested that, an exception has been made to a general principle where the Supreme Court has stated that such applications should not normally be entertained. If on the other hand this court declines to entertain the "points of substance" on procedural grounds the consequence will be that on an appeal to the Supreme Court issues which maybe of importance will not have been considered in the High Court judgment.

To the practitioner to these issues also pose a challenge, in identifying precisely whether an application to challenge the constitutionality of a section may pre-emptively be initiated if an applicant is being charged before a criminal court. Must an applicant be exposed to a trial prior to raising the constitutionality of a section or may pre-emptive applications be made pre-trial? As a separate issue should issues of procedure in judicial review be dealt with prior to a substantive hearing by way of motion for directions brought after the filing of a statement of opposition? In view of the significance of the issues this judgment will seek to address sequentially these interlinked issues and thereafter apply the relevant principles.

11. The C.C. Case (12th July, 2005) delay, prematurity, mootness, and 'exceptional circumstances'.
In *C.C. v. Ireland and Others* (the Supreme Court 12th July, 2005) very similar procedural issues arose as apply here. It must be considered in some detail.

At first instance the trial judge had ruled that while there was delay in initiating proceedings, the issue was too important to be determined simply on procedural grounds. He therefore made findings on the constitutionality of the section impugned, and precluded the potential defences. On appeal to the Supreme Court the discrete questions of delay and prematurity were also considered, which are relevant here.

Denham J., (although in the minority on other issues), Geoghegan J. and Fennelly J. each addressed the issue. It is important to consider the rationale adopted by each judge in their ruling to ultimately entertain the substantive questions.

In the course of her judgment Denham J. stated on the issue of delay:

> "The learned High Court judge held that the applicant's application for judicial review was out of time and had not been made promptly. However, he determined that the issues in the instant case were far too important to permit the judicial review application to be decided on a time point only unless some serious prejudice has or is likely to be caused. He held that prejudice in this context is not confined to the parties but is to be considered in the context of a fair and efficient justice system to the whole community. Further, he relied on the public policy that proceedings relating to public domain law should take place promptly, except where good reason is furnished. In all the circumstances, including the delivering of a fair and just legal system, the learned trial judge permitted the application for judicial review proceed. On this preliminary issue I am in agreement with Geoghegan J. that as the *indictment had not been served in either case neither applicant was out of time to seek leave for judicial review.* (Emphasis added)

12. However, that Denham J. pointed out that there were a number of other factors to which the court should have regard in considering formal procedure. She pointed too, to the fact that the applicants were "in imminent danger" of such a trial.

But an important second factor she considered constrained the Supreme Court to deal with the substantive issue. This was that:

> "12. In all the circumstances of this case, *including the fact that the learned trial judge had given a judgment on the merits of the case*, this court was in a position where it had no real choice and I am satisfied that it had to proceed to consider the substantive issues". (emphasis added)

13. That judge distinguished the situation in C.C. from that where judicial review is sought in the currency of a trial. She pointed out that no indictment had yet been laid although the charges were known. She observed –

> "There is an important difference between considering an application for judicial review in the currency of a trial as opposed to an application prior to the commencement of the trial, prior to the laying of an indictment. While an application for review in the currency of a trial may only be successful in the most exceptional circumstances, applications for judicial review prior to trial fall into a different category. However, even in these latter cases it is still *inter alia* within the discretion of the court to refuse the application for judicial review on the grounds that the issue would best be met at the trial by the trial judge."

Significantly, a factor referred to throughout both judgments was the circumstance which the Supreme Court felt rendered a determination unavoidable on the substantive issues, that is the fact that the learned trial judge had ruled on the substantive constitutional, issues, and that the alternative options including an appeal to the Court of Criminal Appeal, or on a point of law to the Supreme Court might not enable a fair and just trial. In such circumstances Denham J. considered it would be unfair to force the applicants in C.C. and others in a limited number of cases to endure a trial without a final determination on the issue of the defence available, and on a matter which clearly in that case went to the core of the prosecution and the defence. However she warned:

> "this decision *should not be regarded as a precedent determining* that an issue of *statutory interpretation would routinely be circumstances such as to provide a basis for a judicial review pre-trial*." (emphasis added) (p. 6 of Judgment)

Geoghegan J. also based his ruling that the applicant was not out of time on the basis that the indictment had not yet been served. He observed –

> "…the time in my view would only commence to run from the service of the indictment."

He then turned to a further preliminary objection raised by the respondent, that is that the substantive issue as to the appropriate interpretation of s. 1(1) of the Criminal Law (Amendment) Act 1935 should be dealt with at the trial and not in judicial review proceedings. He pointed out –

> "having regard, however, to the events which have occurred since leave was granted to institute the judicial review proceedings in each case, I am quite satisfied that it would be unjust and wrong in principle for this court not to make its own decision on the issue and simply to leave the matter for the trial judge.

14. He added;

> "The *learned High Court judge has decided against each of the appellants on the issue relating to mistake of age. In these circumstances* it is virtually inconceivable that the Circuit Court judge who would be conducting the trial would permit himself or herself to express a different view even if this court were to categorise the views of the learned High Court judge as *obiter dicta*." (emphasis added)

15. Fennelly J. agreed with Geoghegan J. that the application for judicial review was not out of time. However he pointed out:

> "By pursuing the rules of Judicial Review the Appellant has sought to have rulings made in advance of his trial as to the interpretation of the applicable statutory provisions. *This is not a procedure which the court should approve. The forum for ruling on the law applicable in criminal cases is the court of trial.*" (emphasis added)

He continued:

> "I am compelled, however, to agree that, *exceptionally in view of the course events have taken, this court must consider the correctness of the substantive rulings which have, in fact been made by the learned High Court judge*. This court in *Transport Salary to Staff Association and Others v. Coras Iompair Eireann* [1965] I.R. 180, upon which the appellant relies, decided that an action for a declaration could be entertained by the court in its discretion on less conservative basis than in former times (see Walsh J. at p. 202). However that was not a criminal case. The decision of this court in *Director of Public Prosecutions v. Special Criminal Court* [1999] 1 I.R. 60 is much more in point. O'Flaherty J., in the Supreme Court, approved the following statement made in the High Court by Carney J.:
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> > 'It is unique in my experience that relief of this nature is being sought during the currency of a trial which remains at hearing. It cannot be emphasised strongly enough that an expedition to the judicial review court is not to be regarded as an option when adverse ruling is encountered in the course of a criminal trial. I am undertaking this application for judicial review during the currency of the trial because a need has presented itself to urgently balance the hierarchy of constitutional rights including, in particular the right to life. In the overwhelming majority of cases it would be appropriate that any question of a judicial review be left over until after the conclusion of the trial'."

16. Fennelly J. observed of this last quotation:-

> "I fully agree with those sentiments. I also believe that, in general, they are applicable to an application such as the present *made pending a criminal trial. It is, of course, commonplace for applications to be made to prohibit criminal trials*. Such applications are brought by way of judicial review. It is, however, *quite inappropriate and a usurpation of the function of the Court of trial for an accused person – or the prosecution for that matter – to seek advance rulings from the High Court as to how any legal provisions should be interpreted in the course of a pending trial.* It happens that the present case concerns a trial pending in the Circuit Court. Judicial review is not available at all in respect of a trial pending in the Central Criminal Court (The High Court). The proper forum for the determination of legal matters arising in the course of trial is the trial court itself, subject to appeal to the Court of Criminal Appeal. *The learned trial judge has, however, ruled on those matters. He has delivered a considered judgment on the interpretation of the relevant sections. As Geoghegan J. says in his judgment, the Circuit Court may feel bound by the views of Smyth J. They may also be considered binding, rightly or wrongly, not only in this but in other cases. It may be a long time before this court has an opportunity to consider the substance of the matter. In the ordinary way, decisions of the High Court are open to appeal to this court.* In these exceptional circumstances, I am satisfied that the court *must* entertain the appeal." (emphasis added)

Thus the Supreme Court felt constrained to deal with the issues of statutory interpretation and constitutional validity despite concerns as to prematurity or mootness and where delay was cured by the serving of an indictment. It must be emphasised that what was in question was a legal question intrinsic to the trial itself, and not, as has arisen elsewhere, whether the trial should proceed at all such as in the many cases involving delay in prosecution of sexual offences.

17. Delay in Judicial Review

In *De Roiste v. Minister for Defence* [2001] 1 I.R. 190 at p. 221 Fennelly J. stated with regard to time limits in judicial review –

> "The complaint made by the applicant is one which, if established in a timely fashion, would (if not successfully controverted by the respondent) entitled him to relief *ex debito justitiae*. He was bound however to apply "promptly". Furthermore, he was bound, at least *prima facie* to apply for an order of *certiorari* of the decision within six months of its making and otherwise, to explain his delay and to show that the delay was justified. In the nature of things, a short delay might require only slight explanation. The judicial review time limit is not a limitation period. Prompt pursuit of a remedy is however a requirement of the judicial review application."

18. Relying on this statement of law, Counsel on behalf of the Attorney General Ms. Nuala Butler S.C. submits that the choice of pursuing relief by judicial review (without prejudice to the procedural correctness otherwise of that approach) raises time constraints which are provided for under Order 84 of the Rules of the Superior Courts. That order provides that declaratory or injunctive relief by way of judicial review should be sought promptly, and in any event within three months from when the date of the grounds of the application first arose.

Counsel submits that, ordinarily, in dealing with an application to restrain a criminal trial, it has been held that time runs either from the date of service of the book of evidence upon the accused, or the date upon which the accused was returned for trial. Here the

applicant was returned for trial on 16th March, 2004. However leave to issue these proceedings was not sought until 6th March, 2006 some two years later. No evidence has been adduced to explain the basis for that delay.

Toward the close of his submissions on the second day of the hearing counsel for the applicant Mr. John Rogers S.C. sought leave to have admitted a supplemental affidavit to deal with this issue. Counsel for the Director, Mr. Paul Anthony McDermott B.L., and counsel for the Attorney General objected to the admission of any such affidavit at such a late stage. They contended that it was not material whether or not any such affidavit might disclose the state of knowledge of the applicant in the days proceeding the making of the application of issues arising pre-trial: and that any issue which may have arisen on disclosure was not material to the essential point sought to be raised in these proceedings, that is the alleged unconstitutionality or incompatibility of the section, an issue which stands alone. The statement of opposition was filed herein on 25th day of July, 2006. This statement raised each of the procedural issues identified earlier. No application for directions was made then by the applicant. Nor was any application brought to file a supplemental affidavit to deal with the delay or any other point at any time prior to the hearing.

This court ruled that the filing of an affidavit at such a late stage would be impermissible having regard to the date of filing of the statement of opposition, the absence of any other explanation to why such an affidavit should be filed at that stage, and in particular the undesirability, in the context of fair procedures of this court receiving evidence by way of affidavit almost at the conclusion of the submissions on behalf of the applicant.

19. The general factual context, and any question of the nature and effect of the statutory presumption engaged were as evident at the time of return for trial, as two years later; particularly so in the light of statements included in the book of evidence which described the alleged general circumstances in which it is contended the applicant/accused received certain gifts and benefits.

20. Mr. Rogers S.C. argues that were this court to rule that delay or other procedural considerations preclude him from relief, his client would be exposed to a trial which, he contends, is not in due course of law and wherein he may be the subject to a ruling or direction by the trial judge under s. 4 of the Act of 2001 which is constitutionally invalid or otherwise unlawful.

21. Consideration
Here the court is faced with a situation where *prima facie* there has been a very substantial elapse of time indeed prior to the time when the basis of the application was first evident. During that time the decision of the Supreme Court in *C.C.*, (including the observations I have included in this judgment) was pronounced on 12th July, 2005. Yet the application for leave in the instant case was made within three days of the date of trial although before the indictment was served, on 6th March, 2006.

In *Scully v. The Director of Public Prosecutions* [2005] 1 I.R. the Supreme Court (Murray C.J., McGuinness and Hardiman JJ) considered that an apparent elapse of time of two years would be sufficient to justify that court in declining to entertain an application for judicial review in circumstances where, after the elapse of such two year period an application for relief was made the day before the applicant was due to stand trial.

The Court considered that the lapse of time between the charging of the applicant and its application for relief on the eve of trial was, in all the circumstances of the case, excessive. It further observed that it was essential that a court view any lapse of time in its context in a particular case, if on the one hand, the requirements of fair procedures were to be met and, on the other, the administration of justice was not to be compromised by artificial, tactically grounded complaints. If it was necessary to make an application of this sort on the eve of the trial, the reasons for this necessity should have been specifically addressed in the statement of grounds or the affidavit verifying it, so that the court could consider whether, in the exercise of its discretion, it should grant a very late application for leave. In fact, as was pointed out, in that case the application for leave to seek judicial review was made about nine months after the applicant was charged and a little over four months after the book of evidence was served. Nonetheless, despite the significant chronological difference, the court agreed with the High Courts' conclusion that the delay had been nonetheless of such a magnitude as to disentitle the applicant for relief on that ground alone.

22. It was submitted a distinction may be drawn between the facts of the instant case and that of *Scully*. Mr. Rogers S.C. points out that the application before this court is neither artificial, nor tactically grounded. Nevertheless the trial in these proceedings was fixed for Thursday the 9th of March. Leave was not sought until Monday of that week. In *Scully* the Supreme Court specifically points out that facts justifying delay or lateness should be dealt with at the leave stage of an application, in the statement of grounds or verifying affidavit.

23. Does time always run from the date of serving of an indictment?

There is however a line of authority which states that time begins to run in cases of this type, not from service of the indictment (frequently immediately pre-trial), but from the date of return for trial.

In *B.F. v. D.P.P.* (Supreme Court, Unreported, 12th March, 2004) the Supreme Court overturned a decision of the High Court without making any adverse comment on the correctness of the finding by Quirke J. that time should begin to run from the date that the applicant was sent forward for trial and his further finding that such date "was the date on which grounds for the application first arose".

(See also *Manning v. D.P.P.* (Unreported, The High Court, 29th July, 2004) O'Leary J.)

This court however considers that the authority of C.C. is by is authority and relevance binding on this court and thus there can be no finding of delay on the facts.

24. Procedure on "Late Applications"
In *Scully* Hardiman J. also made a number of other relevant observations to any application made "in the immediate run-up to the trial". He observed:

> "Firstly, a case which has a trial date attributed to it is displacing another case which might have been listed for the same day, thereby causing additional stress, anxiety and possibly worse to the parties in the other case.
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> Secondly, inconvenience or worse is inevitably caused to witnesses when the trial is vacated at the last moment.
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> Thirdly, a good deal of effort in assuming that the case is ready to go on will be wasted if the date is lost.
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> I would apply these strictures to the loss of a trial date regardless of which side brings it about. In the particular case of

> loss of an assigned trial date due to a very late application for judicial review, the underlying reason will almost always be failure to think seriously about the case until just before the date for which it is listed. I would not advocate an absolutely rigid attitude to such applications because experience shows that there can be circumstances which justify the delay. But if it is necessary to make a very late application of this sort, I consider that the reason for this necessity should be specifically addressed in the statement of grounds or the affidavit varying it so that the court can consider, whether in the exercise of its discretion it should grant a very late application for leave."

25. In the instant proceedings the verifying affidavit of the applicant did not address these issues. The matter was revisited only at the close of the applicant's submissions when the application was made to file a supplemental affidavit for that purpose. Thus there is an absence of explanation which would constitute good reason for the extension of time on the grounds in (vide *O'Donnell v. Dun Laoghaire Corporation* [1991] I.L.R.M. 301 at 315 Costello J. The verifying affidavit did not include material such as that identified by Denham J. in *De Roiste v. Minister for Defence* [2001] 1. I.R. 190 as grounds for determining whether there are good reasons to extend time.

In *Connolly v. D.P.P.* [2003] 4 I.R. Finlay Geoghegan J. it may be noted that the absence of explanation or evidence to the court which might excuse delay or allow time to be extended was sufficient grounds in itself to decline relief.

26. The Principles Identified in C.C.

(i) Delay
But for the fact that date of service of the indictment was regarded as of pivotal importance by the Supreme Court in C.C. (and in rather similar circumstances) this court would have determined, on the basis of the two-year time elapse for leave should be declined on that ground alone. However, in light of the fact that time of service of the indictment should properly be seen as a determining factor as to the commencement of time, this court considers itself bound by the judgment of the Supreme Court on that issue. The effect of this most recent and authoritative judgment is that in circumstances such as these, time only runs from the time of service of the indictment which has not yet been served in this case.

(ii) "Exceptional circumstance"
The consideration which informed the decision of the Supreme Court to deem the application in C.C. as being made within time must not obscure the consideration of other important observations made.

It is already clear that a highly important factor underlying the decision of that court to proceed to deal with all issues was the fact that the High Court had delivered a considered judgment on the interpretation of the relevant sections, and that the Circuit Court judge might feel bound by such a judgment. Obviously that circumstance need not arise herein.

(iii) Pre-emptive ruling and prematurity
It is important also to advert to the deep concerns expressed by each judge who delivered a judgment in *C.C* on the inappropriateness of pre-emptively seeking by way of judicial review, "advance" interpretation as to how legal provisions should be interpreted in the course of a pending trial. To reiterate the clear statement of principle of Fennelly J. –

> "The proper forum for the determination of *legal matters* arising in the course of trial is the trial course itself, subject to appeal to the Court of Criminal Appeal." (emphasis added).

In the sentence immediately following he too enters the caveat that:

> "The learned trial judge has, however, ruled on those matters.
>
> He has delivered a considered judgment on the interpretation of the relevant sections"

27. Precedential Effect
As was pointed out by Fennelly J. and Geoghegan J., Circuit Court Judge, might feel bound by the views of the High Court and consider such ruling binding rightly or wrongly, not only in this, but in other cases. Geoghegan J. went further and said that in the circumstances it was:

> "virtually inconceivable that the Circuit Court judge who would be conducting the trial would permit himself or herself to express a different view even if the Supreme Court were to categorise the views of the learned High Court judges *obiter dicta*".

He had earlier stated that the High Court judge had decided against each of the appellants on the issue in relating to mistake of age. Denham J. too recalled that even in applications for judicial review prior to trial it lies within the discretion of the court to refuse an application for judicial review on the grounds that the issue had best be met at the trial by the trial judge.

28. The Purpose of Judicial Review
In *Hakizimana v. The Minister for Justice, Equality and Law Reform and Others* Feeney J. 14th November, 2006 that judge recently observed of the duty of the High Court in judicial review:

> "It is not for the court to direct an administrative body as to its procedures, nor does judicial review exist to direct procedure in advance but rather judicial review by the courts is there to ensure that administrative bodies which have made decisions susceptible of review have carried out their duties in accordance with law and in conformity with natural and constitutional justice." (See also *Philips v. The Medical Council* [1992] I.L.R.M. 469, Carroll J.

29. The Discretion of the Trial Judge
In *Blanchfield v. Hartnett* [2002] 3 I.R. at 207 Fennelly J. speaking on behalf of the Supreme Court made a number of important observations on the duty of a review court to exercise exceptional care in trenching on the discretion of a trial judge. He observed:

> "The overwhelming responsibility reposed by the law and the Constitution on the trial judge is to ensure the fairness of the trial. An exceptionally important aspect of this function is to adjudicate on the evidence which should be placed before the jury. It is in my view, inherent in that function that the trial judge be clothed with the power to judge the

validity of legal procedures taken in order to extract, collect or gather evidence."

30. In *Blanchfield* judicial review proceedings had been brought in order to adjudicate on the *inter alia* to adjudicate on the validity of certain orders made under the Bankers Books of Evidence Act, 1879. However, Fennelly J. pointed out that it would be for the trial judge in the Circuit Criminal Court to rule as to the extent as may be necessary on whether to admit evidence. He added:

> "My reason for treating this issue at such length is to show that it is not necessary for a party placed as the applicant is to apply by way of judicial review in advance of his trial to have the relevant orders quashed. The need for the court of trial to have jurisdiction appropriate for the disposal of such problems is underlined by the long recognised undesirability of interrupting criminal trials to enable judicial review applications to the be made …"

31. While this court is not faced with a situation where a trial judge yet has seisin of the issue, the principles which underlie these important observations are very much a *propos*. The applicant contends that these proceedings do not constitute an application for rulings in criminal proceedings in advance of the trial. It is contended that what is at issue here is a procedure whereby the applicant seeks to impugn s. 4(1) of the Prevention of Corruption (Amendment) Act, 2001 for its unconstitutionality and incompatibility with the Convention, and the Circuit Court does not have jurisdiction to determine issues of constitutionality of a statutory provision in the course of a criminal trial nor has it power to determine that s. 4(1) of the Act impugned is unconstitutional. Should the applicant then have to undergo trial?

32. Application of Principles in , and Distinguishing Features From C.C.
The tenor of each decision of the Supreme Court in C.C. on the 12th July, 2005, express the real concern as to whether it was appropriate for the court at that point to entertain the application. For exceptional reasons only the Supreme Court considered it appropriate to proceed to deal with the substantive issue. Prima facie, and absent exceptional circumstances, these are issues for the trial judge.

33. In the instant case it has not been suggested (and certainly not put in evidence) that there are a number of other cases pending whose outcome will depend on that in the instant case. The section impugned is not that under which the applicant is charged.

34. In the instant case this court accepts the submissions made on behalf of the Attorney General that what is in question here is a hypothesis which has not occurred and may never occur. As matters stand no presumption has been invoked against the applicant. This court is unaware, and can only speculate as to how the evidence will evolve at trial. It may be, hypothetically, that the prosecution may call witnesses to say that they paid money to the applicant as a reward for granting them favours. As matters stand the applicant has not put in issue any of the statements contained within the book of evidence. The applicant has not engaged with the evidence in any way nor identified the nature of his defence or which facts may be in issue. In the event that witness statements go unchallenged it may not be necessary for the prosecution to invoke the provisions contained within s. 4 of the Prevention of Corruption (Amendment) Act, 2001 at all.

One must look too, to the role of the trial judge. As matters stand such judge has not been asked to give any ruling on the meaning of the term "*deemed*" or the expression "*unless the contrary is proved*" in the impugned section. The applicant's core complaint in these proceedings is based on the contention that "*unless the contrary is proved*" means "unless the contrary is proved on the balance of probabilities". Whether that contention has any force or application remains to be determined at trial.

35. Furthermore the section in question provides that the presumption will only arise where the prosecution has proved that:

> (a) the gift consideration to advantage has been given or received by the applicant and
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> (b) the person who gave the gift had an interest in the discharge by the applicant of a statutory function.

36. The trial judge has yet to rule on the meaning of the term "it is proved that" in subs. (1) of s. (4). The applicant assumes (and his case requires one to accept in advance) that the prosecution will establish that both elements identified are in place so as to give rise to the presumption of corruption.

37. The evidential basis upon which the applicant seeks relief by way of judicial review have not yet been established. The court is invited to deliver a judgment upon a hypothesis or a moot.

38. Contrast with Prohibition
The inappropriateness of requesting this court to deliver judgment on what is no more than a hypothesis is reinforced by contrasting the present application with an application for prohibition. The latter relief must of course be sought by way of judicial review in advance of the trial. An application for prohibition based on the grounds of delay does not involve a judicial review judge adjudicating on issues of fact (or more relevantly here, law) properly the domain of the trial judge. Usually such judicial review prohibition application concerns issues such as delay and the question of prejudice, matters more exintrinsic (though not unrelated) to the matrix of fact.

This is in strong contrast to the requirement made in the present case where the court is invited to speculate and adjudicate upon issues which have not been canvassed, which have not been adduced in evidence, and may not be. Furthermore such material ought more properly be dealt with by way of oral evidence before the trial judge which would allow that judge to consider the context in which it is contended the legal considerations raised in this case more properly arise. The trial court has not engaged in any analysis of the legal issues involved in their context. Thus this court is being asked to engage in a form of consultative jurisdiction unknown to the law. In this connection the observations of Fennelly J. in *Blanchfield* appear particularly apposite.

39. Judicial review does not exist to determine or pre-determining a hypothetical situation. As pointed out by Feeney J. in *Hakizimana* is not the function of a judicial review court to anticipate or to direct. Carroll J. expressed the position very clearly in *Philips v. The Medical Council* [1992] I.L.R.M. 469 at p. 475 where she stated –

> "Judicial review does not exist to direct procedure in advance but to make sure bodies which have made decisions susceptible of have carried out their duties in accordance with the law and inconformity with natural and constitutional justice."

This passage was cited with approval by McGuinness J. in *Carroll v. the Law Society of Ireland* [2003] 1 I.R. 284.

40. The observations of the members of the court (both minority and majority) in *C.C. v. Ireland* but on distinct facts have been

referred to earlier. It is impossible then to avoid the conclusion that herein the words of Denham J. the issues herein "would best be met at the trial by the trial judge."

41. Proportionality
A further and rather different consideration also informs the conclusion that judicial review is not appropriate in this case. The applicant has sought in the consideration of the substantive issue to advance a contention that the impugned provision does not meet the test of proportionality (i.e. if the section has the effect contended for, that it is a disproportionate statutory means to attaining its objective, and is thereby rendered constitutionally invalid). However, in order for there to be any proper consideration of that issue, (should it arise), there might necessarily be evidence before this court concerning the applicability or otherwise of public policy considerations, or other considerations of the common good which might constitutionally justify the impugned legislation.

42. Had the applicant proceeded by way of plenary proceedings (or brought a motion for directions to reconstitute judicial review proceedings in this way) perhaps oral evidence might have been adduced to enable a court to give consideration to considerations which might be said to justify the measure or not. This might have permitted the hearing of direct testimony and cross examination enhancing the prospects that the proportionality issue might be appropriately litigated on a fully informed basis.

43. The case as advanced before this court by way of judicial review does not enter into any discussion of public policy on an evidential basis. This thereby precludes an appropriate consideration in the context of the section of the issue of proportionality. While this court can undoubtedly take judicial notice of the fact that legislative reversals of evidential burdens may be justified by obvious difficulties facing a prosecution in proving certain elements of an offence, had the proceedings been brought in a different form a more clearly defined discussion of the issue of proportionality would have been possible once the facts had been determined. This should not of course be taken as necessitating that in all cases involving proportionality such considerations arise, especially when the considerations are self evident.

These observations must also be seen in the light of the findings of this court earlier on the procedural principles which the court considers it is constrained to apply on the basis of recent authority.

43A. ECHR Issues
It is necessary now to deal briefly with the relief sought under the Act of 2003.

The appropriateness of seeking declarations under the ECHRA 2003 at this stage prior to the trial also arises. Here decisions of the European Court of Human Rights are of assistance.

In *Salabiaku v. France* 10519/83 [1988] ECHR the question of the Convention status of the presumption of innocence was considered by the European Court of Human Rights in the context of a trial which *had* taken place. The court quite clearly did not consider the actions or determinations of the French Court in its application of French law ex-hypothesi, but on the basis on the manner in which it had actually proceeded. At p. 21 of the judgment the court observed:

> "It is clear from the judgment of 27th March, 1981 and that of 9th February 1982 that the courts in question were careful to avoid resorting automatically to the presumption laid down in Article 392 para 1 of the Customs Code. As the Court of Cassation observed in its judgment of the 21st February 1983, they exercise their power of assessment "*on the basis of the evidence adduced by the parties before [them].*" They inferred from the "fact of possession a presumption which was not subsequently rebutted by any evidence of an event responsibility for which could not be attributed to the perpetrator of the offence are which he would have been unable to avoid" … moreover as the Government said the national courts identified in the circumstances of the case a certain "element of intent", even though legally they were under no obligation to do so in order to convict the applicant.
>
> It follows that in this instance the French courts did not apply Article 392 para. 1 of the Customs Code in a way which conflicted with the presumption of innocence." (emphasis added)

44. This case and also the case of *Barberá v. Spain* (Application No. 10590/83 judgment of the court of the 6th December, 1988) clearly identify that as a starting point for the invocation of Convention rights there must be clear and identified procedure *and a determination* giving rise to circumstances in which the applicant may rely upon Convention rights. Such rights do not arise pre-emptively or in hypothetical circumstances.

The terms of the Act of 2003 are also relevant on this point.

Section 3 of the European Convention on Human Rights Act 2003 provides:

> 3 - (1) "subject to any statutory provision (other than this Act) or rule of Law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention Provisions.
>
> 2. A person who has suffered injury, loss or damage as a result of a contravention of s. 1 may, if no other remedy in damages is available, institute proceedings to recover damages in respect of the contravention in the High Court …"

45. There is thus first of course an obligation on an Organ of the State (including this court and the court of trial) to observe the provisions of the Convention in its proceedings and to act in a manner compatible therewith.

But in order to invoke Convention remedies there must be a factual determination which gives rise to prejudice. Only thereby can there be an entitlement to raise the question of a remedy under the Act of 2003. These principles are clearly to be seen in the express terms of s. 3 of the Act of 2003. To seek a remedy the provisions of the Act a person must *have suffered injury, loss or damage*. This provision does not allow for anticipated, breach of Convention rights or on the basis of a hypothesised set of facts. Thus at present the question of compatibility with the Act of 2003, must also be seen as being moot, premature or hypothetical.

46. Conclusion
For the reasons outlined, therefore the Court will decline the application for judicial review and for directions as brought in these proceedings. For completeness a number of other observations are advanced, with deference and subject to review elsewhere.

First, where procedural consideration such as delay properly arise, it may be appropriate for a respondent to consider whether an application should be made to set aside a leave granted *ex parte*. Second, in such cases where *prima facie* delay is a consideration an issue may arise whether any application for leave should be made on notice. Third, a question may properly arise as to whether

such procedural issues, should, prior to any substantive hearing, be dealt with by a motion for directions.

An early resolution of such issues might obviate the necessity of dealing with both procedural and substantive matters at full hearing; and considerably reduced hearing time for this case.