AN CHÚIRT UACHTARACH
THE SUPREME COURT

S:AP:IE:2020:000066

Clarke C.J.
O'Donnell J.
McKechnie J.
MacMenamin J.
Dunne J.
Charleton J.
O'Malley J.

Between/

TOMASZ ZALEWSKI

Applicant/Appellant

— AND —

AN ADJUDICATION OFFICER

AND

THE WORKPLACE RELATIONS COMMISSION

AND

IRELAND

AND

THE ATTORNEY GENERAL

Respondents

— AND —

BUYWISE DISCOUNT STORE LIMITED

Notice Party

Judgment of Mr. Justice O'Donnell delivered on the 6th day of April, 2021.

I – Introduction

A. Background

1. These proceedings concern the constitutionality of the adjudicative process established under the Workplace Relations Act 2015 ("the 2015 Act"). The central issues raised are: whether that process amounts to the administration of justice required under the Constitution to be administered in courts; and, whether the statutory framework adequately vindicates a claimant's rights under the Constitution and the European Convention on Human Rights ("E.C.H.R.").

2. In a determination of the 28th of July, 2020, this court granted the appellant leave to appeal directly from the decision of the High Court (Simons J. – [2020] IEHC 178 (Unreported, High Court, Simons J., 21st of April, 2020)). The respondents cross-appeal in respect of certain findings of the trial judge and against the decision to award the appellant his costs ([2020] IEHC 226 (Unreported, High Court, Simons J., 21st of May, 2020)).

B. The Judgment of the High Court: [2020] IEHC 178

i. Facts

3. This case originated in the purported dismissal of the appellant by his former employer. The appellant then instituted two statutory claims:

(i.) a claim for unfair dismissal pursuant to the Unfair Dismissals Act 1977 ("the 1977 Act" or "the Act of 1977"); and

(ii.) a claim for payment in lieu of notice pursuant to the Payment of Wages Act 1991 ("the 1991 Act").

Although each of these Acts provides for claims to be made for reliefs, the procedure for such claims is now provided for in the 2015 Act. It is that procedure which is challenged in this case.

4. The appellant's claims were referred by the Director General of the Workplace Relations Commission ("W.R.C."), pursuant to s. 41 of the 2015 Act and s. 8 of the 1977 Act, to an adjudication officer with a hearing scheduled for the 26th of October, 2016. The hearing commenced on that date, and the adjudication officer received written submissions and other documentation from the parties. An application for an adjournment was then made on behalf of the employer. Before the High Court, the parties disagreed as to the precise purpose of such; the State respondents submitted that the adjournment was to allow a witness on behalf of the employer to attend and be cross-examined whilst the appellant maintained that the adjournment was to merely allow the witness to attend with no decision having been made on cross-examination. Simons J. noted that this disagreement was significant in relation to the appellant's contention that cross-examination was not available under the 2015 Act.

5. It is not in dispute that the hearing on the 26th of October only lasted for a few minutes with a further hearing scheduled for the 13th of December, 2016. The parties attended at the W.R.C.'s premises on that date but were informed by the adjudication officer that a decision had already issued in respect of the claim and that the hearing date had been scheduled in error. The adjudication officer informed the parties that the decision had already issued and the parties subsequently received a decision dated the 16th of December, 2016, which appeared to record that a full hearing did take place, after which a decision had been made dismissing the appellant's claim. The extraordinary circumstances have been set out in the judgment in the court below and in a previous judgment of this court on the *locus standi* issue, but it is necessary to repeat them here as they form an essential backdrop to the legal issues raised on this appeal.

6. Tomasz Zalewski worked in a Costcutter convenience store in North Strand, Dublin, between 2012 and April, 2016. He started as a security man and then became a supervisor. The shop was subject to regular shoplifting and was, on occasions, robbed.

In October, 2014, a most serious incident occurred when the shop was robbed with the use of pepper spray and a gun which was discharged. Mr. Zalewski commenced personal injury proceedings against his employer arising out of the incident. Later, in April, 2016, the manager of the shop, Mr. Brady, reprimanded Mr. Zalewski because he considered that there was a known shoplifter on the premises and that Mr. Zalewski ought to have excluded her. The conversation was heated. Mr. Zalewski went home and sought medical advice the following day. The management of the shop considered this to be misconduct.

7. Later, Mr. Zalewski was contacted by the owner's son, who apologised — and then asked him in for a meeting with him and the manager — and then, at the meeting, both apologised. However, when Mr. Zalewski returned from sick leave he was called to another meeting and told it was a continuation of the first meeting. He was informed that he was not doing his job acceptably, had not prevented shoplifting, and had organised legal and medical advice for other members of the staff in relation to the violent robbery incident. He was formally called to a disciplinary meeting. In a letter of the 26th of April, 2016, he was informed that he had not followed correct robbery prevention procedures, had undermined staff members' attempts to follow the procedures, and had denigrated the work ethic of other members of staff. Most seriously, he was informed that he had "associated with and used monies removed from the tills". He was summarily dismissed on grounds of gross misconduct. He appealed the decision, which was upheld by the shop owner, himself. He was told that there was no accusation of stealing, but that the accusation contained in the letter was something asserted by another member of staff. Otherwise, the dismissal was affirmed.

8. Mr. Zalewski consulted a solicitor and commenced proceedings for unfair dismissal, and a claim for pay in lieu of notice under the 1991 Act. Mr. Zalewski and his solicitor attended at Tom Johnson House on the 26th of October, 2016, and met a representative of a professional firm representing the employer. There was a brief hearing, and the

adjudication officer enquired as to whether Mr. Zalewski was in receipt of social welfare payments and asked the solicitor to confirm that he was not in receipt of any illness benefit and to provide her with a letter or certificate from the Department of Social Welfare. The employer's representative then sought to hand in a booklet of documents to the adjudication officer. Mr. Zalewski's solicitor had emailed a brief submission to the Workplace Relations Commission relating to procedures. The submission objected to the taking of any evidence by written documentation, and sought to insist that any evidence would be given by witnesses. Accordingly, Mr. Zalewski's solicitor objected to the handing in of the booklet and stated that any factual evidence should be proved through an appropriate witness. At that point, the employer's representative requested an adjournment of the hearing because one of the witnesses needed was not present. Mr. Zalewski's solicitor indicated that he would not object to any such application, and the adjudication officer adjourned the hearing. The entire hearing took no more than ten minutes.

9. By letter of the 1st of November, the Workplace Relations Commission informed Mr. Zalewski that a hearing date of the 13th of December, 2016, had been assigned to the case, and that the hearing would take place at the W.R.C. offices at Lansdowne House, Ballsbridge. Mr. Zalewski's solicitor had obtained correspondence from the Department of Social Protection confirming that he had not been in receipt of any illness or occupational benefit during the relevant period. Mr. Zalewski attended at Lansdowne House together with his solicitor on the 13th of December. The solicitor then met the representative of the employer, who told him that she had been informed by the adjudication officer's receptionist that the adjudication officer had already issued her decision in relation to the complaints, and that the hearing had been scheduled in error. At that point, the adjudication officer walked into the corridor and met the solicitor and the employer's representative. She apologised and said that the hearing date had been

assigned in error and that she had issued her decision the previous week. She appeared to consider that she had heard and determined the case on the previous occasion. The solicitor received a letter dated the 16th of December, 2016, from the W.R.C. containing a copy of the adjudication officer's decision dismissing the complaints. The decision stated that the adjudication officer had "enquired into the complaints and [*given*] the parties an opportunity to be heard … and to present … any evidence relevant to the complaints". The decision contained a summary of the employer's position which appeared to be extracted from the documentation submitted by the employer's representative and to which the solicitor had objected. The decision also stated that the applicant had been requested to provide a statement from the Department of Social Protection and had failed to do so.

10. An *ex parte* application for leave to apply for judicial review was made on the 20th of February, 2017, seeking a wide range of declaratory reliefs, including declarations that the 2015 Act was repugnant to the Constitution, together with an order of *certiorari* quashing the decision of the adjudication officer. The State respondents conceded that the defects in procedure meant that the decision of the adjudication offer was invalid and offered to consent to the making of an order of *certiorari*. When the appellant did not agree that this would resolve the matter, the State respondents issued a motion seeking to have the appellant's claim for declarations pursuant to the Constitution and the E.C.H.R. dismissed. The High Court agreed, but the decision was reversed by this court (*Zalewski v. Adjudication Officer and The Workplace Relations Commission* [2019] IESC 17, [2019] 2 I.L.R.M. 153). The matter then proceeded to a hearing on the broader issues.

ii. Legislative Overview

11. Prior to the 2015 Act, there was a range of statutory bodies having functions in relation to the field of industrial relations and employment law, and which had developed piecemeal, such as the Labour Court, the Labour Relations Commission (including the Rights Commissioners service), the Employment Appeals Tribunal ("E.A.T."), the Equality Tribunal, and the National Employment Rights Authority. In the specific field of adjudication alone, the Labour Court had functions under the Industrial Relations Act 1946, the E.A.T. had jurisdiction in relation to claims under the Redundancy Payments Acts 1967 to 2003, the Minimum Notice and Terms of Employment Act 1973, the 1991 Act, and claims for unfair dismissal under the 1977 Act, and the Equality Tribunal had jurisdiction to hear and determine claims under the Employment Equality Act 1998 and the Equal Status Act 2000. The 2015 Act reduced the number of bodies having functions in the area to a W.R.C. having general jurisdiction and the Labour Court. In the specific field of adjudication and determination of statutory claims, with which this case is concerned, the 2015 Act streamlined the adjudicatory mechanism, providing for hearings in all cases under the legislation set out above before adjudication officers with a right of appeal thereafter to the Labour Court. This was essentially a procedural change and the substantive rights are still largely to be found in the original legislation. As Simons J. noted, however, the "procedural/substantive dichotomy" is not always observed.

12. Simons J. concluded that the appellant could not advance arguments on specific features of other pieces of legislation, such as the Employment Equality Act 1998, in respect of which he had not brought a claim before the W.R.C., and that he was confined to the operation of the statute insomuch as it concerned claims under the 1977 and 1991 Acts. However, any limitations arising from this approach to *locus standi* appeared to have had little practical effect on the determination of the constitutional challenge. Simons J. explained that this was because a claim under the 1977 Act is one of the more significant type of claims which can be brought within the jurisdiction of the decision-makers

concerned and that the legislative history of the 1977 Act was directly relevant to the administration of justice question raised in this case. The argument in relation to *locus standi* loomed large in the High Court and was repeated in the written submissions, but did not figure strongly in oral argument. The appellant argued that it was necessary to consider the breadth of jurisdiction conferred by or collated in the 2015 Act in order to consider both whether it was an administration of justice under Article 34 and, if so, whether the W.R.C. could be said to be exercising limited powers and functions of a judicial nature under Article 37. However, it is not necessary to resolve the question of *locus standi* here. The Act of 1977 is a substantial piece of legislation and formed, perhaps, the most important aspect of the jurisdiction of the E.A.T. and the issues in this Act can be addressed, in principle, by reference to that Act in particular. It is necessary to keep in mind, however, that the W.R.C. and the Labour Court on appeal exercise jurisdiction in respect of claims in respect of redundancy and equality as well.

13. Simons J. set out the relevant aspects of the Act of 1977 (as amended):

(i.) First, a determination by the Employment Appeals Tribunal could not be directly enforced: under s. 10 of the 1977 Act, the Minister for Labour applied to the Circuit Court for an order that the employer make the appropriate redress to the employee. An express right to make such an application has since been conferred on an employee by s. 11 of the Unfair Dismissals (Amendment) Act 1993 ("the 1993 Act"). Originally, the application for enforcement under s. 10 of the 1977 Act involved a rehearing in the Circuit Court. However, s. 11 of the 1993 Act altered this to an *ex parte* application to the Circuit Court which, on proof that the determination had not been complied with, was obliged to make an enforcement order. If the relief granted was reinstatement or reengagement, the court could substitute an order for compensation (this was the model later

adopted in the 2015 Act, albeit that application for enforcement under that Act is to be made to the District Court).

(ii.) Second, there was a statutory right of appeal from a decision of the Employment Appeals Tribunal to the Circuit Court, pursuant to s. 10(4) of the 1977 Act, which, again, took the form of a full rehearing on oral evidence. There also appeared to be a further right of appeal to the High Court in accordance with the Courts of Justice Act 1936 (see *J.V.C. Europe Ltd. v. Panisi* [2011] IEHC 279 (Unreported, High Court, Charleton J., 27th of July, 2011)).

(iii.) Third, the Act did not remove the right of an employee to make a claim at common law for wrongful dismissal. However, once an employee gave notice in writing of a claim under the 1977 Act, s. 15 provided that he or she was not thereafter entitled to recover damages at common law.

14. Simons J. then considered how these provisions had been amended in subsequent legislation, culminating in the 2015 Act:

(i.) The manner in which parallel claims for unfair dismissal and wrongful dismissal were regulated was amended by the 1993 Act. Parallel claims could be pursued until such time as the hearing before either the Employment Appeals Tribunal or the court had commenced, but then the employee was confined to that specific remedy (s. 10 of the 1993 Act). By s. 80(1)(l) of the 2015 Act, an employee is now precluded from pursuing a claim of wrongful dismissal once a decision has been made by an adjudication officer under the 1977 Act and precluded from pursuing a claim for unfair dismissal once a hearing by a court of a claim for damages at common law has commenced.

(ii.) The 2015 Act transferred the jurisdiction exercised by the Rights Commissioners and Employment Appeals Tribunal — which had been carried out pursuant to s. 8 of the 1977 Act — to the adjudication officers and the Labour Court

respectively, and removed the right of appeal to the Circuit Court. There is a right of appeal to the High Court on a point of law with no further appeal therefrom. However, Simons J. did note that an application to the Supreme Court for leave to appeal may be possible (*Pepper Finance Corporation v. Cannon* [2020] IESC 2, [2020] 2 I.L.R.M. 373).

(iii.) The enforcement mechanism of the decision is by application to the District Court pursuant to s. 43 of the 2015 Act. However, the powers of the court are limited. Under s. 43(2), where reinstatement or reengagement was ordered, the court could substitute an order for compensation. The application is made *ex parte* and the employer is not on notice of the application. Once it is established that the adjudication officer has made a determination and that it has not been satisfied within 56 days of the date of notification, then (subject only to the power to substitute damages for an award of reinstatement or reengagement) enforcement is mandatory:-

> "the District Court *shall* … without hearing the employer or any evidence … make an order directing the employer to carry out the decision in accordance with its terms." (*Emphasis added.*)

15. Simons J. then considered the development of the procedure in respect of claims under the 1991 Act:

(i.) Under s. 5 of the 1991 Act, as defined by s. 1(1) of the 1991 Act, the employer is required to pay a sum in lieu of the appropriate prior notice of the termination of employment. Under the 2015 Act, a claim is now made in the first instance to an adjudication officer with a right of appeal thereafter to the Labour Court. Originally, a decision of a Rights Commissioner or a determination of the Employment Appeals Tribunal under the 1991 Act could be enforced as if it were a court order. Now, a decision of an adjudication officer or the Labour

Court must be enforced through an application to the District Court under s. 43 of the Act.

Simons J. then turned to the features of the 2015 Act that were common to claims under both Acts:

(ii.) Under the 2015 Act, an employee who wishes to advance a claim for unfair dismissal or the payment of wages in lieu of notice is required to present the claim to the Director General of the Workplace Relations Commission. The Director General will then refer the claim to an adjudication officer pursuant to s. 8 of the 1977 Act in the case of a claim for unfair dismissal or pursuant to s. 41 of the 2015 Act for a claim for payment of wages in lieu of notice.

(iii.) Adjudication officers are appointed by the Minister for Jobs, Enterprise and Innovation (as defined in s. 2 of the 2015 Act) pursuant to s. 40 of the 2015 Act, with no formal qualifications prescribed. However, s. 40(2) of the 2015 Act provides that appointments as adjudication officer can only be made pursuant to the selection of that person for the role following a competition. The principal functions of an adjudication officer are set out in s. 41(5) of the 2015 Act. An adjudication officer has the power to compel the attendance of witnesses, but does not have an express power to administer an oath or affirmation.

(iv.) There is a right of appeal against the decision of an adjudication officer to the Labour Court under s. 44 of the 2015 Act. The Labour Court can take evidence on oath (s. 21 of the Industrial Relations Act 1946 (as amended by s. 74(a)(ii) of the 2015 Act)) and proceedings are conducted in public unless the Labour Court, upon the application of a party, determines that the proceedings should be conducted otherwise due to special circumstances (s. 44(7) of the 2015 Act). The Labour Court may refer a question of law to the High Court for determination (s. 44(6) of the 2015 Act). Under s. 45, decisions of the Labour

Court can be enforced *via* an application to the District Court in the same way as determinations of an adjudication officer; failure to comply with an enforcement order made under either s. 43 or s. 45 is a criminal offence under s. 51.

iii. Administration of Justice

16. The appellant argued that the procedure under the Act amounted to the administration of justice as *per* Article 34.1 of the Constitution, which could only be carried out by a court. The starting point was the five-point test for the administration of justice set out in *McDonald v. Bord na gCon* [1965] I.R. 217 ("*McDonald v. Bord na gCon*" or "*McDonald*"), recently applied by this court in *O'Connell v. The Turf Club* [2015] IESC 57, [2017] 2 I.R. 43 ("*O'Connell*"):

(i.) a dispute or controversy as to the existence of legal rights or a violation of the law;

(ii.) the determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty;

(iii.) the final determination (subject to appeal) of legal rights or liabilities or the imposition of penalties;

(iv.) the enforcement of those rights or liabilities or the imposition of a penalty by the court or by the executive power of the State which is called in by the court to enforce its judgment;

(v.) the making of an order by the court which, as a matter of history, is an order characteristic of courts in this country.

17. The parties accepted that the determination of the two relevant claims exhibited the first three characteristics, but disputed whether the fourth and fifth characteristics were fulfilled.

18. Simons J. held that the fifth limb of the test required a consideration of whether the claims for redress which the appellant made were of a type which have historically been determined by a court. He reviewed the case law (*In re The Solicitors Act 1954* [1960] I.R. 239 ("*Re Solicitors Act 1954*"); *Cowan v. The Attorney General & Ors.* [1961] I.R. 411 ("*Cowan v. A.G.*"); *Keady v. Commissioner of An Garda Síochána* [1992] 2 I.R. 197 ("*Keady*"); and *O'Connell*) and concluded that that the fifth characteristic of the *McDonald* test will only assume importance in a small category of cases where there is a long-established tradition of a particular type of decision-making falling within or outwith the courts' jurisdiction. Determining claims for wrongful dismissal was the business of the courts for decades before the 2015 Act and the argument that such were matters of "industrial relations" was contradicted by the legislative history of the 1977 Act and the previous involvement of the Circuit Court. Employment legislation generally implied statutory terms into contracts of employment, and thus the issues for adjudication are not dissimilar to those that would arise in proceedings for breach of contract. The State respondents placed reliance on the jurisdiction in respect of equality claims discussed in *Doherty v. South Dublin County Council (No. 2)* [2007] IEHC 4, [2007] 2 I.R. 696 ("*Doherty*") and argued that, in effect, the 1977 Act created a new self-contained statutory jurisdiction which had never been part of the jurisdiction of the High Court. Simons J. rejected this argument. He did not consider that it was necessary to decide if the fifth limb in *McDonald v. Bord na gCon* could permit the State to put any newly created statutory right beyond the reach of the courts without infringing Article 34, although he doubted it. However, he considered that the very fact that, for almost 40 years, the Circuit Court had jurisdiction to hear and determine claims of unfair dismissal showed that the orders made by the W.R.C. were orders of a type historically made by courts. He considered that *Doherty* was addressed to a different point; in that case, it had been sought to be argued that it was permissible to circumvent the statutory jurisdiction created by the

Equal Status Act and commence a claim for relief under the Act in the High Court. The issue was whether the full and original jurisdiction of the High Court could be invoked notwithstanding the exclusive jurisdiction conferred under the Act. That did not address the question whether the orders made by the Equality Tribunal were of a type which, as a matter of history, were made by courts — indeed, the claim that the High Court had jurisdiction implied that such orders were orders capable of being made by the High Court.

19. Simons J. concluded that the hearing and determination of a claim for unfair dismissal and for the payment of wages in lieu of notice fulfils the fifth limb of the test in *McDonald*: the making of orders determining such claims was characteristic of the business of courts as carried out under the 1977 Act and the type of orders made pursuant to the common law jurisdiction for claims of wrongful dismissal.

20. In relation to the fourth limb, Simons J. noted that the ability of a decision-maker to enforce decisions is one of the essential characteristics of the administration of justice (*Lynham v. Butler (No. 2)* [1933] I.R. 74 ("*Lynham v. Butler (No.2)*")). It was not necessary that the decision-maker must be able to enforce its decisions itself; the executive power of the State may be called to aid in such enforcement. However, a decision to impose financial penalties was not the administration of justice where there is no process for converting such a decision into a judgment and the decision cannot be enforced of its own right and the monies must be recovered in litigation (*O'Connell*).

21. The legislative history of the 1977 and the 1991 Acts indicated that the Oireachtas intended a range of legislative devices to give effect to determinations of statutory bodies in respect of employment disputes. At one end, a determination may be enforced as if it were an order of the Circuit Court made in civil proceedings (s. 8 of the 1991 Act), and, at the other, a requirement to apply to the Circuit Court to enforce a determination where the Circuit Court has full jurisdiction to consider the merits of the underlying claim (s. 10

of the 1977 Act). Simons J. considered that the approach under the 2015 Act lay between these positions: an *ex parte* application must be made to the District Court to enforce a decision of an adjudication officer or the Labour Court and a failure to comply with the District Court order is an offence under s. 51 of the 2015 Act. Simons J. concluded that the necessity of having to make such an application for enforcement deprived the determinations of one of the essential characteristics of the administration of justice. Section 43(2) of the 2015 Act allowed the District Court to modify a determination if the redress ordered was reinstatement or reengagement by making an order that the employer pay compensation fixed by the court, but not exceeding 104 weeks' pay. Simons J. came to the conclusion on this issue "[*w*]ith some hesitation" at para. 77 of the judgment that:-

> "Whereas the function to be exercised by the District Court is a narrow one, it cannot be dismissed as a mere rubber-stamping of the earlier determination."

His reasoning on this aspect of the case was encapsulated at paras. 218 and 219 of his judgment:-

> "218. Crucially, however, the decision-making under the [*2015 Act*] lacks one of the essential characteristics of the administration of justice, namely the ability of a decision-maker to enforce its decisions. The necessity of having to make an application to the District Court to enforce a decision of an adjudication officer or the Labour Court deprives such determinations of one of the essential characteristics of the administration of justice. Whereas the function to be exercised by the District Court is a narrow one, it cannot be dismissed as a mere rubber-stamping of the earlier determination. The District Court's discretion to modify the form of redress represents a significant curtailment of the decision-making powers of the adjudication officers and the Labour Court. The District Court can, in effect, overrule their decision to direct that the employee be re-instated or re-engaged.

219. A decision-maker who is not only reliant on the parties invoking the *judicial power* to enforce its decisions, but whose decisions as to the form of relief are then vulnerable to being overruled as part of that process, cannot be said to be carrying out the administration of justice." (*Emphasis in original.*)

Accordingly, the fourth limb of the test was not satisfied.

iv. Relevance of Access to a Court of Law

22. Simons J. also considered the impact of a scheme not being exclusive in that it did not oust the right of access to the courts for claims in respect of wrongful dismissal. He noted that the orthodox position was that the existence of an appeal to the courts cannot restore constitutionality to a tribunal whose decisions, if unappealed, amount to an administration of justice (*Re Solicitors Act 1954*). Simons J. then referred to *Lynham v. Butler (No. 2)*, holding that it appeared to be concerned with the division of administrative and judicial functions in a situation different to that under the 2015 Act where all issues in dispute are to be determined by an adjudication officer and the Labour Court.

23. Simons J. noted that it was anomalous that requiring the intervention of the District Court to enforce a determination of the Labour Court was sufficient to deprive it of one of the characteristics of the administration of justice but the existence of a full right of appeal against it to the Circuit Court would not. However, it may be that recourse to judicial power was always necessary to obtain an enforcement order, whereas a first-instance decision became final and conclusive in the absence of an appeal. With other statutory schemes, the legislation provided an alternative to legal proceedings, but did not displace a right of action. The 1977 Act did not oust the jurisdiction of the courts; the statutory right to make a claim for unfair dismissal was parallel to the common law right of action for wrongful dismissal.

24. However, the existence of a parallel jurisdiction under statute inhibits the common law. This is known as the "*Johnson* exclusion area" (*Johnson v. Unisys Ltd.* [2001] UKHL 13, [2003] 1 A.C. 518 ("*Johnson*")) where the House of Lords concluded that, by enacting the Employment Rights Act 1996, the Westminster Parliament had set up an entirely new system outside the ordinary courts and that to develop the common law in the area would run contrary to Parliament's intention. Both *Johnson* and the subsequent decision of *Eastwood v. Magnox Electric p.l.c.* [2004] UKHL 35, [2005] 1 A.C. 503 were applied by the High Court in this jurisdiction by Laffoy J. in *Nolan v. Emo Oil Services Ltd.* [2009] IEHC 15, [2010] 1 I.L.R.M. 228. Simons J. concluded, in this regard, that even if the preservation of a parallel right of action before the courts might be an answer to an allegation that a statutory decision-maker was carrying out the administration of justice, this could not apply in the context of employment legislation. He concluded, however, that the failure to satisfy the fourth limb of the *McDonald* test meant that the decision of the W.R.C. did not constitute the administration of justice for the purposes of Article 34.

v. Article 37 of the Constitution

25. In light of the finding that the determination of a claim for unfair dismissal and for the payment of wages in lieu of notice did not involve the administration of justice within the meaning of Article 34 of the Constitution, Simons J. found it unnecessary to consider arguments under Article 37. Having concluded, therefore, that the jurisdiction exercised by the W.R.C. did not amount to the administration of justice confined to courts under Article 34, Simons J. then turned to the arguments that the procedure adopted by the W.R.C. offended the Constitution.

vi. Article 40.3 of the Constitution

26. The appellant made four complaints under Article 40.3 of the Constitution:

(i.) there was no requirement that adjudication officers or members of the Labour Court have any legal qualifications, training, or experience;

(ii.) there was no provision for an adjudication officer to administer an oath or affirmation. There was no criminal sanction for a witness who gave false evidence before an adjudication officer;

(iii.) there was no express provision made for the cross-examination of witnesses; and

(iv.) the proceedings before an adjudication officer were held otherwise than in public.

27. The argument in relation to legal qualifications was made by analogy to the qualifications for appointment to judicial office. Simons J. held that this type of comparison was inappropriate; the argument started by assuming that the role of an adjudication officer was equivalent to that of a judge, but that could not be so given that he had held that decision-making under the 2015 Act did not involve the administration of justice.

28. The appellant presented affidavit evidence from a barrister and solicitor with wide experience in the field of employment law who pointed to the complexity of many of the issues of national and E.U. law that can arise in employment disputes. Both stated that, while it would be inappropriate to refer to individual cases, it was their experience that a number of adjudication officers and ordinary members of the Labour Court simply did not understand some of the more difficult questions that arise and that each had appeared in cases where they firmly believed the adjudication officer involved "quite simply did not have sufficient understanding to deal with the important matters before them". The appellant's solicitor referred to a published article which conducted a survey of users of the new system — including lawyers, representatives of employers' organisations, and trade union representatives, and others — which found that 49% were dissatisfied or very dissatisfied with the new system. It was argued that the evidence demonstrated that the absence of legal qualifications led to systemic problems with the use of adjudication

officers to hear claims. Simons J. considered, however, that the generalised and vague nature of the evidence was such that it was not possible to find that there had been a systemic failure in the hearing and adjudication of claims. Whilst the circumstances in which the present appellant's claim came to be dealt with were regrettable, it was not possible to draw wider inferences of systemic failure from this particular set of circumstances.

29. Simons J. held that the structure of the 2015 Act indicated that it was a deliberate legislative choice that evidence would not be required to be given on oath. At one end of a spectrum requiring fair procedures was the criminal trial: close to the other end were disciplinary procedures against professionals where the final decision to strike off such a professional is reserved to the High Court. However, the heightened safeguards for professional persons whose capacity to earn a livelihood was at risk (*Law Society of Ireland v. Coleman* [2018] IESC 80 (Unreported, Supreme Court, McKechnie J., 21st of December, 2018)) could not necessarily be read across to other employment contexts. While procedures against other classes of employee can have great consequences, and it may be appropriate for there to be the hearing of evidence on oath or affirmation, appropriateness was not the same as a constitutional requirement.

30. When analysing decision-making, the full range of procedures open to a party must be examined (*Crayden Fishing Co. v. Sea Fisheries Protection Authority* [2017] IESC 74, [2017] 3 I.R. 785) and whilst the scheme under the 2015 Act was not unitary, a party who wishes to avail of evidence on oath or affirmation must take the trouble to bring an appeal to the Labour Court or the decision of the adjudication officer remains final. However, the existence of the safeguard of an appeal was an important factor.

31. Simons J. concluded that there was no constitutional requirement that decision-making of the type arising in a claim for unfair dismissal or for the payment of wages in lieu of notice must be performed on the basis of sworn evidence.

32. Simons J. considered that the complaint in respect of cross-examination reduced itself to one predicated on the absence of an express statutory power or duty to allow cross-examination. He considered that a power to allow cross-examination arose from the provisions of s. 41 of the 2015 Act and an adjudication officer was required to give the parties an opportunity to be heard and to present any relevant evidence. The appellant's argument that there should be an express requirement to allow cross-examination in all cases could not be reconciled with the presumption in *East Donegal Co-Operative Livestock Mart Limited v. The Attorney General* [1970] I.R. 317. In those cases where cross-examination was required, the adjudication officer was to be presumed to allow it; if there was a failure in this regard, then it would represent a good ground for judicial review.

33. The appellant also objected to the fact that that proceedings before an adjudication officer are held otherwise than in public (subss. 13 and 14 of s. 41 of the 2015 Act). However, Simons J. noted that the same subsections contained an express obligation to publish every decision and that proceedings in the Labour Court on appeal were conducted in public unless it determines otherwise upon the application of a party to the appeal pursuant to s. 44(7) of the 2015 Act. The appellant relied, variously, on Articles 34.1, 37, and 40.3 of the Constitution for a constitutional right to a public hearing before a statutory decision-maker, but no authority was cited in support. The appellant cited a number of cases illustrating the values underlying Article 34.1 (*In Re R. Ltd.* [1989] I.R. 126; *Irish Times Ltd. v. Ireland* [1998] 1 I.R. 359; and *Gilchrist v. Sunday Newspapers Ltd.* [2017] IESC 18, [2017] 2 I.R. 284). However, Simons J. held that it was not immediately apparent that such values could immediately be read across to non-judicial decision-makers. There were even exceptions to the constitutional requirement that justice be administered in public in the exercise of judicial power. Even if there was a presumption in favour of a public hearing, the requirements of the 2015 Act struck a balance when it

was considered that employees may be disincentivised from bringing proceedings if first-instance hearings are in public and they could be perceived by prospective employers as troublemakers. Even if this was incorrect, Simons J. found that the provisions governing the Labour Court satisfied any requirement of a public hearing.

vii. E.C.H.R. (Article 6(1))

34. The determination of claims under the 1977 and 1991 Acts was the determination of civil rights under Article 6(1) of the Convention. However, a number of judgments of the European Court of Human Rights (*Malhous v. The Czech Republic*, App. No. 33071/96; *Buterlevičiūtė v. Lithuania*, App. No. 42139/08; and *Ramos Nunes de Carvalho E Sá v. Portugal*, App. Nos. 55391/13, 57728/13, and 74041/13) confirmed that a public hearing before an appellate court may remedy what would otherwise be a breach of Article 6(1) at a lower level subject to the requirement that the appellate court have "full jurisdiction". Appeals to the Labour Court are conducted *de novo* and thus this requirement was met.

II – Discussion

A. Development of Jurisprudence

35. While this case raises a difficult conceptual question as to the nature of the administration of justice, it might be thought the essential issue involves a consideration of a limited number of well-known cases (principally: *Lynham v. Butler (No. 2*); *Re Solicitors Act 1954*; and *McDonald v. Bord na gCon*) and a relatively narrow dispute about the application to this case of only two of the five criteria set out in *McDonald*. The appellant argues that the High Court was incorrect to hold that the fourth limb of the test (the enforcement of rights and liabilities or the imposition of penalties by the court or by the executive power of the State) was not satisfied. The State denies this and, also, argues that the High Court was wrong to conclude that the fifth limb of the test (the making of

an order which, as matter of history, is an order characteristic of courts in this country) was satisfied. It will be necessary to consider the case law and legislation in closer detail, but it is useful, in my view, to try and locate this dispute in a wider context in relation to both history and jurisprudence.

36. Since the enactment in 1922 of Article 64 of the Irish Free State Constitution, it has been a fixed point in the constitutional order that justice is administered in courts by judges. Ireland has, since independence, been committed to a constitutional structure which recognises a separation of powers. The judicial power, although the weakest branch, is essential to the maintenance of that balance, particularly, perhaps, in a structure which provides for a parliamentary democracy in which the executive branch is part of, and largely controls, the legislative branch. In that sense, the independent existence of the judicial power which administers justice can be said to be the lynchpin of the constitutional order created first in 1922, and developed in 1937. But, the case law and commentary since 1922 have struggled to provide a satisfactory definition, or even description, of the field of the administration of justice. This is not, as it may be in other jurisdictions, a difficult though somewhat academic jurisprudential issue. As has been observed, "belief in the importance of protecting the judicial power from encroachment by the legislature or executive must at least invoke the idea that there is an appropriate area for its operation" (G. Marshall, *Constitutional Theory* (Oxford: Oxford University Press, 1971), p. 120, quoted in J. Casey, *Constitutional Law of Ireland* (Dublin: Round Hall, 2000), p. 255). The provisions of both the 1922 and 1937 constitutions make it clear that the administration of justice is consigned to courts as a matter of constitutional law which the courts are bound to uphold and enforce.

37. Ireland is by no means the only jurisdiction to struggle with the analysis of dispute resolution by administrative bodies outside courts in a system that distinguishes, even imperfectly, between executive, legislative, and judicial power. This issue has posed

problems in many common law countries, particularly those with constitutions assigning the administration of justice to judges or courts or, perhaps, providing for the administration of justice in a federal system. A.V. Dicey's insistence that the common law did not conceive of any separate system akin to the civil law *droit administratif* was very influential within the common law world and meant that the burgeoning role of the administration in legal matters had to be addressed within the traditional structures and patterns of the common law.

38. The Industrial Revolution led to a significant increase in the role of the state and a demand for adjudication and resolution by bodies other than courts. In some cases, this was driven by the simple desire to have bodies with expertise in specific areas, as was the case in relation to issues such as the developing law of taxation or the rapid expansion of the railway system, which gave rise to novel and complex disputes thought to require particular expertise. In other cases, perhaps most notably in the field of industrial relations, there was a desire for resolution by bodies other than courts (which, particularly in the late 19th and early 20th centuries, were perceived as hostile to employees, trade unions, and collective action) and a preference for a system of low-cost, relatively informal non-judicial dispute resolution.

39. The expanded role of the State and the proliferation of administrative bodies outside the executive government led to concerns among some lawyers as to these developments. Perhaps most notably, the then Lord Chief Justice of England and Wales, Lord Hewart, a former government minister, published in 1929 a controversial, if somewhat intemperate, book entitled *The New Despotism* (London: Ernest Benn Limited, 1929). It criticised as constitutionally subversive the burgeoning practice of delegated legislation which, it was argued, allowed ministers, and therefore civil servants, to bypass Parliament, and the practice of assigning judicial power to specialist tribunals in breach, it was said, of Dicey's first principle of the Rule of Law. This uneasiness among lawyers was reflected

in other jurisdictions and may be seen, perhaps, in the almost contemporaneous approach of the U.S. Supreme Court to the creation of a proliferation of administrative agencies under the New Deal. In the U.K., a high-powered Committee on Ministers' Powers, which included among its members Sir William Holdsworth and Harold Laski, reported on these matters in 1932. The Committee recommended that judicial decisions should "normally" be entrusted to the ordinary courts, but also considered there was nothing radically wrong in the practice of Parliament permitting the exercise of judicial powers by tribunals, recommending, however, that reasons should be given for decisions and there should be a right of appeal to the High Court on a point of law.

40. In the United Kingdom, the practice of creating administrative tribunals increased apace and led to a further review in the Franks Report in 1957 which rejected the contention that the tribunals were purely administrative in nature. It recognised that the functions performed were judicial, and, therefore, the tribunals should be considered to be provided by Parliament for adjudication rather than administration. Accordingly, the Report set out general principles for their operation by reference to familiar court-like concepts of openness, fairness, and impartiality. In the year 2000, the Leggatt Review reported on the further development of the tribunal system and recommended a comprehensive reorganisation. Subsequently, a two-level tribunal system was established with a first-tier tribunal and an upper tribunal both divided into specialist chambers by subject-matter and incorporated within the structure of the administration of justice. In this case, indeed, counsel for the appellant argued that this is the course which ought to have been taken, at least in the field of employment law, in the 2015 Act, and which, it was contended, was, moreover, constitutionally required. It was said that the logic of the judicialising of the employment relationship should lead to the conclusion that the decision-making body should have the role and status of judges under the Constitution, however unwieldy such a solution might be. One noteworthy feature of these developments is that,

notwithstanding the concerns expressed by lawyers such as Hewart, the effect of the development of administrative bodies and tribunals was not the bypassing of the role of the courts. Instead, the development of robust judicial review has meant that the expansive role of the State has markedly increased the role and influence of the courts and the significance and impact of administrative law.

41. During this period, there were repeated attempts to establish a more precise definition of the judicial power and the concept of justiciability. This was not, it appears, an attempt to identify the essence of the judicial power in itself since, *pace* Hewart, there was little concern about legislative subtractions from the jurisdiction of the courts, but rather to cast light on the concept, popularised by the 1932 Committee, of administrative bodies carrying out "quasi-judicial" functions. This proved, however, a dispiriting (if revealing) exercise. In judicial terms, it resulted in a series of negative conclusions, most notably in the judgment of Lord Sankey L.C. in *Shell Company of Australia v. Federal Commissioner of Taxation* [1931] A.C. 275 ("*Shell*"), quoted by Haugh J. in *Cowan v. A.G.* at pp. 422 to 423 of the report of the latter case:-

> "It may be useful to enumerate some negative propositions on this subject: 1. A tribunal is not necessarily a Court in this strict sense because it gives a final decision. 2. Nor because it hears witnesses on oath. 3. Nor because two or more contending parties appear before it between whom it has to decide. 4. Nor because it gives decisions which affect the rights of subjects. 5. Nor because there is an appeal to the Court. 6. Nor because it is a body to which a matter is referred by another body."

42. In his 1957 Hamlyn Lectures, published as *Protection from Power under English Law* (London: Stevens & Sons Ltd., 1957), Lord MacDermott, the then Lord Chief Justice of Northern Ireland, acknowledged the difficulty of drawing any clear line but suggested, at p. 52, that:-

> "[*a*] judicial decision implies the presentation of their case by the parties to the dispute, the ascertainment of the relevant facts and of the relevant law and a decision which is reached by applying the relevant law to the relevant findings of fact".

Slightly later, however, in an essay, "Justiciability", in *Oxford Essays in Jurisprudence* (A.G. Guest ed., Oxford: Oxford University Press, 1961), the noted constitutional scholar Geoffrey Marshall asserted, bluntly, at pp. 277 to 278 that:-

> "there are two interlocking questions involved in the notion of 'justiciability' when it functions as an appraising term: (1) How far is it possible to make the concept of 'judicial' methods precise? and (2) How far is it possible to specify situations or disputes which are inherently suitable to such methods? To the first question one answer seems clear: namely that it is not possible to construct from judicial materials a single set of reasonably unambiguous criteria for calling a procedure 'judicial'. Moreover many of the tests historically enunciated by the courts are now insufficiently precise to discriminate within a large *penumbra* of doubtful cases, and too great an element of chance enters into the question of classification where there is no specific guidance from by the Legislature. To the second question there seems an equally plain answer. No dispute is inherently justiciable or suited to judicial solution".

43. He concluded the essay with the clear, if bleak, observation at p. 287 that:-

> "the characterisation of … issues as 'justiciable' or 'non justiciable' is a legislative job".

44. Nevertheless, Dr. Marshall did recognise that "a constitutional separation of powers raises the problem of characterising the judicial function in a direct and fundamental way". This neatly captures the difficulty which the courts must address in "the *penumbra* of doubtful cases" such as the present. There is no clear definite test capable of being constructed to

distinguish the administration of justice from an administrative decision-making function bound to act judicially, but the Constitution assumes the distinction, asserts its importance, and requires the legislature to respect it and the courts to uphold it. In Ireland, and in any other jurisdiction which mandates the separation of powers, the characterisation of issues as justiciable, and falling within the province of the administration of justice, is, unavoidably, a judicial task. Even if it is true that there is no dispute that is inherently justiciable, the Constitution provides and requires that there be an area known as the administration of justice to be carried out by judges, subject only to Article 37. The courts have been appropriately cautious and have refrained from making overbold assertions of the proper scope of the administration of justice and have proceeded, instead, by way of part broad definition, part analogy, and part description.

45. The development of administrative law in Ireland has tended to reflect some of these influences, albeit with some significant differences. Dicey's teachings were, perhaps, never received as reverently here and, indeed, the constitutional developments of the early 20th century were a direct repudiation of some of the views he espoused. Nevertheless, the administration of justice required under Article 64 of the 1922 Constitution to be carried out in courts was the common law system and, therefore, the conceptual difficulties of fitting the development of adjudicative administrative bodies into the constitutional system remained. At the same time, large-scale administrative bodies did not meet with the same suspicion or scepticism in Ireland. The pre-independence land purchase schemes which were continued post-independence were massive administrative undertakings which transformed land ownership in Ireland in a way which was broadly successful. The major State enterprises established by statute in the aftermath of independence and given extensive statutory powers, like the Electricity Supply Board and Bord na Móna, tended to be viewed positively as symbols of the new State rather than as the encroachment of the administration in the field of individual enterprise. The field of

industrial relations was certainly smaller than that in the neighbouring jurisdiction, and perhaps less fractious. It was, nevertheless, also affected by international developments and the increasing trend towards providing individuals with legally enforceable protection of employment. Irish law therefore showed some of the same strands as were discernible in other jurisdictions: the development of administrative agencies; the increased role of the State; a move towards individual dispute resolution in the industrial relations sector; and a significant expansion of the role of the judicial review. Nevertheless, there were differences of both detail and emphasis. More importantly, Ireland — in common with jurisdictions such as Canada and Australia — had adopted a constitution which required the administration of justice to be carried out in courts. The question, therefore, of how the proliferation of administrative agencies which required bodies to resolve disputes was to be reconciled with the fact that the administration of justice was to be carried out in courts and, at least by implication, nowhere else was something that had to be resolved as a matter of law rather than abstract theory. The foregoing is a necessarily broad-brush sketch of a number of complex developments in Ireland and elsewhere, but it may provide a useful backdrop against which to consider the developing case law and legislation.

46. While the question of the essential function of the administration of justice takes on a particular significance with the coming into force of the 1922 Constitution, a convenient starting point may be a decision in 1902: *R. (Wexford County Council) v. Local Government Board for Ireland* [1902] 2 I.R. 349. The case concerned the question of whether a body was amenable to *certiorari*, but in the course of his judgment, Palles C.B. said:-

> "I have always thought that to erect a tribunal into a "Court" or "jurisdiction," so as to make its determinations judicial, the essential element is that it should have power, by its *determination* within jurisdiction, to impose liability or affect rights. By this I mean that the liability is imposed, or the right affected by the

determination only, and not by the fact determined, so that the liability will exist, or the right will be affected, although the determination be wrong in law or in fact. It is otherwise of a ministerial power." (*Emphasis in original.*)

47. This passage was much-quoted in a number of Australian cases on the judicial power, and captures one element, at least, of the administration of justice: the ability to make binding determinations affecting rights and imposing liabilities. Article 64 of the Irish Free State Constitution, enacted in 1922, provided:-

> "The judicial power of the Irish Free State (Saorstát Éireann) shall be exercised and justice administered in the public Courts established by the Oireachtas by judges appointed in manner hereinafter provided. These Courts shall comprise Courts of First Instance and a Court of Final Appeal to be called the Supreme Court. The Courts of First Instance shall include a High Court invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal, and also Courts of local and limited jurisdiction, with a right of appeal as determined by law."

48. These provisions fell to be analysed in *Lynham v. Butler (No. 2)*, which was a further round in the bitter struggle between the parties which had already generated a number of judgments of the Superior Courts and given rise to a real political crisis. The plaintiff was entitled to the fee simple estate in extensive lands at Mount Seskin, County Dublin, subject to a life estate in favour of one Mary MacInerney. Mrs. MacInerney had let the property to the Reverend Michael Butler at an annual rent for the duration of her estate, namely for her life. She died in 1924, and the plaintiff sought possession of the lands. The Reverend Dr. Butler contended, however, that as of the date of the passing of the Land Act 1923 — which was August, 1923, and thus predated the death of Mrs. MacInerney — he held the lands under a tenancy within the meaning of the Land Act 1923 and, accordingly, was entitled to the benefit of the Act which had the effect of

divesting the landlord of his estate in favour of the occupying tenant. The Judicial Commissioner of the Land Commission (Wylie J.) had made an interim ruling that the lands constituted a holding to which the 1923 Act applied. The High Court dismissed the plaintiff's claim for ejectment, which decision was upheld by the Supreme Court ([1925] 2 I.R. 82 (High Court) and [1925] 2 I.R. 231 (Supreme Court)).

49. The plaintiff then sought to appeal to the Privy Council, which granted leave to appeal. This decision caused public consternation because it appeared inconsistent with the understanding of the Irish government of the terms of the Treaty negotiations and the circumstances in which appeal to the Privy Council would be permitted. The potential crisis was only averted by the stratagem of securing the passage by the Oireachtas of the Land Act 1926, confirming the interpretation of the 1923 Act adopted by the Supreme Court with the effect of rendering the appeal to the Privy Council moot. Viscount Cave L.C. was forced to acknowledge that the tactic was "ingenious and effective" and the appeal was withdrawn.

50. This much of the litigation has its own place in Irish history of the early 20th century (see *e.g.* T. Mohr, *Guardian of the Treaty: The Privy Council Appeal and Irish Sovereignty* (Dublin: Four Courts Press, 2016)). However, the dispute between Mr. Lynham and the Reverend Dr. Butler continued to rage. The Land Commission had published a provisional list of lands, including the lands in question, and Mr. Lynham had given notice of objection. The Lay Commissioners disallowed his objection. Mr. Lynham's appeal to the Judicial Commissioner was then postponed pending the outcome of the appeal to the Privy Council. In the aftermath of that episode, Mr. Lynham then raised an additional ground of objection: that the letting was one for temporary convenience and was not captured by the Land Act of 1923. In the words of Kennedy C.J. in the Supreme Court, Mr. Lynham had, up to this point, been uniformly unsuccessful in all his proceedings, but now a complete reversal of his fortunes took place. The Judicial Commissioner, Wylie

J., upheld the objection that the tenancy was a letting for temporary convenience, and that decision was, in turn, upheld by the Supreme Court. At that point, the Reverend Dr. Butler relinquished possession of the lands to Mr. Lynham.

51. However, even then, the dispute between the parties was not over. Mr. Lynham initiated further proceedings, *Lynham v. Butler (No. 2)*, which sought to recover the sum of £1,600 being damages for trespass and mesne rates in respect of the occupation by the Reverend Dr. Butler of the lands between the expiration of the tenancy and the date upon which he had relinquished possession of the property. The Reverend Dr. Butler presponded by erecting a barrage of defences to this claim. For present purposes, however, the significance of the case is the claim made on his behalf that the Land Commission, other than the Judicial Commissioner, was an "illegal and unconstitutional tribunal and that the adjudication referred to was made wholly without jurisdiction and in violation of the Constitution of Saorstát Éireann" on the grounds that a decision of the Lay Commissioner was an administration of justice required under Article 64 to be carried out by a court. If so, it was contended, there could not be a valid appeal from an unconstitutional tribunal so that the orders of the Judicial Commissioner and the Supreme Court on appeal were also void.

52. It is of some significance that counsel advancing this argument was George Gavan Duffy S.C., a member of the Treaty delegation, and later to become President of the High Court. The argument of counsel is set out in some detail in the report. The exercise of judicial power and the administration of justice in Saorstát Éireann depended on the Constitution, and Article 64 imposed a personal and inalienable trust upon the judges appointed under Article 68 and they alone were authorised to exercise the judicial power of the State in the public courts established by the Oireachtas. The Lay Commissioners of the Land Commission could not be considered to be judges and, accordingly, could not exercise judicial power. Before the creation of Saorstát Éireann, the Land Commission was a court

of record under the Land Law (Ireland) Act 1881 with full power to hear and determine all matters whether of law and fact, and was moreover immune from restraint by any court and from *certiorari*. The exercise of power by the Land Commission prior to the coming into force of the Free State Constitution had been described as an "exercise of judicial power" in *R. (Lord Rossmore) v. Irish Land Commission* [1894] 2 I.R. 394, and s. 24 of the Irish Land Act 1903 had been stated by Palles C.B. in *In Re Talbot Crosbie's Estate* [1905] 1 I.R. 570 to have conferred "a jurisdiction eminently judicial". Gavan Duffy argued that the Constitution of Saorstát Éireann created a wholly new constitutional position as regards the judiciary and the exercise of judicial power; the powers and duties of the Land Commission were merely transferred to commissioners appointed under the Land Law (Commission) Act 1923 and it became unconstitutional and illegal for the Land Commission to exercise many of their former powers. A divisional court of the High Court held that the plea was inadmissible on the grounds that the defendant could not be heard to impeach the validity of the order of the Supreme Court. The matter was appealed to the Supreme Court, which addressed the central argument in much greater detail, with each member of the court delivering a separate judgment.

53. The judgment most commonly cited is that of Kennedy C.J. He referred to Article 64 of the Free State Constitution and Article 3, s.1 of the U.S. Federal Constitution which provides that "[*t*]he judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish" which was, in turn, reflected in the Commonwealth of Australia Constitution Act (1900) 63 & 64 Vict. c. 12, s. 71 of which provided that "[*t*]he judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction". Kennedy C.J. referred to some of the definitions of the judicial power contained in the decisions of the U.S. Supreme Court

and of the High Court of Australia. He put forward his own synthesis of the definitions which, nevertheless, he stated were "by way of description rather than of precise formula". A central passage of his judgment occurs at pp. 99 to 100:-

> "In the first place, the Judicial Power of the State is, like the Legislative Power and the Executive Power, one of the attributes of sovereignty, and a function of government. (See Article 2 of the Constitution.) It is one of the activities of the government of a civilised state by which it fulfils its purpose of social order and peace by determining in accordance with the laws of the State all controversies of a justiciable nature arising within the territory of the State, and for that purpose exercising the authority of the State over person and property. The controversies which fall to it for determination may be divided into two classes, criminal and civil. In relation to the former class of controversy, the Judicial Power is exercised in determining the guilt or innocence of persons charged with offences against the State itself and in determining the punishments to be inflicted upon persons found guilty of offences charged against them, which punishments it then becomes the obligation of the Executive Department of Government to carry into effect. In relation to justiciable controversies of the civil class, the Judicial Power is exercised in determining in a final manner, by definitive adjudication according to law, rights or obligations in dispute between citizen and citizen, or between citizens or the State, or between any parties whoever they be and in binding the parties by such determination which will be enforced if necessary with the authority of the State. Its characteristic public good in its civil aspect is finality and authority, the decisive ending of disputes and quarrels, and the avoidance of private methods of violence in asserting or resisting claims alleged or denied. It follows from its nature as I have described it that the exercise of the Judicial Power, which is coercive and must frequently act against the will of one of the

parties to enforce its decision adverse to that party, requires of necessity that the Judicial Department of Government have compulsive authority over persons as, for instance, it must have authority to compel appearance of a party before it, to compel the attendance of witnesses, to order the execution of its judgments against persons and property. So much towards a definition of the term — "Judicial Power"."

54. It is of some importance that the approach taken by Kennedy C.J., while descriptive, drew upon the decisions of other common law jurisdictions. Thus, he quoted with approval, and echoed, the opinion of the United States Supreme Court in *Kansas v. Colorado* (1907) 206 U.S. 46, 27 Sup. Ct. Rep. 655, that the judicial power "must be held to embrace all controversies of a justiciable nature arising within the territorial limits of the nation, no matter who may be the parties". He also referred with approval to a then-recent opinion of the Privy Council delivered by Lord Sankey L.C. in *Shell Company of Australia Limited v. Federal Commissioner of Taxation* [1931] A.C. 275, noting that the Chief Justice of Canada had been a member of the panel. Kennedy C.J. also quoted a number of decisions of Griffith C.J. in the Australian High Court, including the statement (itself approved in *Shell*) in *Huddart, Parker & Co v. Moorhead* (1908) 8 C.L.R. 330, 357:-

> "[*T*]hat the words "judicial power" … mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action."

55. Kennedy C.J. also quoted the observations of the same judge in *The Waterside Workers' Federation of Australia v. J.W. Alexander Limited* (1918) 25 C.L.R. 434 that, without attempting an exhaustive definition of the term "judicial power", it nevertheless "includes

the power to compel the appearance of persons before the tribunal in which it is vested to adjudicate between adverse parties as to legal claims, rights, and obligations, whatever their origin, and to order right to be done in the matter".

56. On the other hand, Kennedy C.J. also adopted the famous language of Lord Sankey L.C. that there may be ancillary bodies, tribunals, and even juries, who, even though they assume the style of tribunals or courts and sit on a dais adorned with the "trappings of Courts", nevertheless do not pretend to the judicial determination of "justiciable controversies". It is clear from these observations that Kennedy C.J. considered that the administration of justice involved the exercise of "the judicial power" and the determination of "justiciable controversies", and that his description of the judicial power under the Free State Constitution was consistent with the approach he discerned in other common law countries. His approach, admittedly descriptive, emphasised the determination of justiciable controversies in accordance with law by definitive and binding adjudication enforceable by the State and, for that purpose, a court must have the capacity to compel attendance of parties and witnesses and to order the execution of its judgments.

57. Turning then to the case at hand, Kennedy C.J. considered that the Land Commissioners performed functions which were largely administrative in nature. They were "primarily" administrative bodies with ministerial (administrative) duties to perform. Some duties may require to be performed judicially in such a way as not to offend the canons of natural justice, but that did not convert a ministerial (administrative) act into a judicial one. The judicial power of the State was only invoked when there was an appeal to the Judicial Commissioners, and it was irrelevant if that was described as an appeal or case stated, as Kennedy C.J. noted at p. 105:-

> "The Land Commissioners (other than the Judicial Commissioner) are, then, an administrative body of civil servants who are not Judges within the meaning of

the Constitution and do not constitute a Court of Justice strictly so-called but who, in the performance of some of their duties, must act judicially, and who are always subject, in respect of any justiciable controversy arising in the course of their business, to the exercise of the Judicial Power of the State for the determination of such controversy by one of the Judges of the High Court that the State assigned to act as Judicial Commissioner for the purpose."

58. In later years Kennedy C.J.'s judgment has been regularly cited, but it is worth noting both FitzGibbon and Johnston JJ. delivered concurring judgments. FitzGibbon J. acknowledged Gavan Duffy's "devastating argument". FitzGibbon J. considered, in the first place, and somewhat controversially, that it was possible that the Land Act of 1923 could be deemed an implicit amendment of the Treaty permissible by way of ordinary legislation within eight years after the coming into force of the Constitution, as provided for by Article 50. However, he concluded that he was not satisfied that there was anything in the Act of 1923 which was repugnant to the Constitution; the distinction between the administrative functions of the Land Commission and the exercise of judicial power when the necessity for it arose was sufficiently observed by the legislation. The Land Commission must, of necessity, make decisions upon objections, but the safeguard of judicial authority was preserved by the right of appeal to the Judicial Commissioner. This was the exercise of giving a judicial decision upon a question which had been decided by the Land Commission and the exercise of its administrative functions. This bluntly pragmatic approach, that the judicial power is what the legislature says it is in any given case and it only arises in the context of the exercise of powers by the Land Commission when there is an appeal to the Judicial Commissioner, is nevertheless consistent with Kennedy C.J.'s conclusion.

59. Johnston J., for his part, laid emphasis on the fact that the adjudicative function of the Land Commission was only a part of its broader functions. He considered that the Land

Commission was primarily and essentially an administrative body constituted for the purpose of carrying out great social work of the highest importance. It had, he considered, quasi-judicial powers merely ancillary to the administrative duties which it had been constituted to carry out. Having described the work of the Land Commission as "national work of creating a peasant propriety", he considered it to be "administrative work of the highest importance and of the greatest responsibility" and that the quasi-judicial powers which had been conferred upon the Commission as ancillary to and in aid of the main work were quite negligible in importance.

60. Johnston J. considered Article 64 as a provision which would be very useful in the future as a check on encroachments by the legislature and executive upon popular rights and was, he thought, derived from the provisions of the U.S. Constitution embodying, in turn, Blackstone's famous observation that "[*i*]n the distinct and separate existence of the judicial power … consists one main preservative of the public liberty, which cannot subsist long in any State, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power". Johnston J. observed that Blackstone could not have foreseen "the enormous increase in the administrative work of the executive power which was come in the nineteenth and twentieth centuries". While the Constitution of the Irish Free State followed closely the concept of separation of powers, it had been found that this division of government functions could not "as a matter of practical polity, be carried out to its logical conclusion and can only take place as an approximation". He referred to Professor C.K. Allen, a writer "who is the most skilful of the assailants of the system or tendency in politics which is incorrectly and rather unfairly called "bureaucracy"", but who was, nevertheless, forced to admit that it was "quite illusory" to ask courts to judge, at first instance, every minor matter of dispute, arising out of our "greatly extended and reticulated administration". Johnston J. was clearly aware of the contemporary debate occurring in the United

Kingdom in which Hewart and Allen were participants, and, while acknowledging the importance of maintaining the separate function of the judicial branch, nevertheless took a more nuanced view which sought to emphasise that the exercise of the powers of the Land Commission which involved the determination of legal disputes was ancillary to the overall project which was, undoubtedly, administrative in nature. This was a somewhat different approach to that taken by Kennedy C.J.

61. Johnston J. concluded that the work of carrying out the Land Purchase Code was an administrative task of national importance and of colossal magnitude. Part of that procedure required a form of ascertainment of lands to which the Acts applied. This must necessarily be left in the hands of the body or tribunal which was constituted to perform the entire task. He did not think that any other course was possible and was "absolutely satisfied that such ascertainment of the land is not, in any sense, an exercise of judicial power within the meaning of Article 64 of the Constitution. Any other result would have a most paralysing effect upon the whole work of Land Commission".

62. There was, of course, little merit in the contentions made on the Reverend Dr. Butler's behalf which involved a challenge to a jurisdiction which he had willingly invoked, participated in, and been prepared to benefit from, and in which he had even gone to the length of acquiescing in an unfavourable decision without raising any objection until the point when damages were sought. Furthermore, if his challenge was upheld, it would have led to another round in the already extended, bitter, and decade-long litigation between the parties, while significantly disrupting the work of the Land Commission. The judgments are important and useful attempts to address a difficult problem not unique to Ireland. However, it is possible to detect some uneasiness in the judgments with the analysis. In particular, there seems to be a tension between the suggestion in Kennedy C.J.'s judgment that all justiciable controversies are the preserve of the judicial power (p. 97) and his acknowledgment that a justiciable controversy may arise in the course of the

business of the Land Commission (p. 105), and his later assertion that the issue only becomes a justiciable controversy when it is appealed to the Judicial Commissioner, thus invoking the jurisdiction of the courts (p. 105). The particular issue in the case involved the nature of the tenancy between the Reverend Dr. Butler and the life tenant. It is true that it was addressed for the first time before the Judicial Commissioner, but that was merely a consequence of the procedural development in the case. There was no doubt that it could have been raised before the Land Commissioners and have been determined by them. In any event, the fundamental issue of whether the land in question fell within the scope of the Land Commission's powers was determined by the Land Commission and appealed to the Judicial Commissioners. It might be thought that there is some difficulty in reconciling the expansive definition of judicial power, and justiciable controversies, with the conclusion that these issues may be determined by the Land Commission, and which is not necessarily resolved by observing that it is a small part of the general business of the Land Commission. Of course, such a tension would not have posed a particular difficulty prior to 1922 since, as Johnston J. pointed out, there was no equivalent constitutional provision in the unwritten British constitution and, in any event, that constitution was capable of encompassing a number of anomalies such as the curial power of Parliament or the position of the Lord Chancellor. It was however, a more difficult question under the terms of the 1922 Constitution.

63. The uneasiness with the task of reconciling the rigid terms of a constitution which distinguished sharply between judicial and administrative powers and consigned the former exclusively to judges, with the practical requirements of a developing administrative state, could be detected in the inclusion of Article 37 in the new Constitution providing for the exercise of limited functions and powers of a judicial nature in non-criminal matters by persons other than judges or courts. This was widely understood as being directed towards settling the doubts in relation to the Land

Commission, itself, and other substantial state bodies, such as the Revenue Commissioners, which exercised important functions in the new State (see, G. Hogan *Origins of the Irish Constitution* (Dublin: Royal Irish Academy, 2012) pp. 41 to 42). Indeed, Gavan Duffy appears to have had some involvement in the discussions on the new Constitution, and may have expressed views on this issue as well.

64. While the objective of Article 37 may have been clear, the language is not entirely helpful. It does not suggest a different category of power, but implies, instead, the continued existence of a distinction between the executive and judicial power, and merely provides, negatively, that nothing in the Constitution will invalidate the exercise of limited functions and powers of a judicial nature. However, the breadth and significance of the powers of the Land Commission itself, "a task of national importance and of colossal magnitude", might suggest that Article 37 was of potentially broad application. Even if the powers and functions of a judicial nature exercised by the Land Commission which were henceforth to be validated by Article 37 were viewed only as a decision on the application of the relevant legislation, then such decisions were still of enormous significance for those involved, as the lengthy dispute between Mr. Lynham and the Reverend Dr. Butler, itself, testified.

65. Article 37 was applied at first instance in the decision *Re Solicitors Act 1954*. The Solicitors Act of 1954 had set up a new system for the disciplining of solicitors. A disciplinary committee of the Incorporated Law Society was to be established, whose members were to be approved by the Chief Justice, with power to strike off a solicitor and to order the solicitor to make restitution and satisfaction to an injured party as the committee should think fit. Traditionally, the power to strike off a solicitor had been a power exercised by the High Court in exercise of its supervisory jurisdiction over the profession. The High Court retained the power to strike off a solicitor in the aftermath of the 1954 Act. Maguire C.J., sitting in the High Court, held that the decision to strike off

a solicitor was the determination of a justiciable controversy. However, as the power was limited in scope to the solicitors' profession, and there was an appeal to the High Court, he considered the powers could be said to be of a limited nature and permissible under Article 37.

66. The Supreme Court reversed this decision, upholding the decision that the disciplinary committee was, indeed, exercising powers of a judicial nature, but concluding that they were not limited and saved by Article 37. While, as a matter of history, the discipline of members of the solicitors' profession had traditionally been a matter for courts — and this, indeed, was the basis upon which later courts and commentators considered that the decision could be justified — the judgment of Kingsmill Moore J. took a notably broader approach. The power to strike off was a disciplinary and punitive power with the consequence that a struck-off solicitor committed a criminal offence if he or she practised thereafter. Striking off was, he considered, a more severe penalty, therefore, than imprisonment. By the same token, restitution and satisfaction could only be made in respect of something in the nature of misconduct which could include fraud and negligence. To that extent, Kingsmill Moore J. considered that it was impossible to distinguish the powers and functions of a committee to determine whether such misconduct had taken place and to order restitution and satisfaction from those of a court trying an action for fraud and negligence, unless, indeed, it was that the functions of the committee were broader. Accordingly, he considered that the committee was exercising a judicial power.

67. Moreover, Kingsmill Moore J. disagreed that the power of the committee could be saved by the provisions of Article 37. In an important passage in the judgment, at pp. 263 to 264, he said:-

> "What is the meaning to be given to the word "limited"? It is not a question of "limited jurisdiction" whether the limitation be in regard to persons or subject-

matter. Limited jurisdictions are specially dealt with in Article 34, 3, 4°. It is the "powers and functions" which must "limited," not the ambit of their exercise. Nor is the test of limitation to be sought in the number of powers and functions which are exercised. The Constitution does not say "powers and functions limited in number." Again it must be emphasised that it is the powers and functions which are in their own nature to be limited. A tribunal having but a few powers and functions but those are far-reaching effect and importance could not properly be regarded as exercising "limited" powers and functions. The judicial power of the State is by Article 34 of the Constitution lodged in the Courts, and the provisions of Article 37 do not admit of that power being trenched upon, or of its being withdrawn piecemeal from the Courts. The test is to whether a power is or is not "limited" in the opinion of the Court, lies in the effect of the assigned power when exercised. If the exercise of the assigned powers and functions is calculated ordinarily to affect in the most profound and far-reaching way the lives, liberties, fortunes or reputations of those against whom they are exercised they cannot properly be described as "limited"."

He concluded:-

"Eventually the question whether any particular tribunal is unconstitutional must depend on whether the congeries that the powers and functions conferred on the tribunal or any particular power or function is such as to involve the pronouncement of decisions, the making of orders, and the doing of acts, which on the true intendment of the Constitution are preserved for judges as being properly regarded as part of the administration of justice, and not of the limited character validated by Article 37."

Thus, the decision gave a broad reading to the judicial power under Article 34 in considering that the court should have regard to the nature of the power being exercised, rather than its form, but a very narrow reading to Article 37.

68. *Cowan v. A.G.* concerned an election petition which was brought in respect of a member of Dublin City Council. Under the Municipal Corporations Act 1882 and the Municipal Elections (Corrupt and Illegal Practices) Act 1884, judges nominated a practising barrister to be the election court to try the petition. The plaintiff sought a declaration that such an assignment was unconstitutional. Haugh J. referred to the provisions of the Adoption Act 1952, the Social Welfare Act 1952, the Air Navigation and Transport Act 1936, and the Tribunals of Enquiry (Evidence) Act 1921, all of which had authority to compel the attendance of witnesses and determine issues in accordance with law. He considered that there were many other tribunals of a similar nature. That was bound to be so, he considered, as "Article 37 of the Constitution expressly allows the existence of such tribunals provided they do not adjudicate on criminal matters", and acknowledged that if it had it not been for the decision in *Re Solicitors Act 1954*, then the Disciplinary Committee of the Incorporated Law Society might also have been referred to as an example of an Article 37 tribunal. Haugh J. considered that, following the decision in *Re Solicitors Act 1954*, however, an election court could similarly be said to exercise far-reaching powers affecting the lives, liberties, fortunes, or reputations of those against whom they were exercised and, accordingly, could not be considered as limited functions and powers allowable by Article 37. The significance of this finding is, however, lessened by the fact that Haugh J. acknowledged that the election court could, at any point, investigate and try a person on a charge of an illegal or corrupt practice. Thus, it was a body which exercised powers in criminal matters assigned to it, which was something expressly prohibited by Article 37. Accordingly, he concluded that the election court,

when presided over by a practising barrister, was unconstitutional as the administration of justice by a body other than a court, and by a person other than a judge.

69. The decisions in *Re Solicitors Act 1954* and *Cowan v. A.G.* might have been expected to raise further questions in relation to the compatibility with the Constitution of a range of statutory bodies, and to suggest that the courts would take a much stricter approach to the provisions of Article 34 of the Constitution. However, as it transpired, the decisions marked a high-water mark from which subsequent cases have retreated.

70. In *State (Shanahan) v. Attorney General* [1964] I.R. 239 ("*State (Shanahan)*"), Davitt P. returned to the general question of the definition of the judicial power and observed, at p. 247:-

> "I have certainly no intention of rushing in where so many eminent jurists have feared to tread, and attempting a definition of judicial power; but it does seem to me there can be gleaned from the authorities certain essential elements of that power. It would appear that they include 1, the right to decide as between parties disputed issues of law or fact, either of civil or criminal nature or both; 2, the right by such decision to determine what are the legal rights of the parties as to the matters in dispute; 3, the right, by calling in aid the executive power of the State, to compel the attendance of the necessary parties and witnesses; 4, the right to give effect to and force such decision, again by calling in aid the executive power of the State. Any tribunal which has and exercises such rights and powers seems to me to exercising the judicial power of the State."

This approach did not, however, gain traction in the decided cases. Instead, a somewhat different test was formulated in the decision of *McDonald v. Bord na gCon* and which has tended to be the focus of subsequent cases.

71. The Greyhound Industry Act of 1958 ("the 1958 Act") empowered the newly established Bord na gCon with the consent of the Irish Coursing Club, after the making of an inquiry,

to make an exclusion order in relation to any person. That had the effect of excluding a person from being at a greyhound race track or authorised coursing meeting or any public sale of greyhounds. In the High Court, Kenny J. held that the effect of such an exclusion order was to give to the licensee of a racecourse the powers of an occupier, and to override the terms of the contract under which the person had gained access and prohibit entry upon a greyhound race track or authorised coursing meetings or of public sales of greyhounds. In form, it corresponded to an injunction which was a form of order made by courts as a matter of history, although it was not enforced by the executive power of the State. It deprived the person against whom it was made of the contractual right which he acquired otherwise by paying for admission to the track or meeting and imposed a penalty which Kenny J. considered was similar to that which the courts may impose, for it seemed there was a similarity between an exclusion order and a disqualification order made under the Road Traffic Acts.

72. Turning to the argument that the making of an exclusion order constituted an administration of justice, he said at pp. 230 to 231:-

> "It seems to me that the administration of justice has these characteristic features:
>
> (1) a dispute or controversy as to the existence of legal rights or a violation of the law;
>
> (2) The determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty;
>
> (3) The final determination (subject to appeal) of legal rights or liabilities or the imposition of penalties;
>
> (4) The enforcement of those rights or liabilities or the imposition of a penalty by the Court or by the executive power of the State which is called in by the Court to enforce its judgment;

(5) The making of an order by the Court which is a matter of history is an order characteristic of Courts in this country."

This formulation has obvious points of similarity to that offered by Davitt P. in *State (Shanahan)* and, indeed, the earlier discussion in *Lynham v. Butler (No. 2)* but has some points of difference. *McDonald v. Bord na gCon* introduces the question of the historical usage of the courts as a test of the judicial function, which is not mentioned in *State (Shanahan)*, whereas the latter case includes consideration of the power to compel the attendance of witnesses as a feature of the administration of justice, which was also referred to in *Lynham v. Butler (No. 2)* and the cases considered therein, but does not figure in the *McDonald v. Bord na gCon* formulation.

73. Returning to the facts of the case, Kenny J. concluded that an exclusion order under s. 47 of the 1958 Act possessed all of the characteristics of the administration of justice. An exclusion order was made only when Bord na gCon was satisfied that some violation of the code of conduct had occurred. It was in the nature of the imposition of a liability and involved a determination that the person was guilty of some disreputable behaviour or conduct. Finally, an exclusion order seemed similar in form and effect to an injunction against trespass, and such an injunction was an order characteristic of the courts. Kenny J. acknowledged that the powers of the board were limited in the sense that it had no power to summon witnesses or administer an oath, and the refusal of witness to attend was not a contempt matter. Its functions were limited to those specified in the Act, but those considerations were irrelevant because of the test set out in *Re Solicitors Act 1954*: namely, that the question of whether a power was limited or not was determined by the effect of the assigned powers and if the exercise of those powers was calculated, ordinarily, to affect in the most profound and far-reaching way the lives, liberties, fortunes, or reputations of those against whom they are exercised, then they could not be described as limited.

74. The approach taken by Kenny J. in *McDonald v. Bord na gCon* is consistent with that taken in *Re Solicitors Act 1954* in that it is broad in its approach to the question of whether the functions and powers exercised are judicial in nature. The many evident differences of power and procedure between proceedings under the Act and court proceedings were not considered relevant. By contrast, a narrow view of Article 37 was taken. Instead, the effect of an exclusion order was considered to be far-reaching and akin to an order of a civil court. However, the Supreme Court took a different view. While accepting the characteristics of judicial function set out by Kenny J., the Supreme Court concluded that the 1958 Act did not satisfy any of the requirements. At p. 244, Walsh J. said:-

> "In the Court's view the bodies or persons conducting the investigations under ss. 43 or 44, while bound to act judicially, are not constituted judicial persons or bodies nor do they exercise powers of a judicial nature within the meaning of Article 37 of the Constitution. This is an essential difference between the judgment of this Court and the judgment of Mr. Justice Kenny. Accepting the characteristic features of a judicial body set out by Mr. Justice Kenny these investigating authorities do not satisfy any of those requirements. In particular it is to be noted that the investigating authorities do not themselves by virtue of anything in ss. 43 or 44 affect any right or impose any penalty or liability on anybody. So far as the Board is concerned in the exercise of its powers under s. 47, or the Club in the exercise of its powers under the section, they are not constituted judicial bodies or do not exercise powers of a judicial nature as they would only satisfy one of the tests referred to. In the opinion of the Court the submissions that the Act in s. 47 violates the provisions of Articles, 34, 37, and 38 of the Constitution fails."

75. It is somewhat surprising that the five-part test outlined by Kenny J. in *McDonald v. Bord na gCon* has come to be treated as a canonical checklist for the identification of the

administration of justice to the exclusion of the discussion in the prior case law. The endorsement by the Supreme Court of the test in the judgment of Walsh J. did not involve any extensive consideration of it, or the case law, and, moreover, involved the paradox that the application of the test in the Supreme Court led to an almost polar opposite conclusion to that to which it had led the court which had advanced and constructed it. Indeed, it appears that Kenny J., as the chairman for the Report of the Committee on the Price of Building Land (1974), participated in the majority report, expressing the view that a function need not satisfy the *McDonald* test, but could still be the administration of justice under Article 34. This view appeared to underpin the recommendation in the report that the decision on inclusion of land in a designated area was a function which was required to be performed by the High Court.

76. Nevertheless, the five-part test in *McDonald v. Bord na gCon* has been repeated in a number of subsequent cases, albeit that there are few (if any) examples of legislative provisions which have fallen foul of it. Indeed, it may be that the decision of Kenny J. on the 1958 Greyhound Industry Act, so rapidly overturned by the Supreme Court, is one of the very few. It may be that the merit of the test (if it is such) was found to lie in its restrictive effect rather than any jurisprudential precision. It is, moreover, significant that this was not the only issue decided in *McDonald v. Bord na gCon* nor the proposition for which it is most commonly cited. In the Supreme Court, Walsh J. held that the exercise of the statutory power carried with it the obligation that the investigation be objective and carried out in accordance with the dictates of natural justice. This illustrates the fact that the development of the law in relation to the nature of the judicial power must be seen against the background of the increasing extent to which the law found that, even if the procedure fell outside the area of the administration of justice, the actions of administrative bodies in question were subject to judicial review which, over the succeeding decades, has become increasingly searching.

77. A further important case in the sequence is *Keady*. The plaintiff was subject to disciplinary proceedings under the Garda Disciplinary Regulations 1971, and the Commissioner decided to dismiss him from the force. The plaintiff challenged the decision on a number of grounds, including an argument in reliance on the decision *Re Solicitors Act 1954* and the far-reaching effect test. It was argued that the decision to dismiss the plaintiff was a judicial function. Counsel argued that the decision to dismiss the plaintiff amounted to the administration of justice within the meaning of Article 34 and Article 37 and, because of its far-reaching consequences, it could not be considered to be the exercise of a limited function or power under Article 37. Only the State, by means of the courts being an organ of the State, could dismiss a member from An Garda Síochána. Significantly, counsel for the State argued in reply that such an argument would put at risk a number of bodies, *e.g.*: the Valuation Tribunal; the decision-making procedures within the Department of Social Welfare; the decisions of the Legal Aid Board; and, notably in the present context, the decisions of the Employment Appeals Tribunal. The Supreme Court unanimously dismissed the claim. McCarthy J. considered that dismissal from An Garda Síochána did not satisfy the *McDonald v. Bord na gCon* test. He also observed that it was hardly intended by the court in *McDonald v. Bord na gCon* to exclude the matters identified by Kennedy C.J. in *Lynham v. Butler (No. 2)*, or indeed Davitt P. in *State (Shanahan)*. He was reluctant to attempt a definition of judicial power and considered it easier, if less intellectually satisfying, to say in a given incidence whether or not the procedure was an exercise of such power rather than to identify a comprehensive checklist for that purpose save, however, that the requirement to act judicially was not an indicator of an exercise of the judicial power. This approach harked back to the descriptive approach of Kennedy C.J. in *Lynham v. Butler (No. 2)*. McCarthy J. referred, in this regard, to the role of the court as a matter of history in the supervision and disciplining of solicitors. O'Flaherty J., concurring, went further. He considered that

the case of solicitors "must be regarded as exceptional and, perhaps, anomalous and owes a great deal to the historic fact that judges were always responsible for the decision to strike solicitors off the roll".

78. *Keady* represents, therefore, a significant retreat from the rigorous and demanding approach exemplified by *Re Solicitors Act 1954* and the judgment of Kenny J. in *McDonald v. Bord na gCon*. The *McDonald v. Bord na gCon* test was treated as one guide to the identification of the judicial function which was, in any event, largely a matter of impression. The decision in *Re Solicitors Act 1954* was confined to its own facts and treated as somewhat anomalous. Part of the justification for this more relaxed attitude to the significant decision-making functions of non-judicial bodies may, perhaps, be detected in the reference by O'Flaherty J. to the line of authority establishing that:-

> "there is now in place a well-charted system of administrative law which requires decision-makers to render justice in the cases brought before them and sets out the procedures that should be followed, which procedures will vary from case to case and from one type of tribunal to another; and which, of course, are subject to judicial review".

B. <u>The Act of 1977</u>

79. While *Keady* post-dates the enactment of the Unfair Dismissals Act 1977, it represents a point in the trajectory of the law that was already discernible in 1977. The question of employment law dealt with in that statute, and the wider context of industrial relations law, raises, in particular, issues in the context of the distinction between judicial bodies and administrative tribunals. The history of the interaction of the common law and the field of industrial relations is particularly strained. The individual, contractual, focus of what was at one time called the Law of Master and Servant was not easily reconciled with the collectivist approach of the developing trade union movement. Trade unions, with

some justification, were resentful of the decisions of the common law courts in the U.K. of the late 19th and early 20th century, and tended to favour the use of their developing political power to obtain statutory amendments designed to reverse unfavourable decisions and strengthen the role of unions and their capacity to protect workers by collective action. In that respect, the Trade Disputes Act of 1906 was a response to and reversal of cases like the Taff Vale Case (*Taff Vale Railway Co. v. Amalgamated Society of Railway Servants* [1901] 1 K.B. 170) and others. The difficulties caused by industrial disputes were to be addressed by negotiation, arbitration, and conciliation, and if the law was to be involved, it was to establish specialist bodies to assist in that task, such, indeed, as the Labour Court established by the Industrial Relations Act 1946.

80. However, during the 20th century, there was an increasing international trend towards providing individual remedies for employees in respect of disputes concerning employment which would be binding and enforceable as a matter of right. This was obviously in the interest of employees, but was perceived as of general benefit to employers, and the public also, in that it tended to reduce the possibility that individual disputes about employment could create damaging general industrial disputes. As D. Ryan, *Redmond on Dismissal Law* (3rd edn., Dublin: Bloomsbury Professional, 2017) pp. 267 to 270 noted, recommendations of the International Labour Organisation and developments in the law of what was then the E.E.C. influenced the development of Irish law towards providing individual legally enforceable remedies for employment disputes, particularly relating to redundancy and dismissal.

81. The development of statutory bodies for the resolution of disputes, and the particular question of bodies having powers to provide remedies for individual employees in respect of redundancy and dismissal, poses obvious problems with the common law which distinguishes sharply between the judicial function for the determination of individual disputes and the performance of functions described as administrative, albeit that such

functions may have been required to be performed judicially. Many of the cases from common law countries, including the Australian cases, some of which were noted in the judgments in *Lynham v. Butler (No. 2)*, that considered the extent to which certain industrial relations bodies could be considered to exercise judicial power arose in this precise context.

82. Two cases which reached the Judicial Committee of the Privy Council during this period illustrate the type of issues which arose, and the developing international trend towards remedies provided by statute which could be enforced before non-judicial tribunals. In *Saskatchewan Labour Relations Board v. John East Ironworks* [1949] A.C. 134, the Privy Council reversed the finding of the Court of Appeal of Saskatchewan and held that a labour board empowered to order reinstatement of an employee, but to do so not just by the application of legal principles to ascertained facts, but by considerations of policy, was an administrative tribunal rather than a court. The Privy Council considered that there was "no better approach than to ask whether the dispute was of the sort that required determination by judges". This was to find an echo in McCarthy J.'s observation in *Keady* that the matter is really one of impression rather than definition. Later again, in *United Engineers Workers' Union v. Devanayagam* [1968] A.C. 356, the Privy Council, by a narrow majority, overturned the decision of the Supreme Court of Ceylon that a labour commissioner with power to order reinstatement of a dismissed employee was exercising the judicial power and ought to have been appointed by the judicial services commission. In significant contrast to the provisions of the Act of 1977, the commissioner was empowered to make such order as he considered just and equitable and the majority, while acknowledging the matter was not free from difficulty, considered that the general function of the Act was the resolving of industrial disputes rather than to give effect to legal rights. In an interesting judgment, the minority (Lord Guest and Lord Devlin) considered that judicial power was a concept capable of clear delineation and had to be

since it was the basis of a constitutional requirement. Relying in part on the Australian cases of *Huddart, Parker & Co v. Moorhead* (1908) 8 C.L.R. 330 and *The Waterside Workers' Federation of Australia v. J.W. Alexander Limited* (1918) 25 C.L.R. 434, referred to in *Lynham v. Butler (No. 2)* set out at paras. 54 and 55 above, they concluded that the judicial power was concerned with "the ascertainment, declaration and enforcement of the rights and liabilities as they exist or are deemed to exist at the moment the proceedings are instituted", whereas the arbitral power in industrial disputes was to enforce what, in the opinion of the arbitrator, ought to be the respective rights and liabilities of the parties, which test they considered was satisfied. These cases illustrate the fact that the resolution of employment disputes in the field of industrial relations poses particular difficulties of definition and, moreover, that no clearer approach has emerged in the international jurisprudence than is to be found in the Irish case law.

83. The Unfair Dismissals Act 1977 was a significant development in Irish law. While it followed the precedent of the Redundancy Payments Act 1967 and, indeed, transferred the jurisdiction of the Redundancy Appeals Tribunal created by that Act to the Employment Appeals Tribunal created by the 1977 Act, it was of much wider impact. The Rights Commissioners and the Employment Appeals Tribunal had power to resolve disputes under the Redundancy Payments Act 1967, the Minimum Notice and Terms of Employment Act 1973, and the 1977 Act itself. The Act defined unfair dismissal and provided for redress by way of reinstatement, reengagement, or compensation not exceeding 104 weeks' remuneration. Regulations could be made governing the procedure to be followed before the tribunal, the representation of parties attending, and the making of an award by the tribunal of costs and expenses. Section 10(4) of the Act provided for an appeal to the Circuit Court from a determination of the tribunal. Section 15 of the Act maintained the right of a person to recover damages at common law for unfair dismissal, but also provided that the initiation of a claim under the Act barred an entitlement to

recover damages at common law and that proceedings at common law, similarly, precluded a claim for redress under the Act. Proceedings before a Rights Commissioner were to be conducted other than in public (s. 8(6)) but the E.A.T. was to sit in public. By the incorporation of the provisions of s. 21(2) of the Industrial Relations Act 1946, and s. 39(17) of the Redundancy Payments Act 1967, the E.A.T. was given power to summon witnesses and to order them to produce documents and was given power to take evidence on oath, and a failure or refusal to give evidence was an offence. Witnesses before the E.A.T. had the same privileges and immunity as a witness before the High Court.

84. For present purposes, the most noteworthy feature of the Act was its procedure for enforcing the determinations of the tribunal. Section 10(1) of the 1977 Act provided for the procedure that, if an employer failed to carry out a determination of the tribunal within six weeks from the date the determination had been communicated, the Minister for Labour could, if he or she thought it appropriate, institute and bring proceedings to the Circuit Court for redress under the Act. Such proceedings would be a *de novo* hearing, and the Circuit Court was free to make such order as it thought fit within the jurisdiction created by the Act. Subsequently, however, s. 11(3) of the Unfair Dismissals (Amendment) Act 1993 provided for enforcement of a determination of the tribunal by application to the Circuit Court, by either the employee or the Minister and it was provided that the court:-

> "shall, on application to it in that behalf … without hearing the employer or any evidence (other than in relation to the matters aforesaid) make — (I) an order directing the employer to carry out the determination in accordance with its terms".

If the determination directed reinstatement or reengagement, and the court considered it appropriate to do so, the court could make an order of compensation in lieu. The "matters aforesaid" referred to were that a determination had been made and had not been complied

with within the statutory period. This mechanism, with the substitution of the District Court for the Circuit Court, appears to be the precedent for the procedure applicable generally under the 2015 Act.

85. It should be noted that, since its enactment, questions have been raised about the compatibility of the 1977 Act with the Constitution, both in the terms of the Act as originally drafted, and as amended in 1993. Thus, the most recent edition of *Kelly: The Irish Constitution* (5th edn., G.W. Hogan, G.F. Whyte, D. Kenny, & R. Walsh eds., Dublin: Bloomsbury Professional, 2018) ("*Kelly*"), at para. 6.4.100, states:-

> "The former Employment Appeals Tribunal (which was not composed of judges) was established by s 39 of the Redundancy Act 1967 as an amended by s 18 of the Unfair Dismissals Act 1977. Under the latter Act, the Tribunal was empowered, inter alia, to award compensation to dismissed employees up to a maximum sum of an amount representing two years' salary. The tribunal would appear to have been administering justice and it must be an open question as to whether its powers were 'limited' within the meaning of Article 37. In *Government of Canada v Employment Appeals Tribunal*, McKenzie J drew attention to these potential constitutional difficulties and given that the powers of the Employment Appeals Tribunal are now exercised by adjudication officers pursuant to the Workplace Relations Act 2015, it might be thought that similar constitutional concerns may exist in relation to the powers of these officers."

86. Professor James Casey's *Constitutional Law of Ireland*, noted that the possible constitutional difficulties appear to have influenced the form of the Unfair Dismissals Act 1977. He considered that the power conferred on the E.A.T. appeared judicial, and plainly analogous to the courts' traditional jurisdiction over contracts, and that it was open to question that it could be said to be limited. However, the machinery for enforcement involved an application to the Circuit Court. The Circuit Court was not bound by the

E.A.T.'s determination either as to entitlement to redress or the form it should take. These observations, it should be said, do not appear to have taken account of the terms of the Unfair Dismissals (Amendment) Act 1993. However, he went on to consider the jurisdiction of the Labour Court under the Employment Equality Act 1977. The Labour Court was empowered to make an order for the enforcement of an earlier determination and failure to carry out such an order was a criminal offence. He commented that it was yet to be determined if the limitation on the power of the E.A.T. to make binding orders rendered it constitutional.

87. A similar analysis was offered in D.G. Morgan, *The Separation of Powers in the Irish Constitution* (Dublin: Round Hall Sweet & Maxwell, 1997). Professor Morgan considered that the provisions of s. 10 of the 1977 Act requiring enforcement by the Circuit Court at the suit of the Minister where the Circuit Court was free to make its own decision, after a full hearing, was sufficient to "probably make it constitutional". Again, this passage does not address the effect of the amendment made in 1993. By contrast, however, he considered (at p. 106) that the Labour Court's authority under the Employment Equality Act 1977 may fail the essential test (which is whether the non-court's initial decision is final or whether it can be re-agitated or reheard before a court) and concluded that it was quite possible that the making of an order such as that authorised by the Employment Equality Act 1977 by a body other than a court was unconstitutional.

88. It is somewhat puzzling that different methods of enforcement were provided for under closely-related legislation operating in the same field, and more surprising, perhaps, that the evolution of the legislation has been towards reducing almost to vanishing point the degree to which the determinations of the respective tribunals in the field of labour law were capable of review or appeal to a court, even though those features had been identified as probably essential to the constitutional validity of the structure. The view expressed by these distinguished authors has not been doubted in any of the subsequent

case law, and no decision can be pointed to which suggests a different analysis. Nevertheless, the legislative evolution has been consistently to expel from the structure any possibility of review or confirmation by a court until, eventually, the 2015 Act adopted a single minimalist structure of a decision by an authorised officer capable of appeal to the Labour Court (with an appeal on a point of law to the High Court), enforceable by *ex parte* application to the District Court, whose powers were limited to considering if the determination had indeed been made and not complied with within 56 days of notification and, in cases of where reinstatement or reengagement had been ordered, considering whether compensation should be ordered instead. It is this feature of the Act, however, alone, which the High Court found meant that the procedure did not satisfy the fourth limb of the *McDonald v. Bord na gCon* test and thus was not repugnant to the Constitution.

C. The *McDonald v. Bord na gCon* Test

89. Much of the recent case law has involved a close, if unrewarding, analysis of the five-part test in *McDonald v. Bord na gCon*, and this case was argued both in the High Court and in this court by reference to it. But it is, I believe, helpful to look at the issue in a much broader perspective. The Irish Constitution has, since 1922, entrenched a tripartite separation of powers. However, although Montesquieu drew on what he believed to be the example provided by the British system, that system, large elements of which we inherited in 1922 and maintained thereafter, did not have a clear-cut separation between the powers of the executive, legislative, and judicial branches, and the system established under the Irish Constitution, although more rigorous, has nevertheless provided for an interaction and interdependence between the branches. In our system, where the executive sits in parliament, the executive normally controls the legislature and has the power of appointment of the judiciary. Legislation, for its part, can alter the common law

and amend or abolish causes of action or create new ones. Neither the 1937 Constitution nor its predecessor contained any definition of the judicial power (or, indeed, the executive or legislative powers) and has not been interpreted in such a way that each branch may only exercise powers defined as appropriate for that branch. Courts sometimes perform tasks which can be considered administrative, such as licensing, or wardship, or certain functions under the Companies Acts. For example, under s. 54(7) of the Fisheries Act 1980, it was possible to appeal to the High Court from an order of the Minister for the Marine designating an area as suitable for aquaculture if he considered it in the public interest to do so, which does not appear to be an intrinsically judicial task or one which gives rise to any issue of law: *Courtney v. Minister for the Marine* (Unreported, High Court, O'Hanlon J., 21st of December, 1988). On the other hand, bodies established by legislation or by the executive may be required to perform functions apparently judicial in nature, or at least be required to act judicially in certain circumstances. There are areas which move between the branches. Originally, the questions of restrictive practices and monopolies were seen as administrative functions requiring economic and policy expertise. With the passage of the Competition Act 1991, such matters have become justiciable.

90. In *Lynham v. Butler (No. 2)*, Kennedy C.J. stated that the constitutional assignment of the administration of justice of the courts and judges would be jealously guarded. However, the subsequent decisions of the courts have produced few examples of legislation being struck down as a wrongful exercise of or interference with the judicial power, and the case law has shown little enthusiasm for an expansive reading of that power. Increasingly, the decision in *Re Solicitors Act 1954* appears as an outlier rather than establishing a principle. By the same token, the fears expressed, even in *Lynham v. Butler (No. 2)*, that the other branches would seek to remove or whittle away the courts' jurisdiction have not been realised either. As counsel for the Attorney General pointed

out, the 20th century has seen a steady expansion of the reach of the law and, accordingly, of the courts. The great expansion in the role of the State in the 20th century, and the transfer by the legislature of functions, which previously might have been considered to be matters for the executive branch alone, to newly-created statutory bodies, and the concurrent general expansion of the power of judicial review of administrative action, has meant that the boundaries of law's empire, as it were, extend much further than might have been contemplated in 1922 or 1937. Looked at functionally, therefore, rather than from the perspective of legal theory, the decisions of the courts in this field have tended to a pragmatic outcome in which the assignment of the administration of justice to the judicial branch has not operated to hinder these developments, even if that has not been achieved by reasoning which, to borrow the language of McCarthy J. in *Keady*, is not always necessarily intellectually satisfying or elegant, although, in that regard, it must be said that the approach of the case law is firmly in line with international comparators.

91. It is worth recalling that Kenny J., in setting out the test in the High Court in *McDonald v. Bord na gCon*, would have applied it in a very broad way to find that the powers of Bord na gCon to investigate complaints and make an exclusion order enforceable by a racecourse operator nevertheless constituted the administration of justice. However, almost from the time of the decision of the Supreme Court in that case, the test, while remaining in a form identical to that advanced by Kenny J., has been interpreted and applied narrowly, with the effect that few, if any, provisions have fallen foul of it. To that extent, it perhaps owes its longevity to the fact that, by emphasising the historical, it tends to exclude novelty and thus achieves a desired balance and avoids any undue restriction on the capacity of the State to provide for a range of decision-making functions with particular expertise, or informal procedures, or both. However, the treatment of the criteria in *McDonald* as a checklist which must be minutely and precisely complied with risks missing the wood for the trees. It also encourages an approach to drafting that could

remove proceedings from the field of the administration of justice because of some small, and in truth insignificant, deviation from the checklist. That would be a triumph of form over substance. But, whatever the conceptual difficulties of delineating the precise borders of the judicial function, the Constitution requires that there be an area that is and will remain the exclusive domain of the administration of justice in courts by judges, or in Article 37 tribunals. It is important to apply any test, therefore, with an understanding of the substance it is meant to determine.

92. It may be preferable, therefore, as indicated by McCarthy J. in *Keady*, to treat *McDonald v. Bord na gCon* as part of a general approach to the issue alongside, rather than replacing, the observations in *Lynham v. Butler (No. 2)* and those in *State (Shanahan)*, and as indicating general features which tend to show the administration of justice, rather than as a definite and prescriptive test. As one commentator observed of the test, it:-

> "provides only a descriptive summary of the everyday workload of the contemporary court. An *ex post facto* overview of the average judicial caseload, it does not offer a suitably prescriptive analysis of the core concepts of the judicial function. The logic of Kenny J.'s position is hopelessly circular, relying on the current nature of the court's activities to define its function into the future. The *McDonald* criteria reflect the judge's estimation only of what the courts do, rather than what they ought to do. In this, it owes more to historical happenstance than conceptual coherence." (E. Carolan, *The New Separation of Powers: A Theory for the Modern State*, (Oxford: Oxford University Press, 2009)).

93. The features in *McDonald v. Bord na gCon* are closely linked and, to some extent, overlap. They do identify something central to the administration of justice and may be understood as indicating features of importance rather than establishing a statutory checklist. Some, indeed, of the features may be more important than others, and it may

also be relevant to consider not merely whether the provision satisfies the particular heading, but also to assess the extent to which it does so.

94. The first, second, and third features are closely related since they identify a dispute about legal rights, its resolution, and determination. The fourth is a logical extension of the third, since the resolution of the dispute must not be dependent upon the agreement of the parties, but must be capable of enforcement in cases of refusal of the losing party to comply. The fifth feature is, however, quite different. Viewed and applied narrowly, it has the effect of confining judicial power to the areas of the traditional causes of action and proceedings and fossilising the administration of justice in the form of the business of courts in the mid-20th century. The novelty of any new provision (which is, after all, the *raison d'être* of any new scheme) becomes a shield against challenge, no matter how completely the provision might fit the preceding limbs of the test. This feature can give rise to a rather sterile debate as to the extent to which it is necessary that the order made must be characteristic of the courts of this country. In this case, for example, it might be argued that an order for reinstatement is merely a type of order of specific performance, which is a characteristic feature of the courts of equity. On the other hand, it is argued that such an order is a clear departure from the traditional law, which held that, almost without exception, a contract of service could not be made the subject of an order for specific performance. It is difficult to see either argument as compelling.

95. I think this feature is best understood in a broader sense and as emphasising the importance of the existing jurisdiction of the courts, and that any provision subtracting from that jurisdiction, or creating a parallel jurisdiction which might render the courts' traditional jurisdiction defunct, is one which should be closely scrutinised by the courts for compatibility with the Constitution. A distinctive feature of the courts system established by the Irish Constitution is that there is no structural distinction between administrative courts and the ordinary courts. The ordinary courts system, moreover,

deals with every type of dispute, whether as to breaches of the criminal law, public law, or private law issues. It is noteworthy that, although in 1937 there were Continental models which were considered and available, the Constitution did not create a constitutional court to exercise the jurisdiction explicitly conferred under the Constitution to declare acts of legislation void, but — deliberately, it seems — assigned that role to the ordinary courts, which dealt with the full range of disputes, both public and private, and which, indeed, had full and original jurisdiction. It may be speculated that this assignment of jurisdiction in respect of possible repugnancy was, in part, a recognition that the legal and analytical skills, and courtroom procedures, utilised to resolve disputes of public and private law were considered to be beneficial, and that respect for the decisions of the courts on such common law matters cross-subsidised, as it were, the constitutional adjudication and, perhaps, *vice versa*. There is, moreover, a critical mass required for the functioning of the courts system, which normally involves a breadth of subject matter. It is not surprising, therefore, that subtraction from such jurisdiction would be scrutinised closely, not just because of the fear of the incremental whittling away of the jurisdiction of the courts, and thus the administration of justice, to which Kennedy C.J. alluded in *Lynham v. Butler (No. 2)*, but also because of the possible limitation of the capacity of the courts to perform the role assigned to them by the Constitution and which involves a range of jurisidictions. While there has never been a suggestion that the whittling away of court jurisdiction was desired by the legislative or executive branches, constitutional provisions, like constitutional rights, as Ó Dálaigh C.J. put it in *McMahon v. A.G.* [1972] I.R. 69, are established not merely to deal with the problems of the past, but also to guard against the improbable — but not to be overlooked — perils of the future.

96. The administration of justice is not, however, to be defined by, or limited to, those areas traditionally dealt with by the courts. The proper scope of the administration of justice is

not determined simply by analogy with what was done by the courts as a matter of history, and still less by the form of orders traditionally made by them. It may be possible to say, even if no single test can be advanced, that an area is something intrinsically within the scope of the administration of justice. The existence of boundary disputes does not prevent agreement that some areas are definitively within one country or another. In any event, the Constitution establishes an area which is the administration of justice, and the courts must uphold that command. Even if it is considered an impossible task, as a matter of pure theory, to define with precision the exact boundaries of the administration of justice or to offer a single infallible litmus test, we can still identify areas which can be agreed to be part of the administration of justice. That is what the first four features of the *McDonald v. Bord na gCon* test, and the broader observations in *Lynham v. Butler (No. 2)*, and *State (Shanahan)* are directed towards. It would be a narrow and self-defeating approach, however, to find that a provision that comprehensively satisfied these features was nevertheless not the administration of justice because the form of order made in the proceedings was something novel. I would, therefore, be reluctant to give decisive weight to this feature, and would, in any event, take a reasonably broad view of what it requires.

97. Turning to this case, it is appropriate to deal, at this point, with the cross-appeal of the Attorney General, which sought to overturn Simons J.'s finding that the fifth limb of the *McDonald v. Bord na gCon* test was satisfied in this case. It was argued that the reliefs available under the 2015 Act incorporating the Unfair Dismissals Act 1977 left intact the traditional common law action for wrongful dismissal, and created a remedy that was entirely novel and independent of the contract of employment. The relief available was not merely innovative but included reliefs which, as a matter of common law, could not be ordered in the context of an employment relationship.

98. This issue is one of focus and degree. Looked at up close, the differences between a claim for unfair dismissals in the W.R.C. and an action in court are significant. But, this risks elevating the unsurprising fact that new legislation effects a change in the pre-existing law into a decisive test. If we view the picture with some distance and perspective, it appears to me that Simons J. was correct. First, it is necessary to recall that the parties agree that the first three limbs of the *McDonald v. Bord na gCon* test are satisfied. A jurisdiction is established to make binding determinations of legal disputes between private parties according to law. That, in itself, is normally a core business of the courts. Once invoked by a claimant, the jurisdiction is established. An employer is not free to decline to participate, and if he or she refused to participate, that does not prevent the case proceeding or a decision being made. The adjudication officer is, by statute, independent in the performance of his or her functions (s. 40(8)), has power to compel the attendance of witnesses to give evidence (s. 41(10)), or provide documents, and failure to comply is an offence (s. 41(12)). The adjudication officer gives the parties an opportunity to "*be heard*" and to "present … any *evidence relevant* to the complaint or dispute" (s. 41(5)), and makes "a *decision*" in relation to the complaint "*in accordance with the relevant redress provision*" (s. 41(5)). A complaint may be either that there has been a "*contravention of a provision*" specified in Part 1 or 2 of Schedule 5 or a dispute as "to the *entitlements* of the employee *under an enactment* specified in Part 3 of Schedule 5" (s. 41(2)). (*All emphases added.*) The decision of the adjudicating officer is binding on the parties, and there is mechanism for enforcement under s. 43(1) to which it will be necessary to return. These provisions create a machinery for the determination and decision by an independent body of complaints seeking relief, as a matter of law, and which permits the adjudication officer to make a binding decision on such complaint which can be enforced against the losing party. In these respects, the process is indistinguishable from the determination of a legal dispute before a court. Indeed, it was

accepted in these proceedings that the proceedings in the W.R.C. amounted to a "determination of … civil rights and obligations" for the purposes of Article 6 of the E.C.H.R. In that context, the fact that the Unfair Dismissals Act 1977, for example, provides for the remedy of reinstatement and reengagement does not take this procedure outside the category of administration of justice. In the first place, an order of compensation under the Act is an order which, as a matter of history, was made by courts, and redress by way of reinstatement or reengagement is akin to an order of specific performance which is a familiar type of order made by the courts, even if, as a matter of common law, it would rarely — if at all — be made in the context of an employment relationship. If, for example, the 1977 Act had merely implied into all contracts of employment an entitlement not to be unfairly dismissed, and permitted a court to make orders of reinstatement or reengagement, such proceedings could not be said to be incompatible with or alien to the functions of a court. The form of order made by a decision pursuant to the 2015 Act is a final order determining the dispute and awarding redress of a kind known to the courts. That is, in my view, sufficient to comply with what is addressed under the fifth limb of the *McDonald v. Bord na gCon* criteria.

99. I would not, however, place much reliance on the fact that, under the 1977 Act, all these orders may be made by the Circuit Court on appeal, or by the District Court on an application for enforcement. This, perhaps, does show that there is nothing fundamentally incompatible with the traditional forms of court procedure in permitting such orders to be made. But, it does not show that these orders were orders which, as a matter of history, were traditionally made by courts. I think that inquiry must be made outside the Act giving power to make the orders. Otherwise, it would lead to the somewhat curious conclusion that the Act did not satisfy this aspect of the test in 1977 just after it was enacted, but did at some later point. As already indicated, I do not think this aspect of the criteria should be applied with undue precision. In *Cowan v. A.G.*,

Haugh J. was prepared to find that provision satisfied by the fact that the election court hearing a claim under the Municipal Corporations Act 1882 was doing the same work as the High Court had when hearing election petitions prior to 1882. However, as has been pointed out, jurisdiction to hear and determine election petitions was, itself, only conferred on the High Court in 1868; prior to that, all claims were heard by Parliament itself. The historical test is not, therefore, an infallible guide to what is or is not intrinsically a judicial function and the test must be applied with some flexibility. I consider that Simons J. was correct to conclude that it was satisfied here.

100. This brings us to the ground upon which Simons J., not without some doubt, found that a proceeding such as a claim for unfair dismissal under the 2015 Act did not constitute the administration of justice because of the provisions of ss. 43 and 45 in relation to enforcement. Section 43, it will be recalled, provided that if an employer failed to carry out the decision of the adjudication officer within 56 days from the date on which notice of the decision was given to the parties, the District Court, on the application to it by either the employee or the commission or with the consent of the employee, shall:-

> "without hearing the employer or any evidence (other than in relation to the matters aforesaid) make an order directing the employer to carry out the decision in accordance with its terms".

The only matters to be established before the District Court in such an application would be the making of the decision and the fact that such a decision had been made and notified in writing to the parties more than 56 days before the application. If these matters were established, then the District Court is obliged to make the order sought. The only discretion available to the court is that under s. 43(2), whereby in a case where reinstatement or reengagement had been made, the District Court could, in lieu of an order directing the employer to carry out that decision in accordance with the terms, make an

order directing the employer to pay compensation of such amount as was just and equitable having regard to all the circumstances.

101. It is clear that this procedure is quite different from the enforcement mechanism available in relation to a court judgment. The decision of the authorised officer/W.R.C. is not enforceable of its own force. An application must be made to another entity — the District Court — to render the decision an order capable of being enforced, and it becomes enforceable, then, as an order of that court. Furthermore, the application for enforcement can be made by someone other than the party who obtains the decision, such as a trade union or, indeed, the Commission itself. While the decision of the authorised officer/W.R.C. becomes enforceable almost automatically, it is still necessary to satisfy certain proofs and, in the case of redress in the nature of reinstatement or reengagement, the District Court has certain discretion, although normally, it seems, in ease of an employee dealing with a recalcitrant employer, rather than designed to provide any assistance to the defaulting employer, who, after all, does not receive notice of the proceedings, and cannot attend or make submissions. Nevertheless, such an application may involve some evidence and independent decision-making, although the District Court cannot alter the determination of liability but may only select a different method of redress and assess that compensation. These are important features, although it must be said that the procedure is very far removed from the original enforcement provisions in the 1977 Act which required, in effect, a full rehearing before the Circuit Court. This, it will be recalled, was the feature which, at least in the view of academic commentators, was important in saving the provision from unconstitutionality.

102. Sections 43 and 45 can be usefully compared with the original procedure provided by s. 10 of the 1977 Act. The superficial structure of enforcement by separate court proceedings is retained, but in substance almost all capacity for independent decision-making has been removed, and, instead, an enforcement mechanism established that is as

close to automatic as possible. Indeed, in doing so, the Act may create a certain problem. If the proceedings in the W.R.C. are not an administration of justice, then the proceedings in the District Court under ss. 43 and 45 may be viewed as a separate and distinct administration of justice. It is not impossible to have proceedings where the issues to be determined are narrow, and where, on proof of a very limited number of matters, an order may even be mandatory. For instance, in *Dublin Corporation v. Hamilton* [1999] 2 I.R. 486, Geoghegan J. found s. 62 of the Housing Act 1966 — which limited District Court intervention in an eviction from a local authority property to verifying that the local authority had furnished the requisite proofs — to be constitutional. However, it is unusual to permit such an order to be made adverse to another party on an *ex parte* basis with no capacity for the party affected to challenge or dispute the claim, or even know about it. See, in this regard, the judgment of this court in *D.K. v. Crowley* [2002] 2 I.R. 744, where the court held that the provisions of s. 4(3) of the Domestic Violence Act 1996 were unconstitutional in that the section permitted barring orders to be made *ex parte* and continued without a hearing, a system which breached the subject of the barring order's constitutional rights to fair procedures. In *V.P.G. Inc. v. Insurco International Ltd.* [1995] 2 I.L.R.M. 145, McCracken J. held that a power under the Rules of the Superior Courts to make an order *ex parte* had to be understood as giving a right to the affected party to seek to set it aside, even if there was no express provision in the Rules to that effect. See also: *Adams v. D.P.P.* [2001] 1 I.R. 47; and *Adam v. Minister for Justice* [2001] 3 I.R. 53. The *ex parte* nature of the enforcement procedure is certainly problematic, but the Act was not challenged on that basis. Instead, reliance was placed on the fact that the procedure was so automatic that, although a court procedure was provided for, that did not permit the affected party to participate.

103. If this issue was whether the enforcement procedures under ss. 43 and 45 were analogous to the method of enforcement of a court decision, then the distinctions identified above

could be of importance and, perhaps, decisive. However, the issue to which this heading of the criteria is addressed has to be seen in the broader context of the function sought to be defined, or at least described, by it. The question of enforceability of a decision is, indeed, a significant clue to its legal nature, since a decision which depends for its enforcement on the agreement of the parties, or on the decision of another body (indeed, a court) which can, moreover, decide whether or not to enforce it depending on whether it is, itself, satisfied that the decision is correct is a significant distance from the type of automatic enforceability a litigant achieves when they succeed in court. Even then, a pragmatist might observe that the vast majority of E.A.T. decisions pre-1993 determined disputes and were complied with without any formal enforcement, and, to that extent, were similar — if not indistinguishable — from court decisions.

104. The enforcement procedure provided under ss. 43 and 45 requires careful analysis. Structurally, it maintains the feature of resort to court for enforcement of the decision in the case of a failure to comply. However, enforcement is almost automatic, does not permit involvement by the losing party, and, on the presentation of formal proofs, is mandatory. While a court is the vehicle for enforcement, it is not employed for its capacity to administer justice fairly between opposing parties by reference to the law, but, rather, for access to the enforcement mechanism. The court process is conscripted in aid of enforcement of the decision of the W.R.C. In *In Re Haughey* [1971] I.R. 217 ("*Re Haughey*"), the Supreme Court had to address provisions of the Committee of Public Accounts of Dáil Éireann (Privilege and Procedure) Act 1970 which appeared to permit the Dáil Public Accounts Committee to find a witness guilty of contempt and send him forward to the High Court for punishment. The Supreme Court held that such a reading of the Act could not be consistent with the Constitution because, in the words of Ó Dálaigh C.J., "under the Constitution the Courts cannot be used as appendages or

auxiliaries to enforce the purported convictions of other tribunals" and the same must apply to non-criminal determinations by other tribunals.

105. Looked at in this broader context, I do not think that anyone other than a lawyer, and perhaps a pedantic one at that, would consider the details of the process significant in understanding the nature of the proceedings before the W.R.C. An unsuccessful party who had received an adverse decision from the W.R.C. would, I think, consider themselves in no different a position to a party emerging from the District Court or Circuit Court having lost a case. They would consider that, unless appealed, they would have to comply with the decision, and nearly all would. The evidence on behalf of the respondents was, indeed, that 90% of W.R.C. orders were complied with and only 10% were appealed. A losing party would know that if they did not comply of their own volition, they could be forced to do so by the power of the State. Most importantly of all, they would know that the legal consequences of their actions had been determined and that, unless appealed, that determination was the definitive decision by a body provided by the State and backed by it and which, as a matter of law, had determined their rights and responsibilities in respect of the matter in dispute. The fact that the decision of the W.R.C can be described accurately as a determination is of importance here. The State acknowledges that it is, moreover, a "determination of...civil rights and obligations" to which Article 6 of the E.C.H.R. applies. Determination here connotes decision-making which is definitive. It is the decision of the W.R.C. which is decisive of the legal rights of the parties.

106. I appreciate that Simons J. considered himself bound by precedent to conclude, albeit with evident reluctance, that the limited discretionary power available to the District Court to substitute an award of compensation for an award of reinstatement or reengagement meant that the decision of the W.R.C. was not to be considered an administration of justice but rather, presumably, an administrative function, although one

bound to be performed judicially. The separation of powers is a vital feature of the Constitution and has shown its values in the years since independence. It is, nevertheless, a difficult concept and both the borderline between the respective powers and the area of overlap between them is sometimes blurred and indistinct. In particular, the experience under the Constitution of 1922 showed that a rigid and exclusive definition of the judicial power would, if anything, make more difficult the functioning of the separation of powers, and would not be consistent with the structure of the society established under that Constitution. This is an area where the wisdom of the observation of Oliver Wendell Holmes that, in a constitution, there must be some play at the joints, has particular value. It was in the context of the analysis of the full and original jurisdiction of the High Court that Henchy J. set out the principle of harmonious interpretation of the Constitution and rejected a rigid and literal interpretation of Article 34 in *Tormey v. Ireland* [1985] I.R. 289. The experience of many judges and writers has shown that it is difficult and often impossible to offer a clear prescriptive definition of the nature of the judicial power or, indeed, the executive or legislative powers. However, that does not mean that it does not have some independent content. I consider that if it was possible to conclude that the procedure to determine an unfair dismissal case under the provisions of the 2015 Act did not constitute an administration of justice for the purposes of the Irish Constitution, solely because of these features of the enforcement process, it would be to almost empty the concept of the administration of justice of any independent meaning, and render it an almost formal and circular concept: the administration of justice which is consigned so solemnly to courts established under the Constitution and to judges appointed under it would be no more than business which from time to time is done in those courts.

107. Again taking a broad perspective, it is apparent that the development in 1977 (building on the example of the Redundancy Payments Act) and establishing a separate code of unfair dismissal, and conferring jurisdiction upon an Employment Appeals Tribunal, was

a decisive shift. In the field of industrial relations, it was a move from the collective claim to an assertion of individual rights, and from resolution of disputes by collective action, arbitration, and conciliation, to a form of State-enforced official judicial determination of individual disputes. The issue to be decided was not a matter of discretion, or what was advisable or desirable in the future for industrial peace or good employer/employee relations: it was, rather, a determination of the legal rights of parties in relation to the past events. The deciding body had power to determine, for the purpose of its decision, the facts which had occurred, and to apply the law to such facts. Indeed, if the tribunal failed to do so correctly, it would be open to correction, not because the decision it had reached was unwise or inadvisable, but simply because it was wrong or impermissible as a matter of law. It had power to exercise jurisdiction against the will of a party and ensure that its orders were enforced by the State. It could compel the attendance of witnesses and the production of documents and failure to comply was an offence. It had power to determine disputes according to law and, in the words of Griffith C.J., quoted by Kennedy C.J. in *Lynham*, to "order right to be done in the matter".

108. The Blueprint to Deliver a World-Class Workplace Relations Service (2012) which preceded the enactment of the 2015 Act, and which was exhibited in the proceedings, states that the decisions of the adjudication officers would include the issues identified as relevant to the claim, an explanation why any such issue was not determined, the findings of fact relevant to the issues, a concise statement of the applicable law, the application of that law to the facts found, and the decision (including any award). This is precisely the task of any court required to resolve a justiciable controversy. The fact that, since 1977, a determination in respect of a claim for unfair dismissal, whether favourable or not, precludes pursuit of a claim for wrongful dismissal (and *vice versa*) is a clear illustration of the fact that the respective processes were understood to occupy the same ground. Furthermore, the fact that the existence of an unfair dismissals jurisdiction is understood

to preclude development of the common law of dismissals demonstrates the function the unfair dismissals regime is understood to perform. Approaching the issue with a degree of caution and flexibility consistent with the case law, it is appropriate to acknowledge that not one of these features, on its own, is determinative and it is possible to have many of these features but yet conclude that the process does not amount to the administration of justice. However, here, it is an unavoidable conclusion, in my view, that what was designed and sought to be implemented was a judicial process which was intended to resolve justiciable controversies according to law.

109. A valuable contemporary book written from the perspective of the Trade Union movement, N. Wayne, *Labour Law in Ireland: A Guide to Workers' Rights* (Dublin: ITGWU/Kincora Press, 1980), makes the point very clearly. At p. 98, it is observed that:-

> "unlike the Labour Court and the Rights Commissioner the [*E.A.T.*] is *exclusively* concerned with issuing legal rulings." (*Emphasis in original.*)

At p. 103, it is said:-

> "[*t*]hough the [*Rights*] Commissioners are required to implement the Unfair Dismissals Act, in practice they have come to be regarded as having a broader function – that of settling disputes… By contrast the [*E.A.T.*] will operate *strictly in accordance with legal principles*." *(Emphasis added.)*

In my view, this is a correct analysis. In terms of the nature of the process, the procedure to be followed, the issue to be determined, and the manner in which it was to be determined, whether viewed from the perspective of abstract legal analysis, or the more pragmatic and functional vantage point of the persons made subject to it, it is plain that the process set out was intended to be a judicial process. The question of the method of enforcement becomes critical therefore. Under the 1977 Act, there was a cumbersome process which allowed not just for a full appeal to the Circuit Court, but, moreover, required such a rehearing even in cases where there had been a refusal to comply with the

determination of the tribunal. Such a procedure cannot be explained as required by considerations of efficiency, and it seems plain, as the commentators observed, that the purpose of the enforcement procedure, initially at the instance of the Minister, was to establish a marked distinction from the administration of justice, and protect against constitutional frailty. Whether or not the extended enforcement procedure under the 1977 Act had the effect that the entire procedure was not the administration of justice (something on which I express no view), I do not think that the almost automatic enforcement procedure under the 2015 Act can have the same effect. Instead of interposing a full hearing by a court with the effect, and reality, that the order enforced is that of the Circuit Court and not that of the tribunal, the court process is commandeered to provide for near-automatic enforcement of the determination of the adjudication officer or Labour Court. In my view, the function of the W.R.C., and the Labour Court on appeal, is the administration of justice. It is not coincidental that the parallel jurisdiction in the U.K. is conferred upon a tribunal understood to be performing a judicial function and part of the judicial system.

D. <u>Limited Functions and Powers</u>

110. The fact that the exercise of the jurisdiction by the W.R.C. constitutes an administration of justice does not, however, mean that it must be performed by a court. Article 37 is framed in negative terms:-

> "nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature."

Although the Article does not define either the area of administration of justice or the subset covered by this saver, it is, in my view, clear that justice may be administered by bodies which are not courts, and by persons other than judges in non-criminal cases. However, such exercise must constitute the exercise of limited functions and powers of a

judicial nature. The only judicial consideration is that contained in the judgment of Kingsmill Moore J. in *Re Solicitors Act 1954* set out at para. 67 above.

111. These observations have not been the subject of much, if any, judicial scrutiny for the subsequent half-century and more, and have had the effect of significantly limiting the scope of Article 37, with the result that much of the case law has been determined by reference to the basic distinction between the administration of justice and administrative functions. It is, perhaps, somewhat surprising that it has been accepted uncritically, given that the decision of the Supreme Court in *Re Solicitors Act 1954* has been treated as increasingly anomalous. However, this narrow conception of the scope of Article 37 was analysed and criticised by Professor James Casey in 'The Judicial Power under Irish Constitutional Law' (1975) I.C.L.Q. 305 as follows:-

> "This exegesis of the word "limited" is one of the crucial aspects of the case, yet no real reasons are offered in support of it. One might think it possible to hold that the context suggests a different meaning, *viz*. "restricted in number or as to subject-matter". This construction would give the Oireachtas wider scope for experiment."

Referring to the reference to Article 34.3.4°, Casey notes, at p. 322:-

> "The precise meaning of "limited" in this context has not yet been settled by judicial decision. Consequently the Supreme Court's assertion that "limited jurisdiction" necessarily means something quite different from "limited functions and powers" is difficult to accept."

112. Taken in isolation, there is no doubt that the interpretation of Article 37 accepted as in *Re Solicitors Act 1954* is a possible interpretation of the text alone. It is, however, also possible to interpret the terms of Article 37 more broadly, as argued for by Professor Casey. There are a number of reasons why, in my view, a broader interpretation should, indeed, be taken. First, the plain function of Article 37 is to provide a saver to permit the

exercise of some functions and powers by persons and bodies who are neither judges nor courts under the Constitution. What is required to be performed in courts by judges is the administration of justice under Article 34. It is, and has always been, accepted that there are administrative functions which can be carried out by non-judicial bodies, albeit that they may be required to act judicially and are bound by the rules of constitutional justice. Article 37 was not required to render such functions and powers constitutional. It follows, necessarily, that what Article 37 validates is something which, in the absence of the Article, would be considered an administration of justice and exclusively consigned to the courts, and not a mere component of the administration of justice such as, for example, the right to hear evidence or require the attendance of witnesses. In broad terms, therefore, what Article 37 permits is a State-mandated decision-making function to be exercised by persons other than judges, which suggests a capacity to determine some disputes, at least, conclusively. Whatever Article 37 permits, it must be capable of being the administration of justice which means, at a minimum, a State-supported decision-making function capable of delivering a binding and enforceable decision.

113. Second, the background to Article 37 points to a broader understanding of the text. If the exercise of the powers of the Land Commission and the Revenue Commissioners, to take two of the extant examples considered in 1937, could nevertheless be considered to be "limited" functions and powers capable of being validated by Article 37, then that suggests a significantly broader scope for the application of the Article, and argues against a narrow reading.

114. Third, the test of far-reaching effect is both relativist and impressionistic. In any event, it can be said that any change in the law is intended to have <u>some</u> effect, and most contested decisions made by any official decision-making body will be keenly felt by the parties to it. It seems likely that Mr. Lynham considered the original decision of the Land Commission, that the valuable lands to which he was about to become entitled were to be

compulsorily transferred to the Reverend Dr. Butler, was a decision having far-reaching effect, and no doubt the Reverend Dr. Butler felt the same when that decision was later reversed. A decision by the Revenue Commissioners in relation to tax may be of enormous, even ruinous, impact on a person or a company. Far-reaching does not, therefore, supply a useful basis for identifying the area covered by Article 37, but it does have the unhelpful effect of suggesting that Article 37 bodies must have a very limited scope, and excludes, or at least inhibits, the possibility of conferring decision-making jurisdiction in important areas on bodies with particular expertise in that limited area.

115. Finally, contrasting Article 37 with Article 34.3.4° and the local and limited jurisdiction of courts, and excluding from limited powers and functions under Article 37 anything which can be said to limit a court's jurisdiction for the purposes of Article 34, is not persuasive. Indeed, a different lesson might be drawn from the text. It seems at least arguable that both Article 37 and Article 34.3.4° are to be contrasted not with each other, but, rather, with Article 34.3.1° and "the full original jurisdiction" of the High Court, and the power to determine all matters and questions, whether of fact or law, civil or criminal. On this approach, the limitations on jurisdictions of local and limited courts under Article 34.3.4° may indeed provide some insight as to the type of limitation contemplated by Article 37. There is, in my view, no necessary reason to conclude that the fact that inferior courts may have limits to their jurisdiction should exclude the possibility of similar limits being taken into account when considering the operation of non-judicial bodies under Article 37.

116. Looked at in this way, there are a number of ways in which the functions and powers of the W.R.C. can be said to be "limited". First, and most obviously, it is limited by subject matter to those areas of employment law specifically identified in the Act. It has no inherent jurisdiction, and no jurisdiction under, or in relation to, common law. Furthermore, it does not have jurisdiction to deal with any other type of dispute. This, in

itself, is, in normal language, a significant limitation and, moreover, something that distinguishes such a body from courts established under the Constitution having general jurisdiction. Second, there is a limitation on awards which can be made by the W.R.C. which, for example, in cases of unfair dismissals, is limited to an award of compensation of 104 weeks' remuneration. In some cases, this can, of course, be a substantial sum, but it may equally in some cases fall short of the loss suffered by the applicant. It is, in any event, a limitation on the powers of the W.R.C. The Circuit Court has, for example, a limitation on equitable jurisdiction by reference to rateable valuation which captures some very valuable property, but that it is still a court of limited jurisdiction when dealing with such matters is undeniable. Third, there is the (much reduced) limitation on enforceability coupled with the limited capacity of the District Court to substitute compensation for redress by way of reinstatement or reengagement. Fourth, the decision of the W.R.C. is subject to appeal. While the question of appeal or confirmation by the court has tended to be approached under the heading of the enforceability of the order made by the deciding body, it is also, and perhaps more, relevant when considering the question of limitation on the powers and functions of a non-judicial body under Article 37. A requirement that a decision be confirmed by a court, or which makes it subject to a full *de novo* appeal in a court, is necessarily a limitation on the powers of the body giving the decision. Here, the decision by an adjudication officer is subject, firstly, to a full appeal on a matter of fact to the Labour Court. That body is, in turn, subject to appeal on a point of law to the High Court. These appeals are available as of right, and do not require permission from either body or the court itself. Thus, the correctness of the conclusion of the W.R.C. on matters of fact or law may be reviewed and, insomuch as a decision made by the Labour Court is a matter of law (as it can involve the application of law to the facts), it is reviewable, in turn, by the High Court.

117. Finally, in this regard, I think it is appropriate to have regard to the limitation imposed by the fact that the W.R.C. is a body subject to judicial review. While this might be said to be common to any body exercising a power or function under public law today, that does not mean that it is not a significant limitation on the exercise of the powers and functions of such a body. It is worth recalling that the extensive exercise of the jurisdiction of the High Court by way of judicial review for jurisdiction, error of law and, to some extent at least, of fact, unreasonableness, proportionality, the taking into account of irrelevant considerations, or failing to consider relevant considerations, compliance with the Constitution and the E.C.H.R., and much more, is largely a feature of the development of the law in the latter part of the 20th century. At the time of the decision in *Re Solicitors Act 1954*, for example, the first edition of De Smith's *Judicial Review of Administrative Action* (London: Stevens & Sons, 1959), and Wade's *Administrative Law* (Oxford: Oxford University Press, 1961), had not been published, and it would be more than a quarter of a century before the first edition of Hogan and Morgan's *Administrative Law in Ireland* (Dublin: Round Hall, 1986) in this jurisdiction. It is useful to consider if, for example, the Solicitors Act of 1954 had provided by statute for the extensive review which is now available under the supervisory jurisdiction of the High Court, how such a review would have been analysed when considering limitations on the powers of the tribunal. A decision of an adjudication officer is limited in subject matter, and may be appealed, both in relation to fact to the Labour Court, and in relation to law through the Labour Court to the High Court, and, in addition, may be reviewed not merely for what it has done but, as this case illustrates, how it has done it. In my view, when these matters are considered cumulatively, I would conclude that the W.R.C. is exercising limited powers and functions of judicial nature, which exercise of power is therefore covered by Article 37 and does not, therefore, offend the Constitution.

118. I appreciate that some of my colleagues take a different view of what is, on any view, a difficult case. Charleton J. would find that the absence of an appeal to the Circuit Court (or, presumably, any court) means that the jurisdiction of the W.R.C. and Labour Court is the administration of justice and is not saved by Article 37. I recognise that the possibility of appeal has been considered important from the time of *Lynham v. Butler (No. 2)*, but I have difficulty in agreeing that an adjudication loses its character as the administration of justice if the selfsame issue may be decided by a court on appeal, which is the administration of justice. The third limb of the *McDonald* test acknowledges that the existence of an appeal does not deprive an adjudication of its character as the administration of justice. The decision of a court is no less the administration of justice because it is subject to appeal and I cannot see, therefore, why a final and binding adjudication by a non-judicial body is not the administration of justice because the issue can be the subject of appeal. Nor, if the availability of an appeal is viewed as a limitation bringing the jurisdiction within Article 37, can I see that there is a fundamental constitutional distinction between an appeal, the form of review provided for under the Residential Tenancies Act 2004, for example, which limited a court to considerations of whether there was a want of procedural fairness or a manifestly erroneous decision, and the type of appeal and review which applies in this case, particularly when the review of what is a limited administration of justice can be expected to be rigorous.

119. I have also had the opportunity of reading the judgment, to be delivered, of MacMenamin J. in its draft form. I recognise the scholarship displayed, and the important and real concerns which lead him to a different conclusion to that which I have come. I hope to set out, relatively briefly, some of the principal reasons why, however, I respectfully disagree.

120. The logic of the analysis advanced by MacMenamin J. is that the exercise of jurisdiction by adjudication officers and the Labour Court under the 1977 Act and related legislation

is the administration of justice reserved to courts and judges under Article 34 and is, accordingly, incompatible with the Constitution; however, that, he considers, could be remedied by the provision of an appeal to a court established under the Constitution. However, the conclusion that the exercise of jurisdiction is the administration of justice leads to the further conclusion that the personal rights of a citizen under Article 40.3 of the Constitution are engaged. On this basis, the procedures provided for under the 2015 Act in relation to hearings in private, the inability to require evidence to be given on oath, the absence of a specific provision provided for cross-examination, and the inability to provide for suitably qualified decision-makers for cases with a significant legal dimension are, also, separate and distinct items of unconstitutionality.

121. It is something of a paradox that what is described as a cautious and narrow approach leads, nevertheless, to a wholesale invalidation of the Act and the procedures adopted under it. MacMenamin J., however, disagrees that the jurisdiction can be covered by Article 37, partly for reasons of history, and more fundamentally because he considers that the combined effect of the W.R.C.'s power to prosecute offences under the Act and the fact that the failure to comply with an enforcement order made by the District Court is an offence under s. 51 of the Act means, in his view, that the jurisdiction is, at least in part, criminal and thus outside the potential scope of Article 37. Alternatively, it is said that the power of the W.R.C. to disapply national law incompatible with E.U. law, which power the Court of Justice of the European Union ("the C.J.E.U.") established, in Case C-378/17 *Minister for Justice and Equality & Anor. v. The Workplace Relations Commission* ECLI:EU:C:2018:979, ("*Minister for Justice v. W.R.C.* (C.J.E.U.)") and *Minister for Justice, Equality and Law Reform v. The Workplace Relations Commission* [2017] IESC 43 (Unreported, Supreme Court, Clarke J. (as he then was), 15th of June, 2017) could not be considered a limited function or power and which accordingly, again,

has the effect of preventing the jurisidiction of the W.R.C. and Labour Court under the 2015 Act from being capable of benefitting from the protection of Article 37.

122. First, if it is correct that the adjudication officer and/or the Labour Court is engaged in the administration of justice when making decisions pursuant to the procedures of the 2015 Act in relation to questions of unfair dismissal and payment of wages (and I agree that it is), then, as already discussed, I doubt that the elaborate machinery of the 2015 Act could be rendered a non-judicial administrative function merely by providing for an appeal to a court. Those cases in which recourse to a court has been found to have the effect of rescuing an adjudicatory function from unconstitutionality involve an application to court for a determination or confirmation of a determination with the full capacity of the court to come to its own conclusion on the merits so that, indeed, the court could be said to be the "effective decision-making tribunal" and making the "vital decisions" in a real sense, as explained by Finlay C.J. in *C.K. v. An Bord Altranais* [1990] 2 I.R. 396, 403. Indeed, the third limb of the *McDonald* test recognises that a decision-making function can be the administration of justice if it comes to final and binding decisions, even if those decisions are subject to appeal.

123. While it is a matter for others to judge in due course, I do not consider or intend that my judgment should involve any radical departure from precedent in the shape of the *McDonald* test. Indeed, since I reach the same conclusion as my colleagues by reference to the test, such differences of approach, if any, might be thought to be minimal rather than radical.

124. In my view, the circumstances here are also entirely distinguishable from the situation identified in *Cowan v. A.G.* There, an electoral court established under the Municipal Elections (Corrupt and Illegal Practices) Act 1884 was to be presided over by a barrister, and had jurisdiction not only to try issues in relation to a disputed election, but also to try a person on a criminal charge of an illegal or corrupt electoral practice, which on

conviction carried a sentence of up to 6 months' imprisonment. By contrast, if, under the 2015 Act, a party fails to comply with an enforcement order made under s. 44 or s. 45, such non-compliance may constitute a criminal offence triable in the District Court. In such circumstances, however, it would be the District Court which was administering justice in a criminal matter. The function of prosecuting the offence, if carried out by the W.R.C., would not thereby mean that the W.R.C. was invested with any jurisdiction to administer justice in criminal matters. Article 37 provides a limited saver in respect of functions which otherwise would have to be carried out by judges under Article 34: the prosecution of criminal offences has never been a judicial function.

125. The decision in *Minister for Justice v. W.R.C.* (C.J.E.U.) is certainly striking, but that case was decided explicitly on the basis that the obligation to disapply national law considered to be inconsistent with E.U. law was an obligation that lay on <u>any</u> body, whether judicial or administrative, which had the obligation to apply or enforce law. Indeed, the case itself was decided on the basis that the W.R.C. was an administrative, and not a judicial, body. The disapplication of national law and the enforcement of law was not treated by the C.J.E.U. as a judicial function, but instead an obligation on any body applying the law. If, indeed, all the bodies subject to that obligation were to become thereby bodies administering justice under Article 34, and not entitled to benefit from the saver in Article 37, then the unconstitutionality would sweep very far indeed. Indeed, the logic of MacMenamin J.'s approach would appear to lead not only to the conclusion that the functions currently performed by the W.R.C. are the administration of justice which can only be carried out by a court, but also to a finding that only the High Court could do so, since he considers the disapplication of national law a judicial function which could not be carried out by a court of local and limited jurisdiction. In fairness, it should be observed that neither this contention, made in reliance on the *Minster for Justice v. W.R.C.*, nor the argument that the W.R.C. and or/the Labour Court are engaged in the

exercise of a criminal jurisdiction (and thus excluded from Article 37) was advanced in argument or even touched on by either of the parties, and are not endorsed by any other member of the Court.

126. I do not agree, with respect, that the historical materials suggest that the drafters of the Constitution took an extremely narrow view of Article 37. The functions of the Land Commission, the Revenue Commissioners, and the Social Welfare Adjudicators are significant and important functions. They are limited functions, but only by subject matter and the possibility of appeal to, and review by, a court. They have far reaching effects on lives. Nor would I, for my part, consider that the judgments of Murnaghan and FitzGibbon JJ. in *The State (Ryan) v. Lennon* [1935] I.R. 170 were in any way akin to the tactic of legality discussed by MacMenamin J. One might, with equal, if not greater, justification question how a democratic society based on the separation of powers might have developed if the dissenting judgment of Kennedy C.J. had prevailed. The 1922 Constitution may, indeed, have had an Achilles heel, but if it did, it is not self-evident that it was part of the courts' function to purport to remedy that or any other perceived defects rather than to identify them. But, these matters are some distance from the issues arising in this case and I doubt that, even if it was appropriate to determine this case by these broad considerations, it would indeed be possible to do with any precision or accuracy. For example, if it is possible to remove an adjudicatory function from the field of the administration of justice by the simple device of allowing for a limited, rare, but expensive appeal to a court, with the consequence, it appears, that the obligation to adopt procedures required by Article 40.3 would also disappear, then it might be thought that the constitutional protection for the field of the administration of justice could be hollowed out. Similarly, while MacMenamin J. considers that the 5th limb of *Mc Donald* means that the principles of Article 34, as interpreted, would not stand in the way of other quasi-judicial bodies operating in new areas which were never the business of the courts,

I do not, with respect, understand how this squares with a conclusion that the W.R.C. in exercising statutorily-created jurisdiction in respect of the Unfair Dismissals Act 1977, the Employment Equality Act 1998, or the Equal Status Act 2000 – to mention only three – all of which would have been regarded as novel, if not indeed heretical, in 1937, is nevertheless administering justice reserved exclusively to courts by Article 34. If, moreover, it is possible to avoid Article 34 (and Article 37) entirely by creating new claims and causes of action, or forms of adjudication which may, however, render redundant common law actions, then it would be possible to circumvent the Constitution much more effectively and comprehensively than by the use of Article 37 that MacMenamin J. fears, since the resultant jurisdiction would be deemed administrative only, and subject to no requirement of limitation and reviewable only on the basis of unspecified fair procedures. This would be particularly troubling, since such new areas of adjudication are, almost by definition, areas considered to be of such relevance to the lives of citizens and their current concerns as to require statutory intervention. In the end, the only sure guide to our decision can be the terms of the Constitution understood in its context, and as interpreted by the courts. Accordingly, while acknowledging the important concerns raised in the judgment of my colleague, I cannot agree that Article 37 should be read so narrowly and restrictively, whether as a matter of interpretation or broader policy.

127. MacMenamin J. also quotes from my judgment in *O'Connell*, in which I acknowledged that there was no single unifying theory for the identification of the administration of justice, the area of the judicial function, or the nature of justiciable controversies. I hope the discussion earlier in this judgment explains why I still consider that it is not possible to identify a single infallible litmus test which will determine the existence of the administration of justice or, indeed, the limits of the area covered by Article 37. However, the Constitution and the case law make it clear that, while closely related, there are critical

distinctions between: (i) administrative adjudication required to be carried out in accordance with fair procedures; (ii) the administration of justice by a judge under Article 34; and (iii) the exercise of limited functions and powers of a judicial nature under Article 37, each of which has different legal consequences. In this case, we are required to locate the jurisdiction exercised by adjudication officers and the Labour Court under the 2015 Act within that classification. We cannot avoid that task.

128. I fully accept that the boundaries between the areas are difficult and contestable. It is also emphatically the function of the court under the Constitution to determine, in any given case, how a particular jurisdiction is to be analysed and categorised. Indeed, it may be for future courts to revisit, revise, and refine the decisions made. It is to be expected that those courts will approach this task cautiously in the light, in particular, of the concerns expressed in this case by my colleagues and will be vigilant to ensure in the future, just as much as in the early part of the 20th century, that there is no whittling away of the function of the administration of justice. That is a foundation, indeed keystone, of the separation of powers and cannot be eroded without undermining the essential constitutional structure of the State.

129. This case is located at a difficult and indistinct frontier. But, decision-making is unavoidable and no course is free from difficulty. If Article 37 is shrunk almost to vanishing point as covering no more than adjectival and somewhat inconsequential functions not previously thought to potentially contravene Article 34, then the law would be faced with a stark binary choice between either the administration of justice required to be carried out by judges appointed under the Constitution or the performance of administrative functions by persons subject to appointment and removal by the executive and required only to comply with unspecified fair procedures. Such a stark divison is not attractive, particularly in an area where history shows that precision is impossible and

some flexibility is required. I do not agree, therefore, that the case law shows a reluctance to invoke Article 37. On the contrary, as observed in this regard at para. 6.4.111 of *Kelly*:-

> "Subsequently, however, there was clear evidence of judicial unhappiness with the logical implications of the *Solicitors Act* case and nearly all the later cases show a tendency either to confine that case to its special facts or to refuse to apply the principle by analogy."

130. Thus, in *Central Dublin Development Association v. The Attorney General* (decided in 1969 but reported in (1975) 109 I.L.T.R. 69), Kenny J. held that the ministerial power exercisable under the Local Government (Planning and Development) Act 1963 to decide if a development was an exempted development was an administration of justice, but covered by Article 37, and the same principle must, it appears, apply to the later exercise of similar powers by An Bord Pleanála. In *Madden v. Ireland* (Unreported, High Court, McMahon J., 22nd of May, 1980), McMahon J. found that the power of the Lay Commissioners and the Appeal Tribunal of the Land Commission to fix the price of lands acquired was "the administration of justice and the exercise of judicial power", but was sanctioned by Article 37. He said, at para. 14:-

> "Experience has shown that modern Government can not be carried on without many regulatory Bodies and those Bodies can not function effectively under a rigid separation of powers. Article 37 had no counterpart in the Constitution of Saorstát Éireann and in my view introduction of it to the Constitution is to be attributed to a realisation of the needs of modern Government. The ascertainment of the market value of a holding of lands by an administrative Body with special experience appears to me to be the kind of judicial power contemplated by Article 37."

131. In *The State (Calcul International Ltd. and Solatrex International Ltd.) v. The Appeal Commissioners & The Revenue Commissioners* (Unreported, High Court, Barron J. 18th

of December, 1986), Barron J. considered that the powers of the Appeal Commissioners in Revenue matters was not the administration of justice but, if it was considered to be such, then it clearly fell within Article 37. Most recently, in a monumental judgment in the High Court on multiple issues arising from the An Blascaod Mór National Historic Park Act 1989 (*An Blascaod Mór Teo. & Ors. v. Commissioners of Public Works & Ors.* [1998] IEHC 38 (Unreported, High Court, Budd J., 27th of February, 1998)), Budd J. found that the power of the property arbitrator to assess compensation under the Acquisition of Land (Assessment of Compensation) Act 1919 was an administration of justice, but permitted under Article 37. These are all substantial functions which cannot be considered incidental or adjectival. If anything can be said to be absent from the case law to date, at least until today, it is a finding that a function conferred by statute is the administration of justice being performed outside courts and not permitted by Article 37, and contrary to Article 34 .

132. I appreciate and accept that there are downstream risks which it is difficult to foresee or remove in advance, and that future courts may have to navigate those waters in the light of the developing case law. However, the paradox remains that if the jurisdiction of the Adjudication Officer and/or the Labour Court is seen as the administration of justice which is both limited, and must comply with the requirements of the administration of justice by an independent tribunal according to law under Aticle 37, that provides a structure for analysis, and greater assurance of fair outcomes. I am reluctant to accept that it should be viewed either as the administration of justice which can only be performed by a court, or the performance of an administrative function by a non-judicial body, in each case dependant only on the presence or absence of the fig leaf of a rarely used and expensive appeal to court, which the evidence in this case showed was little more than a statistical curiosity, and which accordingly provides little by way of guarantee of fairness throughout the process for the parties to employment disputes.

133. I have also had the opportunity to read a draft of the judgment which McKechnie J. delivers today. As I read it, he agrees that the function being performed under the 2015 Act constitutes the administration of justice under Article 34, and to that extent would apply the *McDonald* criteria with a degree of flexibility. However, he does not agree that the function can be considered to be covered by Article 37. This follows from his reading of the case law, rather than from the concerns which lead MacMenamin J. to his conclusions. He agrees with the conclusion I would come to in relation to procedures and the order I propose in that regard, and, unlike MacMenamin J., does not consider that there is any constitutional frailty in the provisions in relation to cross-examination or the absence of a requirement that ajudication officers or members of the Labour Court should possess legal qualifications. I acknowledge and respect the reasons which lead a valued colleague – whose last judgment this is – to his separate conclusions. His judgment does make it very clear that the question of appeal cannot be decisive, and accordingly the conclusion he would reach means, necessarily, that the functions currently being performed by adjudication officers and the Labour Court on appeal under the 2015 Act, and indeed any similar functions created by statute, can only be performed in courts, by judges appointed under the Constitution. The reasons why I differ, with respect, from him in this regard are, I hope, sufficiently apparent from the discussion set out above.

E. <u>Procedures</u>

134. The conclusion that the jurisdiction created by the 2015 Act is not an impermissible administration of justice, but rather falls under Article 37 of the Constitution, does not, however, dispose of this case. The appellant complains of the procedures adopted by the adjudication officer and the W.R.C. and relies, in this regard, on the evidence of both a solicitor, Mr. Ciarán O'Mara, and a barrister, Mr. Tom Mallon B.L., with considerable experience in employment matters acting for both employers and employees. The

appellant also points to the extraordinary facts of this case as being the manifestation of systemic flaws in the organisation and procedures adopted by the W.R.C.

135. Taking this latter point first, the appellant criticises the evidence submitted on behalf of the respondent because no affidavit has been sworn by the individual officer with no explanation given by any witness for how the error in this case occurred. It should be said that, in making this point, the appellant does not seek to embarrass the individual adjudication officer, and agrees that it is not necessary to identify that officer by name in these proceedings. I agree, and would not wish to be unduly influenced by the startling, indeed calamitous, error in this case. The fact is that anyone can make a mistake which, in hindsight, appears both extraordinary and inexplicable. Given that the State is not seeking to defend the decision in any way, I do not consider the absence of an affidavit from the adjudication officer to be significant. What is relevant here, however, is what that error suggests for broader practice. It is not that the procedures under the 2015 Act necessarily lead to an adjudication officer deciding a case without hearing from the parties. It is, however, relevant, I think, that such an error could only occur, or at least could most readily occur, if it was commonplace to decide cases on documents submitted and with very limited or no oral hearings, and if such hearings take place in private.

136. In addition, I do not think that the evidence of the practising lawyers can be discounted as readily as the respondent suggests. It may well be the case that lawyers are only retained in a small minority of cases where the complexity and amounts at issue can justify their engagement and, therefore, the unsatisfactory experience they recount in such cases cannot necessarily be extrapolated to the majority of cases dealt with by the W.R.C. However, that does not address the criticism. As discussed above, the 2015 Act has, in effect, conferred a jurisdiction limited by subject matter upon the W.R.C. That jurisdiction extends, effectively, to all disputes arising in the course of, or in relation to, employment, and renders largely redundant the traditional common law remedies. The

system established must, therefore, be capable of providing a satisfactory resolution for all the cases, whether complex or simple, and whether the awards are small or more substantial. Indeed, the individual employer and employee are entitled to no less than a competent resolution in any and every case. I consider it disturbing, therefore, that experienced practitioners would consider it necessary to express in a measured and responsible way the serious concerns which they have. Furthermore, if the hearings take place in private, then the only way in which evidence can become available as to the practices followed is if practitioners and representatives are prepared to provide evidence.

137. I wish, however, to make it absolutely clear that, in doing so, I do not criticise in any way the policy underlying the 2015 Act of providing a cheap, relatively informal, and efficient decision-making function, staffed by persons with expertise in the areas of employment law and with practical experience in industrial relations. The concept of speedy dispute resolution close to the workplace and in a manner not hidebound by either formality or procedure has much to recommend it, and I would reject unhesitatingly the contention that such a body must be staffed by people with formal legal training and sufficient legal experience to be appointed judges. I should also say that, in my limited experience, I have had the opportunity of considering a number of decisions made by adjudication officers which show a detailed understanding of the relevant law, and a careful and thoughtful assessment of the facts of the case. Courts and lawyers do not have a monopoly on fact-finding, or even the law's application, and cannot claim infallibility in either respect. If it were otherwise, there would be no need for an appellate system. There is no doubt that the range of decisions required to be made by the W.R.C. can involve very complex areas of law both national and European, but there is no justification for insisting that, as a matter of constitutional law, a law degree or experience as a practising lawyer is an essential qualification.

138. The logic of the conclusion that the W.R.C. is exercising functions covered by Article 37 is, however, instructive here. The exercise of jurisdiction captured by Article 37 is the administration of justice. The Article merely permits it to be carried out by a body other than a court and by a person other than a judge in a context that is non-criminal and limited. This has the consequence that, for example, a decision-maker is not required to make a declaration required by Article 34.6 to be appointed by the President, and is not prohibited from holding any other position of emolument. However, the function being performed and the power being exercised must comply with the fundamental components of independence, impartiality, dispassionate application of the law, openness, and, above all, fairness, which are understood to be the essence of the administration of justice. It might be said that this is encompassed in the requirement that any decision-maker act judicially and adhere to the principles of constitutional justice but, in my view, the acknowledgement that what is at issue here is the administration of justice, albeit by a body other than a court and a person other than a judge, provides a useful structure within which to consider the procedures established pursuant to the legislation. The standard of justice administered under Article 37 cannot be lower or less demanding than the justice administered in courts under Article 34.

139. The 2015 Act represents a number of different policies which are sought to be pursued in the field of labour law more generally. First, there is a comprehensive judicialising of disputes noted by the Franks Report in the United Kingdom which is, perhaps, its own unexpressed compliment to the virtues of the law and legal method resolution as a way of resolving disputes between individuals. Increasingly, in the latter part of the 20th century, citizens were given rights by statute, and the capacity to have those rights enforced as a matter of law. On the other hand, the 2015 Act seeks to pursue the desirable objective of having any disputes resolved as speedily, cheaply, and informally as possible, and without the aspects of court proceedings which might be considered unnecessary and,

in some cases, intimidating and inhibitory. There is no necessary incompatibility between the two policies. However, if the policy of informality and the rejection of expensive and potentially cumbersome legal procedures becomes a rejection of the law and those features of procedure necessary for a fair determination, then there is an unavoidable, and fatal, clash. It might be thought that to be able to dispense with unnecessary and irrelevant procedures, but maintain the fundamental structure sufficient to permit a fair hearing and a proper application of the law, would require a very comprehensive understanding of what matters are central to the fair resolution of disputes and what matters, by contrast, can be safely discarded or modified. It has to be recognised that if it is desired to have legal disputes, sometimes involving complexity of fact and law, resolved satisfactorily outside the court system, it is necessary to respect the essence of the fact-finding processes and capacity for legal analysis that can be found in courtrooms. Wherever they are decided or by whom, it is not possible to have claims fairly determined in accordance with law in the absence of law and fair procedures.

140. The appellant points specifically to three further features of the 2015 Act which, it is contended, are incompatible with the Constitution. First, proceedings before the adjudication officer cannot be heard in public as s. 41(13) provides that "proceedings … before an adjudication officer *shall* be conducted otherwise than in public" (*emphasis added*); second, there is no possibility to take evidence on oath, and, consequently, no penalty for false evidence; and, third, there is no express provision for cross-examination, as s. 41(5) provides merely that the adjudication officer shall give to the parties an opportunity to be heard by the adjudication officer and to present evidence relevant to the complaint or dispute.

141. In response to these points, the respondent offers a number of different arguments. It is argued that the procedures adopted are consistent with the policy of ensuring that proceedings do not become excessively formal or intimidatory. It is pointed out that the

prohibition on public hearings only applies before adjudication officers. Under s. 44(7), proceedings before the Labour Court on appeal shall be heard in public unless otherwise ordered. It is also argued that it is not necessary to have evidence on oath or have some other method of punishment for false evidence, and that it is permissible to pursue a policy of relative informality in proceedings. In relation to cross-examination, a different argument is advanced. It is said that the Act does not preclude cross-examination. The Act must be construed compatibly with the Constitution and, in such cases where constitutional fairness requires that evidence be capable of being directly challenged, then that must be permitted. There is nothing in the procedures set out in the Act which precludes this, and therefore the Act cannot be said to be unconstitutional. If, in any particular case, cross-examination ought to have been provided and was not, then that may be corrected by judicial review.

142. Approached through the lens of Article 37, I cannot accept that there is a justification for a blanket prohibition on hearings in public before the adjudication officer. Article 34.1 makes clear that public hearings are of the essence of the administration of justice. In some cases, this may be practically important because the publicity may bring forward further relevant evidence and witnesses, or because it will allow a party (whether an employee or employer) to achieve public vindication. It may, furthermore, have the general public benefit that it allows the public to see justice administered, which might, for example, make it easier for a judgement to be made on the fairness, competence, and efficiency of the decision-maker. However, the requirement for a public hearing does not require any functional justification: from time immemorial, it has been regarded as fundamental to the administration of justice, and as establishing a principle from which any exception must be justified. Jeremy Bentham said that:-

"[*w*]here there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity."

143. The rule established under the Constitution is not an absolute one, even for court proceedings, and is not expressly required under Article 37 in respect of the adjudicative processes covered by it. There is a justification for calm, quiet, and private resolution of many disputes which may be of particular sensitivity for the participants, and it may even be permissible to have a presumption in favour of private hearings at first instance, but it is not, in my view, possible to justify the absolute ban contained in s. 41(13), particularly when, on appeal, the opposite provision is made.

144. Similar arguments arise in relation to the absence of the possibility of ensuring that evidence is given on oath, and the consequential capacity to punish witnesses for deliberately false evidence. It should be said that the significance of evidence on oath is not because of any importance attached to the procedure itself, but because it triggers the power to punish for false evidence and thus provides an incentive to truthful testimony. Those who designed the system, and who may have some familiarity with the standard type of dispute and how they are best resolved, may have considered that it is preferable not to have the formality of an oath or the capacity to punish for false evidence, although no evidence was presented in this case as to any such conclusion, or any basis for it. It is, moreover, noteworthy that there is a power to administer an oath to witnesses before the Labour Court. See s.21(1)(b) of the 1946 Act as amended by s.74 of the 2015 Act. It is, moreover, difficult to square this approach with the fact that there is a capacity to summon witnesses to give evidence, and produce documents, and that such witnesses are given the same immunities and privileges as witnesses before the High Court, and that failure or refusal to give such evidence is a criminal offence. Though there may be few prosecutions for perjury, there seems little doubt that the structure created by the

requirement to give evidence on oath, and the possibility of prosecution for false evidence, is an important part of ensuring that justice is done in cases where there is serious and direct conflict of evidence. Certainly, we have yet to find a better one. There is nothing in the Act which suggests that such conflicts cannot arise in the context of the jurisdictions exercised by the W.R.C. In such circumstances, I consider that the absence of at least a capacity to allow the adjudication officer to require that certain evidence be given on oath is inconsistent with the Constitution. I appreciate that one possible contention is that a blanket rule is easier to apply since, if the question of evidence on oath becomes a matter for discretion and only applicable in certain cases, it is an issue which may be raised in many cases, and, if an incorrect decision is made, may lead to the overall decision being quashed. This, in turn, might lead to adjudication officers feeling that the safest route is to concede the procedure even when it is not required, and possibly unhelpful, and leading, inevitably therefore, to greater and unnecessary formality in the proceedings. However, this type of problem is inevitable in any form of judicial decision-making and is a reason to have experienced decision-makers. Difficulty of decision-making cannot be designed out of a system intended to decide difficult disputes.

145. Finally, in this regard, it is striking that the Act sets out specific procedures for the adjudication officer (and the Labour Court) to follow. Section 41(5) requires the adjudication officer to permit the parties "to be heard" and "to present evidence". Given this enumeration of procedures, the absence of a reference to cross-examination might appear deliberate and directed towards discouraging cross-examination. The Act contemplates "evidence" being given by "witnesses" having the same privileges and immunities as witnesses in the High Court. As long ago as *Re Haughey*, these features of court proceedings, and, in particular, the ability to cross-examine the opposing party, were regarded as fundamental to fair procedures, and the right of cross-examination

(which was excluded by the procedures adopted by the Committee of Public Accounts) was one of the rights without which no party:-

> "could hope to make any adequate defence of his good name. To deny such rights is, in an ancestral adage, a classic case of *clocha ceangailte agus madraí scaoilte*. Article 40, s. 3, of the Constitution is a guarantee to the citizen of basic fairness of procedures. The Constitution guarantees such fairness, and it is the duty of the Court to underline that the words of Article 40, s. 3, are not political shibboleths but provide a positive protection for the citizen and his good name."

146. The arguments offered in defence of the statute effectively concede that cross-examination may be necessary in at least some of the cases coming before an adjudication officer and, it might be thought, in most, if not all, cases in which a witness attends and gives evidence which is not conceded. It is certainly unsatisfactory, in my view, that there is no express provision for this in the procedures set out in the Act, particularly when the Act is meant to be capable of being operated by persons without any knowledge of the law, and for decisions to be made by persons without any broader legal experience or training, even though they may have very detailed familiarity with the statutory code in the field of employment law. Mr. O'Mara, in his affidavit acknowledged the "tremendous advance" in establishment of a single system for adjudication, but observed that this had come at a cost:-

> "Although never specifically stated, there has been an underlying hostility to the involvement of the legal profession in acting for parties to employment litigation. We can all agree that there should not be a place for unnecessary formalism and lay litigants should not be discouraged. This should not mean that minimum standards of procedures … should not have a place".

The State respondents exhibited a paper prepared by the Registrar of the W.R.C. on "fair procedures in quasi judicial statutory bodies" which addressed, *inter alia*, the question of

cross-examination. Quoting Wigmore's famous description of cross-examination as the greatest legal engine invented for the discovery of truth, the paper continues:-

> "whether courts are really concerned with the discovery of truth is a topic for another day. For the purposes of this presentation, it is worth emphasising that depriving a party to a hearing from their constitutionally entrenched right to confront and cross-examine his or her accusers could be deemed prejudicial, by the courts, in certain circumstances."

This seems to display a narrow and defensive conception of fair procedures. Cross-examination and any other procedure should be allowed because they contribute to a fair hearing, and not merely because refusal may lead to challenge. It is, however, the case that it is to be presumed that an Act will be operated consistently with the Constitution, and any procedures carried out under it will comply with constitutional requirements. I note that the W.R.C. has produced a *Guidance Note for a WRC Adjudication Hearing* which, at para. 6.4, expressly refers to the right to question and cross-examine witnesses. While the guidelines have no statutory force, they are an indication that the W.R.C. does not seek to preclude cross-examination where it is necessary. If cross-examination is wrongly refused, then a remedy is available. I cannot conclude that the absence of an express reference to the availability of cross-examination in this case renders the Act unconstitutional.

147. Finally, the issue of the independence of decision-makers was touched on in argument, although not itself a separate ground of challenge. Independence and impartiality are fundamental components of the capacity to administer justice. Under the Act, an authorised officer is appointed by the Minister, which appointment contemplates revocation of the appointment in accordance with s. 40. Section 40(7) merely provides that the Minister may revoke an appointment under the section, but does not specify the circumstances in which such revocation may, and, as importantly, may not, occur. While

the section contemplates the possibility of appointment for a fixed term, it is not required. Section 40(8) does contain a guarantee that an adjudication officer "shall be independent in the performance of his or her functions". However, the Act does not reconcile this with the power under the preceding subsection which gives to the Minister unqualified power of revocation of appointment. This is troubling, particularly as it is likely that the adjudication officers will be civil servants in the Minister's department with other responsibilities where they will routinely be required to accept direction. It would seem, however, that, if the procedure is treated as an administration of justice permitted by Article 37, the power of revocation could not be exercised in a fashion that interfered with, or detracted from, the independence of the adjudication officer in the exercise of their functions. Membership of the Labour Court is not regulated by the 2015 Act but by the provisions of the Industrial Relations Act 1946, which provides for appointments for a fixed term and removal for stated reasons but does not contain any express statement of the independence of such members. These matters were not the subject of argument in this case but would, at a minimum , require careful scrutiny in the light of the conclusion of this Court that the functions being performed are functions of a judicial nature involving the administration of justice under the Constitution. These considerations are not peculiar to the Irish constitutional order: guaranteed impartiality and independence are also essential requirements for any adjudication within the scope of European law, or in accordance with Article 6 E.C.H.R. and the jurisprudence of the E.Ct.H.R.

III – Remedy

148. The features identified above which are I consider to be repugnant to the Constitution are not inevitable, or even central, to the operation of the 2015 Act. It is necessary to distinguish between the consequences of each finding. The terms of s. 41(13) require that all hearings shall be conducted otherwise than in public. It is appropriate to declare that

provision repugnant to the Constitution. The effect is that the prohibition on public hearings is removed, and proceedings may, but not must, be heard in public. In relation to question of the administration of an oath, the unconstitutionality resides in the absence of something, rather than a positive provision in the statute. It would, in my view, be inappropriate to declare the statute as a whole unconstitutional because it does not make provision for this, particularly because, in many cases, an adjudication officer may properly decide that such a requirement is not necessary. Instead, I think it is appropriate to merely declare that the absence of provision for the administration of an oath, or any possibility of punishment for giving false evidence, is inconsistent with the Constitution.

149. These conclusions do not, moreover, appear to have any consequence for decisions already made in other cases under the 2015 Act, nor do they necessarily preclude current proceedings under the Act, even without amendment of the Act. The effect of this decision is that proceedings may be heard in public, and it would appear that it is only in those cases where an adjudication officer concludes that it is necessary that an oath be administered that the flaw in the Act would preclude proceedings pending any considered amendment of the Act. However, I would hear the parties further on the question of the precise remedy, and the order to be made.