THE COURT OF APPEAL
CIVIL

Neutral Citation Number [2020] IECA 360

Appeal No 2018/343

Costello J.
Collins J.
Pilkington J.

BETWEEN

GILES KENNEDY

PLAINTIFF/APPELLANT

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS,
IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS/RESPONDENTS

JUDGMENT of Mr Justice Maurice Collins delivered on 21 December 2020

BACKGROUND

1. The Appellant ("*Mr Kennedy*") appeals from the judgment and order of the High Court (O' Connor J) striking out these proceedings (hereafter "*the proceedings*" or "*the plenary proceedings*") on the basis that they fail to disclose a reasonable cause of action. The judgment of the High Court was given on 14 June 2018 ([2018] IEHC 351) and the relevant order was made on 6 July 2018.

2. The proceedings were commenced by plenary summons issued on 2 October 2015. A statement of claim was delivered on 5 October 2015. The primary relief sought is a declaration that section 12(3) of the Road Traffic Act 1994 (as substituted by section 2 of the Road Traffic Act 2003 [1]) is inconsistent with Bunreacht na hÉireann. Mr Kennedy also seeks a declaration pursuant to section 5 of the European Convention on Human Rights Act 2003 ("*the 2003 Act*") that section 12(3) is incompatible with the State's obligations under the provisions of the European Convention on Human Rights ("*the Convention*"). Damages are also sought by him for breach of his constitutional rights and pursuant to section 3 of the 2003 Act.

3. Section 12 has subsequently been substantially repealed and replaced but, as at April 2007, it provided that a member of the Gardai could require a person in charge of a motor vehicle in a public place to provide a preliminary breath specimen in certain circumstances, including where the member formed the opinion that the person concerned *"[had] consumed intoxicating liquor*." Any person who refused or failed to

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[1] I have corrected the mistaken reference to section 3 of the Road Traffic Act 2003 in Mr Kennedy's pleadings.

"comply immediately" with such a requirement was guilty of an offence and liable on summary conviction to a fine not exceeding €2,500 or imprisonment for a term not exceeding 6 months or both: section 12(3). Section 12(4) empowered a member of the Gardai to arrest a person who, in that member's opinion, was committing or had committed such an offence.

4. Mr Kennedy was stopped by Gardai while driving on the East Wall Road in Dublin on the evening of 25 April **2007**. The relevant Garda member, Garda Coyne, formed the opinion that Mr Kennedy had consumed alcohol and required him to provide a preliminary breath specimen. No specimen was provided, though Mr Kennedy ostensibly attempted to do so. He was then arrested under section 12(4) of the 1994 Act. On the following day, he was charged with failing to provide a breath specimen contrary to section 12(3), as well as a separate offence under section 13(2) of the 1994 Act arising from his alleged failure to provide breath specimens at Store Street Garda Station following his arrest. He was convicted of both offences in the District Court in April *2011*. He appealed to the Circuit Court and was ultimately convicted of the section 12(3) offence (but acquitted of the section 13 offence) on 12 May **2016**, following a 3-day hearing. Thus, a period in excess of 9 years elapsed between Mr Kennedy being arrested and charged and the conclusion of the *"summary"* proceedings against him.

5. In the plenary proceedings, Mr Kennedy asserts that section 12(3) is unconstitutional because (so he pleads) it creates an "*absolute offence*". While he claims to have had "*a defence based on inability/incapacity*" no such defence was available to him under section 12(3). Furthermore (so Mr Kennedy pleads) section 12(3) did not require *mens rea* on his part or provide for a "*defence based on inability or incapacity to provide a specimen of breath.*" The availability of such a defence is, he says, "*constitutionally mandated*[2]" and the absence of any such defence from section 12(3) means that it is inconsistent with the Constitution. Mr Kennedy asserts that his right to a fair trial and to due process has been/will be denied and also alleges that he has not been treated equally before the law. Similar grounds are relied on by Mr Kennedy in support of his claim that section 12(3) is incompatible with the Convention.

6. Mr Kennedy has never claimed to have been physically unable to provide a breath specimen when required to do so on the East Wall Road on 25 April 2007. Rather, as it is put in his Statement of Claim, he claims that "*a hearing incapacity prevented him from complying with [the] requirement made under ss 12 ... of the 1994 Act at East Wall Road"*. He says that his failure to provide a breath specimen arose from the fact that his hearing incapacity meant that he could not hear the instructions given to him by Garda Coyne and therefore did not understand what he needed to do in order to provide the breath specimen required of him.

[2] Statement of Claim, paragraph 16.

7. Mr Kennedy clearly gave evidence to this effect in the District Court. However, as the Statement of Claim pleads - tersely but unambiguously - the "*District Court judge in convicting [Mr Kennedy] did not accept [his] evidence.*"[3]

8. The plenary proceedings issued while Mr Kennedy's appeal was pending in the Circuit Court. The Defendants' motion was also issued before the appeal was heard (and in advance of any defence being delivered by them). The motion sought an order pursuant to the High Court's inherent jurisdiction striking out the proceedings "*on the basis that they are barred by reason of estoppel by omission and/or abuse of process*". In the alternative, an order was sought pursuant to Order 19, Rule 28 and/or the inherent jurisdiction of the Court striking out the proceedings on the basis that they disclosed no reasonable cause of action and/or frivolous or vexatious "*in circumstances where the Circuit Court has yet to make any findings of fact such as could properly ground a defence of inability/incapacity*". Finally, the Defendants sought – again in the alternative – an order staying the plenary proceedings until the conclusion of Mr Kennedy's appeal in the Circuit Court.

9. By the time this motion came on for hearing in the High Court on 16 May 2018, Mr Kennedy's appeal had been heard and determined by Judge Codd in the Circuit Court and he had once again been convicted of the section 12(3) offence, with the Court imposing a fine of €3,000 by way of penalty. No period of disqualification was imposed by the Judge. The transcripts of the hearing in the Circuit Court were put before the High Court by the Defendants, apparently without objection from Mr Kennedy. According to the Defendants, the Circuit Court Judge had found that no defence based on alleged hearing loss could arise as a matter of fact and it followed (so the Defendants said) that the Circuit Court "*did not have to address any issues as regards what defences would or would not be open if it had been found that hearing loss had been a factor on the evening in question*."[4] On that basis, the Defendants contended that Mr Kennedy lacked standing to maintain a challenge to section 12(3) "*since he is not, as a matter [of] fact, a person who could have availed of the defence in question*" and was not entitled to rely on a *ius tertii*.[5]

10. Mr Kennedy swore an affidavit in which he accepted the ruling of the Circuit Court Judge as "*being the ruling made*" but emphasised that it had to be put in context of the Judge having "*been made aware of the fact that s.12 of the Road Traffic Act 1994 provided for no defence and appeared to be an absolute liability offence*." [6] Contrary to what the Defendants were suggesting, he had standing "*particularly so on the basis that your deponent stands convicted of the offence.*" [7]

11. It will be evident from the above that the intervention of the Circuit Court's determination had a significant impact on the dynamics of the Defendants' motion. Any question of a stay pending the conclusion of the appeal obviously fell away and the proceedings could

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[3] Statement of Claim, paragraph 8

[4] Affidavit of Tom Conlon sworn on 23 January 2017, at paragraph 12.

[5] *Ibid*, at paragraph 13

[6] Affidavit sworn on 8 March 2017, at paragraph 32

[7] *Ibid*, at paragraph 33

no longer be impugned on the basis that the Circuit Court had yet to make any findings of fact. Such findings had been made and, while the estoppel by omission/abuse of process ground remained, the primary basis on which the motion was actually advanced in the High Court was that Mr Kennedy could not maintain the proceedings having regard to those findings. For obvious reasons, no relief had been sought on that basis in the Defendants' motion. Nevertheless, the parties, and the Court itself, all appear to have accepted that the Court could and should indeed address the application on that basis. No objection to the Court doing so appears to have been made before the High Court and no point was taken before this Court either.

12. It will be necessary to refer in more detail to the evidence heard by Judge Codd and the findings made by her but at this point in the narrative it will suffice to refer to what the High Court Judge said on this point in the Judgment under appeal:

> "The plaintiff, his wife and an audiologist gave evidence at the Circuit Court about the plaintiff's impaired hearing but Judge Codd found that he was not impaired to the extent that he did not understand what he was required to do at the roadside."[8]

THE DECISION OF THE HIGH COURT

13. The High Court Judge accepted that Mr Kennedy had an interest in the constitutionality of section 12(3), given that he had been prosecuted and convicted of an offence under it. However, he considered that, in view of the findings made by the Circuit Court Judge, Mr Kennedy lacked the relevant facts to challenge section 12(3). [9] He accepted the Defendants' contention that Mr Kennedy was effectively seeking to rely on a *ius tertii*, citing (*inter alia*) the following passage from the judgment of Hardiman J in *A v Governor of Arbour Hill Prison* [2006] 4 IR 88:

> ".. a person who seeks to invalidate a statutory provision must do so by reference to the effect of the provision on his own rights. He cannot seek to attack the section on a general or hypothetical basis and specifically may not rely on its effect on the rights of a third party: see Cahill v Sutton [1980] IR 269. In other words, he is confined to the actual facts of his case and cannot make up others which would suit him better." [10]

14. Separately, the Defendants had sought the dismissal of the proceedings "*on the basis that they are barred by reason of estoppel by omission and/or abuse of process.*" I should explain the factual basis for this application. Mr Kennedy had raised disclosure issues in the criminal proceedings before the District Court. After he was convicted and had appealed those convictions to the Circuit Court, a further issue concerning disclosure arose, resulting in the Circuit Court directing that a further document (an internal Garda circular which, in an earlier iteration, had already been provided to Mr Kennedy) should be disclosed to him, but in redacted form. Mr Kennedy was dissatisfied with that outcome and he brought judicial review proceedings (leave being granted in May 2012) seeking the

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[8] Judgment, paragraph 5

[9] Judgment, at paragraph 11.

[10] Paragraph 196 (page 165)

disclosure of the document in unredacted form and also seeking prohibition of the further prosecution of the section 13 charge pending such disclosure (the document was relevant to the section 13 charge only). The judicial review proceedings were concerned only with this narrow issue of disclosure in the context of the section 13 charge and did not raise any issue concerning the proper interpretation of and/or the constitutional validity of, section 12 (or section 13) of the 1994 Act. The judicial review proceedings were dismissed by the High Court (O' Malley J) on 28 March 2014: *Kennedy v DPP* [2014] IEHC 200.[11] In essence, O' Malley J held that Mr Kennedy had failed to demonstrate that non-disclosure of the full document created a real risk of an unfair trial.[12]

15. Invoking the so-called "*rule*" in *Henderson v Henderson* (1843) 3 Hare 100, the Defendants submitted to the High Court that Mr Kennedy ought to have brought any challenge to the validity of section 12(3) within those judicial review proceedings and that the subsequent action impugning that provision amounted to an abuse of process that the Court ought to restrain. While the High Court Judge observed that Mr Kennedy "*may have exhibited signs bordering on obsession with litigating an issue that arose over a decade ago" and expressed concern "with the time and resources expended which have allowed the plaintiff to exhaust every conceivable cause of action and remedy to right the plaintiff's perception of wrongdoing on the part of the State in applying and enforcing the road traffic legislation*", he did not consider that it would be appropriate to make a finding of abuse of process without first giving Mr Kennedy an opportunity to explain why a challenge to section 12(3) was not pursued within his judicial review proceedings. In the circumstances, however, that was not necessary as the Court was dismissing the challenge to section 12(3) in any event.

THE APPEAL AND CROSS-APPEAL

16. Mr Kennedy appeals the decision to strike out the proceedings. His notice of appeal is rather generic and, while many authorities on standing are referred to in the written submissions delivered on his behalf, those submissions engage only in a limited way with the actual basis for the High Court's decision. The submissions repeatedly observe that Mr Kennedy had been charged with, and convicted of, an offence under section 12(3) as though that fact is, in itself, a complete answer to the High Court Judge's analysis and conclusions. The submissions do not engage in any meaningful way with the findings of the Circuit Court Judge or the importance (if any) of those findings in considering Mr Kennedy's entitlement to maintain these proceedings.

17. On the *Henderson v Henderson* point, Mr Kennedy's written submissions state that the challenge to the validity of section 12(3) could not have been brought before the Supreme Court's decision in *DPP (Keoghan) v Cagney* [2013] 1 IR 493 which – in the context of a section 13 prosecution – "*unequivocally held that a defence based on "inability or incapacity is one which is constitutionally mandated.*" Furthermore, it is said,

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[11] Mr Kennedy appealed the High Court's decision to the Supreme Court and, in the context of that appeal, sought but was refused a stay on the Circuit Court proceedings pending the determination of the appeal. Ultimately, it appears that the appeal was transferred for hearing by this Court but was rendered moot by a direction for disclosure made by Judge Codd in the Circuit Court.

[12] At paragraph 43

the Defendants are guilty of adopting an inconsistent and contradictory position, suggesting on the one hand that the challenge to section 12(3) should have been brought forward as part of the judicial proceedings commenced in 2012 – before Mr Kennedy's District Court appeal was heard – and on the other hand opposing as premature the stating of a case by the Circuit Court before the conclusion of all of the evidence.

18. As well as opposing Mr Kennedy's appeal, the Defendants have cross-appealed from the High Court's failure to dismiss the proceedings on the basis of *Henderson v Henderson*, arguing that all of the necessary ingredients for a finding of abuse of process had been established and that the Judge was in error insofar as he appeared to consider that some "*ulterior motive*" on the part of a litigant had to be demonstrated.

19. In his oral submissions, Mr Devally SC for Mr Kennedy made a narrow and focussed argument. He submitted – correctly – that the High Court had made its decision on the basis of the findings made by the Circuit Court Judge regarding the alleged hearing disability of Mr Kennedy. It was on the basis of those findings that the High Court had held that the proceedings were founded on a *ius tertii* and should not be permitted to proceed. While not challenging the status of those findings as such, Counsel submitted that, when properly analysed, those findings were not such as to preclude Mr Kennedy from maintaining his challenge to section 12(3).

20. Mr Devally accepted that the Circuit Court Judge had found that, as a matter of probability, Mr Kennedy's hearing difficulties had not been an operative factor in his failure to provide a breath specimen. It followed, he accepted, that any defence that imposed a legal burden on Mr Kennedy to establish a reasonable excuse for his failure to provide a breath specimen could not have availed him. But, he said, the Circuit Court Judge had wrongly approached the matter on the basis that the burden would have been on Mr Kennedy to establish such a defence. On Mr Kennedy's case, the Constitution required that there should be a defence based on inability or incapacity (citing *DPP (Keoghan) v Cagney*). It had been open to the Oireachtas to provide for such a defence – and Mr Devally allowed that had it done so in terms which placed a legal burden (and not merely an evidential burden) on the accused, that would probably "*pass muster*" constitutionally – but the Oireachtas had not done so. [13] In the absence of a statutory provision having a different effect, the only burden that could lawfully rest on an accused was an evidential one. The prosecution carried the burden of proving all aspects of the case to the normal criminal standard i.e. beyond a reasonable doubt and, provided only that there was sufficient evidence of inability so as to raise an issue, the prosecution had to prove the absence of any operative inability beyond reasonable doubt. Mr Kennedy was entitled to make the case that the Constitution mandated the availability of such a defence, but no such defence was available in response to a section 12(3) charge because, so it was said, the offence was one of absolute liability.

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[13] As to the distinction between legal and evidential burdens of proof in this context, see the discussion in the judgment of O' Malley J for the Supreme Court in *People (DPP) v Forsey* [2018] IESC 55, [2019] 1 ILRM 173

21. According to Mr Devally, the findings made by the Circuit Court Judge do not foreclose that argument because the Judge had applied the incorrect burden of proof and had not addressed her mind to the question of whether, having regard to all of the evidence, including the evidence of Mr Kennedy and his wife and of Ms Nugent, the audiologist, it had been established beyond reasonable doubt that Mr Kennedy's hearing difficulties had *not* been an operative factor in his failure to provide a breath specimen. Mr Devally accepted that, if the Circuit Judge had made such a finding, that would be fatal to his client's entitlement to challenge section 12(3).

22. Counsel further argued that, although Mr Kennedy's conviction was final and would not be affected even if he were to succeed in his challenge to section 12(3), he nevertheless had standing to proceed with that challenge, relying in particular on the decision of the Supreme Court in *Mohan v Ireland* [2019] IESC 18, [2019] 2 ILRM 1 from which it is clear (so Counsel submitted) that an indirect impact on interests is sufficient to give standing. Mr Kennedy had been impacted directly and indirectly by his conviction and, even if that conviction survived a successful challenge to section 12(3), it could not be said that such an outcome would be of no benefit to Mr Kennedy.

23. On inquiry from the Court, Mr Devally (who did not appear in the High Court) accepted that the argument being advanced by him had not featured, or at least had not featured to the same extent, before the High Court. That no doubt explains why there is no specific reference to it in the Judgment of the High Court. However, the Defendants did not object to the argument being made or submit that it should not to be considered by the Court. In the circumstances and having regard to the fact that it is common case that the nature and effect of the Judge's findings are central to the proper resolution of the principal issue in this appeal, it appears appropriate to consider the argument on its merits.

24. Responding for the Defendants, Mr Clarke SC referred to the context in which the Circuit Judge had made her findings. She had been asked to state a case at an earlier stage but, following objection by the Defendants, had deferred her decision on that application until after the evidence was heard. Having heard all of the evidence, the Judge had concluded that there was no factual basis to state a case. Mr Clarke made detailed reference to the transcript of the final day of the Circuit Court hearing and submitted that the Circuit Judge had found "*in trenchant terms*" that Mr Kennedy's stated hearing difficulties were "*just not a factor in this case*."

25. I hope that it is not unfair to Mr Clarke to observe that there was a discernible retreat from the second limb of the Defendants' application – the *Henderson v Henderson* ground – in the course of the hearing before this Court. It was, he emphasised, relied on only in the alternative and by way of fall-back. He fairly accepted that, in the event that Mr Kennedy had sought to include a challenge to the constitutionality of section 12(3) in the 2012 judicial review proceedings, he would likely have been met with objections that such a challenge was procedurally irregular (on the basis that any constitutional challenge should properly proceed by plenary proceedings) and premature (on the basis that it ought to await the conclusion of Mr Kennedy's pending appeal in the Circuit Court).

DISCUSSION

Preliminary

26. As already recounted, Mr Kennedy was charged in 2007 with an offence under section 12(3) of the 1994 Act, as well as an offence under section 13(2) of that Act.

27. Section 12 is silent on the circumstances (if any) in which a failure to provide a preliminary breath specimen may be excused. Section 23(1) of the 1994 Act provided for a defence to a prosecution under section 13 but it had no application to a prosecution under section 12(3). [14]

28. In DPP *(Keoghan) v Cagney* [2013] IESC 13, [2013] 1 IR 493, the Supreme Court was asked by the Circuit Court whether, in a prosecution under section 13, there was an obligation on the prosecution to establish that the defendant had been warned that, in order to rely on a defence of "*special and substantial reason*" for the refusal or failure to provide a breach specimen, they were required to offer to provide a blood or urine specimen. The Supreme Court (per Clarke J) held that such a warning had to be given and, where the giving of such a warning was not proved, the prosecution would be precluded from arguing that the section 23 defence was unavailable on the basis of non-compliance with that element of it. While the Court reached that conclusion on the basis of a literal construction of section 23(1), Clarke J added that, in his view, "*there would be serious questions as to the consistency with constitutional rights of an absolute offence of failing to provide a breath sample to which there was no defence based on inability or incapacity."* [15] That being so, Clarke J continued, it appeared appropriate to approach the question raised by the Circuit Court "*on the basis that some form of defence based on an actual and non-contrived inability or incapacity is one which is constitutionally mandated*." [16] Finally, although acknowledging that ordinarily there was no obligation on an investigating garda to alert a person under suspicion of a possible defence that might be available, Clarke J considered that "... *where, as here, legislation, for reasons of constitutional necessity, acknowledges that it is appropriate to make provision for persons who may not have the ability or capacity to give a breath sample*", it would be an insufficient vindication of the rights of persons with such an incapacity to rely on such a defence if it could be lost through ignorance.

29. The decision of the Supreme Court in *DPP (Keoghan) v Cagney* was given on 11 March 2013, almost 2 years after Mr Kennedy's conviction in the District Court. But the argument that there was (or ought to be) a defence of inability/incapacity available in a prosecution under section 12(3) appears to have already occurred to Mr Kennedy and his legal advisors. It was on that basis, presumably, that Mr Kennedy gave evidence to the

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[14] Section 23(1) provides that it shall be a defence for a defendant in a prosecution under section 13 for refusing or failing to give a breath specimen, to satisfy the court *"that there was a special and substantial reason for his refusal or failure"* <u>and</u> that, as soon as practicable after the refusal or failure concerned, he complied (or offered, but was not called upon, to comply) with a requirement under the section to give specimen of blood or urine.

[15] At paragraph 32

[16] Paragraph 33

District Court (evidence that the District Judge did not accept) that a hearing incapacity had prevented him from complying with the requirements made under **both** section 12 and section 13: paragraph 8 of the Statement of Claim here.

30. In his written submissions, Mr Kennedy argues that that the issue of the constitutionality of section 12(3) only arose when the Supreme Court gave its decision in *DPP (Keoghan) v Cagney*. I do not agree. Undoubtedly, the statements of Clarke J referred to above would provide support for any challenge to that provision. However, it appears to me to put the matter much too far to suggest that the basis for such a challenge could not have been identified before that decision was given. Anyone who reviewed the 1994 Act with a degree of care – and that surely included Mr Kennedy and his legal team – would have noted the availability of a specific statutory defence to a prosecution for refusing or failing to provide a breath specimen when required under section 13 but not when required under section 12. That would at the least raise a question as to whether any defence of inability was available under section 12 and, if not, whether the exclusion of such a defence in respect of a section 12 offence could be justified, given its availability in a prosecution for essentially the same offence under section 13. In fact, as just noted, Mr Kennedy appears to have run a defence of inability before the District Court in April 2011 in respect of both the section 12(3) and section 13 charges against him, though that defence failed on the evidence.

31. In any event, the Supreme Court's decision in *DPP (Keoghan) v Cagney* in March **2013** does not appear to have been the trigger for these proceedings, given that they were not commenced until October **2015.** That trigger was, it seems, the decision of the Circuit Court on 23 July 2015 not to state a case to this Court and to list Mr Kennedy's appeal for hearing on 11 November 2015.

The First Issue – Standing/*Ius Tertii*

32. I will come back to consider how matters proceeded before Judge Codd in the Circuit Court. Before doing so, however, it is necessary to say something about the related issues of standing and *ius tertii*. I addressed these issues in a context having some parallels with the circumstances here in my concurring judgment in the recent decision of this Court in *Galvin v Director of Public Prosecutions* [2020] IECA 319. The applicant in *Galvin* had been charged with an offence of offering tobacco products for sale in packs that did have the necessary tax stamp affixed to them, contrary to section 78(3) of the Finance Act 2005 (as amended). He had challenged the constitutionality of that provision (*inter alia*) on the basis (he said) that it excluded any defence to the effect that he did not know or intend that his actions were unlawful.

33. The issue before this Court in *Galvin* was whether the High Court was correct to direct that the proceedings should proceed as a plenary action, having been commenced in the form of Order 84 judicial review proceedings. But questions of standing/*ius tertii* arose indirectly and, in that context, I offered the following observations:

> "31. I would observe that where constitutional challenges revolve around the nature of a statutory offence and/or the defences available in relation to such an offence – as

in CC – the assessment of disputed questions of standing and/or ius tertii must be sensitive to that context. As a general principle, the prosecution bears the burden of proving, to the criminal standard, all elements of a criminal offence. Even where some burden rests on an accused, it will generally be an evidential burden only. A statute may impose a legal burden on an accused in relation to a specified element of an offence but that is comparatively rare.

32. The fact that a statutory provision creating a criminal offence is challenged on the basis that it wrongly excludes a particular form of defence does not imply that, in order to maintain such a challenge, a plaintiff must establish that defence affirmatively. That is well-illustrated by CC and its aftermath. The kernel of the constitutional argument advanced in CC was that section 1(1) of Criminal Law (Amendment) Act 1935 was inconsistent with the Constitution because it excluded any defence of mistake. The Court upheld that complaint, finding that section 1(1) "wholly remove[d] the mental element and expressly criminalise[d] the mentally innocent" and provided for a "form of absolute liability". As Hardiman J explained in A, section 1(1) unconstitutionally prevented CC "from putting his version of the facts before the jury at all." (footnotes omitted)

The reference to *CC* is, of course, a reference to *CC v Ireland* [2006] 4 IR 1. CC also featured prominently in the submissions in this appeal. The reference to *A* is to the subsequent decision of the Supreme Court in *A v Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 IR 99.

34. There were important factual differences between *Galvin* and the proceedings here. Mr Galvin's prosecution had been stayed when he commenced the judicial review proceedings and therefore no hearing on the criminal charge had taken place, in contrast to the position here. However, the essential posture adopted by Mr Galvin on the standing/*ius tertii* issue was similar to the posture adopted by Mr Kennedy here.

35. As I stated in *Galvin*, some plausible evidence of mistake appears to have been sufficient to allow the applicants in CC to maintain his challenge to section 1(1) of the Criminal Law (Amendment) Act 1935 and he was not required (and, in my view, could not properly have been required)"*as a condition of establishing an entitlement to maintain that challenge to section 1(1), to establish affirmatively a form of defence that in fact section 1(1) excluded, on the basis that, if section 1(1) were declared unconstitutional, the Oireachtas might in response legislate for such a defence.*" [17]

36. In contrast, the applicant in A could never have impugned section 1(1) on the basis successfully advanced in CC because, on the admitted facts of A's case, no defence of mistake would have been open to him. In that respect, A was in the same position as the plaintiff in *Cahill v Sutton* [1980] IR 269.

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[17] At para. 36.

37. Ms Cahill had challenged the constitutionality of section 11(2)(b) of the Statute of Limitations 1957 on the basis of the absence from it of any discoverability proviso. However, in the words of O' Higgins CJ, "*on an examination of the facts it transpired that at all material times the plaintiff was aware of her rights and of the alleged wrong of the defendant.*"[18] In his judgment, Henchy J noted that it "*is clear – indeed, it is admitted – that the plaintiff would still be shut out from suing after the three-year period limitation even if the suggested saving provision had been included in the Act of 1957*." [19] As a discoverability proviso would not in any event have availed Ms Cahill, her constitutional action was founded on a *ius tertii*. [20]

38. In *Tuohy v Courtney* [1994] 3 IR 1, a further challenge was brought to the constitutionality of section 11, this time in the context of a professional negligence action, again on the basis of the absence from the section of any discoverability proviso. Notably, the plaintiff was required to establish as a matter of probability that he did not have knowledge of his potential cause of action until after the expiry of the limitation period in order to establish an entitlement to maintain his constitutional claim.

39. The contrast between *CC* and *Tuohy v Courtney* demonstrates that while the rules of standing/*ius tertii* that apply in constitutional litigation involving statutory provisions in the areas of criminal and civil law may formally be the same, they may apply quite differently in practice.

40. This discussion helps to delineate the battle lines between the parties. Given that Mr Kennedy has been convicted of a section 12 offence, no issue of his general standing to challenge that section arises. The narrow issue in dispute is whether, having regard to the findings made by the Circuit Court Judge, Mr Kennedy's challenge to section 12(3) effectively depends on the "*facts of others*" (as the Defendants contend). On the Defendants' argument, Mr Kennedy is in the same position as the applicant in *A*, save that in *A* it was the *admitted* facts that would have precluded any challenge to the statute by him whereas here it is the facts *as found by the Circuit Court Judge* that are said to have that effect.

41. Mr Kennedy on the other hand argues those findings do not amount to a positive finding, to the applicable criminal standard, that his failure to provide a breath specimen was not attributable to a hearing difficulty (and emphasises the Judge's apparent acceptance that he did in fact have a hearing problem). Such a finding, it is accepted, would have been fatal to Mr Kennedy's capacity to pursue his challenge but, in the absence of any such finding, it is said that no question of *ius tertii* arises. As a matter of principle, I did not understand the Defendants to dispute that latter proposition and, in my opinion, it is correct. In other words, if Judge Codd here simply found on the evidence that Mr Kennedy had failed to establish, as a matter of probability, that his failure to provide a breach

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[18] At page 276.
[19] At page 280.
[20] *Ibid*.

specimen was attributable to his stated hearing difficulties, that would not be enough, in my view, to bar him from maintaining his constitutional challenge here.

42. As will be evident, therefore, the proper resolution of the first issue turns on the nature and effect of the findings made by the Circuit Court Judge.

The Proceedings in the Circuit Court

43. Mr Kennedy's appeal was, it appears, initially listed for hearing on 18 December 2014. It was assigned to Judge Codd. On the hearing date, Counsel for Mr Kennedy applied to the Judge to state a case to this Court pursuant to section 16 of the Courts of Justice Act 1947 as to whether a defence of inability/incapacity was available in a prosecution under section 12(3) of the 1994 Act. It appears that Judge Codd indicated a willingness to do so and the proceedings were adjourned to allow for the preparation of a draft case stated.

44. In July 2015 – by which time a draft case stated had been prepared by Mr Kennedy's legal team – Counsel on behalf of the DPP appeared before Judge Codd to argue that it would not be appropriate to state a case until the court heard the evidence on the appeal. According to the DPP, it was only at that stage, when the relevant facts had been found, that any question of a consultative case stated might properly arise. Express reference was made in the DPP's submissions to the *ius tertii* principle and to the passage from the judgment of Hardiman J in *A v Governor of Arbour Hill Prison* set out above. Reference was also made to the decision of the Supreme Court in *CC*.

45. Over the objections of Mr Kennedy, Judge Codd decided not to state a case at that stage and proceeded to fix the appeal for hearing on 11 November 2015.

The Draft Case Stated

46. The draft case stated is relevant because it was an important part of the context in which Judge Codd ultimately made the findings which, on the Defendants' case, justified the High Court's conclusion that the plenary proceedings involve an assertion of a *ius tertii* by Mr Kennedy.

47. The draft case stated recited that Counsel for Mr Kennedy had indicated that he was seeking a preliminary ruling from the Circuit Court as to whether a defence was available to Mr Kennedy in respect of the alleged section 12(3) offence, in circumstances where (it was said) section 12(3) purported to be an offence of absolute liability for which no defence based on inability or reasonable excuse was provided. That, it was said, was in contrast to the alleged offence under section 13, where a statutory defence was provided by section 23. Reference was made to the decision in *DPP (Keoghan) v Cagney* and the draft recited Mr Kennedy's submission that, similar to the position in relation to section 13, "*it was constitutionally mandated that a defence based on an actual and non-contrived inability or incapacity was available to a person prosecuted for an offence contrary to s.12.*" The draft then referred to the intention of Mr Kennedy to put forward a defence "*based on an inability to hear and follow the instructions*" given by Garda Coyne at East Wall Road and to the intention to adduce expert evidence from Ms Nugent, a

consultant audiologist in respect of whose evidence a notice under section 34 of the Criminal Procedure Act 2010 had been served. That proposed evidence (so the draft stated) "*established a factual basis that was not hypothetical or theoretical, whereby the appellant was entitled to know prior to the commencement of the trial whether a defence based on incapacity or inability is available to him."* The draft case stated then identified the following two questions for reference to this Court:

"(i) Where a person is prosecuted for an offence contrary to s.12 of the Road Traffic Act 1994, as amended, is a defence available to a person notwithstanding they have failed to comply with [a] requirement to provide a specimen of breath indicating the presence of alcohol in the breath?

(ii) Is a court obliged to convict a person who refuses or fails to comply [with] a requirement under s.12 of the Road Traffic Act 1994, as amended, where that requirement is not complied with although the person may have a reasonable excuse or a defence based on actual and non-contrived inability?"

The expression "*actual and non-contrived inability*" is of course taken from the judgment of Clarke J in *DPP (Keoghan) v Cagney*.

The hearing and disposition of Mr Kennedy's Appeal to the Circuit Court

48. Mr Kennedy's appeal was heard over 3 days between November 2015 and May 2016. The Circuit Court Judge heard the evidence of a number of Garda witnesses, including Garda Coyne (by that time Detective Garda Coyne). At the end of the prosecution evidence, Judge acceded to an application for a direction in respect of the section 13 charge. The basis for that direction had no bearing on the section 12(3) charge.

49. Mr Kennedy and his wife, as well as the audiologist, Ms Nugent (who had first seen Mr Kennedy after his arrest) then give evidence in respect of the section 12(3) charge. At the conclusion of that evidence, counsel for Mr Kennedy addressed the Court to the effect that Mr Kennedy would have a "*defence in principle*" if the Court accepted that it was "*reasonably possible that Mr Kennedy could not understand what was going on or did not for instance, have the full opportunity to provide a specimen*." [21] However, counsel submitted, such a defence was excluded by the section. Counsel then referred to the fact that Mr Kennedy had commenced the plenary proceedings and appeared to raise the possibility that the Judge could defer any decision on the appeal and await the outcome of the proceedings.

50. At that stage, the Judge made it clear that, as far as she was concerned, the possibility of stating a case remained live. She explained that she had declined to state a case at a preliminary stage and had made it clear that "*once the evidence was engaged in, I would determine whether or not the defence arose .. on the facts*." It is clear from the context that the "*defence*" that the Judge was referring to here was the defence of inability/incapacity which, on Mr Kennedy's argument, was constitutionally mandated but

[21] Transcript of Day 3 (12 May 2016), at page 94.

which was unlawfully excluded by the terms of section 12(3). Following further exchanges with counsel during which counsel suggested that it would be unfair to proceed to a conviction in light of the suggested infirmity of section 12(3) she observed that "[*s]urely the Court would have to decide whether it's relevant or not, whether the defence has any relevance or not.*" After further discussion, the Judge stated that she had understood that everyone was agreed that, once she had heard the evidence, if she felt that the defence raised was a "*genuine defence*" or had any "*merit*" "*we could frame a case stated in relation to it.*" Again, the "*defence*" being referred to by the Judge here was the defence of inability/incapacity canvassed by Mr Kennedy.

51. Ultimately, the Judge did not state a case and proceeded instead to convict Mr Kennedy on the section 12(3) charge. She expressed her reasons for doing so in some detail, stating *(inter alia)*:

- "I'm not satisfied on the facts in this case .. that the hearing loss was a factor, I'm not satisfied on the facts that it was a factor." [22]

- "So I'm not satisfied that he was deprived of a defence. And in that regard in relation to Mr Kennedy's own evidence, he gave – he outlined no specific problem he had on the evening …" [23]

- "I accept he had a hearing problem, but I do not accept it impaired him to the extent of not understanding what he was required to do. And the garda's evidence was very strong in relation to that and that was the evidence of Garda Coyne… [Mr Kennedy had] no problem understanding the instructions as given to him inside the car .. and he was given an opportunity to blow into .. the Alcometer at that point on a number of occasions and then it was tried again .. once he stepped out of the car. So I'm satisfied, even if he had difficulty with traffic noise outside and I don't – I don't accept he had.. But even if he had, he was given ample opportunity before he stepped out of the car…" [24]

- "If you had some temporary deafness going on and you were observing all this, you would – any road user, any driver would understand what a garda was requesting you to do if he steps out and presents you with the device to blow into… Now, there's an issue regarding the specific instructions that the garda was giving him. But it certainly occurred to me and what stood out for me in Mr Kennedy's evidence, he never outlined any specific problem he had with the device." [25]

- "I don't find that it has – that the hearing loss had a bearing on it." [26]

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[22] Day 3, page 105
[23] Ibid, page 106
[24] Also at page 106
[25] At page 106-107
[26] At page 107

- "So I'm finding on the evidence that the defence doesn't arise… I think that short circuits matters…" [27]

The Effect of the Judge's Findings

52. In his submissions, Mr Devally suggested that the circumstances in which these findings were made were "unusual" and that they had "*something of a moot*" about them. I do not agree. At no stage did the Circuit Court Judge rule that section 12(3) excluded any defence of inability or incapacity or endorse the suggestion that the offence it created was one of absolute or strict liability. To the contrary, she had left open the possibility of stating a case to this Court so that those issues could be authoritatively determined, *if relevant*. It was in that context that these findings were made, and it was on the basis of them that the Judge concluded that no purpose would be served by stating a case (because no such defence arose on the facts) and therefore proceeded to convict Mr Kennedy on the section 12(3) charge. Accordingly, the findings were not in any sense extraneous to the Judge's determination of Mr Kennedy's appeal or properly seen as a moot.

53. Mr Devally seeks to characterise these findings as amounting only to a finding that the evidence, including the evidence adduced by and on behalf of Mr Kennedy, failed to establish *as a matter of probability* that his hearing difficulties had been an operative factor in his failure to provide a breath specimen. The Judge, he says, applied the incorrect burden of proof and had failed to consider whether the evidence raised a reasonable doubt that Mr Kennedy's hearing difficulties may have been an operative factor.

54. I cannot accept this characterisation of the Judge's findings. The Judge did not at any point indicate that she was approaching the issue on the basis that any burden of proof lay on Mr Kennedy in this context. She had not been invited to adopt such an approach. The Judge is very experienced in the area of criminal law and clearly understood the nature of the burden of proof in criminal proceedings and it is quite clear from the transcript that she fully understood that the case being made on Mr Kennedy's behalf was that section 12(3) created an absolute offence and that its exclusion of *any* defence of inability or incapacity rendered it unconstitutional. The fact that the Judge refers at various points to the "*defence*" asserted by Mr Kennedy does not imply any view as to the burden of proof. As the discussion above demonstrates, the terminology of "*defence*" was common coinage in the debate before the Court. As is evident from the questions in the draft case stated, the focus of the debate was whether *any* defence based on inability was excluded by section 12(3). The Judge was aware that, on Mr Kennedy's case, he had a "*defence in principle*" if the Court accepted that it was "*reasonably possible that Mr Kennedy could not understand what was going on or did not for instance, have the full*

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[27] At page 108.

opportunity to provide a specimen." It is clear that, so formulated, such a defence would not involve any legal burden on Mr Kennedy.

55. The Judge herself had made it clear that "*the Court would have to decide whether it's relevant or not, whether the defence has any relevance or not*" and that, if she felt that the defence raised was a genuine defence or had any merit "*we could frame a case stated in relation to it.*" In deciding not to state a case, the Judge clearly concluded that, on the evidence, any alleged defence based on Mr Kennedy's hearing problems did not have "*any relevance*", was not a "*genuine defence*" and lacked "*merit*". It was on that basis that, even assuming that section 12(3) created an absolute or strict liability defence, Mr Kennedy had not been "*deprived of a defence*". That is emphasised by the other findings made by the Judge which I have set out above. On any fair reading, those findings go significantly further than Mr Devally would allow. The Judge explicitly found, on the evidence, that "*the defence does not arise*" and that the evidence did not establish that "*the hearing loss had a bearing*" on Mr Kennedy's failure to provide the required breath specimen. That "*short-circuit[ed]*" the debate about the stating of a case precisely because the issue as to whether section 12(3) permitted or excluded a defence of inability/incapacity would not, on the evidence, have any impact on the determination of Mr Kennedy's guilt or innocence on the section 12(3) charge.

56. In other words, the Judge was clearly of the view that the evidence she had heard established beyond any reasonable doubt that Mr Kennedy's failure to provide a breath specimen was not attributable to any hearing problem on his part. If she had been of the view that the evidence had raised a reasonable doubt, it is wholly improbable that she would not have said so and equally improbable that, in that scenario, she would not have proceeded to state a case as to whether, on the proper construction of section 12(3), she should proceed to convict Mr Kennedy or not.

57. In my opinion, the Judge Codd's findings compel the conclusion that Mr Kennedy is not entitled to pursue his constitutional challenge to section 12(3). Even if section 12(3) provided for a defence of inability or incapacity (as Mr Kennedy asserts it should), it is evident that, having regard to the findings made, such a defence would not have availed Mr Kennedy. Any suggestion otherwise on the part of Mr Kennedy would involve an impermissible collateral attack on Judge Codd's findings.

58. The argument that section 12(3) is unconstitutional because it fails to provide for a defence of inability or incapacity would therefore involve the assertion by Mr Kennedy of a *ius tertii* in precisely the same way as did the argument of the plaintiff in *Cahill v Sutton* (and as would have been the case in the event that the applicant in *A v Governor of Arbour Hill Prison* had challenged section 1(1) of the 1935 Act). Unlike the applicant in CC, Mr Kennedy has no plausible basis for contending that he had a defence to the section 12(3) charge which was wrongly shut out by the terms of that sub-section. That claim was, it seems, examined and rejected by the District Court and was examined, in great detail, by the Circuit Court on appeal and found not to be plausible.

59. I would therefore uphold the High Court's determination on this point.

60. Before leaving this issue, I would point out that the facts and circumstances here are rather particular. As Mr Devally observed in argument, in *CC* the prosecution never went to trial. Even if it had, he said, it is unlikely that any defence of mistake would have gone to the jury as the trial judge would probably have ruled that no such defence was available under section 1(1) (as the High Court and Supreme Court ruled in *CC)*. The evidence of mistake in *CC* was certainly not examined in the way that the evidence of inability/incapacity was examined here. But that is a function of the particular manner in which these proceedings unfolded. The issue of standing/*ius tertii* here necessarily falls to be determined by reference to the facts of this case, not the facts in *CC*. The relevant facts here include the findings made by the Circuit Court Judge by reference to the evidence that Mr Kennedy adduced as to his hearing difficulties and their alleged impact on his capacity to comply with Garda Coyne's requirement to provide a breath specimen. Those findings cannot be disregarded or avoided on the basis that such findings might not have been made, or made in the same terms, had the proceedings taken a different procedural course.

61. I should also note for completeness that, in light of the conclusion just stated, it is not necessary to consider whether the fact that Mr Kennedy's conviction is now final and conclusive impacts on his entitlement to maintain his constitutional challenge. In *Redmond v Ireland* [2009] IEHC 201, [2015] IESC 98, [2015] 4 IR 84, the plaintiff brought a post-conviction challenge to section 3(2) of the Offences Against the Person (Amendment) Act 1972 and his entitlement to maintain such a challenge does not appear to have been disputed. I did not understand the Defendants to raise any such issue here. It is also unnecessary to express any view as to the implications (if any) for Mr Kennedy's section 12(3) conviction in the event that he were permitted to proceed with his claim and succeeded in having section 12(3) declared invalid.

The Convention Challenge

62. The parties did not separately address Mr Kennedy's Convention challenge and it seems that the High Court was effectively invited to proceed on the basis that the Constitutional and Convention challenges stood or fell together. No submissions were directed to this issue before this Court on appeal. That is rather unsatisfactory.

63. I am not aware of any decision of the Superior Courts that expressly considers the issue of standing (in the broadest sense) for the purposes of an action for a declaration of incompatibility pursuant to section 5 of the 2003 Act. Certainly, no such authority was cited in argument before this Court.

64. As a matter of principle, it is difficult to identify any good reason why the standing rules applicable to a claim for a section 5 declaration should be different to the rules applicable to a constitutional action. In that context, it is also difficult to see any good reason why a person seeking a section 5 declaration in relation to a statutory provision enacted by the Oireachtas might be permitted to advance their claim on the basis of a *ius tertii*, in circumstances where a litigant challenging the constitutionality of the same statutory provision would not be permitted to do so. Applying a lower threshold for claims for a

section 5 declaration could also impact significantly on the inter-relationship between the Constitution and the Convention as explained by the Supreme court in *Carmody v Minister for Justice* [2009] IESC 71, [2010] 1 IR 635.

65. I do not overlook the fact that, for the purpose of an individual application to the European Court of Human Rights, the complainant must establish that they are a "*victim*" of a violation of a right or rights protected by the Convention: Article 34 of the Convention. There is a considerable body of jurisprudence from the European Court of Human Rights on how this requirement is to be interpreted and applied. However, it is not obvious that this has any bearing on the issue of standing for the purposes of section 5 of the 2003 Act. In any event, Mr Kennedy does not contend that, even if he is not entitled to pursue his constitutional challenge here, he is nonetheless a "*victim*" of section 12(3) and ought therefore to be entitled to pursue his claim for a section 5 declaration. In these circumstances, it does not appear to me to be necessary to consider further the question of whether Mr Kennedy might be a "*victim*" in the Article 34 sense.

The Claim for Damages

66. Nothing at all was said in argument about Mr Kennedy's claim for damages. Again, the parties' shared – though unarticulated – assumption appears to be that the damages claim stands or falls with the other reliefs sought by Mr Kennedy. Given that the premise of the damages claim appears to be that section 12(3) is inconsistent with the Constitution and/or incompatible with the Convention, it appears to follow that the damages claim made here has no independent basis such that it might be pursued as a stand-alone relief. As I have made clear, no contrary argument was advanced on Mr Kennedy's behalf.

Conclusions on the First Issue

67. In light of the findings made by the Circuit Court Judge, Mr Kennedy is not in my opinion entitled to pursue his constitutional challenge to section 12(3). Even if section 12(3) allowed for a defence of inability or incapacity (as Mr Kennedy asserts it must), it is evident that, having regard to those findings, such a defence – whatever its precise form – would not have availed Mr Kennedy. The argument that section 12(3) is unconstitutional because it fails to provide for such a defence therefore involves the assertion by him of a *ius tertii* which, the authorities make clear, ought not to be permitted.

68. For the same reasons, I am of the opinion that Mr Kennedy cannot properly pursue his claim for a declaration of incompatibility in respect of section 12(3).

69. The damages claim made by Mr Kennedy derives from and is dependent on his claims that section 12(3) is inconsistent with the Constitution and/or incompatible with the Convention and cannot be maintained independently of those claims.

70. Accordingly, I would affirm the order made by the High Court striking out these proceedings.

The Second Issue – Abuse of Process

71. Given the view I have taken on the first issue, it is not strictly necessary to address the issue of abuse of process. However, the issue is an important one as a matter both of principle and practice and, given that it was the subject of a specific cross-appeal by the State Defendants, it appears appropriate to engage with it.

72. As a starting point, it is important to observe that the so-called "*rule*" in *Henderson v Henderson* (1843) 3 Hare 100 is to be applied flexibly and not in a rigid or mechanical manner. That has been emphasised in successive decisions of the Supreme Court, including *AA v The Medical Council* [2003] 4 IR 302*, SM v Ireland* [2007] IESC 11, [2007] 3 IR 283 and *McFarlane v Director of Public Prosecutions* [2008] IESC 7, [2008] 4 IR 117.

73. All of these decisions have cited with approval a passage from the speech of Lord Bingham in *Johnson v Gore Wood & Co* [2002] 2 AC 1. It warrants extended quotation:

> *"But Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party.* ***It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before****. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not."* [28]

74. Here, the abuse of process objection rests on the contention that, when, in May 2012, Mr Kennedy brought judicial review proceedings to challenge the decision of the Circuit Court

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[28] At page 31 (my emphasis)

to direct disclosure of a document in redacted form only (that document being relevant only to the section 13(2) prosecution), he ought also to have brought forward his challenge to the validity of section 12(3).

75. That objection is not well-founded in my view. In the first place, for the reasons explained by the Supreme Court (per Kearns J) in *SM v Ireland*, the reliefs sought in these proceedings could not properly have been sought in the judicial review proceedings. That aspect of *SM v Ireland* was considered by this Court in *Galvin v Director of Public Prosecutions* and the judgments delivered by the Court comprehensively review the authorities, starting with *Riordan v An Taoiseach (No 2)* [1999] 4 IR 343. There, Barrington J, while noting that "*no rigid rule*" should be laid down, observed that "*when the primary relief claimed by an applicant for judicial review is the validity of an Act or the repugnancy of a Bill, having regard to the Constitution, this Court considers that the case is not an appropriate one for judicial review, and that the applicant ought to be left to claim relief, if any, in a plenary action*". That approach has been affirmed on a number of occasions since and was applied by this Court in *Galvin.*

76. More generally, I can see no basis on which it could plausibly be said that these proceedings are oppressive of the State Defendants or otherwise constitute an abuse of process. There are, in my view, a number of relevant factors:

- Ireland and the Attorney General – the principal defendants in these proceedings – were not parties to the earlier judicial review proceedings.

- The only issue in the judicial review proceedings – a discrete and narrow one concerning disclosure/redaction in the context of the section 13 prosecution against Mr Kennedy – was entirely distinct from the very different issues subsequently raised in these proceedings, relating as they do to the validity of section 12(3). In the language of *Henderson v Henderson* itself, I do not think it can reasonably be said that the claims advanced in these proceedings "*properly belonged to the subject of litigation*" in the judicial review proceedings.

- There was an obvious imperative to have the issue raised by the judicial review proceedings determined before the District Court appeal was heard. No such imperative applied to the claims made in these proceedings. If those claims *had* been included in the judicial review proceedings, it is not at all clear that they should or would have been determined before the criminal proceedings were concluded. As I noted in *Galvin* (citing *MD v Ireland* [2009] 3 IR 690, at paras 17-18) a person facing criminal prosecution who challenges the constitutionality of the statutory provisions founding their prosecution has no general or automatic entitlement to have their constitutional challenge determined before the criminal prosecution is heard. Thus, significant timing and sequencing issues would have arisen and it appears to me there would have been a real prospect that the disclosure issue and the constitutional/convention issues might ultimately have been severed.

- Furthermore, it seems clear that, if the claims made in these proceedings *had* been included in the judicial review proceedings, the State would have objected that the claims were premature. In this context, it will be recalled that in the motion now before this Court by way of appeal, the Defendants sought to have the proceedings struck out "*in their entirety*" on the basis that the criminal proceedings had not yet concluded. Whatever may be the merits of that position – and *CC* is relevant in this context also – there is no reason to suppose that the same objection would not have been made in answer to any constitutional proceedings that might have issued in May 2012 in the same manner and with the same vigour as it was to the proceedings here. The position of the Defendants might thus seem rather opportunistic and unattractive. If the claims made in these proceedings had in fact been advanced in May 2012, the Defendants would likely have objected on the basis of prematurity but, those claims not having been made in May 2012, the Defendants say instead that it is too late to advance such claims now.

- No material prejudice whatever to the Defendants has been identified.

- While the Judge expressed concern "*with the time and resources expended which have allowed the plaintiff to exhaust every conceivable cause of action and remedy to right the plaintiff's perception of wrongdoing on the part of the State*", the picture that this conveys is not, in my opinion, an entirely accurate one. The fact is that the only proceedings commenced by Mr Kennedy were the (very narrow) judicial review proceedings brought in May 2012 and these plenary proceedings brought in October 2015. Both of those proceedings arose from the criminal proceedings brought *against* Mr Kennedy. Mr Kennedy was clearly entitled to defend those proceedings in the District Court and to appeal his conviction to the Circuit Court. While there was significant delay in the conclusion of those proceedings – which was no doubt a cause of significant frustration to the Defendants and in particular the DPP – the proceedings here did not contribute to that delay and I do not think that any concern that the High Court had about the delay, understandable as it was, was a relevant factor in the *Henderson v Henderson* analysis here.

- While *SM v Ireland* suggests that the "rule" in *Henderson v Henderson* can, in principle, apply to constitutional litigation, it appears to me that courts should be particular cautious in its application in that context.

- Finally, to hold that Mr Kennedy was precluded from pursuing these proceedings on *Henderson v Henderson* grounds in the circumstances here risk creating a perverse incentive for litigants to bring premature and unnecessary constitutional challenges on a precautionary basis, which would not be in the interests of the Defendants or in the public interest.

77. Here, when one addresses what Lord Bingham identified as the "*crucial question*", there is not, in my view, any basis on which it could properly be concluded that "*in all the circumstances, [Mr Kennedy] is misusing or abusing the process of the court by seeking*

to raise before it the issue which could have been raised before". There is no question of the Defendants being "*unjustly harassed*" and, in my opinion, it would be contrary to the interests of justice to dismiss these proceedings as an abuse of process in the *Henderson v Henderson* sense.

78. Addressing the *Henderson v Henderson* issue, the Judge considered that the evidence did not allow him to determine whether Mr Kennedy had "*an unlawful ulterior motive in prosecuting these proceedings or whether the proceedings have been instituted for a purpose which the law does not recognise as a legitimate use of the remedy which has been sought*".[29]

79. I agree with the Defendants that an "*unlawful ulterior motive*" is not a necessary ingredient for the application of the rule in *Henderson v Henderson*. That is to confuse "*Henderson v Henderson abuse of process*" with the distinct form of abuse/misuse of process considered in decisions such as that of the High Court (Quirke J) in *Sean Quinn Group v An Bórd Pleanála* [2001] 1 IR 505. I did not understand the Defendants to suggest that these proceedings are an abuse of process in that sense nor do the papers disclose any basis on which such a suggestion could properly be made.

80. However, in light of the discussion above, the Defendants' cross-appeal fails in any event and Mr Kennedy's appeal succeeds to the extent that I have concluded it would be contrary to the interests of justice to hold that these proceedings were an abuse of process in the *Henderson v Henderson* sense. However, that has no effect on the actual outcome of this appeal.

CONCLUSION AND ORDER

81. In my opinion, therefore, the Court should dismiss the appeal (save to the limited extent indicated above in relation to the second issue), dismiss the cross-appeal and affirm the order of the High Court.

82. As regards costs, each party should have a period of 10 days from the date of this judgment to submit a brief supplement submission (not exceeding 1,000 words) as to the order that, in their view, ought to be made, which the Court will consider before making its decision.

In circumstances where this judgment is being delivered electronically, Costello J and Pilkington J have authorised me to record their agreement with it.

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[29] At para 38.