THE SUPREME COURT

[RECORD NO.: 66/20]

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

BETWEEN:

TOMASZ ZALEWSKI

APPELLANT

AND

ADJUDICATION OFFICER, THE WORKPLACE RELATIONS COMMISSION, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment of Mr. Justice John MacMenamin dated the 6th day of April, 2021

Section I

Introduction

1. This appeal arises from a judgment delivered by Simons J. in the High Court, regarding a claim brought by the appellant, Tomasz Zalewski, against the respondents. ([2020] IEHC 178). The issues in this case, at one level, concern an injustice done to Mr. Zalewski when he brought a claim before the Workplace Relations Commission, ("WRC"). At another, and more profound, level the questions raised concern as to the harmonious interpretation of the Constitution. Article 6 of the Constitution provides that all powers of government, legislative, executive and judicial, derive under God, from the People, whose right it is to designate the rulers of the State, and, in final appeal, to decide all questions of national policy, according to the requirements of the common good. The Constitution provides that the powers of government are exercisable only by, or on the authority of, the organs of State, established by this Constitution (Article 6.2). These powers of government are carefully balanced and based on a tripartite allocation of function and responsibility between the legislative, executive and judicial arms of the State. The functions and powers of the third arm, the judiciary, are laid down by Article 34 of the Constitution.

Background

2. The case arises in the following circumstances. At the time of the events, the appellant was a married man with a young child. He previously worked in Buywise/Costcutters Discount Store in the North Strand in Dublin. The shop where he worked was subject to a series of robberies, some of which were violent. He had a series of disagreements with his employers. He was accused of not doing enough to stop the thefts. He was also accused of having removed money from the till of the shop. Mr. Zalewski's case was that he was summarily dismissed from his employment. His view was that he had been unfairly dismissed, and that the procedures leading to his dismissal were a sham.

3. On the advice of his solicitor, Mr. O'Hanrahan, Mr. Zalewski brought a claim to the WRC, claiming unfair dismissal under the Unfair Dismissals Act, 1977 ("UDA 1977"), and Payment of Wages Act, 1991 ("PWA 1991"). These were to be dealt with by an adjudication officer, appointed by the Minister under s.24 of the Workplace Relations Act, 2015 ("WRA 2015"), with the powers set out in s.40 of that Act.

4. In pursuing the claim, Mr. O'Hanrahan put in a written submission to the WRC. Later, in an email, he informed the Adjudication Officer, ("AO"), who had been designated to inquire into the claim, that, because of an anticipated conflict in the evidence, he wished to have an opportunity to cross-examine all witnesses appearing on behalf of Buywise. The solicitor said he would object to any hearing based exclusively on written submissions, although, in some circumstances, the WRA 2015 actually allows for such a procedure (s.47). The employers, too, put in a submission. They contended they had carried out an investigation in line with policies and procedures, and that all the requirements of natural justice had been observed. Mr. Zalewski disagreed. He considered that the original hearing before Mr. Alan Costello, Jnr., and the appeal before Mr. Alan Costello, Snr., the owners of the shop, were, effectively, a sham.

5. On the date assigned, 26th October, 2016, a brief hearing took place. The representative appearing for Buywise asked for an adjournment. Mr. Zalewski and his solicitor did not object. After a brief hearing, in which no evidence was heard, the matter was then set to be dealt with in December, 2016. By letter of the 1st November, 2016, the WRC informed Mr. O'Hanrahan that there was to be a new hearing date of the 13th December, 2016. Mr. O'Hanrahan so informed Mr. Zalewski. On the adjourned date, Mr. Zalewski and Mr. O'Hanrahan arrived for the hearing. They met the employers' representative. They began to talk. They were then briefly joined by the AO, who had been assigned. She had walked into the corridor at that moment.

6. What happened then can only be described as truly bizarre. Mr. O'Hanrahan was informed that a decision had already been made in his client's case. The AO apologised, saying the hearing had been given an adjourned date in error. She had issued her decision in the previous week, and the scheduling office had made an error in arranging a hearing for that morning. This situation became truly *Kafkaesque*, when a number of days later Mr. O'Hanrahan received a copy of what purported to be the AO's decision.

The Adjudication Officer's Decision

7. I deal briefly now with some of the statements contained in that decision. The AO said that, in compliance with the legislation, she had "*inquired into the complaints",* and given "*the parties an opportunity to be heard by me and to present to me any evidence relevant to the complaints."* The decision contained a "*summary of complainant's position*". This, too, gave the appearance that Mr. Zalewski had been given the opportunity to present his complaint, and make relevant

submissions. It stated that Mr. Zalewski had been requested to provide a statement from the Department of Social Protection, and that he had not done so. There were then findings. The decision stated:

> *"The complainant did not contradict the respondent's, (i.e. the employer's), evidence, that the meeting of the 12th April, 2016, was called by the respondent to discuss issues concerning the store, and his role as assistant manager".*

8. Later, the unfair dismissal complaint was summarised in this way:

> *"The complainant and his legal representative did not advance any argument or evidence at the hearing as to why they considered the dismissal to be both "procedurally and substantially unfair" as stated in the complaint form.*
>
> *The Complainant stated at the hearing that he was in receipt of jobseekers benefit from the Department of Social Protection since the date of his dismissal. He was requested to provide evidence of this but did not do so."*

Explanations

9. In these proceedings, two affidavits were filed by the WRC, which sought to explain what had happened. The first of these stated:

> *"The filing of the decision as a "decision to issue", and the issue of the decision in that further hearing was an administration error with their [sic] being no intent to conduct the hearing or issue the decision, other than in accordance with natural and constitutional justice and fair procedures."*

10. Later, there was a second affidavit, sworn by a departmental official. This said:

> *"In error, a decision was prepared in advance of the adjourned hearing proceeding, and it was for that reason that the presentation of evidence and the questioning of witnesses did not occur in this instance".*

Inconsistencies

11. In what follows there is no criticism whatever intended of those who represented the respondents in this appeal. To the contrary, their submissions did justice to the importance of the

case. My criticism, rather, must focus on the WRC itself. In any organisation mistakes will happen. There will be pressure of work, and confusion about cases. But what happened in this case could not simply be explained on the basis of "misfiling". Unfortunately, what is actually found in this "decision", however construed, does not allow for any conclusion other than, on its face, it was a prejudging of a hearing which had not even taken place. It contained a series of inaccuracies. It gave the impression to any reader that a hearing had taken place, where both sides had been given the opportunity of presenting their case. This was simply incorrect. It alleged the appellant had failed to file documentation. This, too, was incorrect. It was not simply that the decision contained errors concerning some aspects of a claim. That can happen. More seriously, it purported to give a full decision based on events and evidence which had simply never taken place at all. The AO who was responsible for this did not swear an affidavit. Instead, others sought to explain what had happened. I hope I will be forgiven for concluding that, when considered, the explanations tendered simply do not hang together.

12. Since that time, the WRC itself has chosen never to explain what happened. What occurred hangs like a pall over the entire case, where the appellant's claim involves allegations of systemic failure. The WRC has not informed anyone about what happened, or why it happened. That is not an acceptable situation. There is no indication of a systems-review in order to find out what happened. The Court is not told what occurred immediately after the AO met the parties on the "adjourned date". Surely then a question might have been prompted in someone's mind on the WRC side, as to whether there had been a mistake. But a filing mistake would not account for what was contained in the decision.

Mr. O'Hanrahan's Evidence concerning other hearings

13. In these proceedings, Mr. O'Hanrahan, Mr. Zalewski's solicitor, deposed that his experience had been that hearings of complaints before the WRC were often heard in a manner where there was no *viva voce* evidence, with no opportunity given to test that evidence by means of cross-examination. He had had previous experience of AOs hearing and deciding cases on the basis of written submissions, and brief and extremely informal hearings, where there had been no formal evidence, or an opportunity to properly test such evidence. He points out that the WRA 2015 does not make a clear provision for cross-examination. Nor does that Act make any provision for the taking of evidence on oath, or the other requirements necessary for ensuring fair procedures

in complex matters, where there is a dispute on evidence. It is ironic that an organisation which was created in order to ensure fair and efficient hearings for parties, including workers who are deprived of rights to employment, should have acted in such a manner in relation to this worker, and then not explain what happened.

14. Mr. Zalewski brought High Court proceedings challenging the procedure, and the decision. Later, on the 4th April, 2017, the Chief State Solicitor wrote to Mr. O'Hanrahan, and gave an account, based on instructions, as to the circumstances which had led to the issuing of the decision. The letter stated the respondents would not stand over the decision of the AO, and that the respondents were willing to agree to the disposal of the proceedings on certain terms, namely, the making of an order of *certiorari* in respect of the decision, and the remittal of the complaint to the WRC, paying Mr. Zalewski's legal costs. Mr. Zalewski refused this offer, unless consent was forthcoming to the grant of all the reliefs which he had sought in the legal proceedings, including claims regarding the compatibility of certain sections of the WRA 2015 with Article 34 of the Constitution.

The Evidence of Experienced Legal Practitioners in Industrial Relations Law

15. In these proceedings, Mr. Tom Mallon, B.L., and Mr. Ciaran O'Mara, Solicitor, both swore supporting affidavits. It is no exaggeration to say both are lawyers pre-eminent in the field of industrial relations law. In his affidavit, sworn in 2019, Mr. Mallon deposed that, since the inception of the WRA 2015, he had been disturbed by a number of hearings which had taken place before AOs. He set out that many AOs, and indeed members of the Labour Court, had appropriate qualification and experience and were properly qualified for determining complaints under the UDA 1977, Employment Equality law, the Protected Disclosures Act, and other legislation. A number of AOs were qualified barristers or solicitors. He acknowledged that there were AOs who did not have legal qualifications, but, by reason of their experience and general knowledge, had great competence to conduct a hearing.

16. However, Mr. Mallon deposed that many AOs lacked competence to adjudicate issues of law which arose which might be complex. In a not insignificant proportion of cases in which he had appeared, AOs lacked sufficient qualifications or experience. In some cases, AOs were, in his view, incapable of exercising the full range of powers under the WRA 2015 and lacked the basic skill and ability to conduct a fair hearing. His concerns about qualifications and experience of AOs

applied equally to some members of the Labour Court. Mr. Mallon deposed that, as time passed after the introduction of the WRA 2015, the facility to permit cross-examinations had become more common, but it was not yet granted in every single case. He believed that, in the early days, there had been a policy to deny cross-examination, and to reduce the time available for cases to a minimum. He maintained, however, that there continued to be serious issues regarding the administration of hearings, the assignment of limited time, and difficulties in obtaining second and subsequent hearing dates.

17. Mr. O'Mara deposed that it was his experience that a number of AOs simply did not understand some of the more difficult issues which arise. Very fairly, he considered it would be inappropriate for him to refer to any specific case. However, he stated that he had appeared before AOs in cases where he firmly believed that the officer quite simply did not have the sufficient understanding to deal with the important matters before them. These are serious allegations, and not to be readily disregarded.

Background to the WRA 2015

18. No issue was raised as to the admissibility of preparatory materials regarding the WRA 2015, (cf. *Crilly v. Farrington* [2001] 3 I.R.; s.5 Interpretation Act, 2005). I treat this material *de bene esse*. The defence in this case referred to the intent behind the WRA 2015. That intent was, in many respects, a laudable one. The aspiration was to create a system whereby disputes of this nature could be informally resolved without recourse to excessive reliance on legal procedures. Anyone can entirely sympathise with that view. The respondents referred to a number of impressive reviews and reports which ultimately provided for the basis of the WRA 2015 procedures, which partly superseded the UDA 1977. One review said there had been difficulties in enforcing awards under the UDA 1977 and its successor Act in 1993. Further, it was desirable that awards should be enforced through only one statutory body. The question of enforcement of awards is an important issue in this case, as will be seen later.

19. The respondents also referred to a document, "Legislating for a World Class Workplace Relations Service". This was a submission to the Oireachtas Committee on Jobs, Enterprise and Innovation in July, 2012. It set out some of the cumbersome aspects of the procedures under the UDA 1977. It stated that the appeals system (which included a potential for appeal to the courts) on the merits, might be exploited by an employer determined to force a complainant in an unfair

dismissals action to endure several *de novo* hearings of his or her complaint. (page 57). The Court has not been informed about any consideration given to the legal or constitutional effect of adopting the procedures in the WRA 2015, which were quite radical. These included that the Labour Court would act as a court of final appeal for final adjudication decisions of the WRC, subject to the right of either party to bring a further appeal from a Labour Court determination to the High Court on a point of law only (page 58).

20. The respondents' case also referred to extensive WRC material, whereby AOs were sought to be trained in relation to fair procedures - and how to conduct hearings. There was a survey where questions were put to AOs as to the number of times they permitted questioning. Reference was made to a "guidance note", reflecting the terms of the WRA 2015: it stated that an AO was to take direct evidence from both parties, and all other relevant witnesses; that the other party, or the representative, would be given the opportunity to question the parties, and other witnesses, regarding the evidence they have given. When all the evidence had been taken, both parties were to be given the opportunity of providing a summing up of the case.

21. Taken together, these documents, whether or not admissible in evidence, provide a good picture of the intentions behind the intended legislation, which took statutory form in 2015. Many of these were good intentions and aspirations, but that alone cannot absolve the WRA 2015 from the same level of constitutional scrutiny as any other legislation. The Constitution applies to all legislation.

The High Court - *Locus Standi*

22. The judicial review proceeding first came before the High Court, where the respondent sought to raise issues as to *locus standi* of the appellant to pursue the constitutional claims. Meenan J. upheld those submissions, but sternly criticised the affidavits sworn by the respondents seeking to explain what had occurred as "lacking credibility". The appellant appealed to this Court, which held that the appellant had *locus standi* to pursue the constitutional claim.

The High Court: Simons J.

23. Ultimately, the matter came before Simons J., who delivered a judgment remarkable in its clarity and rigorous reasoning. As he outlined, the appellant's case involved contentions; (a) whether the proceedings in question involved the administration of justice within the meaning of

Article 34 of the Constitution; (b) that relevant provisions of the WRA 2015 were invalid, having regard to Article 34 of the Constitution in that they conferred decision-making powers on a non-judicial body, namely, AOs appointed by the Minister. The judgment also outlined the two main defences relied on by the State respondents. These were (a) that a decision of an AO lacked the character of a binding determination, and that, if a claimant employee wished to enforce a decision, it was necessary to apply to the District Court in order to do so. This was said to be fatal to the argument that AOs were themselves carrying out the administration of justice; (b) the respondents contended that employment disputes had not traditionally been regarded as the business of the courts, or justiciable. Here, reliance was placed on the important decision of *McDonald v. Bord na gCon* [1965] I.R. 217, ("*McDonald*"). However, because Simons J. concluded that what was in issue was not an administration of justice, he did not consider it was necessary for him to consider an alternative case advanced by the respondents, which was based on Article 34, if necessary combined with Article 37, of the Constitution.

Articles 34 and 37 of the Constitution

24. Article 34.1 of the Constitution provides:

> *"1. Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public."*

This speaks to the constitutional purpose of the Article. Article 34.2 defines the courts in which justice should be administered as comprising (i) courts of first instance; (ii) a court of appeal, and (iii) a court of final appeal.

25. Article 34.3 provides that 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*". Article 34.3.4 also provides for Courts of First Instance, including courts of local and limited jurisdiction, with a right of appeal as determined by law.

26. Article 37 can be seen as being in the nature of a saver. It provides:

> *"1. Nothing in this Constitution shall operate to invalidate the exercise of **limited functions and powers of a judicial nature**, in matters other than **criminal matters**, by any*

person or body of persons ***duly authorised by law*** *to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court appointed or established as such under this Constitution."* (Emphasis added)

I have emphasised a number of terms as they arise later for detailed consideration. In *re The Solicitors Act 1954* [1960] I.R. 239, this Court applied the interpretative principle *expressio unius est exclusio alterius* to these two provisions, holding that the corollary of what was said in Article 34.1 was that justice should not be administered by persons who are not judges appointed in the manner provided by the Constitution, save in those cases specially excluded by other provisions of the Constitution (*Kelly,* at p.263).

Procedure under Part 4 of the WRA 2015

27. Part 4 of the WRA 2015 sets out the mechanisms whereby claims and disputes under various pieces of legislation, including employment legislation, are to be determined. The "first instance" hearing is to be by AOs, with a right of appeal thereafter to the Labour Court. Thus, the provisions of Part 4 might, as Simons J. pointed out, be regarded as setting out the procedure with the substantive rights to be found in other pieces of legislation, here, the Unfair Dismissals Act, 1977, and the Payment of Wages Act, 1991.

28. In the course of the judgment, Simons J. made many important observations, all of which should give cause for pause, and further reflection. Among these, he noted that one point made in the argument by counsel had been that, if legislative change of the type involved here could be done *in one significant area of law*, i.e. employment law, then, in principle, it could be done in relation to other areas of law, such as family law or commercial law. He observed that the sheer breadth of jurisdiction conferred upon AOs and the Labour Court might be relevant to arguments as to whether the exercise of the statutory jurisdiction involved the administration of justice under Article 34 of the Constitution, or the exercise of limited functions and powers of a judicial nature within the meaning of Article 37 of the Constitution. The High Court judge commented that the Payment of Wages Act, 1991, which dealt with payment in lieu of notice, might provide stronger grounds for an argument based in respect of Article 37 of the Constitution. This was because such a claim might be measured in hundreds rather than thousands of Euros. Under the UDA 1977, by contrast, award might include reinstatement – effectively a form of enforcement by way of mandatory injunction- and potential awards of redress up to 2 years loss of salary. The judge was

well aware of the balance, or perhaps tension, between the spirit and letter of Article 34 and Article 37 of the Constitution.

29. Under the redress available under the UDA 1977 (as amended by the WRA 2015), AOs have the power to order (a) re-instatement; (b) re-engagement; (c) payment of compensation in respect of loss, not exceeding 104 weeks' remuneration; (d) compensation, not exceeding 4 weeks' remuneration, as might be just or equitable having regard to all the circumstances.

30. The WRA 2015, therefore, removed a number of provisions which had previously existed under the UDA 1977. The jurisdiction previously exercised by rights commissioners and the Employment Appeals Tribunal, ("EAT"), was transferred to AOs. Importantly, the right of appeal to the Circuit Court was removed, and replaced by a right of appeal from an AO to the Labour Court, and to the High Court, but only on a point of law.

31. The High Court judgment dealt with two main issues. The first of these was whether or not the legislation was compatible with Article 34 of the Constitution. For reasons set out presently, Simons J. ultimately held that it was. The second aspect, dealt with later in this judgment, deals with fair procedures.

Section 41(5) of the WRA 2015 and Article 34 of the Constitution

32. It is necessary to set out the procedure under s.41(5) of the 2015 Act:

> *"(5)(a)An adjudication officer to whom a complaint or dispute is referred under this section shall -*
>
> *(i)* ***inquire*** *into the complaint or dispute,*
>
> *(ii) give the parties to the complaint or dispute an opportunity to—*
>
> *(I)* ***be heard by the adjudication officer****, and*
>
> *(II)* ***present to the adjudication officer any evidence relevant to the complaint or dispute****,*
>
> *(iii) make a decision in relation to the complaint or dispute in accordance with the relevant redress provision, and*

(iv) give the parties to the complaint or dispute a copy of that decision in writing." (Emphasis added)

The words emphasised (above) indicate the number of procedural steps which were not taken by the AO assigned to Mr. Zalewski's case, prior to the issuing of the decision.

33. As can be seen from the text of s.41, an AO to whom a dispute is referred shall give the parties to the complaint or dispute an opportunity to be heard and to present to the AO any evidence relevant to the complaint or dispute, make a decision in relation to the complaint or dispute, in accordance with the relevant redress provision, and give the parties to the complaint or dispute a copy of that decision in writing. (s.41 (5) (a)(i), (ii), (iii), (iv) WRA 2015). While an AO has the power to compel the attendance of witnesses, (failure to attend can be an offence under the Act), he or she has no express power to administer an oath or affirmation. A right of appeal to the Labour Court is provided for in s.44 WRA 2015, as applied to a claim for unfair dismissal by s.8A of the UDA 1977. The Labour Court proceedings are to be conducted in public, unless the Labour Court, upon application of a party, determines that, due to the existence of special circumstances, the proceedings, or part thereof, should be conducted otherwise than in public (s.44(7) WRA 2015). The procedures there allow for a wider range of fair procedure requirements. The Labour Court may, in turn, refer a question of law to the High Court for determination (s.44(6) WRA 2015). Section 41(5) is quoted above. Whether it can be said that the law as it stands provides adequate provision for full independence of decision-makers at first or second level in the WRC must be open to question. The Minister retains considerable powers of appointment, and determination of persons appointed under s.10 Industrial Relations Act, 1946.

Enforcement: Section 43

34. Section 43 of the WRA 2015 is also central to this appeal. It is necessary to quote it in full.

"43(1) If an employer in proceedings in relation to a complaint or dispute referred to an adjudication officer under section 41 ***fails to carry out the decision of the adjudication officer under that section in relation to the complaint or dispute in accordance with its terms before the expiration of 56 days from the date on which the notice in writing of the decision was given to the parties****, the District Court shall -*

(a) on application to it in that behalf by the employee concerned or the Commission, or

(b) on application to it in that behalf, with the consent of the employee, by any trade union or excepted body of which the employee is a member,

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.

(2) Upon the hearing of an application under this section in relation to a decision of an adjudication officer requiring an employer to reinstate or reengage an employee, the District Court may, instead of making an order directing the employer to carry out the decision in accordance with its terms, make an order directing the employer to pay to the employee compensation of such amount as is just and equitable having regard to all the circumstances but not exceeding 104 weeks' remuneration in respect of the employee's employment calculated in accordance with regulations under section 17 of the Act of 1977.

(3) The reference in subsection (1) to a decision of an adjudication officer is a reference to such a decision in relation to which, at the expiration of the time for bringing an appeal against it, no such appeal has been brought, or if such an appeal has been brought it has been abandoned and the references to the date on which notice in writing of the decision was given to the parties shall, in a case where such an appeal is abandoned, be construed as a reference to the date of such abandonment.

(4) The District Court may, in an order under this section, if in all the circumstances it considers it appropriate to do so, where the order relates to the payment of compensation, direct the employer concerned to pay to the employee concerned interest on the compensation at the rate referred to in section 22 of the Act of 1981, in respect of the whole or any part of the period beginning 42 days after the date on which the decision of the adjudication officer is given to the parties and ending on the date of the order.

(5) An application under this section to the District Court shall be made to a judge of the District Court assigned to the District Court district in which the employer concerned

ordinarily resides or carries on any profession, business or occupation." (Emphasis added)

35. Thus, if an employer fails to carry out the decision of an AO in relation to a complaint or dispute, the District Court *shall*, on application to it by an employee or the Commission, or brought with the consent of the employee by any trade union or excepted body, "*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 effect of s.43(1)(b) is to substantially and radically restrict the application of fair procedures in the District Court. The District Court is debarred from hearing a respondent employer, or any evidence, save in relation to the matters set out in s.43(1). The effect of sub-section (2) is that, when hearing an application in a case where an AO has required an employer to reinstate or re-engage an employee, the District Court may, instead of making an order directing the employer to carry out the decision, instead make an order directing the employer to pay compensation to the employee, as may be just and equitable having regard to all the circumstances within the statutory limitation provided for under the Act. But the section does not identify any basis upon which a District Court judge might exercise that limited discretion, other than what is set out. Under s.43(4), the District Court may also direct an employer to pay to the employee concerned interest on the compensation "*at the rate referred to in section 22 of the Act of 1981*". The question considered later are whether these provisions can be seen as vesting a court with true curial powers recognised under the Constitution, as protecting fair procedures.

Enforcement: Section 51 of the Act

36. Section 51 of the WRA Act, 2015, provides:

"51(1) It shall be an offence for a person to fail to comply with an order under section 43 or 45 directing an employer to pay compensation to an employee.

(2) It shall be a defence to proceedings for an offence under this section for the defendant to prove on the balance of probabilities that he or she was unable to comply with the order due to his or her financial circumstances.

(3) A person guilty of an offence under this section shall be liable, on summary conviction, to a class A fine or imprisonment for a term not exceeding 6 months or both."

37. The High Court judgment points out:

> *"Crucially, it is not an offence for an employer to fail to comply with the decision of an adjudication officer or the Labour Court: the offence is the failure to comply with the order of the District Court."*

38. But these are not the only enforcement provisions. As can be seen, under s.51 it is provided that it shall be an offence for a person to fail to comply with an order under s.43 made by an AO, or s.45 made by the Labour Court, directing an employer to pay compensation to an employee. As can be seen Section 51(3) provides:

> *(3) A person guilty of an offence under this section shall be liable, on summary conviction, to a class A fine or imprisonment for a term not exceeding 6 months or both."*

39. The WRA 2015 contains other extensive enforcing powers. In each, the WRC is the prosecuting authority in a criminal prosecution, where courts may impose a fine and imprisonment against an employer who fails to comply with an order made by the District Court. But further prosecutor powers are provided for under s.7 of the Act in relation to other offences which may be committed by an employer. On summary conviction, these can involve a fine, imprisonment for not more than 6 months, or, on conviction on indictment, to a fine not exceeding €50,000, or imprisonment for a term not exceeding 3 years, or both. In each instance, the WRC is the prosecuting authority of these offences, many of which relate to the power of inspectors to carry out inspections on premises in order to ensure compliance with working conditions.

Section 66 of the Act and Hearing Procedures

40. I also mention here s.66 of the WRA 2015, which provides for transfer of functions from the Employment Appeals Tribunal. *Inter alia*, it provides that references in any enactment, *or instrument* in enactment, to the Employment Appeals Tribunal, insofar as they related to a function transferred to the WRC, should be constructed as references to the Commission. In the case of the Redundancy Payments Act, 1967 and later the UDA 1977, S.I. 24/1968 provided that a party to an appeal by the Employment Appeals Tribunal might, (a) make an opening statement, (b) call witnesses, (c) cross-examine any witnesses called by any other party, (d) give evidence on his own behalf, and (e) address the Tribunal at the close of the evidence. The Employment Appeals Tribunal also had the power to administer an oath. (See Regulation 13, S.I. 24/1968; s.19 UDA

1977; Regulation 10, S.I. 286/1977; and *Employment Law*, Regan & Murphy, 2nd Edition, 2018. But see also s.26(2)(d) – (f) Interpretation Act, 2005).

McDonald v. Bord na gCon

41. The first question which Simons J. had to determine was whether or not these extensive powers were compatible with Article 34.1 of the Constitution. He applied the long-established "classic", five-pronged test, identifying whether or not there has been an administration of justice, contrary to Article 34.1, as first set out in *McDonald v. Bord na gCon* [1965] I.R. 217, ("*McDonald*"). These now long-established indicia are:

> 1. The resolution of dispute or controversy as to the existence of legal rights, or a violation of the law;
>
> 2. A process involving a determination or ascertainment of the rights of parties, or the imposition of liabilities, or the infliction of a penalty;
>
> 3. A 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, as a matter of history, is an order characteristic of courts in this country.

Simons J.'s conclusion that the fourth limb of *McDonald* was not satisfied

42. In the High Court, and in this Court, there is broad agreement that the adjudicative role of the WRC satisfied the first three elements of the *McDonald* test. The brief summary which follows does scant justice to Simons J.'s fully reasoned judgment. In brief, he concluded that the decision-making process under s.43 WRA 2015 lacked one of the essential characteristics arising from the fourth test in *McDonald*, namely, the ability of a decision-maker to enforce its decisions. He held that the necessity of having to make an application to the District Court to enforce a decision of an AO, or the Labour Court, deprived determinations of one of these essential characteristics of the administration of justice. Given that the District Court's discretion to modify the form of redress

represented a significant curtailment of the decision-making powers of AOs, and the Labour Court, the function exercised by the District Court could not be dismissed as a mere "rubber stamping" of the earlier determination. He held that the District Court could, in effect, overrule a decision made by an AO or the Labour Court to direct reinstatement or re-engagement. (para. 218) He concluded that a decision-maker, who was not only reliant on the parties invoking the judicial power to enforce its decision, but whose decisions as to the form of relief were then vulnerable to being overruled as part of that process, could not be said to be carrying out the administration of justice (para. 219).

43. The judgment noted what he called "the anomaly" 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 an EAT decision to the Circuit Court would not. However, he opined, that it might 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 this did not displace a right of action.

Simons J. conclusion that the fifth limb of *McDonald* was satisfied

44. In the High Court, Simons J. held that this fifth criterion only assumed importance in cases where there had been a long-established tradition of a particular type of decision-making, falling either inside or outside the courts' jurisdiction. He correctly cited *In re Solicitors Act, 1954* [1960] I.R. 239, ("*the Solicitors Act"*); *Cowan v. Attorney General* [1961] I.R. 411, ("*Cowan*"); *Keady v. Commissioner of An Garda Siochana* [1992] 2 I.R. 197, ("*Keady*"); and *O'Connell v. The Turf Club* [2017] 2 I.R. 43, ("*O'Connell*"), as instances where the courts had drawn that line. In *The Solicitors Act*, Kingsmill Moore J. held that the scope of a decision which might run afoul of Article 34 was very wide, including decisions of a type that might fundamentally affect persons and their livelihoods. In *Keady*, recognising the important role of administrative bodies in the running of the State, this Court held that Kingsmill Moore J.'s judgment should be confined largely to its own facts, and that it could not be said that the large range of administrative bodies by then in existence were engaged in making orders which, as a matter of history, were characteristic of the courts.

45. On this, Simons J. observed that claims for *wrongful* dismissal had been the business of the courts for decades before the WRA 2015. The law of employment generally concerned adjudications similar to those involved in proceedings for breach of contract. He rejected the respondents' submission that the UDA 1977 had created a new self-contained statutory jurisdiction, which had never been part of the jurisdiction of the High Court. He doubted that legislation by the Oireachtas could put legislation beyond the reach of the courts, without infringing Article 34. He pointed out that the fact that the Circuit Court had previously exercised jurisdiction to hear and determine appeals in claims of unfair dismissal under the UDA 1977 showed that the orders made by the WRC had been orders of a type historically made by the courts. He pointed out that, in *Doherty v. South Dublin Co. Co.* [2007] 2 I.R. 696, the issue had been whether the full and original jurisdiction of the High Court could be relied on when there had been an exclusive jurisdiction conferred on the tribunal under the Act. This did not address the different question of whether an order made by the Equality Tribunal was of a type which as a matter of history had been made by the courts. Thus, the High Court judgment actually concluded that the hearing and determination of a payment of wages claim did fulfil the fifth limb of the test in *McDonald*: that is to say, the making of orders determining claims were characteristic of the business of the courts as carried out under the UDA 1977, and the type of orders made pursuant to the common law jurisdiction for wrongful dismissal.

46. I comment here that the scope of the fifth limb remains significant in this case. As explained earlier in *re Solicitors Act*, Kingsmill Moore J. proposed as one of the tests of judicial function the extent to which the power to exercise a far-reaching power to strike a solicitor off the Rolls could be a non-judicial power. Some subsequent decisions, especially *Keady*, showed a desire to limit that decision to its special facts. (cf. *The State (Calcul International Ltd. & Anor) v. Appeal Commissioners*, 18 December 1986, Barron J., High Court).

The Unfair Dismissals Act, 1977

47. The UDA 1977 did not oust the jurisdiction of the courts. Rather, the statutory right to make a claim for unfair dismissal was parallel to the common law right of action for wrongful dismissal. Simons J. observed, however, that the existence of this parallel jurisdiction under statute was a limitation on the common law. (See *Johnson v. Unisys* [2003] 1 AC 518; *Eastwood v. Magnox Electric plc* [2005] 1 AC 503, as applied in Ireland by Laffoy J. in *Nolan v. Emo Oil*

Services Ltd. [2010] 1 ILRM 228). But the issue of what areas of law are, as matters of history, characteristic of the courts, remains an important consideration, if it comes to a question of whether some areas of law can be placed in the hands of a non-judicial decision-making body.

48. The High Court judge concluded 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 was of the view that the failure to satisfy the fourth limb of *McDonald* meant that the decision did not constitute the administration of justice for the purposes of Article 34.

49. Simons J. held 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, which dealt with an area which he held had been traditionally part of the courts' jurisdiction. However, he concluded that the failure to satisfy the fourth limb of *McDonald* meant that the decision did not constitute the administration of justice for the purposes of Article 34. It is fair to say that the judge's decision on this question was arrived at with, as he said, "some hesitation".

50. As mentioned, the rigour of the analysis, and the scope and depth of the judicial reasoning in the High Court judgment, is such that, in hindsight, it is unfortunate that the trial judge, for perfectly good reasons, did not consider it necessary to consider Article 37 of the Constitution. His assessment and consideration of that question would have been of real benefit to this Court, particularly in light of the observations he had made at the outset of his judgment regarding the extent of the jurisdiction provided for by the WRA 2015, *by contrast with* the *limited* jurisdiction under the Payment of Wages Act. The word "limited" is one of the key elements of Article 37 of the Constitution.

Procedural Requirements

51. Additionally, the High Court judge held that the appellant's claims for entitlement to fair procedures, compliant with Article 40.3 of the Constitution, began by assuming that an AO was equivalent to that of a judge. However, he held that, given that the decision-making power under the WRA 2015 did not involve the administration of justice, this could not be so. He held the evidence based on a 2016 survey which found that 49% of claimants were dissatisfied, or very

dissatisfied with the new system, was not sufficient in itself to lead to a conclusion that there was a systemic problem with the use of AOs to hear claims. He commented that the appellant's evidence was "generalised" and "vague", to the extent that it was not possible to make a determination of systemic failure. I deal with these inferences later in this judgment. Thus, he held that AOs did not require to have legal qualifications; that the provisions did not require an oath or affirmation; that there need be no express provision for cross-examination, or hearings in public. I address these four conclusions at the end of this judgment.

Section II

An Overview of the Issues in this Case

52. The starting points, as in all issues which come to court, must be a set of given facts, and how the law should be applied to those facts. At one level, this case *simply* involves a consideration of the interaction between Articles 34 and 37 of the Constitution. But I believe, that, in fact, the issues go deeper and touch on the very nature of the State itself, as identified in the Constitution adopted by the People in 1937, and amended, where necessary, by a vote of the People in referendums. In enacting the Constitution, the People, who are sovereign, recognised the nature of the State identified in the Constitution as being based on Montesquieu's concept of the tripartite allocation of powers, based on checks, as well as balances. The constitution of the United States was the first which sought to give practical effect to Montesquieu's understanding of the tripartite allocation of powers.

53. Now, the very issue of how that constitution should be interpreted has come to the forefront of political discourse, and itself become a political question. We are fortunate that, in this State, our Constitution is flexible enough to entrust fundamental decisions to the People as the ultimate legislators. But the fact that there has been a tendency in other countries and jurisdictions, to portray courts as the agents of undesired or dangerous change must, on occasion, prompt a degree of caution when engaging in constitutional development. I make these observations not as a judicial conservative, but because I think there are times for caution. To everything there is a season. How a state actually functions is dependent upon the values of those who rule and administer that state. This judgment concerns the interpretation and application of the separation of powers, as identified in the Constitution of 1937. Underlying the previous jurisprudence of the courts on this issue is an accretion of wisdom in the process of interpretation by judges who, since

the time the Constitution was enacted, had, to the forefront of their minds, the preservation and protection of the values expressed in that Constitution – again not for judges but to serve the public, including those who, like Mr. Zalewski, have to go to court to vindicate their rights when these have been denied elsewhere. In this process, judges bring to bear their own life experience, and the experience of other judges. It is hardly necessary to reiterate Oliver Wendell Holmes' oft quoted remark that experience, not logic, is the life-blood of the law. Holmes, having warned that the law cannot be dealt with as if it contains only the axioms and corollaries of a book of mathematics, then added "*In order to know what [the Court] is, we must know what it has been, and what it tends to become."* (The Common Law 1881).

54. I start this consideration also bearing in mind O'Dalaigh C.J.'s caution in *McMahon v. The Attorney General* [1972] I.R. 60, that constitutional rights "*are declared, not alone because of bitter memories of the past, but no less because of improbable, but not to be overlooked, perils of the future".* I acknowledge that the jurisprudence, (especially *McDonald*), in relation to Article 34 has been occasionally criticised as lacking a foundational *prescriptive* basis. But, while the judges in the courts do and must consider legal theory, in *practice* we must be empirical and practical. In any process of interpretation, too, courts must have regard to the *improbable*, but not to be *overlooked*, perils of the future. In judicial reasoning, judges will bring to bear not only their experience in interpreting the Constitution, but some knowledge of history and contemporary events which show the ways in which apparently well-established constitutional values can be placed under threat or undermined. Fortunately, this State is not threatened by such political forces in this way, either at present or in the foreseeable future. I engage in this discussion fully acknowledging that there is always the risk that accusations will be made of unnecessary concern, and of judges protecting their own territory. To that I would respond, the courts do not belong to judges, but to serve the People. Ultimately, under the Constitution, the courts provide the forum to right wrongs, and administer justice. Throughout the process he has been ably represented by his lawyers. The events in this case prompt a question as to how the appellant could have vindicated his rights if he had not been legally represented?

Section III

An Article 37 Resolution of the Case

55. This judgment would hold there is a direct route to resolving this claim, based on Article 34 of the Constitution itself, and the established case law. But, it is proposed, there is another route to resolution by resort to Article 37 of the Constitution, holding that, in fact, the Adjudication Officer and the WRC were, in this case, ones exercising limited powers and functions under Article 37 of the Constitution. This requires close scrutiny, both of the intent and effect of that Article. Like Holmes, we must proceed on the basis of what the law has been, and not only what it tends to become, but what it might possibly become. It is necessary, first to look at what the law "has been" regarding Article 37, back to the intention of the authors of the Constitution.

The Original Intentions of Article 37 – The Protection of *Quasi* Judicial Bodies

56. Discerning the "original intention" of the drafters of a constitution is not always a satisfactory method of interpreting the provisions of a living constitution. However, sometimes, such investigations throw much light on the interpretive process. This is such a case.

57. The original intention behind Article 37 was simple. (See Hogan, *The Origins of the Irish Constitution, 1928 to 1941,* p.580 et seq.). The Article was intended, only, to avoid the difficulties and litigation which had been experienced since independence, when the exercise of powers of a judicial, or *quasi* judicial, nature had been challenged in the courts on the grounds that these were matters reserved to the courts. (Hogan, p.581). These included powers exercised by the Land Commission, Ministers, County Registrars, Referees, and persons holding similar offices. In a revealing observation, Mr. Philip O'Donoghue, an official in the Attorney General's office in 1937, stated that the Article "*merely attempts to establish that rulings of such* ***quasi-judicial bodies*** *shall not be* ***upset on purely technical grounds, namely, that they were not judges****"*. (See p.581 *Origins*) (Emphasis added). This limited intent, therefore, was to avoid chaos in large areas of administration, as would deprive of their functions "the numerous Courts of *Referees, Appeal Committees, and Appeals Tribunals"* operating under Acts such as the *"Old Age Pensions Act, National Health Insurance Acts, and Unemployment Insurance Acts."* These were the *quasi* judicial bodies which described the intention of the authors of the Constitution. The note from Mr. O'Donoghue to the then Attorney General, Patrick Lynch, K.C. was in the context of an

amendment to the Constitution then being considered before the Dáil, the effect of which would have been the entire deletion of Article 37 from the Constitution. Perusal of the Dáil Record of 12th May, 1937 shows, among other things, a concern as to how the Article *might* be deployed, bearing in mind the lack of limitations in the text. Be it said, that concern was not warranted. The authors of the Constitution had no such intention. (See Hogan, op. cit. p.41, 63, 84, 333.n.). The powers were to be exercised within the strict terms of the Constitution. (Hogan, p.84). But those who proposed the amendment had concerns as to the potential scope of the Article, as applied in other, future, circumstances.

58. There can be no doubt that the authors saw Article 37 as a saver, or exception, or exclusion, from the fundamental principle established by Article 34 that justice *shall* be administered in courts established by the Constitution. This value, including the open administration of justice, mentioned in the same Article, were seen as fundamental to the independent, democratic nature of the State, and the principle of separation of powers contained in the Constitution.

59. But not all shared this view. There were concerns raised in the Oireachtas about the potential scope of Article 37, at a time when, elsewhere in Continental Europe, the Weimar Constitution, a "parent" of our own, had been subverted by enemies of the rule of law by the utilisation of what was called the "*tactic of legality*", in which the *law* itself was exploited or interpreted in order to undermine the fundamental objectives of the Constitution. The functions and protections which, under the Weimar Constitution, were intended to be uniquely vested in the courts, were, instead, reposed by law in other "*courts*", by an "enabling" legislation. (See *Judges, Transition, and Human Rights*, Morrison ed.: Quinn, *Dangerous Constitutional Moments,* C.12, p.223 et seq).

The State (Ryan) v. Lennon

60. There was, too, another concern, based on recent national constitutional experience. That concern was to ensure that the spirit and intent of the new Constitution could not be undermined by an interpretation which defeated the aims of the new Constitution.

61. In *The State (Ryan) v. Lennon* [1935] I.R. 170, this Court's predecessor had to consider whether, under the terms of the 1922 Constitution, the Oireachtas had an unlimited power of amendment during a transitory period, provided for under Article 50 of that Constitution, which

provision it was claimed, could itself be amended by the Oireachtas, rather than the People. The majority of the former Supreme Court, (Fitzgibbon and Murnaghan JJ.), considered that the Third Dail Eireann, as a constituent assembly, could have exempted Article 50 from the amending powers conferred upon the Oireachtas, but had not done so. Thus, the courts had no jurisdiction to read either into the Constituent Act, or into Article 50, a proviso excepting it, and it alone, from these powers.

62. Chief Justice Kennedy's dissent is memorable. He held that:

> *"... any amendment of the Constitution, purporting to be made under the power given by the Constituent Assembly, which would be a violation of, or be inconsistent with, any fundamental principle so declared, is necessarily outside the scope of the power and invalid and void."* ([1935] I.R. 209)

63. The judgments of the majority of the former Supreme Court, justifying the power of amendment claimed, were so utterly contrary to the spirit and original intent of the 1922 Constitution as should be a cause for reflection in this case, where, to my mind, what is in question is both the spirit and text of the 1937 Constitution. As I have already commented, Ireland is now fortunate. But it is also sometimes the duty of courts to look to what might now seem improbable, but what might possibly occur in the far future. Reading the judgments cited in this case, it is hard not to admire the role past judges have played in interpreting the Constitution, and shaping and guiding the evolution of the State. Some judges of half a century ago might be surprised as to how the nature of the State has evolved. But one feature of the many judgments is striking: it is a judicial reluctance to address the difficult issues of interpretation of what are *quasi* judicial functions by resort to Article 37, though there are some limited exceptions to this reluctance.

The Achilles Heel of the 1922 Constitution

64. Our Constitution of 1937 was specifically intended to avoid the "Achilles heel" of the 1922 Constitution where its authors had not foreseen the possibility of unlimited amendment by the Oireachtas. The question of limitations is always important in any constitutional discussion. A power or function which is stated in terms in a constitution to be "limited" is not to be interpreted in a way which undermines a more general definition of power or function or deprive that general definition of its true effect in spirit and text.

Section IV

Other Relevant Case Law

In re The Solicitors Act

65. Three judgments setting out settled law, form the essential framework for this judgment. These are *McDonald, re The Solicitors Act*, and *Keady*, referred to below. The judgment of the former Supreme Court in *re The Solicitors Act 1954*, actually predates *McDonald*. But it is essential background. In that case, the court had to consider the power provided by the Solicitors Act, 1954, to strike a solicitor off the Roll of Solicitors. Reversing an order of the High Court, the former Supreme Court held that the power to strike a solicitor off the Roll of Solicitors was, when exercised, an administration of justice, both because the infliction of such a severe penalty on a citizen was a matter which called for the exercise of the judicial powers of the State, and because to entrust such a power to persons other than judges was to interfere with the necessity of the proper administration of justice. The Court held that the powers and functions conferred by the Solicitors Act, 1954 on the disciplinary committee could not be described as merely limited powers and functions of a judicial nature, within the meaning of Article 37 of the Constitution, and accordingly the exercise of such powers was unconstitutional, and the applicants accordingly were not validly struck off the roll of solicitors.

66. In the course of his judgment, Kingsmill Moore J. observed that the power to strike a solicitor off the roll was disciplinary and punitive in nature, even though what was in question was not a criminal cause or matter. It was, however, a sanction of such severity that its consequences might be much more serious than a term of imprisonment. He observed that admission to the roll of solicitors was only attained after a long apprenticeship and training and the attainment of a high standard of legal knowledge. When a solicitor was struck off the roll, all his training and endeavours would go for nothing and it became a penal offence for him to practice as a solicitor. Historically, the act of striking solicitors off the roll had always been reserved to judges. It was necessary for the proper administration of justice that the courts be served by legal practitioners of high integrity and professional competence. On that basis, this Court's predecessor concluded that the power to strike a solicitor off the roll was, when exercised, an administration of justice, both because the infliction of such a severe penalty on a citizen was a matter which called for the

exercise of judicial power of the State, and because to entrust such a power to persons other than judges was to interfere with the necessities of the proper administration of justice.

67. As we will see, the over-broad scope of this section of the judgment was later limited by this Court in *Keady.* In recognising the important role of administrative bodies in the running of the State, this Court held that application of that part of Kingsmill Moore J.'s judgment should be confined largely to its own facts, and that it could not be said that the large range of administrative bodies by then in existence were engaged in making orders which, as a matter of history, were characteristic of the courts.

68. But I do not think many of the observations in Kingsmill Moore J.'s judgment can so easily be disregarded. He raised legitimate questions as to the potential interpretation of Article 37. The validity of those questions endures. His conclusion was that, in accordance with Article 34, the fact that justice *was to be administered in courts established by law*, by *judges* appointed *under* the Constitution, necessitated that there could be only one corollary: that justice was *not* to be administered by persons who *were not* judges appointed in the manner provided by the Constitution, save in those instances especially excluded by the Constitution. Critically, he pointed out that justice, and what is "administration of justice" were nowhere defined in the Constitution, save that trial of criminal matters and offences was, undoubtedly, the administration of justice, as was clear from Article 38 of the Constitution.

69. But, regarding the text of Article 37, he rhetorically asked these questions:

> *"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 especially dealt with in Article 34(3),(4).*** *It is the "powers and functions" which must be "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 of 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 as 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."* (Emphasis added) I return to each of the underlined passages later.

Those questions, especially ones arising from the emphasised words, have never satisfactorily been answered. It is not a sufficient answer simply to assert a power under an Act is "*limited*". Many, indeed most, statutory powers and functions are "limited". One concern posed in this judgment is, the extent to which powers, perhaps concerning fundamentally important areas of law, might be deemed by statute to be *limited* by a statute, when there might be no way under the Constitution of knowing or discerning which areas of law, whether core areas or not, are actually capable of such "limitation".

70. In the 1960 case, Kingsmill Moore J. added that, if the exercise of the assigned power was calculated ordinarily to effect 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". It was that final passage which this Court later had to limit in *Keady*. This Court observed it went too far and did not have regard to the way in which administrative bodies formed an essential part of the State.

Keady

71. For present purposes, it is useful next to consider in more detail the last of the triad of cases, that is, the judgment of this Court in *Keady*. In that case, a tribunal of inquiry, composed of members of An Garda Siochana, found the plaintiff guilty of a number of breaches of discipline in relation to the falsification of claims for expenses. The plaintiff sought an order of *certiorari* in respect of the decision, on the grounds that the tribunal had acted *ultra vires* in determining upon criminal matters. He also sought a declaration that the tribunal had acted *ultra vires* in the absence of criminal convictions, and that the effect of the tribunal's decision constituted more than a mere exercise of limited functions and powers of a judicial nature, as permitted by Article 37 of the Constitution.

72. In dismissing the appeal, this Court held that Articles 37 and 38 of the Constitution did not operate to prohibit the making of allegations, which might also found a criminal prosecution before any statutory or other domestic tribunal of inquiry. (*The State (Murray) v McRann* [1979] IR 133,

and *Deaton v. Attorney General* [1963] I.R. 170). This Court held that the tribunal of inquiry had power to determine a breach of discipline in respect of breaches of garda conduct. The Court held, crucially, that, having regard to what is described in the headnote as "long and settled authority", the Garda Tribunal inquiry, although obliged to act judicially, did not exercise a judicial function, in that its determination was not upon a contest between parties before it, but an inquiry only, and, moreover, matters of internal police discipline historically had never been reserved to the jurisdiction of the courts in the administration of justice. In so holding, this Court *applied McDonald* as settled law. The Court went on to hold that, unlike the powers of certain tribunals established to regulate the professions, with the powers of disqualification, or striking from the register, and powers to make further professional practice in the absence of proper certification or registration a criminal offence, a garda was appointed to or dismissed from his office by the Commissioner, in accordance with the regulations. In so holding, this Court distinguished *In Re Solicitors Act 1954, and C.K. v. An Bord Altranais* [1990] 2 I.R. 396. In the course of his judgment, McCarthy J. quoted from the judgment of Kennedy C.J. in *Lynham v Butler (No.2*) [1933] I.R. 74. There, the then Chief Justice, identified that the controversies which fall to courts for determination may be divided into two classes, criminal and civil. Chief Justice Kennedy said:

> *"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.****"* (Emphasis added)

73. The former Chief Justice continued:

> *"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 and the State, or between any parties whoever they may be and in binding the parties by such determination which will be enforced if necessary with the authority of the State. ... 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 the party before it, to compel the attendance of witnesses, to order the execution of its judgments against persons and property."

74. Having referred to *The State (Shanahan) v. Attorney General & Ors.* [1964] IR 239, and the five tests in *McDonald*, McCarthy J. pointed out that Walsh J. had accepted the characteristic features of a judicial body set out by Kennedy J. in *McDonald*. McCarthy J. indicated that the *McDonald* tests were cumulative, and each must be satisfied. But then McCarthy J. added:

"It was scarcely intended by Kenny J. or by this Court to exclude from the qualifying criteria such matters as were identified by Kennedy C.J. in Lynham v. Butler (No.2) [1933] I.R. 74 - 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."

These, I understand, were identified by McCarthy J. as being "qualifying criteria", which, too, would constitute the administration of justice. As will be seen, very many of the powers of the AO and the WRC involve precisely those powers.

75. But, importantly, McCarthy J. went on to point out that, for the purposes of *Keady*, test number 5 was not satisfied, that is, that the courts had no role, as a matter of history, in the supervision and disciplining members of An Garda Sioahana. He observed:

"In the case of an office or other position created by statute and held pursuant to statute, in my view the principles stated in In re Solicitors' Act 1954 [1960] I.R. 239 are not to be extended, if they are to be extended at all, so as to embrace the statutory framework which deals with the creation of and appointment to a particular position or rank and not to the wider factor of being qualified to work for gain in a restricted occupation as well, in appropriate cases, as being qualified to hold a particular position or rank. ..."

76. In his judgment in *Keady*, O'Flaherty J. observed that the line of authority established that there was 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."* But, O'Flaherty J. did not consider it necessary, on the facts of the case, to embark on any consideration of the concept of "limited

functions and powers". In my view, the fifth test in *McDonald*, together with the limitations contained in *Keady*, militate against any suggestion that any other past, or future, *quasi* judicial bodies might be deemed to be administrations of justice, as properly understood.

Section V

The Established Status of Article 34 Case Law

77. But, additionally, McCarthy J. enumerated the vast number of decisions of the courts which had expressed what he termed the "constitutional prescript" that justice shall be administered by judges in a manner provided by the Constitution. These included *Lynham v. Butler,* cited earlier*; Halpin v. Attorney General* [1936] I.R. 226; *State (McKay) v. Cork Circuit Judge* [1937] I.R. 650; *Fisher v. Irish Land Commission & The Attorney General* [1948] I.R. 3; *The State* (*Crowley) v. Irish Land Commission* [1951] I.R. 250; *Foley v. Irish Land Commission & The Attorney General* [1952] I.R. 118; *Cowan v. Attorney General* [1961] I.R. 411; *Deaton v. Attorney General* [1963] I.R. 170; *State (Shanahan) v. Attorney General & Ors.* [1964] IR 239; *McDonald v. Bord na gCon (No.2)* [1965] I.R. 217; *Garvey v. Ireland* [1981] I.R. 75. He was seeking to emphasise the accretion of consideration which had been given to the issue. McCarthy J. quoted an observation of Davitt P. in *The State (Shanahan) v. The Attorney General* [1964] I.R. 239, to the effect that he had "*certainly no intention of rushing in where so many eminent jurists*" had feared to tread and offer a definition of judicial power.

78. McCarthy J. stated:

> *"I share the reluctance of Davitt P. … to attempt a definition of judicial power; it is easier,* ***if intellectually less satisfying****, to say in a given instance whether or not the procedure is an exercise of such power, rather than to identify a comprehensive check-list for that purpose. The requirement to act judicially is not a badge of such power."* (page 204) (Emphasis added.)

Observations in *O'Connell v. The Turf Club*

79. Years later, in *O'Connell v. The Turf Club*, this Court stated:

> *"There are very many bodies which adopt court-like procedures and which may make orders and determinations which have severe impact on individuals which can far exceed*

the orders made by courts. Furthermore, it must be recognised that the case law on this area is difficult and some of the decisions are not easily reconciled. The line between bodies required to act judicially or fairly, and those exercising judicial functions, is not one easily drawn in any jurisdiction, but is here more complicated by the existence of Article 37." (para. 54.)

But the judgment went on:

> *"It is now* ***however, much too late to seek any comprehensive theory****, even if such was desirable. Instead the resolution of these cases must be found within the existing case law and the guidance which they offer. As the majority of the Constitutional Review Group noted in this regard in its Report of the Constitutional Review Group 1996, (Stationery Office Dublin 1996, at page 155):*
>
> > *"…there is no completely satisfactory answer to the problem raised and … there are great difficulties in formulating a different set of words which deal adequately with these complex issues".* (Emphasis added.) (para. 54)

I think there was much wisdom in each of these observations. For courts, any search for a theory can *only* begin, and be rooted in, present realities, past experience, and take place within the framework of the Constitution governing the courts, and other organs of government. That present-day reality and experience includes the way in which courts have, sometimes with difficulty, sought to define the "administration of justice". As recently as three months ago, this Court delivered an important judgment as to the rights of persons when a decision is made to consider depriving a person of citizenship and whether this was in the nature of a judicial decision. In *Damache v. Minister for Justice* [2020] IESC 63, this Court's comprehensive judgment relied heavily on *McDonald* in its consideration of whether revocation of citizenship was a judicial procedure. (c.f. paras. 39 – 70 of the judgment). The judgment describes the *McDonald* criteria as the "classic test", (para. 64), whereas, here, the Court considered whether the power came within Article 37 of the Constitution, but concluded the power was an executive function.

80. The three quotations cited above speak powerfully as to the established status of the *McDonald* criteria in a profoundly important area of jurisprudence. The evolution of that jurisprudence is comprehensively dealt with in the judgments delivered by my colleagues. The

historic case law is dense. In order to see the wood from the trees, I think the focus must be on what are the key decisions.

81. To again simplify: the five-pronged test in *McDonald* must now be subject to the limitations imposed on it by this Court in *Keady*. The *McDonald* test may not always be satisfactory in jurisprudential theory. But, I would hold that practice and experience show the criteria should be maintained as a fundamentally important safeguard for the rights of individuals going to court – not judges - even accepting criticisms. The criteria are rooted in experience and history. It has been said, by way of criticism, that the tests, especially presumably the fifth one, based on history, may be "circular", but it begins from what courts actually *do*, an essential starting point in an empirical analysis as to the nature of the checks and balances, which, in truth, has troubled courts in many common law nations.

The Attorney General's Submissions on Article 34 and *McDonald*

82. This case requires to be examined in a balanced way, looking at *all* the possible consequences of a potential invocation of Article 37, from all standpoints. I begin with the Attorney General's important submissions.

83. The Attorney General appeared for all the respondents in this appeal. He deserves thanks for this, and for his reminders to this Court concerning the values protected and served in the *McDonald* decision. In this appeal, he argued that the procedures under s.41(5) of the WRA 2015 did not satisfy either the fourth or fifth tests of *McDonald*, and, therefore, did not constitute the administration of justice. For the reasons now set out in this judgment, I respectfully differ from the conclusions he would seek to draw concerning how the fourth and fifth limbs of *McDonald* should be applied.

84. But those submissions are, nonetheless, of fundamental importance. They transcend the significance of this one case concerning the constitutionality of procedures in one Act of the Oireachtas. Based on his specific experience, and vantage point, the Attorney General submitted that *McDonald*, as now mediated by *Keady*, posed no insurmountable problems for the evolution of the administrative state. It is hard to think of more reliable expert testimony on the concrete reality of the issue. The Attorney General submitted with great force, that the current formulation of *McDonald* should be maintained. I do not think his cautions should be ignored. *Pace* criticisms

occasionally levied against *McDonald*, he submitted that the judgment, as a matter of fact, based on experience, provided a balance between the different relevant considerations that needed to be applied in the application of Article 34 of the Constitution. He pointed out that the test contained the flexibility necessary to allow for the development of the law. In fact, it could, in some senses, be seen as a far-reaching test, or at least one which gave a structure, within which Article 34 could be interpreted, which nonetheless managed to contain a certain flexibility, as it envisaged that, not only would the law develop, but that the spheres of operation and responsibility of other organs of the government could also develop. The Attorney General submitted that the decision in *McDonald*, as now seen through the prism of *Keady*, actually encapsulated a core principle of the Constitution and of government in its broadest sense; that core principle being that the separation of powers should not stand in the way of new institutional approaches to a social, economic or political problems that had been addressed by other organs of government. The regulatory aspect that now pervades so many of the rights and obligations of different sectors of society simply could not be conducted by the standards and efficiencies required consistent with the Constitution itself, if one took a narrow view of what had been intended within the meaning of Article 34. The Attorney General submitted that, rather than ticking any one of the five tests in *McDonald*, they should, rather, be applied cumulatively. I agree with that submission.

85. But what he said in relation to Article 37 is no less relevant. He submitted that a reliance on Article 37 could lead to having to see that Article as "a prism" through which one assessed the accretion of power in the judicial sphere, and then determining the effect on the individual affected. This, he submitted, would create difficulties in legislation, and would be *to introduce an entirely different test from McDonald, whereby the concept of justiciability became the touchstone of whether or not a particular decision-making function came within Article 34 – an idea which had never been suggested previously*. This would overlook both the fourth and fifth criteria in *McDonald* and involve an abandonment of that *established authority*. The importance of these submissions cannot be overstated.

<u>The Respondents' Case on Article 37</u>

86. It must be said that, at minimum, there was something of a tension between the respondents' primary case, supporting Simons J.'s conclusions on the fourth limb, and opposing his conclusions on the fifth limb, and the respondents' alternative, fall-back position involving

reliance on Article 37 as a constitutional justification for the WRC functions. The Attorney General expressed strong reservations on resort to Article 37. But, in fact, the respondents' case relied on both *McDonald, and* Article 37, contending the AO was exercising a limited power or function.

87. In her able argument, Ms. Catherine Donnelly, S.C., who also appeared on behalf of the respondents, outlined circumstances in *which, were it thought appropriate,* the Court might adopt the approach that what is in issue here is the administration of limited judicial powers under Article 37 of the Constitution. She correctly pointed out that, quoting from Johnson J. in *Lynham v Butler (No.2*) [1933] IR 74, that it was illusory to ask the courts to judge at first instance every minor matter of dispute arising out of the greatly extended and articulated administration. Ms. Donnelly S.C. submitted that the Court should look at the scheme of the WRA 2015, and the objectives, including simplification and integration of mechanisms, and the pathways to redress. These included a system that was "non-legalistic" that encouraged compromise and agreement. The aim is to have access to an adjudication body, which was informal, with the appropriate assistance on the presentation of the facts. Thus it was that the legislation included dispute resolution procedures and facilities. The primary objective is to seek resolution of disputes close to the workplace level. This is to be done in a non-legal informal basis, to encourage compromise and agreement. These are, she submitted, legitimate objectives for the legislature to pursue. I entirely accept that, in themselves, these are legitimate policy objectives. But I do not understand why it is said Article 34 of the Constitution stands in the way of such aims and objectives. Article 34 does not stand as an obstacle to pre-trial mediation, or for that matter court procedures aimed at resolving issues without resort to a full hearing.

Observations on Article 37

88. Nor can it be successfully argued that the structures created by the WRA 2015 are necessary for the vindication of entitlements under the Act. This argument confuses means with ends, policy with the words of the statute. The *desire* was to provide a system of resolution of employment disputes which is sufficient, timely, and minimises costs. But there is nothing in the respondents' case to suggest that these same objects could not be achieved in a constitutionally compliant manner. For example, the simple step of adopting procedures which are clear and constitutionally compliant, but which achieve those same ends. (See, for example, the rules governing the Commercial Court). Different procedures would not alter the statutory rights set out

in the Act. The abrogation, or non-observance, of earlier procedures laid down for the Employment Appeals Tribunal, could, in any given case, certainly obstruct the attainment of entitlements for workers, as much as, potentially, for respondents.

89. As to the words of Article 37, she submitted that the limitations in question there were such as might render it appropriate to characterise the power here as being "limited". But, she submitted, one could not simply adopt it. The issue in the *re Solicitors Act* was not only the question of earning one's profession, but the severity of the sanction, containing a disciplinary element, which brought it outside the scope of being the exercise of a limited jurisdiction.

90. These, too, were significant submissions in the context of this case. They again raised the question, what *limitations* can be found in Article 37, or elsewhere in the Constitution? But I think the difficulties in favouring an Article 37 resolution in this case go very far. I turn then to the manner in which this case can be resolved by the application of established case law, rather than by resort to an idea which has "never been suggested previously".

Section VI

Simons J.'s Conclusions on the Fourth *McDonald* Criterion: Enforcement of Rights or Liabilities

91. There is no dispute in relation to the first three *McDonald* criteria. They are satisfied. The question under the fourth heading can be simply put. It is whether the decision of an administrative officer can be enforced by the executive power of the State, which is called on to enforce that judgment? Contrary to the submissions of the respondents, I would answer "yes" to this question. The text of s.43 has been set out earlier. It provides that, if an employer fails to carry out the decision of an AO, then an application can be made by the employee, or trade union, or excepted body to the District Court who, *without hearing the other side, or any evidence,* other than in relation to the making of the decision, can make an order directing the employer to carry out the decision in accordance with its terms. The District Court may, instead of making an order directing the employer to carry out the decision, direct the employer to pay to the employee compensation of such amount as is just and equitable, having regard to all the circumstances, but not exceeding 104 weeks' remuneration. Furthermore, the court may award interest pursuant to the s.22 of the Courts Act, 1981. But then, in the event of further non-compliance, without just excuse, the WRC

itself is empowered to bring a criminal prosecution against a respondent where, on conviction, such respondent may be liable to a fine or imprisonment. It is necessary to look at s.43 in combination with s.51. Does s.43 offend *the Constitution* of 1937, or just one Article of the Constitution?

Section 43 of the WRA 2015

92. Where the State respondents' argument falls down is that the wording of s.43 is not incompatible with the argument made seeking to justify it. The rationale for this section can only be a legislative or drafting concern in relation to the administration of justice, as in *McDonald*. The fourth limb is "*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*". Simons J. concluded, with hesitation, that the area of discretion permitted by s.43 of the WRA 2015 was sufficient to render that section, and the procedure flows from it, constitutionally firm. I respectfully disagree. In a key finding, Simons J. concluded: "*A decision maker who is not only reliant on the parties invoking the judicial power to enforce its decisions, but whose decisions as to form of relief are then vulnerable to being overruled as part of the process cannot be said to be carrying out the administration of justice.*" I do not agree that what can be invoked here can be characterised as "*the judicial power*", in the sense of a court carrying out its function as a court recognised under the Constitution. Nor do I agree that, within the rigid limitations contained in s.43 of the Act, it can be said that, in considering remedy, the District Court could be said to be carrying out a judicial function, where fair procedures are a fundamental requirement. Very similar procedures were struck down in similar circumstances by this Court. (See, for illustration, *DK v. Crowley* [2002] 2 I.R. 744). The procedure here cannot be justified, either on the basis of fairness, or proportionality.

93. Instead, the District Court, for enforcement, is restricted to the process set out in s.43 of the Act, which simply cannot be seen as being ones where a court carrying out a judicial function. But s.43(1) involves a near-total restriction on the right of fair procedures. I agree with O'Donnell and Charleton JJ. who also hold in their judgments, that its effect is to allow for a mechanism whereby the court is called upon by statute to exercise a power and function which, by any standard, cannot be seen as a court exercising a *judicial* function, having regard to the principle of *audi alteram partem*, fair procedures, or the right to summon witnesses and cross-examine. Thus,

the question is whether this power can be said to be the invocation and exercise of a *judicial* power "making the vital decisions" under the Constitution? If it was, it could be said that an ultimate decision on the merits could be made by a court of law exercising fair procedures. This is not a *judicial* power.

94. The intent behind s.43 was to provide "a protective" constitutional umbrella to the procedures, by providing that ultimately, resort could be had to a court. It fails in that aim, but simply because the District Court is not acting as a court, but, rather, in an administrative capacity. I do not agree either that the fact that the District Court can modify an AO's order on redress, can be seen as a significant judicial curtailment of the statutory power. At best, it is unclear how, and on what basis that power could be *judicially* exercised, having regard to the way in which the power of a District Court is so limited by s.43(1)(a) and (b). So also the exercise of the power under s.43(2) must operate within the constraints set out in s.43(1)(a) and (b).

95. Prior to the WRA 2015, a right to appeal to a court on the merits was, it is clear, assumed to be a potential constitutional protection. It was adopted in the UDA 1977 in order to avoid running afoul of Article 34. The importance of this assumption can be easily shown. In *Keady*, McCarthy J. quoted from, and distinguished, the judgment of this Court in *CK. v An Bord Altranais* [1990] 2 I.R. 396, a case arising under s. 38 of the Nurses Act, 1985, where the Court was considering a procedure contained in that Act for the regulation, registration and disciplining of members of the nursing profession. But, in the course of his judgment, Finlay C.J. observed that:

> *"... it is in **the court**, namely, the High Court, that the decision effective to lead to an erasure or suspension of the operation of registration must be made. The necessity for that procedure to vest that power unequivocally in the court, in my view, arises from the constitutional frailty that would attach to the delegation of any such power to a body which was not a court established under the Constitution, having regard to the decision of the former Supreme Court in In re Solicitors' Act 1954 [1960] IR 239."* (p. 403.) (Emphasis added)

96. Finlay C.J. went on to say:

> *"In order for the court to be **the effective decision-making tribunal leading** to a conclusion that the name of a person should be erased from the register, or the operation*

of registration should be suspended, it is, in my view, ***essential*** *that, having regard to the particular facts and issues arising in any case,* ***it is the court who should make the vital decisions****".* (Emphasis added.)

It was the "*fact*" that a court has made the final decisions that was seen as providing compliance with Article 34.

97. Along with the fair procedures enshrined in Regulation 13 of S.I. 24/1968, the fact of a potential appeal on the merits militated against a constitutional challenge to the UDA 1977 on the basis of non-compliance with Article 34, despite some doubts expressed *obiter*. (see *Canada v. Employment Appeals Tribunal* [1992] 2 I.R. 484). In enacting the WRA 2015, the legislature, and those who were to administer the WRA 2015, departed from those protective measures provided for in the 1977 legislation, and by statutory instrument, not carried forward.

98. Like many of the provisions of the WRA 2015, s.43 espoused the good intention of protecting claimants from ruthless employers. But, to my mind, the section seeks to achieve its intention in a manner which simply could not withstand constitutional scrutiny. The process set out in the section denies the right of *audi alteram partem* to a respondent. It could not be characterised as a court administering justice. The section is, rather, a legislative devise. The process, as laid down in s.43, lacks the fundamental elements of justice and constitutional fairness, which would have to include in such a process the implementation of the constitutional guarantee that both sides can be heard. It is incapable of being understood as having any other purpose. But, not only that, it requires a District Court to carry out an assessment as to whether or not reinstatement should, or should not, be ordered, in circumstances where no right of audience is provided for. It is incapable of being understood as having any other purpose or meaning.

The Fifth Limb: Orders "as a matter of history characteristic of the courts"

99. As to the fifth limb of *McDonald*, I would uphold Simons J.'s conclusion that the fifth limb is satisfied. I accept his analysis. Having considered the issue in great detail, he concluded:

"The hearing and determination of employment disputes, and the making of orders thereon, is something which is characteristic of the business of the courts. This is evident from the fact that for almost forty years prior to the enactment of the WRA 2015, the Circuit Court had heard and determined claims under the UDA 1977, whether by way of a full

appeal or by way of an application to enforce a determination of the Employment Appeals Tribunal." (paras. 101-121 of the High Court judgment).

100. I think his findings that employment law has always been the business of the courts is correct. I do not agree with the respondents' submissions that the WRA 2015 can be seen as a self-contained code, to be seen as segregated, separate and distinct from the general area of employment law. While I agree that the courts will not entertain a claim for unfair dismissal, under the legislation, the line of distinction between unfair dismissal, the business of the WRC, and wrongful dismissal, the business of the courts, is too thin to be meaningful as an escape from the fifth limb. The judgments of my colleagues also set out reasons with which I respectfully agree.

The Five *McDonald* Criteria are satisfied

101. In this case, there are areas of agreement between the judgments. As I understand it, there is consensus that the five tests, as set out in *McDonald*, are satisfied, and consequently the procedures under question here are incompatible with Article 34.1 of the Constitution. The enforcement measure comes as near to automatic as is possible, and does not allow for input by a losing party. The District Court, as O'Donnell J. comments in his erudite judgment, is seen as a vehicle for enforcement, but is not deployed for its capacity to administer justice. Instead, the court process is "conscripted" in aid of the enforcement of the decision of the WRC (para. 95 of his judgment). Thus, the process cannot be an administration of justice, as it does not contain any of the essential ingredients of fair procedures (para. 97). The fifth limb is satisfied. Thus, the judgments are agreed that the functions of the WRC are the administration of justice. Charleton J., in his judgment, agrees with this conclusion. As I point out later, I am not sure how this finding, that the enforcement procedure cannot be an administration of justice, is necessarily compatible with the conclusion that the enforcement procedures constitute a limitation on the power of an adjudication officer, as set out in s.41(5) of the WRA 2015.

102. To my mind, until these important issues can be considered further, and in greater detail, I think the arguments in favour of the maintenance of *McDonald*, as now understood, are overwhelming. Experience shows that the test has withstood the test of time, as the Attorney General submits. Properly understood, the principles identified do not stand in the way of necessary work of *quasi* judicial bodies, which, historically, were never part of the business of the courts, or were to be excluded from the ambit of Article 34. Those same principles, to my mind,

would not stand in the way of other *quasi* judicial bodies operating in new areas which were never the business of the courts. The principles are based on a series of judgments, where the courts have had to consider, an admittedly difficult question of the identification of judicial power in the context of the *administration* of justice, rather than a theoretical consideration of the problem.

Section VII

The Choice and Consequences

103. This is a case where it is essential to maintain a clear focus on the main issues. The Court is faced with a choice. But every choice, including those made in constitutional interpretation, entails a sacrifice. We should not sacrifice the substance or intent of Article 34. If the application of the logic of *McDonald* has the effect of arriving at a conclusion that the WRC is engaged in the administration of justice, I would conclude that its procedures, devoid of any protection as they would be by the flawed s.43 of the Act, are contrary to Article 34.1 of the Constitution.

104. The question then is how the Court should proceed? In the course of his comprehensive and detailed judgment, O'Donnell J. quotes from an extraordinarily interesting and thought-provoking work of legal and political philosophy. The author criticises *McDonald*, as providing only a *descriptive* summary of the everyday workload of the contemporary court, and that it does not offer a suitably *prescriptive* analysis of the core concepts of the judicial function. It is said the logic of the judgment is "hopelessly circular", as it relies on the current nature of the court's activities. A criticism is made that the categorisation of institutional power should be carried out on a case by case basis, despite the fact that this "easier if intellectually less satisfying" approach has been adopted by U.S. and Irish courts in several cases. These important observations must be cause for reflection. But, to be candid, I find the fact that *McDonald* provides a "descriptive" summary to be unsurprising. It is hardly a valid, practical, criticism, as that judgment is *predicated* on an analysis which must, of necessity, start from the reality of court business, which, in turn, reflects the *reality* of the society within which courts must function. Any identification of a process by a court must begin with what *is* the work which the courts actually do. An analysis by a court cannot begin with a clean slate, or a rejection of the accretion of case law, history, and experience. The work of the courts is a reflection of the society in which the courts must operate, framed by the concepts underlying the Constitution from the beginning.

105. Courts are constantly engaged in an empirical day-by-day process of self-definition by the demands placed upon them. In that sense, any approach to a definition of court functions must always be based on practical reality, and historical accretion. Any critique or reasoning must be seen in the light of its ultimate end point or object, which, in this instance, advocates a *new theory* of *separation of powers*. But the *foundational principle* within which the courts *actually* operate is set out in the Constitution itself. This reflects Montesquieu's thinking as realised first in the Federal Constitution. I think that any argument that the tripartite principle now fails to acknowledge a substantial tranche of government activity, including *quasi* judicial decision-making, or other administrative procedures, must, for the purposes of this case, be seen in the light of the Attorney General's submissions that *McDonald*, as explained, should be maintained, and that the judgment, as now understood, poses no real obstacle to the necessary extensions of administrative government. I agree, as the Attorney General submits, that an understanding of Article 34 should not be gleaned from the context of judicial observations regarding the separation of powers made in other jurisdictions, in different eras. The consideration in this judgment is confined to decisions of our own courts, and not only referring to history and experience, but speaking to what are contemporary and, potentially, future issues. Not all references to past experience lead to a restrictive interpretation of a constitution. The concerns in this judgment are contemporary ones, and arise from future possibilities.

Uncertainty

106. One deep concern, arising from proceeding to an Article 37 resolution of this case, is that, as Kingsmill Moore J. pointed out, it gives rise to uncertainty. From the standpoint of the State, I see the force of the Attorney General's submissions. These speak powerfully against the adoption of what he described as what would be an "entirely new test", distinct from *McDonald*. I would say the same, even if what was suggested is a "softening" of *McDonald* in the way suggested in the judgment of the majority. My apprehensions are increased by the fact that, by the same steps of logic, it might be possible, *by statute*, to engage in a process of legislation which, itself, might, potentially, have the effect of "hollowing out" Article 34 of the Constitution. A process which might lead to a near equivalence between the administration of justice, under Article 34 of the Constitution, and judicial powers subject to limitations, under Article 37 of the Constitution, begs the question of where, precisely, would the limitations be drawn? I pose the question, considered

later in more detail, whether, even having regard to the precept that in interpreting a constitution there must be scope for flexibility at the points of intersection, that this could be the correct course of action for this Court to adopt in this case? I pose these concerns, too, in addition to those expressed by the Attorney General, as to the difficulty from the respondents' standpoint in drafting legislation in defining what the limits might be, and where the line between Article 34 and Article 37 should be drawn, and what duties of compliance with fair procedures, or otherwise, might be entailed.

Identifying Core Areas of Law

107. During argument in the appeal, there was some limited discussion as to the consequences of a departure from, or a softening of, *McDonald*. This, in turn, gave rise to a consideration as to whether there were core areas of law which could not be taken away from the courts. It is no criticism of counsel to say this discussion was rather inconclusive and speculative. Examples were given of what might be core areas, such as the whole area of administrative law, or the common law in large part. I am unable to see why these particular areas might be seen as definitively ones which could be described as core areas, and many other areas which would not fit in that description. Perhaps, a distinction might be made on areas governed by statute, and those not so limited. The reason for this difficulty is self-evident. There are *no* objective constitutional criteria for determining what are such core areas. I revert to the rhetorical question posed by Simons J. If legislative change of the type involved in the WRA 2015 could it be done in one significant area of law, then, in principle, it could be done in other areas of law? Simons J. instanced family law or commercial law. There were just examples. Neither Article 34, nor Article 37, contain any constitutional limits. It is true, criminal law is precluded by the terms of Article 37. But, with that one exception, I, too, pose the question, could other important areas of law be legislatively re-classified "by (statute) law", even those involving fundamental rights, with their scope categorised *by legislation* by an Oireachtas as "limited functions"? At some future time could some future Oireachtas define by statute *other* areas of law as "limited" in their area, or exercise, or by the limited extent of the remedy? I do not say this would, or will, ever foreseeably happen. I do not suggest that any foreseeable government would seek to adopt such a course. But I do not see why this Court should adopt a course of action involving a substantial departure from established

precedents in a constitutional area which has the potential to affect both the State and the rights of citizens and individuals who must have recourse to the courts in the protection of their rights?

Absence of Constitutional Limitations

108. This question is not fanciful or speculative. In his comprehensive submissions, the Attorney General addressed the possibilities that there could, in the far future, be some cynical attempt by a legislature to remove core administrative or judicial functions, and to "dress them up" in some way. He submitted such circumstances would require a different approach by this Court, but that this consideration did not arise in an assessment of the jurisdiction of the District Court, as it raises under s.43 of the WRA 2015, in this case. I am not convinced that this concern should be thus confined. I think this issue certainly arises more broadly in the context of an Article 37 resolution of the case.

109. I find it hard to escape a sense that a different approach does indeed involve something "new" in terms of the norms of constitutional interpretation. I would emphasise, it is the *provisions* of *the* WRA 2015 which fall to be examined by reference to the Constitution and long-established principles of law: not a converse approach. I see a theoretical case can be made for reviewing the dividing line between Article 34 and 37 – the concept is theoretically and intellectually attractive - but this cannot be at the expense of depriving Article 34 of its spirit and substance. If there is one thing that is absolutely clear, it is that the authors of the Constitution were of the view that there must be a distinction, even if sometimes a difficult one to draw, between the administration of justice under Article 34, and the exercise of limited judicial powers under Article 37. They were seeking to establish a republic governed by the rule of law, the Constitution of which would be proof against modification or amendment, save by the People.

110. I do not think that it is necessary for the just resolution of Mr. Zalewski's case that the procedures under the WRA 2015 should be "re-categorised" under Article 37 of the Constitution, especially when the extent to which the administration of justice of the WRC can be characterised as "limited" under Article 37 has not been fully explored. Like Kingsmill Moore J., and McCarthy J., I think this raises the spectre of uncertainty.

The Order later proposed in this judgment

111. As will be seen later, I would hold that, for the purpose of doing justice in this case, what was in question was an administration of justice, where the appellant was entitled as of right to the full range of *Re Haughey* principles. I re-emphasise, without going further, that neither s.43 of the WRA 2015, nor any provision of that Act, provide that the decisions in issue in *this* case would be capable of an appeal on the merits by a court of law. The provisions governing appointment and determination of presiding officers are not sufficient to guarantee judicial independence.

An Article 37 Resolution of the Case: The text of Article 37: Limitations

112. I turn to a consideration of the limitations, as they are to be found in Article 37. I now consider the issue from a somewhat different standpoint than that set out in the Attorney General's submissions, to which I will return.

"Other than criminal matters …"

Core Functions

113. As touched on earlier, the concerns I have in relation to the application of Article 37 include, but are not limited to the fact that, in the range of the legal areas – whether they are deemed to be core functions of the courts or not – it might be possible to legislate so as to reclassify that area so that, by reason of legislative limitations "by law", be deemed "*limited functions and powers of a judicial nature …, by any person or body of persons duly authorised* ***by law*** *to exercise such functions and powers notwithstanding that they are not judges …"*. (Emphasis added) With the exception of criminal law, Article 37 itself contains no specific limitations on what areas of law, whether fundamental rights or otherwise, might, potentially, be placed within its scope. This is so despite the "original intent" of Article 37 being very limited. Are there other reasons why the Court should not adopt an Article 37 resolution? I think there are, potentially. I offer a number of instances merely as illustrative of a more general concern.

Cowan v. Attorney General

114. In *Cowan v. The Attorney General* [1961] I.R. 411, (adverted to in the High Court judgment), the plaintiff was elected a member of Dublin City Council. Subsequently, his election was the subject of an election petition on the grounds that he was disqualified by law from seeking

election. A practising barrister was elected on to an election court to try the petition. In an action by the plaintiff seeking, *inter alia*, a declaration that such assignment was unconstitutional, Haugh J. held in the High Court that the purported assignment of the election petition to be tried by the barrister was repugnant to, and *ultra vires*, the Constitution because (i) the election court might make findings which would affect the life, liberties, fortunes or reputations of individuals; and (ii) t*he election Court might exercise its jurisdiction in matters partly criminal*. As a consequence, the High Court held that the impugned sections of the various Acts that permitted a practising barrister be selected as an adjudicator in this case were repugnant to, and *ultra vires*, the Constitution. (*In re Solicitors Act 1954* applied).

115. In the course of its judgment, Haugh J. held:

> *"I am of opinion that the* [election] *court, availing of all the powers and duties conferred upon it in its ordinary day-to-day exercise of its powers and functions, is in fact not exercising the limited functions and powers allowable by Article 37, and is therefore unconstitutional."* (p. 423.)

116. In so finding, the judge was adopting much of the phraseology used by Kingsmill Moore J. in *Re Solicitors Act*. However, more relevantly, Haugh J. then went on to observe:

> *"Assuming for the purpose of my further observations, that the exercise of its powers is of a limited nature in the manner envisaged by Article 37, a further important question arises.* ***Does that court exercise even part of its powers and functions in matters that are criminal****? From the pattern of the Acts as a whole it seems to me that the court's right to assume its criminal jurisdiction, at any time, should circumstances so warrant, is one that cannot be taken away from it without doing something that was contrary to the intention of Parliament. And it is beyond question that the court has power to try persons on matters that are criminal and to fine and imprison a person whom it convicts on a criminal charge. ..."* (Emphasis added, p. 423.)

117. Later, he said that he felt:

> *"... compelled to hold that an election court, even if only exercising limited functions and powers of a judicial nature, must of necessity be ready at all times to exercise its powers in the criminal matters assigned to it - either of its own volition or at the request of the*

Attorney General - a function that is expressly prohibited by Article 37 of the Constitution. For these reasons I must hold that the election court when it sits to hear any matter is unconstitutional. …" (p. 424.)

118. In so finding, Haugh J. was persuaded by the arguments of Mr. T. J. Conolly, S.C., a pre-eminent advocate in the development of Irish constitutional law. The judgment was not appealed, as is pointed out in *Kelly* on the Constitution.

Enforcement

119. Again, for the purposes of this judgment, I go no further than to observe, as was pointed out earlier, that an AO is, under the WRA 2015, an official of the WRC. But it is the WRC which, having engaged in adjudication becomes also the prosecuting authority, for the purposes of a prosecution for the criminal offence of non-compliance with a District Court order. While the WRC may not be the decision-maker in this context, it is certainly granted by statute a deep engagement in a criminal matter. (See the passage from *Lynham v. Butler*, quoted earlier). Section 51, quoted earlier, provides that it shall be an offence for a person to fail to comply with an order under s.43, or s.45, directing an employer to pay compensation to an employee. Section 43 deals with the decision of an AO. Section 45 deals with a decision of the Labour Court.

120. This was not an argument advanced by the appellant, nor could it be, in his case. It is, however, are potential unforeseen potential consequence of categorisation of the functions of the WRC under Article 37. I make no comment on whether this Court would necessarily uphold the *Cowan* decision in its entirety. I confine myself to saying that it speaks to the inadvisability of a re-categorisation of the powers and functions of the WRC under Article 37, without due deliberation. The question, therefore, is twofold. When engaging in enforcement, would the WRC be engaged in "limited" functions? Would these functions be "criminal" matters? (c.f. Article 37).

121. I express this concern with caution. I do not say these considerations are definitive. There are authorities which might appear to be of contrary effect. (*The State (Murray) v McRann* [1979] IR 133; *Gilligan v. Governor of Portlaoise Prison*, 12th April, 2001, High Court, McKechnie J.; *Keady*; *Goodman International v. Hamilton (No. 1)* [1992] 2 I.R. 42). It may be said *Cowan* was distinguished in *Keady*. Similar concerns have arisen elsewhere in the case law, such as in *Melling v. Ó Mathghamhna* [1962] I.R. But I do think these observations show that a reasoning process

based on re-categorisation is, itself, fraught with difficulty, and not consistent either with the spirit of either Article 34 or 37, or, to use the interpretive term *expressio*, the "*expression"* of a firm principle concerning the role of the judiciary contained in Article 34. I accept that other long-established bodies, fundamentally important to the State, have extensive powers involving adjudication and enforcement. In some cases, such enforcement powers have been held by the courts to be non-criminal in nature. (cf. *McLoughlin v. Tuite* [1986] I.R. 235). But, in fact, these would not come within the scope of the fifth limb of *McDonald*. These included those bodies described by the authors of the Constitution for the limited purposes described by those authors. A further illustration assists in the consideration of whether the process can now be seen as "limited".

"Limited Functions and powers …"

Minister for Justice v. WRC

122. The learned editors of Kelly comment that, hitherto the courts have understood the meaning of "limited" as meaning "modest or not far-reaching". But the editors also comment, perceptively, that the words leave much room for subjective interpretation, since there appears to be no objective criterion for any of these notions. (Chapter 6.4.101). Can it be said the powers of an AO are "modest", and not "far-reaching".

123. In the judgment of the CJEU in *The Minister of Justice v. The Workplace Relations* Commission (Case C-378/17), the Court of Justice, tasked with determining the direct effect of E.U. equality law in the context of a reference from the WRC, held that the primacy of E.U. law meant that national courts (within which category it included the WRC) must be under a duty to give full effect to the provisions of E.U. law even when in conflict with national law, and without requesting or awaiting the prior setting aside of that provision of national law by *legislative* or other *constitutional* means. The CJEU went on to say that it had repeatedly held that such a duty to dis-apply national legislation was binding on "all organs of the State, including administrative authorities called upon within the exercise of their respective powers to apply E.U. law" (para. 35 and 38). But the court also held that, insofar as the WRC must be considered as a court or tribunal, within the meaning of Article 267 TFEU, it could refer to the court questions of interpretation, or relevant provisions of E.U. law, be bound by the judgment of the court, and forthwith apply that judgment, dis-applying, if necessary, of its own motion, conflicting provisions of national

legislation (para. 47). The court ruled that rules of national law, even constitutional provisions, cannot be allowed to undermine the unity and effectiveness of E.U. law. Thus, an AO would have the power to disapply national law. I contrast this with Article 34.3.2 of the Constitution, which, in terms, limits the jurisdiction to raise the question of validity of any law under the Constitution to the High Court, the Court of Appeal, or the Supreme Court, and precludes such issues being raised in courts, save those courts. Thus, such questions cannot be raised in courts of local and limited jurisdiction established under Article 34.3.4 of the Constitution. This surely speaks very strongly against any proposition that an AO can be operating "modest", or "limited" powers.

124. I acknowledge that such duties may arise from membership of the European Union, but I find it impossible to conclude that such an extensive power could be reconcilable with the provisions of Article 37 of the Constitution, which have hitherto been understood to be modest, and not far-reaching. I do not think it is a response to say that now other statutory bodies, many of which deal with new areas of law never part of the business of the courts, are under a similar duty. The question is, what do the words of Article 37 mean? The word "limited" must have a concrete application, and from the standpoint of the State and its People, must be capable of clear definition as an aspect of the rule of law which requires certainty.

The Text of Article 37

125. I accept that the WRA 2015 was intended with the intention of protecting rights of vulnerable employees. But that good aim cannot obscure the consequences which flowed from the attempt to achieve that aim. In summary, and at its heart, this case concerns a matter of constitutional interpretation. Article 34 of the Constitution expresses a fundamental principle in the clearest of terms. It is that "*justice **shall** be administered in courts established by law by judges appointed in the manner provided in the Constitution …"*. The mandatory expression of that principle, reflected in the word "*shall*", is clearer still in the Irish version of the Constitution, which provides:

> *"Is i gcúirteanna a bhunaítear le dlí agus ag breithiúna a cheaptar ar an modh atá leagtha amach sa Bhunreacht seo **a riarfar** ceart, …."* (Emphasis added)

Literally translated, this is:

> *"It is* ***in courts established by law and to judges appointed in the manner set out in the Constitution*** *that justice* ***shall*** *be administered ...".* (Emphasis added)

This principle is an expression of a fundamental principle of the Constitution, in turn, referable to Article 6, which identifies the tripartite nature of the arms of government.

126. By contrast, Article 37 is, it is clear, a saver. It provides that:

> *"Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court appointed or established as such under this Constitution."*

127. The ambit of power and function, contained in Article 34, is not only clear, it is supported by the remainder of that Article, which sets out the structure and the constitutionally based jurisdictional limits of other courts established under the Constitution, and by law. In Kelly, it is suggested that Article 37 may have confused rather than clarified matters. (See The Irish Constitution, 6.4.7). Elsewhere, in Bennion, *Statutory Interpretation*, 4th Edition, it is suggested that saver clauses are an unsatisfactory guide, as they may throw doubt on which matters are intended to be preserved, but which are not mentioned in the saver. This concern is not, I think, confined to statutes.

128. The judgment of the majority (para. 106 et. seq.), concludes that, although Article 37 does not define either the area of administration of justice, or the "subset" covered by this saver, it is nonetheless 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. I do not know how this conclusion can be reconciled with the words and intent of Article 34.

129. Earlier, this judgment quoted the passage from Kingsmill Moore J. in *Re Solicitors Act 1954*. The judge of the former Supreme Court was there engaged in an interpretation of Articles 34 and 37. The judgment identified what was contained in Article 34 as the *expression (expressio)*

of principle, and Article 37 as the saver, or exception. This is not only consistent with the principle of constitutional interpretation, but also with the concept of a harmonious interpretation of the Constitution, whereby an interpretation of one Article should not do violence to an interpretation of another. The Constitution must be seen as a whole. It must look to the fundamental purpose of each provision. The "fundamental purpose" of Article 34, to use Henchy J.'s phrase in *Tormey v. Ireland*, is to give expression to the powers and functions of the third arm of government, that is, judiciary.

130. I believe that the judgments are *ad idem,* that s.43 WRA 2015 is inconsistent with Article 34 of the Constitution, as identified by the "*McDonald/Keady"* criteria. One question which might logically follow is whether it can be said that s.43 is repugnant to the Constitution, or whether, rather, it is saved by Article 37 of the Constitution, and is to be seen, in fact, as one of the limitations on the functions exercised under s.41?

131. I here pose some consequential questions which I find difficult to resolve. The first is whether s.43(1) and (2) are *also* repugnant to Article 37? If they are not, is the consequence that they become surplusage? If these provisions of s.43 are *also* repugnant to Article 37 of the Constitution, by reason of flawed and questionable procedures, what is the consequence to the procedure under s.41(5) or s.43, and s.51, seen together? Can s.43 be seen as a limitation on the powers set out in s.41(5) of the WRA 2015.

Consequences of an Article 37 Resolution of this case

132. I see further difficulty in the steps whereby it is said that the procedure can be located within Article 37. It is suggested that, whatever Article 37 permits, it must be capable of being the administration of justice, which means, at a minimum, a State sponsored decision-making function, capable of delivering a binding and enforceable decision. I am uncertain how that is reconcilable with s.41(5) and the intent behind s.43, given the flaws in the latter. The judgment of the majority holds that the background to Article 37 points to a broader understanding of the text, and that the exercise of the powers of the Land Commission and the Revenue Commissioners could be considered limited, then that suggests a significantly broader scope for the application of the Article. I am not persuaded that this is so. In fact, Article 37 was intended to be a constitutional exclusion clause. Such clauses are generally to be interpreted narrowly. The evidence from the authors of the Constitution shows nothing but the same intention. So, too, does the text in the first

national language. Article 34.3 itself contains, either expressly or by clear implication, a series of limitations, which indicate the intent of the Constitution itself. The reservation of power contained in Article 34.3.2, regarding which courts may consider invalidity of laws, has been referred to. All these point to the conclusion that Article 37 should be given a narrow interpretation. An alternative analysis leads to areas of uncertainty in application, which are not consistent with the spirit of the Constitution, or the fundamental precepts of the rule of law, which include certainty. Whether decision-making bodies extant, or in the future, do, or do not, come within Article 37 will continue to have to be assessed on a case by case basis. The powers, including those implied by the Court of Justice in Case 378/17, and potentially vested in an AO are hard to reconcile with the concept of such persons exercising limited powers or functions. It appears to me that the logic of the reasoning goes too far: it is to disproportionately elevate the administration of justice under Article 37 into a position of near-equivalence to Article 34, which sets out the essence of the principle of where justice is to be administered – that is in courts established by the Constitution. As a matter of interpretation, the "exclusion", or saver, which is Article 37, almost itself becomes an *expression* of constitutional principle. Moreover, arguably, the saver becomes a different form of limitation, that is, on the right of claimants to have access to the administration of justice in the courts.

The Five Limitations Proposed

133. But, even if I am incorrect in my conclusions as to the potential scope of Article 37 of the Constitution, I think that there are other intractable issues based on any process of *application* of the approach adopted. It is said that the functions and powers of the WRC can be said to be limited by (a) subject matter; (b) limitations on awards; (c) enforceability; (d) a right of appeal to the Labour Court; and on point of appeal to the High Court; and (e) the fact that WRC may be subject to judicial review. But, again, I pose a question of interpretation.

134. Could these five limitations also be applied to the Circuit Court when it is carrying out an administration of justice under Article 34 of the Constitution? Where, then, is the distinction? In administering justice under Article 34, under its governing statutes, the Circuit Court is, also, subject to very similar limitations. But it cannot be suggested that, as a consequence, the powers and functions of the Circuit Court – in essence an administration of justice under the Constitution - might, in any given case, fall to be considered under Article 37 of the Constitution, rather than

Article 34. Where then does the dividing line lie? There must be a distinction made between form and substance. The five limitations identified are those of statutory form, rather than derived from the substance of constitutional administration of justice. My concern, therefore, is whether, at some future time, a legislature might assert this power of designation of limitations. Addressing each, I do not believe that "subject matter" can be a true constitutional limitation under Article 37. In any given law-case, a judge will, too, be limited by subject matter. Here, the limitation is that contained in the WRA 2015, as enacted by the Oireachtas. That limitation is one set not by the courts, but by the Oireachtas. The limitation of awards is, too, laid down by statute, where similar considerations arise. I turn then to enforceability. This must be seen in light of the uncertain constitutional status of s.43 of the Act. Yet, it is said that this constitutes a limitation for the purposes of s.41(5). But any objective standard, it cannot be seen as a limitation cognisable by law. Next, there is a "right of appeal to the Labour Court". The difficulty here is that, while there is such an appeal, it is not to a court of law, although a fuller range of fair procedures are provided for in the WRA 2015. But, further, such right of appeal is to a body appointed by the Minister, whose members do not enjoy the degree of independence which is guaranteed to the judiciary under the Constitution. Such absence of guarantees might, in individual cases, lead to a want of appreciation of what is required as true independence in decision-making. I include here the avoidance of actual or objective bias. Finally, there is said to be the existence of "judicial review". The fact that an AO, or the Labour Court, may be susceptible to judicial review is not, to my mind, a meaningful limitation. It also is applicable to any statutory administrative body exercising *quasi* judicial powers.

135. Taken together, I am concerned that the limitations, as described, do not set any objective boundary. Potentially, in some far future less benign scenario than the present, these might actually be utilised as a means of attempting to redefine or transgress the boundary between legislature and judiciary. Perhaps these concerns may be seen as hypothetical. But it is the duty of courts, especially this Court, to guard against a potentially non *bona fide* application of the law, as well as benign application. The obligation of this Court is to ensure that there remain checks, as well as balances. (Federalist Papers No. 78). The questions posed earlier in this judgment remain recurrent themes: by what yardstick or measure can an assessment be made as to whether a given area of law is, or is not, a core function of the courts, and who is to make such an assessment? Must that yardstick, in turn, be measured by reference to the fifth limb of *McDonald*? But then the concept of "core areas" begs a further question: whether, outside those core areas, there is to be "penumbra"

of other non-defined core areas, which may, or may not, fall to be classified in one category or the other.

The Attorney General's Submissions Reconsidered

136. On the other side of the line are the Attorney General's concerns, which are no less important. By what objective criteria will it be possible, in any given future case, for the executive or legislature, acting entirely *bona fide,* to determine whether some future regulatory, or other body, with an adjudicatory function, is a limited administration of justice under Article 37. What rights will flow from such categorisation under that Article? When for some hypothetical statutory body is designated as having a limited judicial function, to what extent will fair procedures be required in any given situation, and if so, which entitlements of fair procedure? From what standpoint, will the question of limitations fall to be considered? As mediated by *Keady*, *McDonald* poses no obstacle to the operation of extant statutory bodies, sometimes with extensive powers and functions, operating in the public interest which were never part of the courts domain. There is much to be said for "leave well enough alone". Properly understood, *McDonald* does not stand in the way of accommodating competition or financial regulation, or the myriad of other important examples cited by the respondents, which are vital parts of the functioning of a modern state. Those statutory bodies deal with functions which were never part of the business of the courts historically. They are excluded from being an administration of justice by the fifth limb of *McDonald*. The limited intent of the authors of the Constitution is clear from the historical material referred to earlier.

137. I express these reservations in what I hope are polite and restrained language. Heightened judicial rhetoric is both unattractive, and counter-productive. But I would not like those constraints to conceal my very deep concern as to the process of classification applied here, from every standpoint. I am unable to see any basis within the Constitution which allows for an objective limitation on such a process of re-categorisation. As O'Dalaigh C.J. observed "*The duty of the courts is not only to look to the present, but also the improbable future"*. On the most fundamental level, I conclude, a broad interpretation of Article 37, in the manner envisaged here, has the potential effect of hollowing out the *essence* or *substance* of Article 34. This cannot reflect a harmonious constitutional interpretation. It affects both the State in its concerns, and the citizens and others, who may have to seek recourse to the courts.

138. Perhaps I may be permitted to make further observations. In *The Minister for Justice v. The Workplace Relations Commission*, the equality case referred to earlier, Advocate General Wahl observed *that in relation to equality legislation, not all disputes in particular those raising important issues of principle with broader legal importance, are best dealt with by such bodies* [as the WRC]. (para. 87). He made this comment among many other valuable and perceptive observations, having pointed out that AOs, such as persons engaged in the process under discussion there, did not necessarily have legal qualification. He commented that bodies, such as the WRC, might be better placed than courts to provide low cost, speedy and effective solutions to conflicts of that nature (paras 87-88). But I think this comment also raises the question as to whether, in industrial relations law, as in equality law, there are areas which would be challenging, be it said, even for legally qualified persons, not to mind those not so qualified.

139. I turn then to a different question. Earlier this judgment noted that the WRC has not adopted any rules of procedure by statutory instrument. This, too, creates undesirable uncertainty, which arose in this case. Where significant issues are at stake, such as employment, parties are entitled to know, in advance, the rules of procedure to be applied prior to embarking on a hearing. This did not occur. This is not to say that the full range of fair procedures would be necessary in every case, but, in this one, they were necessary. In a case where there is a conflict of evidence, a person entrusted with making decisions or determinations which may affect someone's life, must make clear to the parties, from the outset, the scope of procedures which will apply in that given case. Such procedures are necessary for the administration of justice. Here, the full range of *Re Haughey* procedures should have applied.

140. Finally, I add observations as to the appellant's rights, *even* if it were to be held that the issue was not an administration of justice, but, rather, a *quasi* judicial administrative procedure. To my mind, the procedures were of such importance that the full range of *Re Haughey* rights would apply in cases of this type. Mr. Zalewski's personal rights under Article 43, including his right to a good name, are no less important to him, a worker, than to a doctor, or a solicitor. Thus, there should have been rules of procedure. There should have been a power to administer an oath. The importance of the issues required a right to cross-examine. Finally, in my view, he would be entitled to have a hearing in public. (*Re Haughey* [1971] I.R. 218; *Kiely v. Minister for Social Welfare* [1977] I.R.; *Glover v. BLN* [1973] I.R. 388).

Section VIII

Conclusion

143. In view of my conclusion that the procedures, as provided for at present by the WRA 2015, in fact, should be seen as an administration of justice, I would have set aside Simons J.'s findings on the four procedural requirements which he deemed did not arise for resolution. I would hold that each such requirement should have applied, even were the proceedings not an administration of justice, I would hold that the appellant's personal rights required the same entitlements should have been available to him.

144. This is a difficult constitutional issue. But, throughout our constitutional history, the process of judicial reasoning has operated as a form of self-righting mechanism, where the logic or consequence of each decision is later reviewed and scrutinised on the basis of new perceptions, different circumstances, and accretion of experience. Thus, mis-steps are remedied. In this case, the Court is of one mind that the procedure in question did constitute an administration of justice, contrary to Article 34 of the Constitution. That decision is based on the application of settled principles. I would hold that, by that logic, and the application of those long-settled principles, the consequent orders should necessarily be to declare the procedures in question under the WRA 2015, as repugnant to the Constitution of 1937.