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The Irish exclusionary rule after *DPP v JC*

Clare Leon and Tony Ward
Independent scholar, Ireland and University of Hull

This commentary updates the paper 'Excluding evidence (or staying proceedings) to vindicate rights in Irish and English law' by analysing the recent decision of the Supreme Court of Ireland in DPP v JC. *It argues that although the court has relaxed the exclusionary rule in one major respect, it has strengthened it in others, and that Ireland's approach to unconstitutionally or illegally obtained evidence remains very different from that of England and Wales.*

Dr Clare Leon, Independent scholar, Ireland. Dr Tony Ward (corresponding author), Law School, University of Hull, Hull HU6 7RX, UK. Email: A.Ward@hull.ac.uk

The day after our paper on the exclusionary rule in Irish and English law was published in Early View, the Supreme Court's decision *DPP v JC*[1] significantly changed the Irish exclusionary rule, without adopting anything like the discretionary approach that prevails in England and Wales. As anticipated in our paper, the decision revisits *People v O'Brien*[2] and *People v Kenny*.[3] It relaxes the version of the exclusionary rule established in *Kenny* – the strictest in the common-law world – that absent 'extraordinary excluding circumstances', any evidence obtained by a 'conscious and deliberate act' that violated the constitution must be excluded, whether or not those who obtained the evidence were aware that they were violating the constitution. The original exclusionary rule established in *O'Brien* survives, however, not merely intact, but significantly strengthened. The decision still leaves considerable uncertainty about the correct course of action in the 'Gardagate' cases.

The defendant JC had been arrested on charges of robbery when the police searched his house on the basis of a warrant issued under the Offences Against the State Act 1939, s 29. Following arrest, he made incriminating statements on which the prosecution proposed to rely. Subsequently, the Supreme Court decided in *Damache v DPP*[4] that s 29, which enabled the police to authorise searches without independent scrutiny, was unconstitutional. The trial judge ruled that evidence of the defendant's statements could not be admitted because they were obtained as a result of his arrest during an unconstitutional invasion of his dwelling. The DPP did not dispute that the learned judge had correctly applied the law as laid down in *Kenny*, since the search and arrest were unquestionably 'conscious and deliberate acts' in the *Kenny* sense: the Gardaí had consciously and deliberately invaded JC's home, even though they had not

1. .[2015] IESC 31.
2. .[1965] IR 142.
3. .[1990] 2 IR 110.
4. .[2012] 2 IR 266.

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consciously violated his rights. The DPP, however, invited the Supreme Court to overrule *Kenny*.

The DPP chose to bring this appeal under the Criminal Procedure Act 2010, s 23, which could lead to the quashing of JC's acquittal, rather than by way of a 'without prejudice' appeal (similar to an Attorney General's reference in England and Wales), which could have clarified the law without affecting JC's acquittal. Three judges of the seven-member court, Murray, McKechnie and Hardiman JJ, considered that they had no jurisdiction to hear the case under this section because the trial judge had not made an 'erroneous' ruling. Murray J dissented on this ground alone and did not express a view on the exclusionary rule. The majority (O'Donnell, Clarke and MacMenamin JJ and Denham CJ) considered that a decision correctly applying a Supreme Court decision that ought to overruled could be considered 'erroneous' within the meaning of the 2010 Act. Whether JC should be retried will decided at a further hearing. The Court subsequently decided not to order a retrial.[5]

The crux of the majority's view of the exclusionary rule is that '*O'Brien* does not go far enough but *Kenny* goes too far' (Clarke J, para 4.16). *O'Brien* does not go far enough in excluding only evidence obtained in 'conscious and deliberate' breach of the constitution, in the sense that the individuals responsible knew they were acting unconstitutionally: 'Any rule of exclusion should also exclude evidence obtained in reckless or grossly negligent disregard of the Constitution' (O'Donnell J, para 96). *Kenny* goes too far in excluding any evidence obtained by any action that was in fact unconstitutional, provided only that the *act* was 'conscious and deliberate'. Clarke J (para 4.18) and O'Donnell J (para 94) both quote O'Higgins J's judgment in *Moynihan v Greensmyth*[6] to the effect that the duty of the state under Art 40.3 is to 'defend and vindicate' personal rights 'as best it may', having regard to 'the common good'. Some balancing exercise is therefore (as we argued with reference to the words 'so far as practicable' in Art 40.3.1) implicit in Art 40.3. For O'Donnell J, the duty to vindicate rights must be set in the context of the court's fundamental duty to administer justice, and the interests of victims and the wider society must be taken into account (paras 61, 86, 93).

The majority did not leave this balance to be worked out by judges on a case-by-case basis. Instead, they adopted a new rule set out at some length in the judgment of Clarke J.

The rule set out by Clarke J has three aspects. First, where it is claimed that prosecution evidence was unconstitutionally obtained, the onus lies on the prosecution to prove beyond reasonable doubt either that it was not so obtained; or that if it was, it ought nevertheless to be admissible. Secondly, where the evidence was obtained by consciously and deliberately violating the constitution, *O'Brien* still applies: the evidence must be excluded in the absence of 'extraordinary excusing circumstances', such as the need to save life. Clarke J elaborated further in relation to determining whether a breach was 'conscious and deliberate'. In a test that will undoubtedly have significance in future cases, he specifically stated that account is to be taken of the state of mind of senior officials '*who are involved either in that decision or in decisions of that type generally or in putting in place policies concerning evidence gathering of the type concerned*' (para 5.10, original italics).

Thirdly, where the breach was not 'conscious and deliberate', there is a presumption against admission, which the prosecution can rebut by showing that the breach was either 'inadvertent' or (as in the case of *JC*) 'derives from subsequent legal developments' (para 5.20). An act will not be 'inadvertent' where 'any relevant person acted

5. [2015] IESC 50.
6. [1977] IR 55.

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in a manner that was reckless or grossly negligent' (para 5.14). The term 'relevant person' appears wide enough to cover anyone whose mental state is relevant to whether an act was 'conscious or deliberate'. In this way, Clarke J argues (contrary to the vehement dissent by Hardiman J) that the rule avoids giving 'any comfort to those who might seek to rely on exaggerated ignorance of the law' (para 5.16).

Clarke J's judgment gives surprisingly little comfort to those who might have hoped to avoid the worst constitutional implications of unauthorised recording of telephone calls to police stations. If the new rule were applied to such cases, it would be hard to avoid the conclusion that senior Garda officers were, at best, reckless as to whether this practice would lead to violations of the right to consult privately with a lawyer. It is at least arguable that they were also reckless or grossly negligent in failing to consider whether breach of this right would render the detention of suspects unconstitutional.

There remains a difficult issue, discussed in our main paper,[7] of whether the unconstitutionality of Garda actions has a sufficient causal connection to any evidence obtained, but – though we do not reach this conclusion with any great enthusiasm – the argument for excluding confession evidence in the 'Gardagate' cases is at least as strong after *JC* as it was before.

It is, however, unclear whether the new rule is applicable to cases of unlawful recording of telephone calls. O'Donnell J expressly restricted his judgment – and therefore the support of a majority of the Court for Clarke J's detailed ruling – to the area of search warrants, leaving cases on arrest and detention to be dealt with in their factual context (para 5). In such cases – including the 'Gardagate' cases – it seems that all *JC* authoritatively determines is that some balancing exercise is required under Art 40.3. This leaves scope for the courts to accept that *JC* has overruled *Kenny*, but to avoid any awkward implications of Clarke J's rule in non-search warrant cases.

A final important feature of Clarke J's judgment is that it largely abrogates the former distinction between unconstitutionally and illegally obtained evidence: 'Where the absence of legality arises in circumstances properly described as reckless or grossly negligent, then the relevant evidence should be excluded even if the illegality concerned does not result in a breach of constitutional rights' (para 6.2). Clarke J suggests, however, that in determining whether a breach was grossly negligent, a higher standard of care may be appropriate in respect of constitutional than merely legal rights.

In short, *JC* is a retreat from *Kenny* but quite a limited one, and in respect of non-constitutional illegality it is actually an advance. There are, however, hints, not only in O'Donnell J's judgment but also in Clarke J's concluding remarks, that it may in future be modified to deal with cases other than those involving search warrants. The interpretation of the 'vindication principle' advanced in our main paper would support such a modification. Rigid application of Clarke J's rule would require judges to sacrifice the prospect of vindicating the rights of victims of grave crimes so as to vindicate suspects' rights in response to the kind of reprehensible but relatively harmless violations that we discuss.

It may be a suspicion that the exclusionary rule will be further diluted in future that explains the passionate tone of Hardiman J's dissent. He called the majority ruling 'a gratuitous writing down of the respect due to the Constitution, which is an absolutely retrograde step which I deeply deplore', and expressed foreboding about how it would be applied: 'I deeply regret to say that the experience of the Courts over the last forty years strongly suggests that "inadvertence" will be accepted very generally as a reason

7. T Ward and C Leon 'Excluding evidence (or staying proceedings) to vindicate rights in Irish and English law' (2015) 35(4) Legal Stud 571–589. See text to nn 37–39.

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to allow to be proved in evidence the fruits of deliberate and conscious violation of citizens' rights.'

It appears to be true that *Kenny* has not been strictly and consistently applied. As noted by MacMenamin J (para 67), the Court of Criminal Appeal, in a rather unclear judgment, treated *O'Brien* rather than *Kenny* as applicable in cases where there is an error on the face of the warrant,[8] and according to Yvonne Daly, judges commonly use the *O'Brien* rather than the *Kenny* version of the 'conscious and deliberate' test in such cases.[9] What Hardiman J foretells, however, would amount to wholesale disregard of the letter and spirit of the majority judgments in *JC*. Perhaps something of the distrust of trial judges implied by Hardiman J's prediction also influenced the majority in their preference for what remains an unusually rigid exclusionary rule.

Comparing the Supreme Court's approach with that advocated in our paper, it is common ground that Art 40 requires a balancing exercise. Whereas we put this in terms of balancing the vindication of one right against that of another, Clarke J (para 4.18) and MacMenamin J (paras 30, 63) put it in terms of balancing rights against other aspects of the common good (a concept central to Catholic social teaching and mentioned several times in the Irish Constitution).[10] We do not see this as a major difference so long as it is understood that far from human rights and the common good being in opposition to each other, human rights are specifications of the most important aspects of the common good.[11] As the Preamble to the Constitution puts it, the common good is to be promoted 'so that the dignity and freedom of the individual may be assured', including the dignity and freedom of both suspects and victims of crime.

The more important difference between our view and that of the Court is that the majority appears to be of the view that the requisite balance can be struck by a general rule requiring the exclusion of evidence obtained by a deliberate, reckless or grossly negligent breach of rights, without regard to the seriousness of the violation in the particular case, or the importance of the right that would be vindicated were the defendant to be convicted. We appreciate the risk that a more flexible exclusionary rule may be undermined by repeated exercises of judicial discretion, but if the rule is strictly applied and extended beyond the narrow area of defective search warrants, its rigidity could lead to results that are hard to defend.

8. *DPP v Balfe* [1998] IR 50 at 58–59.

9. See http://humanrights.ie/civil-liberties/dpp-v-jc-initial-observations-on-the-exclusionary-rule-case/ (accessed 2 May 2015). But cf Clarke J at para 50.

10. Constitution of Ireland, Preamble and Arts 6.1, 40.6.1, 41.2.1, 42.3.2, 42.5, 43.2, 45.2.

11. J Finnis *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) pp 210–221.

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