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Finlay C.J.
Walsh J.
Griffin J.
Hederman J.
McCarthy J.

THE SUPREME COURT

314/88

BETWEEN

CHRISTOPHER McGIMPSEY
and
MICHAEL McGIMPSEY

Plaintiffs

and

IRELAND AND OTHERS

Defendants

JUDGMENT delivered on the 1st day of March 1990 by
FINLAY C.J.

This is an appeal by the Plaintiffs against the dismissal on the 25th day of July 1988 by Order of the High Court made by Barrington J. of their claim for a declaration that the "Agreement between the Government of Ireland and the Government of The United Kingdom" made on the 15th November 1985 (The Anglo-Irish Agreement) is contrary to the provisions of the Constitution.

The parties

The Plaintiffs are two brothers, each of whom born in Northern Ireland, and each of whom now resides in Northern Ireland.

SUPREME
COURT
JUDGMENT.

In the course of his judgment Barrington J. described the political ambitions and activities of both the Plaintiffs in the following words:

"Both Plaintiffs are members of the Official Unionist party in Northern Ireland. Both are deeply concerned about the present state of Northern Ireland and of all Ireland. Both reject any form of sectarianism and both have been involved in peace movements working to accommodate people of various traditions who live on the island of Ireland. Both gave evidence before the New Ireland Forum and, in oral and written submissions, attempted to explain to the Forum how the problem appeared to men fully committed to Unionism but interested in finding a peaceful solution to the problem of Northern Ireland and of Ireland. Both believe that the Anglo-Irish Agreement has aggravated the problem and instead of solving the problem has become part of it."

The learned trial Judge having heard the Plaintiffs in evidence was satisfied that in the expression of these opinions and in their attitude to the problems with which the case is concerned, they were both sincere. Against these findings by the learned trial Judge there is no form of appeal,

nor is there any suggestion that they are otherwise than justified by the evidence which he heard.

The Plaintiffs' claim

The Plaintiffs' claim for a declaration that the provisions of the Anglo-Irish Agreement are contrary to the provisions of the Constitution was directed in particular to Articles 1, 2, 4 and 5 of the Agreement, and the inconsistency alleged was with Articles 2, 3, 29 and 40 of the Constitution.

The defence

The Defendants in their defence, apart from joining issue on the claims of the Plaintiffs, raised a special defence denying the locus standi of the Plaintiffs in the following terms:

"The Plaintiffs do not have the locus standi necessary to seek the reliefs sought in the Statement of Claim on the grounds that neither of them has any interest or right which has or will suffer any injury or prejudice by reason of any of the matters alleged in the Statement of Claim or by reason of the coming into force of the said Agreement or at all, nor has either a common interest with any other person who could claim to be or to be likely to be adversely affected thereby."

Amongst the submissions made on behalf of the Defendants in the Court below on foot of this plea of an absence of locus standi was that the Plaintiffs should not be permitted to invoke Article 2 of the Constitution because they themselves do not believe that "the national territory consists of the whole island of Ireland" and are only invoking the Article in a tactical manoeuvre.

In his judgment the learned trial Judge stated:

"Both Plaintiffs were born in Ireland and are therefore in contemplation of Irish law citizens of Ireland."

The statement of Claim contains no claim that either Plaintiff is a citizen of Ireland, although it is stated that the first-named Plaintiff is the holder of an Irish passport. No evidence was given by either Plaintiff that either he or either of his parents had made the prescribed declaration pursuant to Section 7(1) of the Irish Nationality and Citizenship Act 1956, or of any facts which would indicate that he was "otherwise an Irish citizen".

It may well be that the Plaintiffs are Irish citizens under Section 6(1) of the Act of 1956 because

either or both of their parents were Irish citizens at the respective dates of their births, though this was not proved.

Since the Defendants made no submissions to this Court on this issue and have not sought to vary the finding of the learned trial Judge to which I have referred, I will assume without deciding that each of the Plaintiffs is an Irish citizen.

The learned trial Judge decided this issue of locus standi in favour of the Plaintiffs in the following passage contained in his judgment:

"The present case is, to say the least, unusual and there is no exact precedent governing it, but it appears to me that the Plaintiffs are patently sincere and serious people who have raised an important constitutional issue which affects them and thousands of others on both sides of the Border. Having regard to these factors and having regard to the wording of the Preamble to the Constitution and of Articles 2 and 3, it appears to me that it would be inappropriate for this Court to refuse to listen to their complaints."

Against this finding the Defendants did not enter any cross-appeal or notice to vary. This Court, as

it would be bound to do, raised the query as to the locus standi of the Plaintiffs and the consequent jurisdiction of this Court to determine the issues raised on the appeal. Counsel for the Defendants, upon that being raised, did not seek by any special submission or argument to vary the decision which had been reached by the learned trial Judge.

As a general proposition it would appear to me that one would have to entertain considerable doubt as to whether any citizen would have the locus standi to challenge the constitutional validity of an act of the Executive or of a statute of the Oireachtas for the specific and sole purpose of achieving an objective directly contrary to the purpose of the constitutional provision invoked.

However, having regard to the evidence in this case, to the findings of fact made by the learned trial Judge, and to the absence of any cross-appeal brought on behalf of the Defendants, I am satisfied that the Plaintiffs' claim in this case and their appeal against the dismissal of it by the High Court should be entertained on its merits.

The relevant constitutional provisions

The relevant constitutional provisions are as follows:

"Article 2

The national territory consists of the whole island of Ireland, its islands and the territorial seas.

Article 3

Pending the re-integration of the national territory, and without prejudice to the right of the Parliament and Government established by this Constitution to exercise jurisdiction over the whole of that territory, the laws enacted by that Parliament shall have the like area and extent of application as the laws of Saorstat Eireann and the like extra-territorial effect."

"Article 29

1. Ireland affirms its devotion to the ideal of peace and friendly co-operation amongst nations founded on international justice and morality.
2. Ireland affirms its adherence to the principle of the pacific settlement of international disputes by international arbitration or judicial determination.
3. Ireland accepts the generally recognised principles of international law as its rule of conduct in its relations with other States.

4. 1° The executive power of the State in or in connection with its external relations shall in accordance with Article 28 of this Constitution be exercised by or on the authority of the Government."

"Article 40

1. All citizens shall, as human persons, be held equal before the law."

"Article 40

3.1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen."

"The Anglo-Irish Agreement"

"ARTICLE 1

The two Governments

- (a) affirm that any change in the status of Northern Ireland would only come about with the consent of a majority of the people of Northern Ireland;
- (b) recognise that the present wish of a majority of the people of Northern Ireland is for no change in the status of Northern Ireland;
- (c) declare that, if in the future a majority of the people of Northern Ireland clearly wish for and formally consent to the establishment of a united Ireland, they will introduce and support in the respective Parliaments legislation to give effect to that wish."

"ARTICLE 2

- (a) There is hereby established within the framework of the Anglo-Irish Intergovernmental Council set up after the meeting between the two Heads of Government on the 6 November 1981, an Intergovernmental Conference (hereinafter referred to as "the Conference"), concerned with Northern Ireland and with relations between the two parts of the island of Ireland, to deal, as set out in this Agreement, on a regular basis with
- (i) political matters;
 - (ii) security and related matters;
 - (iii) legal matters, including the administration of justice;
 - (iv) the promotion of cross-border co-operation.
- (b) The United Kingdom Government accepts that the Irish Government will put forward views and proposals on matters relating to Northern Ireland within the field of activity of the Conference in so far as those matters are not the responsibility of a devolved administration in Northern Ireland. In the interests of promoting peace and stability, determined efforts shall be made through the Conference to resolve any differences. The Conference will be mainly concerned with Northern Ireland; but some of the matters under consideration will involve cooperative

actions in both parts of the island of Ireland, and possibly also in Great Britain. Some of the proposals considered in respect of Northern Ireland may also be found to have application by the Irish Government. There is no derogation from the sovereignty of either the Irish Government or the United Kingdom Government, and each retains responsibility for the decisions and administration of government within its own jurisdiction."

"ARTICLE 4

- (a) In relation to matters coming within its field of activity the Conference shall be a framework within which the Irish Government and the United Kingdom Government work together
 - (i) for the accommodation of the rights and identities of the two traditions which exist in Northern Ireland; and
 - (ii) for peace, stability and prosperity throughout the island of Ireland by promoting reconciliation, respect for human rights, co-operation against terrorism and the development of economic, social and cultural co-operation.
- (b) It is the declared policy of the United Kingdom Government that responsibility in respect of certain matters within the powers of the Secretary of State for Northern Ireland should be devolved within Northern Ireland on a basis which would secure

widespread acceptance throughout the community.
The Irish Government support that policy.

- (c) Both Governments recognise that devolution can be achieved only with the co-operation of constitutional representatives within Northern Ireland of both traditions there. The Conference shall be a framework within which the Irish Government may put forward views and proposals on the modalities of bringing about devolution in Northern Ireland in so far as they relate to the interests of the minority community.

ARTICLE 5

- (a) The Conference shall concern itself with measures to recognise and accommodate the rights and identities of the two traditions in Northern Ireland, to protect human rights and to prevent discrimination. Matters to be considered in this area include measures to foster the cultural heritage of both traditions, changes in electoral arrangements, the use of flags and emblems, the avoidance of economic and social discrimination and the advantages and disadvantages of a Bill of Rights in some form in Northern Ireland.
- (b) The discussion of these matters shall be mainly concerned with Northern Ireland, but the possible application of any measures pursuant to this Article by the Irish

Government in their jurisdiction shall not be excluded.

- (c) If it should prove impossible to achieve and sustain devolution on a basis which secures widespread acceptance in Northern Ireland, the Conference shall be a framework within which the Irish Government may, where the interests of the minority community are significantly or especially affected, put forward views on proposals for major legislation and on major policy issues, which are within the purview of the Northern Ireland Departments and which remain the responsibility of the Secretary of State for Northern Ireland."

Interpretation of Articles 2 and 3 of the Constitution

Barrington J. in the course of his judgment identified from previous decisions what appeared to him to be two conflicting interpretations of Articles 2 and 3 of the Constitution. He concluded that the impugned provisions of the Agreement were not contrary to either of these interpretations, and that accordingly it was not necessary for him to decide between them.

The first interpretation mentioned by the learned trial Judge was derived by him from the decision of this Court on the reference of the Criminal Law (Jurisdiction) Bill 1977 I.R., and he quotes from that decision the following paragraph:

"One of the theories held in 1937 by a substantial number of citizens was that a nation as distinct from a state had rights: that the Irish people living in what is now called the Republic of Ireland and in Northern Ireland together form the Irish nation: that a nation has a right to unity of territory in some form, be it as a unitary or federal state: and that the Government of Ireland Act 1920, though legally binding was a violation of that national right to unity which was superior to positive law. This national claim to unity exists not in the legal but in the political order and is one of the rights which are envisaged in Article 2: it is expressly saved by Article 3 which states that the area to which the laws enacted by the Parliament established by the Constitution apply."

From that decision he concluded that the interpretation of the Articles was as follows:

Article 2 contained a claim to the national territory of the whole of the island of Ireland, its islands and the territorial seas as a claim in the political order and not as a claim of legal right.

Article 3 provided that pending the reintegration of the national territory the Parliament established by the Constitution could only enact laws with a like area and extent of application

as the laws of Saorstát Éireann and the like extraterritorial effect, and could therefore not enact laws with an area of application in the counties of Northern Ireland.

Counsel for both parties submitted in the High Court, and repeated those submissions in this Court, that Article 2 constituted a claim of a legal right, but that pursuant to Article 3 the Parliament established by the Constitution was entitled at any time it wished to enact laws applicable in the counties of Northern Ireland, though pending the reintegration of the national territory, laws enacted which did not otherwise provide are deemed to have the restricted area and extent mentioned in the Article.

In support of this submission they relied on the dictum of O'Keefe P. in Boland v. An Taoiseach 1974 I.R., and on the decision of O'Byrne J. in The People v. Rutledge decided in 1947 but reported in 1978 I.R.

I am not satisfied that the statement that "this national claim to unity exists not in the legal but the political order and is one of the rights which are envisaged in Article 2", necessarily means that the claim to the entire national territory is not a claim of legal right.

The phrase occurs in a decision tracing the historical, political and social background to the Constitution, and seems more appropriately understood as a reference to the origin of the claim than to its nature.

If, however, it is so construed, I would after careful consideration feel obliged to decline to follow it.

I do not accept the contention that Article 3 is to be construed as permitting, during the period pending the reintegration of the national territory, the enactment of laws applicable in the counties of Northern Ireland.

With Articles 2 and 3 of the Constitution should be read the Preamble, and I am satisfied that the true interpretation of these constitutional provisions is as follows.

1. The reintegration of the national territory is a constitutional imperative (cf. Hederman J. in Russell v. Fanning).
2. Article 2 of the Constitution consists of a declaration of the extent of the national territory as a claim of legal right.
3. Article 3 of the Constitution prohibits, pending the reintegration of the national territory, the enactment of laws with any greater area or extent of application or extra-territorial effect than the laws of Saorstát

Eireann and this prohibits the enactment of laws applicable in the counties of Northern Ireland.

4. The restriction imposed by Article 3 pending the reintegration of the national territory in no way derogates from the claim as a legal right to the entire national territory.

The provision in Article 3 of the Constitution contained in the words "and without prejudice to the right of the Parliament and Government established by this Constitution to exercise jurisdiction over the whole of that territory" is an express denial and disclaimer made to the community of nations of acquiescence to any claim that pending the reintegration of the national territory the frontier at present existing between the State and Northern Ireland is or can be accepted as conclusive of the matter or that there can be any prescriptive title thereby created and an assertion that there can be no estoppel created by the restriction in Article 3 on the application of the laws of the State in Northern Ireland. This is of course quite distinct from the extraterritorial effect of the laws of the State in respect of matters occurring outside the State for which persons are made answerable in the Courts of the State.

The grounds of the Plaintiffs' claim

Barrington J. has correctly identified the three main submissions on which the Plaintiffs' claim rested in the High Court and they remain the same on the appeal to this Court.

"1. That the Agreement by recognising the legitimacy of the present constitutional arrangements in respect of Northern Ireland violates Articles 2 and 3 of the Constitution.

2. That in as much as the Agreement establishes an Intergovernmental Conference and Secretariat it fetters the power of the Government to conduct the external affairs and powers of the State under Articles 28 and 29 of the Constitution.

3. That the State may not enter into a Treaty whereby it commits itself to have regard to one section of the Irish nation (i.e. the minority population of Northern Ireland) and to disregard the interests of a section of the Irish people, namely, the majority community in Northern Ireland."

In regard to the first of these grounds the Plaintiffs relied in addition to the terms of the Agreement and of the Constitution upon submissions that the terms of the Agreement could in international law constitute an estoppel preventing a subsequent assertion of right to the reintegration of the national territory

and also on a submission that the fact that the Agreement did not contain a fixed time for its duration added to the alleged constitutional inconsistency.

The decision

With regard to these three main grounds of appeal I have come to the following conclusions.

1. Inconsistency of the Agreement with Articles 2 and 3 of the Constitution

The main source of this submission was Article 1 of the Anglo-Irish Agreement. In the course of his judgment Barrington J., after considering the details of that and other provisions of the Agreement reached the following conclusion.

"It appears to me that in Article 1 of the Agreement the two Governments merely recognise the situation on the ground in Northern Ireland, [paragraph (b)], form a political judgment about the likely course of future events, [paragraph (a)], and state what their policy will be should events evolve in a particular way [paragraph (c)]."

I find myself in agreement with this economical but precise analysis of the provisions of Article 1. The learned trial Judge then concluded that on any interpretation of the provisions of Articles 2 and 3 of the Constitution that these provisions of the Anglo-

Irish Agreement were not in any way inconsistent with either of those two Articles. With that conclusion I am in complete agreement. There can be no doubt but that the only reasonable interpretation of Article 1, taken in conjunction with the denial of derogation from sovereignty contained in Article 2(b) of the Anglo-Irish Agreement is that it constitutes a recognition of the de facto situation in Northern Ireland but does so expressly without abandoning the claim to the reintegration of the national territory. These are essential ingredients of the constitutional provisions in Articles 2 and 3.

This interpretation is not affected by the provisions of Articles 4(c) or 5(c) nor are either of these two Articles capable of any separate inconsistent interpretation. In so far as they accept the concept of change in the de facto status of Northern Ireland as being something that would require the consent of the majority of the people of Northern Ireland these Articles of the Agreement seem to me to be compatible with the obligations undertaken by the State in Article 29, sections 1 and 2 of the Constitution, whereby Ireland affirms its devotion to the ideal of peace and friendly cooperation and its adherence to the principles of the

pacific settlement of international disputes.

The conclusion that these Articles of the Anglo-Irish Agreement do not constitute any form of abandonment of the claim of right to the reintegration of the national territory but constitute instead a realistic recognition of the de facto situation in Northern Ireland leads to the consequential conclusion that the Anglo-Irish Agreement cannot be impugned on the basis of any supposed estoppel arising to defeat the constitutional claim to reintegration, nor on the basis of any indefinite duration in the Agreement.

2. Fettering of the power of Government to conduct external relations in breach of Article 29 of the Constitution

The submission made on this issue was that the terms of the Anglo-Irish Agreement were of similar character to the terms of the Single European Act which the decision of this Court in Crotty v. An Taoiseach 1987 I.R. held to be inconsistent with the provisions of Article 29 of the Constitution.

I am satisfied that this analogy is quite false. The Anglo-Irish Agreement is an agreement reached between two Governments, both of whom have an acknowledged concern in relation to the affairs of Northern Ireland. It acknowledges that the Government of Ireland may make

representations, put forward proposals, and try to influence the evolution of peace and order in Northern Ireland.

The frameworks contained in the Agreement and structures created by it provide a method of carrying out these activities, it can be argued, in the manner most likely to make them effective and acceptable, namely, constant mutual discussion. The Government of Ireland at any time carrying out the functions which have been agreed under the Anglo-Irish Agreement is entirely free to do so in the manner in which it, and it alone, thinks most conducive to the achieving of the aims which it is committed to. A procedure which is likely to lead to peaceable and friendly cooperation at any given time must surely be consistent with the constitutional position of a State that affirms its devotion not only to the ideal of peace and friendly cooperation but to that ideal founded on international justice and morality.

The basis of the decision of this Court in Crotty v. An Taoiseach was that the terms of the Single European Act could oblige the Government in carrying out the foreign policy of the State to make the national interests of the State, to a greater or lesser extent, subservient to the national interests of other Member States.

I have no doubt that there is a vast and determining difference between the provisions of this Agreement and the provisions of the Single European Act as interpreted by this Court in Crotty v. An Taoiseach.

3. Disregard of the interests of the "majority community in Northern Ireland"

A submission made on the appeal in regard to this matter was that the provisions of the Anglo-Irish Agreement contained in Articles 4(c) and 5(c) which expressly recognised the Conference as a framework within which the Irish Government might put forward views and proposals on bringing about devolution in Northern Ireland in so far as they relate to the interests of the minority community, constituted a breach of Article 40.1 of the Constitution. The Anglo-Irish Agreement is not "a law" within the meaning of that term contained in Article 40.1 of the Constitution. A provision for the capacity of the Irish Government in regard to possible devolution in Northern Ireland to put forward views and proposals as to the modalities of bringing that about could not be the holding of any person equal or unequal before the "law".

In the alternative the submission was made that the provisions of this subclause of the Agreement was

inconsistent with Article 40.3.1° of the Constitution. I am satisfied it is not. The mere fact that there is an express acknowledgment in the event of discussions leading or intended to lead to devolution in Northern Ireland of the right of the Irish Government to bring forward views and proposals in so far as they relate to the interests of the minority community in Northern Ireland is in no way an abandonment of concern by the Irish Government for the majority community in Northern Ireland.

It does not seem to me that there are any grounds for suggesting that there has been an invidious or any discrimination between the two communities in Northern Ireland by virtue of the terms of the Anglo-Irish Agreement.

I am satisfied, therefore, that all the grounds of the appeal brought by the Plaintiffs must fail. I come to that conclusion from an analysis of each of the submissions that have been made, both in the High Court and in this Court. I would also point out, however, that there is, looking at the Anglo-Irish Agreement in its totality and looking at the entrie scheme and thrust of the Constitution of Ireland a high improbability that

a clear attempt to resolve the position with regard to the reintegration of the national territory and the position of Northern Ireland by a process of consultation, discussion and reasoned argument structured by constant communication between servants of each of the two States concerned could ever be inconsistent with a Constitution devoted to the ideals of ordered, peaceful international relations. I would dismiss this appeal.

approved J. A. Furlong

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