

THE HIGH COURT**JUDICIAL REVIEW****2003 No. 942 J.R.****BETWEEN****NIALL DILLON****APPLICANT****AND
THE DIRECTOR OF PUBLIC PROSECUTIONS****RESPONDENT****AND
THE ATTORNEY GENERAL****NOTICE PARTY****Judgment of Mr. Justice Eamon de Valera delivered on the 4th day of December, 2007**

1. On the 19th day of August, 1847 in the 10th year in the reign of Queen Victoria the Parliament sitting at Westminster passed into law the Vagrancy (Ireland) Act 1847. At this time the Disaster, known to us now as "The Great Hunger" was at its height and on its way to reducing the population of Ireland from eight and a half million to under four million in a few short years.

2. The Vagrancy (Ireland) Act 1847, (hereinafter referred to as the Act) was, clearly, passed into law to assist the authorities in controlling the social effects of this calamity.

3. Section 3 of the Act is declared in the preamble to be for the:-

"Punishment of persons wandering abroad or begging in public places"

"And be it enacted, that every person wandering abroad and begging, or placing himself in any public place, street, highway, court or passage to beg or gather alms, or causing or procuring or encouraging any child or children so to do, and every person who, having been resident in any union in *Ireland*, shall go from such union to some other union, or from one electoral or relief district to another electoral or relief district in *Ireland*, for the purpose of obtaining relief in such last mentioned union or district shall on conviction thereof before any justice of the peace, if such justice shall see fit, be committed to the common jail or house of correction, there to be kept to hard labour for any time not exceeding one calendar month."

This section constitutes a prohibition against begging in any public place in all circumstances and remains in force to this day, over one hundred and fifty years later.

4. The verb "to beg" is defined in the new shorter Oxford Dictionary (1993 Edition) as "to ask for food, money etc. as a charitable gift".

5. The noun "alms" is defined as, variously, "charitable relief of the poor", "a charitable donation", "things given in charity", and "a good deed". (The gathering of alms now appears to be controlled by the Street and House to House Collections Act 1962, which, it should be noted, does not purport to repeal, amend or alter the Vagrancy (Ireland) Act 1847, in any way, and does not appear to seek to permit or control begging).

6. On the 19th day of September, 2003 at Parliament Street in the city of Dublin the applicant herein, Niall Dillon, was charged that he "did place himself in a public street to beg contrary to s. 3 of the Vagrancy (Ireland) Act 1847".

7. By order of the High Court dated the 15th December, 2003 the applicant was given leave to seek judicial review and the reliefs sought included a declaration that the provisions of s. 3 of the Vagrancy (Ireland) Act 1847, are inconsistent with the Constitution and also an order of prohibition and/or an injunction (including if necessary an interim interlocutory order) restraining the Director of Public Prosecutions from taking any further steps in the District Court, the subject matter of these judicial review proceedings.

8. The grounds upon which relief was sought were that s. 3 of the Vagrancy (Ireland) Act 1847, was unconstitutional in that it:-

(i) Interferes with the independence of the judiciary contrary to Article 35(2) of the Constitution in that it dictates to a trial judge the penalty to be imposed on a person convicted of an offence and deprives the trial judge of jurisdiction to exercise discretion so that different sentences may be applied, as appropriate in different circumstances;

(ii) It is inconsistent with Article 3.4 of the Constitution in that it dictates to a trial judge the penalty to be imposed on a person convicted of an offence and deprives the trial judge of jurisdiction to exercise discretion so that different sentences may be applied, as appropriate, in different circumstances;

(iii) It is inconsistent with Article 40.1 and/or Article 40.3 of the Constitution in that it invidiously discriminates between those who are rich and those who are poor;

(iv) Is inconsistent with Article 40.1 and/or Article 40.3 of the Constitution in that it invidiously discriminates between those charged with begging offences and persons charged with other offences in relation to public order;

(v) Interferes with the applicant's constitutional rights pursuant to Article 34.1 and/or Article 38 and/or Article 40.3 of the Constitution in that it is disproportionate and interferes with the applicant's constitutional rights to an extent greater than necessary, having regard to the offence and the circumstances of the applicant;

(vi) Is inconsistent with Article 38 and/or Article 40.4.1 and/or Article 40.1 and/or Article 40.3 of the Constitution in that the ingredients of the offence and the mode by which its commission may be proved are so related to rumour or ill-repute or past conduct, so ambiguous in failing to distinguish between apparent and real behaviour of a criminal nature, so prone to make a man's lawful occasions become unlawful and criminal by the breath and arbitrariness of the discretion that is vested in both the prosecutor and the Judge, so indiscriminately contrived to mark as criminal conduct committed by one person in certain circumstances when the same conduct, when engaged in by another person in similar circumstances,

would be free of the taint of criminality;

(vii) Is inconsistent with Article 4.3 and Article 40.6 of the Constitution in that it interferes with the applicant's constitutional right to freedom of expression and constitutional right to communicate.

9. When this application was originally brought the applicant's submissions were predicated upon an incomplete version of s. 3 of the Act, in that the phrase "if such justice shall see fit" was omitted from the section as opened to this Court.

10. I am satisfied on a proper construction of this section, including this phrase, that a discretion is given to the justice of the peace, now the District Judge, and the prison sentence (not exceeding three months) is not, as is suggested by the applicant, in fact mandatory.

11. It is not necessary to rely on the rules of statutory interpretation to reach this conclusion.

"The rule of law ...upon the construction of all statutes is,...to construe them according to the plain literal and grammatical meaning of the words in which they are expressed." (Ref. *H.E. v. Lockwood* (H.E. 42) 9 M.W. 378.

Only in cases of doubt are the rules of construction to be relied upon.

"In determining the meaning of any word or phrase in the statute, the first question to ask always is, what is the natural or ordinary meaning of that word or phrase in its context in the statute? (It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature that it is proper to look for some other possible meaning of the word or phrase)." (Ref. *Pinner v. Everett* [1969] 3 A.E.R. 257).

This cannot be said of s. 3 of the Act, the plain literal meaning of which is clear. Therefore the grounds which rely upon this proposition must fail.

12. It has been suggested to me, both in written and oral submissions, that this application is premature. I am satisfied that this is not the case. I accept the applicant's submissions that, as decided by Carroll J. in *Curtis v. Attorney General* [1985] 1 I.R. p.458, that he has a reasonable apprehension of a determination effecting his constitutional rights and therefore is entitled to seek judicial review prior to the determination of the charge which he faces.

13. There are four ingredients which constitute an offence under s. 3 of the Act. To be convicted, a person must be:-

- (a) Wandering abroad,
- (b) In a public place,
- (c) Begging, or,
- (d) Seeking alms.

The phrase "wandering abroad" is not defined in the Act and has been held when used in another similar Act (Vagrancy Act 1824) in the matter of *Maghers v. Penfold* [1915] 1 K. B. 514, which referred to the judgment of Cave J. in *Pointon v. Hill* [1884] 12 Q.B.D. 306, to mean persons who have "given up work and adopted begging as a habit or mode of life"; to carry out begging "as a means of livelihood". The respondent, in his submissions, argues that s. 3 of the Act should be interpreted as meaning that begging in a public place, simpliciter, constitutes an offence in that the term "wandering abroad" is without any meaning in this context and should be ignored. In the light of the decision in *Maghers v. Penfold* and *Pointon v. Hill*, already referred to, I do not accept this submission: the phrase is included in the section and cannot be ignored, it must have some meaning and I accept that the interpretation which has been applied to it in *Maghers v. Penfold* and *Pointon v. Hill* is the correct one.

14. This means that an ingredient of this offence must be "related to rumour, or in repute or past conduct" and this in turn pursuant to the decision of Henchy J. in *King v. Attorney General* [1981] 1 I.R. 233 at p. 257 which stated:-

"In my opinion, the ingredients of the offence and the mode by which its commission may be proved are so arbitrary, so vague, so difficult to rebut, so related to rumour or ill-repute or past conduct, so ambiguous in failing to distinguish between apparent and real behaviour of a criminal nature, so prone to make a man's lawful occasions become unlawful and criminal by the breadth and arbitrariness of the discretion that is vested in both the prosecutor and the judge, so indiscriminately contrived to mark as criminal conduct committed by one person in certain circumstances when the same conduct, when engaged in by another person in similar circumstances, would be free of the taint of criminality, so out of keeping with the basic concept inherent in our legal system that a man may walk abroad in the secure knowledge that he will not be singled out from his fellow-citizens and branded and punished as a criminal unless it has been established beyond reasonable doubt that he has deviated from a clearly prescribed standard of conduct, and generally so singularly at variance with both the explicit and implicit characteristics and limitations of the criminal law as to the onus of proof and mode of proof, that it is not so much a question of ruling unconstitutional the type of offence we are now considering as identifying the particular constitutional provisions with which such an offence is at variance."

The offence both in its essential ingredients and mode of proof of commission violates Article 34.1, Article 40.4.1, Article 40.1 and Article 40.3 of the Constitution.

15. It is also argued, on behalf of the applicant, that s. 3 of the Act offends against the constitutional right of the citizen to express freely his or her convictions and opinions as specified in Article 40.3 and Article 40.6.1 of the Constitution.

16. In *Kearney v. Minister for Justice* [1986] I.R. 116, Costello J. accepted that "the right to communicate" was protected by Article 40.3 and begging as already defined is clearly a manner of communication by one person to another

17. In *Murphy v. Independent Radio and Television Commission* [1999] 1 I.R. 12, Barrington J. in considering the right to communicate pursuant to Article 40.3 and the right of freedom of expression pursuant to Article 40.6.1 accepts the right of the citizen to express his or her needs "by words and gestures as well as by rational discourse".

18. Again in applying this dictum to begging as already defined, the Act clearly offends against freedom of expression as provided for

in Article 40.6.1 of the Constitution.

19. There are no Irish decisions directly relevant to the provisions of the Act, though the Law Reform Commission produced a very learned, comprehensive and helpful report on vagrancy in 1985 which, had it received the attention it deserved and required, would probably have rendered this application unnecessary.

20. I have been referred, helpfully, to a number of Canadian and United States of America cases touching on the matters under review: cases such as *Loper v. New York City Police Department* 999 F.2d 699 (2nd Cir. 1993) and *Hague v. Committee for Industrial Organisation* 307 U.S. 496 [1939] and *Village of Schaumburg v. Citizens for a Better Environment* 444 U.S. 620 [1980], and in particular *Bennett v. Cambridge* 424 Mass. 918 [1997], clearly support the applicant's contention that an overall ban on all forms of begging is unconstitutional. The *Bennett* case is of particular interest in its similarity with the instant matter.

21. The Canadian cases cited included *Federated Anti-Poverty Groups of British Columbia v. Vancouver City* [2002] B.C.S.C. 105, also supports the applicant's contention that s. 3 of the Act infringes the applicant's right to freedom of expression and freedom to communicate though it must be noted that these authorities from the United States of America and Canada are of a persuasive value only.

22. Finally it is accepted by the applicant, and it is undoubtedly so, that the right to communicate and the right to freedom of expression can be limited in the interests of the common good. Nothing in this judgment should be construed as preventing the legislature from making laws controlling the location, time, date, duration and manner in which begging or the seeking of alms might take place and the age of any person involved in such activity.