Damache v DPP[1]: Natural Justice, The Exclusionary Rule and Proportionality

The recent Supreme Court decision in *Damache v DPP* has justifiably been hailed as an important restatement of the principle of *nemo iudex in sua causa*[2], one of the twin foundations upon which our concept of natural justice is built. However, the judgement itself has ramifications beyond solely that of procedural fairness in the issuance of search warrants. In the first place, the scope and continuing application of the exclusionary rule is an obvious hostage to fortune resulting from the Supreme Court's decision. Less obviously, but no less importantly, *Damache* represented an opportunity for the Court to clarify the test for the proportionality of legislation in this jurisdiction.

Facts

The facts are, by now, well known: The appellant, Ali Charaf Damache, was arrested for conspiracy to murder Swedish cartoonist, Lars Vilks, who had drawn a likeness of the prophet Mohamed portrayed with the body of a dog. Damache was ultimately charged under Section 13 of the Post Office (Amendment) Act, 1951 with sending a message of a menacing character. In the course of the investigation of the alleged offence, a warrant was issued under Section 29(1) of the Offences Against the State Act 1939 for the search of Mr Damache's dwelling house. Crucially, for this case, the warrant was authorized by a superintendent who was heading the investigation into Mr Damache. Furthermore, there was no dispute as to the premises in question amounting to Mr Damache's 'dwelling' as defined by jurisprudence concerning Article 40.5 of the Constitution. In the course of this search, and as a direct result of it, a mobile phone was seized containing a message which constituted the primary evidence against Mr Damache for the offence under Section 13 Post Office (Amendment) Act 1951.

Mr Damache argued, inter alia, that Section 29(1) was invalid under the Constitution because it failed to provide for the balance between the requirements of the common good and the protection of individual rights.

Nemo Iudex in Sua Causa

The evident constitutional flaw in the provisions of Section 29(1) was that it allowed a Superintendent investigating a given offence to also be the Superintendent who authorised the issuance of a search warrant to further that investigation. Put baldly, it must be considered highly unlikely that a Superintendent with such an obvious vested interest in the successful investigation of an offence would deny any officer the permission to use a search warrant to assist that investigation. The twin pillars upon which procedural fairness are based are those of *audi alterem partem (*hear the other side) and *nemo iudex in sua causa*. Clearly, the latter principle is breached in circumstances surrounding the issuance of the search warrant in *Damache*. On this issue of independence, the Chief Justice concluded as follows:[3]

"A member of An Garda Síochána who is part of an investigating team is not independent on matters related to the investigation. In the process of obtaining a search warrant, the person authorising the search is required to be able to assess the conflicting interests of the State and the individual person, such as the appellant. In this case the

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[1] [2012] IESC 11

[2] *"no man should be judge in his own cause"*

[3] At paragraph 54 of the judgement

person authorising the warrant was not independent. In the circumstances of this case a person issuing the search warrant should be independent of the Garda Síochána, to provide effective independence"

The Exclusionary Rule

The Court held as follows regarding the central issue of Mr Damache's appeal:

"Thus, the issue in the appeal is the constitutionality of s. 29(1) of the Act of 1939 "

Somewhat confusingly, however, Denhalm, CJ held in her conclusion that *Damache* was nonetheless decided "*on its own circumstances*[4]*"*. These circumstances were then particularised as being:

(a) The fact that the Superintendent issuing the warrant was *actually* the investing superintendent in the case, and
(b) The fact that it was Mr Damache's *dwelling house*, as interpreted under Article 40.5 jurisprudence, which had been the subject of that search.

These conclusions would seem to suggest that had either of the above scenarios not been present in *Damache*, then the Court would not have deemed Section 29(1) warrants to be unconstitutional. Surely, however, the only relevance of (a) and (b) above is to the *locus standi* of Mr Damache. Once such standing had been established (whether through (a) and (b) above or otherwise) the sole constitutional issue for the Court was whether Section 29 warrants – *generally* – were constitutional or not. *DPP v Birney*[5] - cited in *Damache* - is relevant to this question but is a case with an entirely different focus. The issue in *Birney* was whether or not Section 29 *did* allow an investigating Superintendent to issue such a warrant, not whether Section 29 *should* allow the issuance of such a warrant. Thus, *Birney* did not query (and could not query) whether Section 29(1) was constitutional or not. The Court of Criminal Appeal in that case simply concluded that - for good or for ill – Section 29(1) did indeed allow a Superintendent involved in an investigation to issue such a warrant to further that investigation. Once the constitutional issue was before the Supreme Court, however, it is submitted that there was no requirement to limit the conclusions of Damache to its own particular facts. Otherwise, the Court would arguably be concluding that Section 29(1) is only unconstitutional when it is used for search warrants of the dwelling and when it is used by Superintendents who happen to be involved in the investigation of the offence in question.

The fact is that the importance of *Damache* to the continuing application of the exclusionary rule has yet to be tested. The Supreme Court could not conclude if the evidence gathered on foot of the (now) unconstitutional Section 29(1) warrant was inadmissible or not. The Court did not, and could not, embark on a consideration of whether or not there were "extraordinary excusing circumstances"[6] justifying the use of unconstitutionally obtained evidence against Mr Damache in the course of his trial. Those questions will be for a subsequent Court charged with their specific resolution, and not with the question of the constitutionality of Section 29(1) of the Offences Against the State Act 1939. Nonetheless, it is an unavoidable result of *Damache* that

[4] Paragraph 54 of the judgment.
[5] [2007] 1 IR 337 (at p. 370)
[6] See *AG v O'Brien* [1965] I.R and *DPP v Shaw* [1982] 1 IR 1

the exclusionary rule will fall to be considered in the criminal case of Mr Damache himself and of those convicted solely or largely on evidence obtained pursuant to Section 29(1) warrants. Given the *obiter dicta* of Charleton, J in the recent case of *DPP (Walsh) v Cash*[7] and given the recommendations of the Balance in the Criminal Law Group[8] - both of whom criticise the extent of the exclusionary rule at the expense of the victim – it will be interesting to note to what degree this fundamental principle retains its current form.[9]

Proportionality

It is submitted that one of the less obvious but no less critical elements of the *Damache* judgement is the opportunity it offered for clarification on the issue of the proportionality doctrine in Irish constitutional law. Denhalm, CJ drew attention to the two elements which must be present to ground a valid and constitutional search warrant of the citizen's dwelling house: the warrant must be independently vouched and there must be a reasonable basis for the issuance. Most of the focus on the *Damache* judgement has been, understandably, on the issue of independence. As discussed above, there is a clear failure of impartiality in allowing the superintendent who heads a given investigation to also be the person charged with deciding whether a crucial part of that investigation is being fairly and constitutionally prosecuted. However, quite apart from the issue of actual or objective bias, Denhalm, CJ rightly draws attention to the requirement that the issuance of such a warrant must be reasonable. It is at this point that the legislature, and subsequently the Court, must consider the balance between the constitutional rights of the citizen and the corresponding duty upon the State to prosecute crime. Legislation which walks this precarious line must, of course, be proportionate. Unfortunately, what constitutes a 'proportionate' interference with the rights of the citizen is far from clear. True, we have indeed developed a proportionality 'test' in this jurisdiction for assessing legislation which incurs into individual constitutional rights. In fact, we have developed at least two such tests. Problematically, these tests differ widely both in their wording and in their subsequent application in later jurisprudence. A first-class discussion of the full consequences of this problematic phenomenon is to be found in "*The Proportionality Test: Present Problems*"[10] by Brian Foley in the Judicial Studies Institute Journal. For present purposes, however, the two conflicting proportionality tests currently utilised by the Superior courts are those promulgated in *Tuohy v Courtenay*[11] and *Heaney v Ireland.*

Tuohy, which concerned the constitutional right to litigate and/or of access to the Courts, proffered the following test when deciding if legislation disproportionately incurs into the rights of the citizen:

"The Court is satisfied that in a challenge to the constitutional validity of any statute in the enactment of which the Oireachtas has been engaged in such a balancing function, the role of the courts is not to impose their view of the correct or desirable balance in substitution for the view of the legislature as displayed in their legislation but rather

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[7] Unreported, High Court, Charleton J., March 28, 2007

[8] *Final Report of the Balance in the Criminal Law Review Group* March 15, 2007, pp.161–66.

[9] For an excellent overview of this current 'threat' to the exclusionary rule, see "*Unconstitutionally obtained evidence in Ireland: protectionism, deterrence and the winds of change". Dr Yvonne Marie Daly,* Irish Criminal Law Journal 2009, 19 (2). pp. 40-50.

[10] 2008, page 67

[11] [1994] 3 IR 1

to determine from an objective stance whether the balance contained in the impugned legislation is so contrary to reason and fairness as to constitute an unjust attack on some individual's constitutional rights." (emphasis added)

Heaney, which concerned the right to silence and against self-incrimination, posits the following proportionality test, relying expressly on the test outlined the Canadian Supreme Court case of *R v Oakes*[12]*:*

"The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:—

(a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
(b) impair the right as little as possible, and
(c) be such that their effects on rights are proportional to the objective.

Put very simply, then, the choices for the Court when deciding if legislation is unconstitutionally disproportionate or not are:

(1) Whether the legislation is "so contrary to reason and fairness" as to be unconstitutional (*Tuohy*) or
(2) Whether or not there was a less restrictive way of achieving the goal of that legislation. (*Heaney*)

It is abundantly clear that legislation subject to the first test has a significantly better chance of being found to be proportionate than if it were subject to the second test. If for no other reason than that the second test asks whether or not any other measure could have been found to achieve the legislative end in question. When applied to Section 29(1), for example, it is clear that there are a number of less restrictive ways of authorising search warrants to search a suspect's dwelling home. It is much less clear that Section 29(1) warrants were 'so contrary to reason and fairness' as to constitute an unjust attack on Article 40.5. Therein lies the interpretive gulf between the two tests. *Damache* represented an important opportunity to bridge that gulf.

[12] [1986] 1 S.C.R. 103.

Proportionality and *Damache*

On the positive side, *Damache* does contain a bold assertion of the current proportionality test for legislation which limits the constitutional rights of the citizen. Denhalm, CJ states (at paragraph 52 of the judgement)

"The Oireachtas may interfere with the constitutional rights of a person. However, in so doing its actions must be proportionate. The proportionality test, adopted from Canada, was first declared clearly in Ireland by Costello J. in Heaney v. Ireland [1994] 3 I.R. 593 at p. 607"

The learned Judge then goes on to quote the *Heaney* test outlined above in full. The next portion of the judgement is simply a discussion of the 'Burnfoot' module of the Morris Tribunal wherein the Tribunal advised that urgent consideration be given to vesting the power to issue Section 29 warrants in either a District Court or a Circuit Court Judge. There is no further discussion of the proportionality doctrine or of the conflicting jurisprudence that has arisen since *Tuohy* and *Heaney*. Now, it might be argued that such is the conclusive and unambiguous assertion of the *Heaney* test in *Damache* that it leaves no room for any countervailing proportionality test such as *Tuohy* to be considered. Unfortunately, however, it is eminently possible that a subsequent Supreme Court might indeed nonetheless apply the *Tuohy* proportionality test to some other legislative provision limiting the rights of the citizen. And, just as *Damache* invokes and applies *Heaney*, any subsequent application of *Tuohy* will be asserted with equal certainty and with an equally lamentable failure to reference (let alone reconcile) the conflicting second proportionality test still open to the Court to apply. Both tests still exist, both tests still conflict and no meaningful attempt has been made to cut this Gordian knot.

What is required, then, is for the Superior Courts to grapple once and for all with the fact that we have two conflicting proportionality tests which can be invoked to decide whether or not certain legislation is constitutional. *Damache* represented a clear, and rare, opportunity to do so.

Conclusion

Damache is an important decision. It represents, at the very least, a concrete and robust reassertion of one of the basic pillars of natural justice upon which the citizen's Article 38.1 rights are founded. The exact ramifications for the future of the exclusionary rule, as a result of this judgement, remain unclear. One likely consequence of the decision, however, might well be the reconsideration of that rule in light of recent and trenchant criticism of it. Finally, albeit unfortunately, *Damache* represented a missed opportunity for the Supreme Court to bring some much-needed clarity to the Irish doctrine of proportionality.