**LRC WEBINAR**

**QUASI-JUDICIAL DECISION MAKING POST *ZALEWSKI***

Good afternoon everyone.

My name is Maurice Collins. I am a judge of the Court of Appeal and I am also a part-time Law Reform Commissioner and on behalf of the Law Reform Commission, it gives me great pleasure to welcome you to this webinar to discuss the recent decision of the Supreme Court in *Zalewski v Workplace Relations Commission & others* [2021] IESC 24.

I would especially like to welcome Judge Mary Laffoy, President of the Commission and my fellow Commissioners Ray Byrne and Andrea Mulligan, as well as all my judicial colleagues that are in attendance.

A large number of people have registered to attend, which is great. A number of other people have been in contact to explain that, for one reason or another, they are unable to attend live. In the circumstances, we are going to record the webinar and the recording will be available in due course.

Many of you will no doubt be familiar with the *Zalewski* decision, but to briefly summarise: Mr Zalewski made a statutory claim for unfair dismissal pursuant to the Unfair Dismissals Act 1977. He also made a Payments of Wages Act claim but the proceedings focused on the unfair dismissals claim. Consequent on the enactment of the Workplace Relations Act 2015 – a major piece of legislation intended to streamline the procedures applicable to a wide swath of employment-related claims – his claim fell to be determined by the Workplace Relations Commission (WRC), a new body established under the 2015 Act and replacing (*inter alia*) the Employment Appeals Tribunal. Under the 2015 Act, there is a full appeal from determinations of the WRC to the Labour Court. The Unfair Dismissals Act had provided for an appeal from the EAT to the Circuit Court which operated as a full rehearing on the merits (with a further appeal, again by rehearing, to the High Court). Under the 2015 Act, however, the only appeal from the WRC is to the Labour Court and the only appeal from that body is an appeal on a point of law to the High Court.

A further and important feature of the statutory regime is that determinations of the WRC are, in effect, subject to almost automatic enforcement by the District Court, on the *ex parte* application of the employee. That is in contrast to the position under the 1977 Act as enacted which conferred on the Circuit Court the power to enforce determinations of the EAT but which involved a rehearing of the claim. The issue of enforcement features significantly in the Supreme Court’s Article 34 analysis (as it had in the High Court)

The central issue in *Zalewski* was whether the adjudication of the Plaintiff’s unfair dismissal claim under the 2015 Act amounted to the administration of justice within the meaning of Article 34 of the Constitution, which requires justice to be administered *“in courts established by law by judges appointed in the manner provided for by [the] Constitution*” and, if so, whether such came within the scope of Article 37 of the Constitution, which protects from invalidity “*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*” even though they are not a judge or court.

The Supreme Court held (unanimously) that the adjudicative functions of the WRC – at least in respect of claims for unfair dismissal – involve the administration of justice within Article 34 but also held (by a bare majority) that these functions came within the scope of Article 37. No less than 3 separate dissenting judgments were given in addition to the majority judgment given by O’ Donnell J. All merit close consideration.

The core structure of the 2015 Act thus survived constitutional challenge. There was, however, a very significant rider. The exercise of jurisdiction captured by Article 37 is, the Court emphasised, the administration of justice. It followed that “*the power being exercised must comply with the fundamental components of independence, impartiality, dispassionate application of the law, openness, and, above all, fairness, which are understood to be the essence of the administration of justice.*” (per O’ Donnell J, at para 138) *“The standard of justice administered under Article 37 cannot be lower or less demanding than the justice administered in courts under Article 34”* (*ibid*)

Approached through “*the lens of Article 37*”, there was no adequate justification for the blanket requirement that hearings before the WRC be held in private. Equally, the absence from the 2015 Act of a power for the WRC to administer the oath and the consequent lack of capacity to punish a witness for false evidence given to it was constitutionally unjustified. McKechnie and MacMenamin JJ agreed with these aspects of the Court’s decision.

On any view, *Zalewski* is a significant decision, addressing as it does fundamental issues around the nature and scope of the judicial power, the relationship between Articles 34 and 37 of the Constitution, the outer bounds of the *“limited functions and powers of a judicial nature*” that bodies other than Article 34 courts may be authorised to exercise and – crucially - *“the standard of justice administered under Article 37”.* As the implications of *Zalewski* are worked out in future litigation, it may well be this latter point – including issues around the formal independence and tenure of non-judicial decision-makers (issues which are touched on in the judgments of O’ Donnell J for the majority and MacMenamin J in dissent)– that will loom largest.

I should perhaps disclose that I acted for the State Defendants in *Zalewski* prior to my appointment as a judge. My interest in *Zalewski* is now, I hope, purer and less partisan. The decision has particular relevance and importance from the Law Reform Commission’s point of view. One of its current projects is the *Reform of Non-court adjudicative bodies and appeals to courts,* in respect of which I am co-ordinating Commissioner.

More information is available on the Commission’s website regarding this project. As will be evident from its title, its scale is ambitious. A great multitude of *Non-court adjudicative bodies* exercise a great variety of decision-making functions. The functions of some – such as the WRC – more closely resemble the functions performed by Article 34 courts than the functions of (say) of a planning authority, an economic regulator such as ComReg or the Commission for the Regulation of Utilities or a body such as the Revenue Commissioners. Attempting to identify common elements across the range of these bodies is certainly a challenge. However, the appropriate taxonomy of these bodies takes on added urgency in light of *Zalewski:* if, as the Supreme Court has stated, *“the standard of justice administered under Article 37 cannot be lower or less demanding than the justice administered in courts under Article 34*”, it appears essential to identify those bodies whose functions involve the administration of justice under Article 37.

Then there is a myriad of administrative appeal bodies, most of which have specific and narrow jurisdictions. In other jurisdictions such as England and Wales and Australia (both Federally and at State level) administrative appeal tribunals of general jurisdiction have been created but that has not been a feature of Irish administrative law to date. Whether such a general tribunal should be established here will certainly warrant consideration by the Commission.

Finally, there is the issue of appeals to the courts. Again, the picture presented is – to put it at its lowest – less than satisfactory. In some cases, an appeal lies to the District Court, in others to the Circuit Court (appeals from the Data Protection Commissioner being a notable example) and in other cases the appeal is to the High Court. Frequently, the scope of statutory appeals is not specified with any precision, so that the first issue on appeal is to determine the scope of the appeal and the standard of review to be applied. The relationship of appeals with judicial review, in terms both of timing and scope, is frequently unclear.

A very interesting aspect of *Zalewski* is the discussion in the various judgments of the issue of whether the existence of an appeal on the merits to an Article 34 court may in some circumstances be required (and sufficient) to avoid a finding that an administrative tribunal is administering justice in a manner which would otherwise go beyond the permissible scope of Article 37.

It is difficult indeed toargue with the views of the Chief Justice – expressed in a speech to the Commission’s Annual Conference, November 2017 which was one of the principal drivers of the *Reform of Non-court adjudicative bodies and appeals to courts* project

*“In Ireland, every time there is a new form of right or obligation created, we create a new body. Sometimes there is a regulatory body, and a regulatory appeal body, and sometimes the legislation says you can appeal from that body to the courts on a point of law, sometimes to the Circuit Court and sometimes to the High Court. Sometimes you may even appeal on the merits to the Circuit Court. Of course, behind that there is always the right to seek judicial review and there are acres of case law about whether or not the internal systems in the regulatory bodies were exhausted before seeking judicial review. However, often a party argues that if they had done that, it would have been too late and then it’s a collateral attack on the original decision.*

*I think we have got ourselves into a significant mess in this area.”*

*Zalweski* does not – and could not be expected to – provide a blueprint for law reform but it does provide important signposts and further guidance will no doubt be provided by the follow-up litigation that will inevitably take place. *Zalewski* is not the last word on Articles 34 and 37, any more than this webinar is the last word on *Zalewski*.

The Commission has always been committed to engaging with the legal community and wider society in relation to its work. I hope that this will be the first of many engagements about the *Reform of Non-court adjudicative bodies and appeals to courts* project, including - but by no means limited to - formal consultations. We would welcome submissions, from whatever source, regarding the project.

It is past time for me to introduce the speakers. Before I do so, however, I want to express my heartfelt thanks to the Commission’s Director of Research, Ms Rebecca Coen, for having the idea to hold this webinar in the first place and then putting in place all of the practical arrangements to enable it to take place. Thanks also everyone in the Commission who has helped with its organisation.

***Professor David Gwynn Morgan***

Professor David Gwynn Morgan is an Emeritus Professor of Law, at University College Cork, undoubtedly the leading university in Ireland. David has written extensively on Irish Constitutional and administrative law and is co-author (with Gerard Hogan and Paul Daly) of *Administrative Law* (5th ed, 2019). Earlier, he wrote ‘The Separation of Powers in the Irish Constitution’ and a polemic on judicial activism, entitled ‘A Judgement too Far’. He has also been Director of Research to the (Ryan) Commission to Inquire into Child Abuse. Since retirement, he has lectured at universities in Africa and Kuwait. His greatest claim to fame, however, is that he was, from 1999 – 2003, Director of Research at the Law Reform Commission.

Professor Gwynn Morgan will focus on the reconsideration of *In Re Solicitors Act 1954* by the Supreme Court in *Zalewski*. In particular, he will consider whether the apparent re-assessment in *Zalewski* of the significance and effect of the decision in *In Re The Solicitors Act* can be reconciles with the doctrine of precedent and how some of the practical considerations that arise following *Zalewski* underscore the important value of precedent in Irish law.

***Dr Laura Cahillane***

Dr Laura Cahillane is a Senior Lecturer in the School of Law, University of Limerick. She is a frequent contributor to public discussion on legal and constitutional issues and has advised the Oireachtas on law reform on a number of occasions. Her research interests lie in the areas of Constitutional Law, Legal History, Judicial Politics and Comparative Law. Laura has published nationally and internationally. She is editor-in-chief of the Irish Judicial Studies Journal and her monograph on the 1922 Constitution was published by Manchester University Press in 2016.

Dr Cahillane will discuss whether decisions of quasi-judicial bodies must be subject to appeal or whether the existence of Judicial Review is sufficient. Undoubtedly this is an issue that will be the subject of further debate and discussion post-*Zalewski*, particularly given the differing views of the judges of the Supreme Court on the issue.

***Tricia Sheehy Skeffington BL***

Tricia Sheehy Skeffington is a practising barrister with a broad civil practice spanning intellectual property, employment, defamation, housing and regulatory/administrative law. She has a particular interest in administrative decision-making processes, having sat as a decision-maker for a number of bodies and trained and advised others in respect of the implementation of their procedures. She established the Advanced Diploma in Quasi-Judicial Decision-Making in the King's Inns and her book *The Law and Craft of Quasi-Judicial Decision-Making in Ireland* is due to published by Clarus Press.

Post-*Zalewski*, if a body is engaged in the administration of justice it must demonstrate court-like independence, impartiality, openness, and fairness. Tricia will examine which bodies can be considered to be engaged in Article 37.1-type limited administration of justice and what the implications of *Zalewski* are for them.

While the speakers are speaking, you can use the Q & A function to ask questions. We will organise and synthesise these questions as best we can and, after the speakers have finished speaking, we will have as full a Q & A session as time allows.

Now I will invite the first speaker, **David Gwynn-Morgan** to get us started.