The Bar Review

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- Financial Non-disclosure in Judicial Separation and Divorce Cases
- Libel on the Internet
- Mandatory Minimum Sentences in Drug Cases

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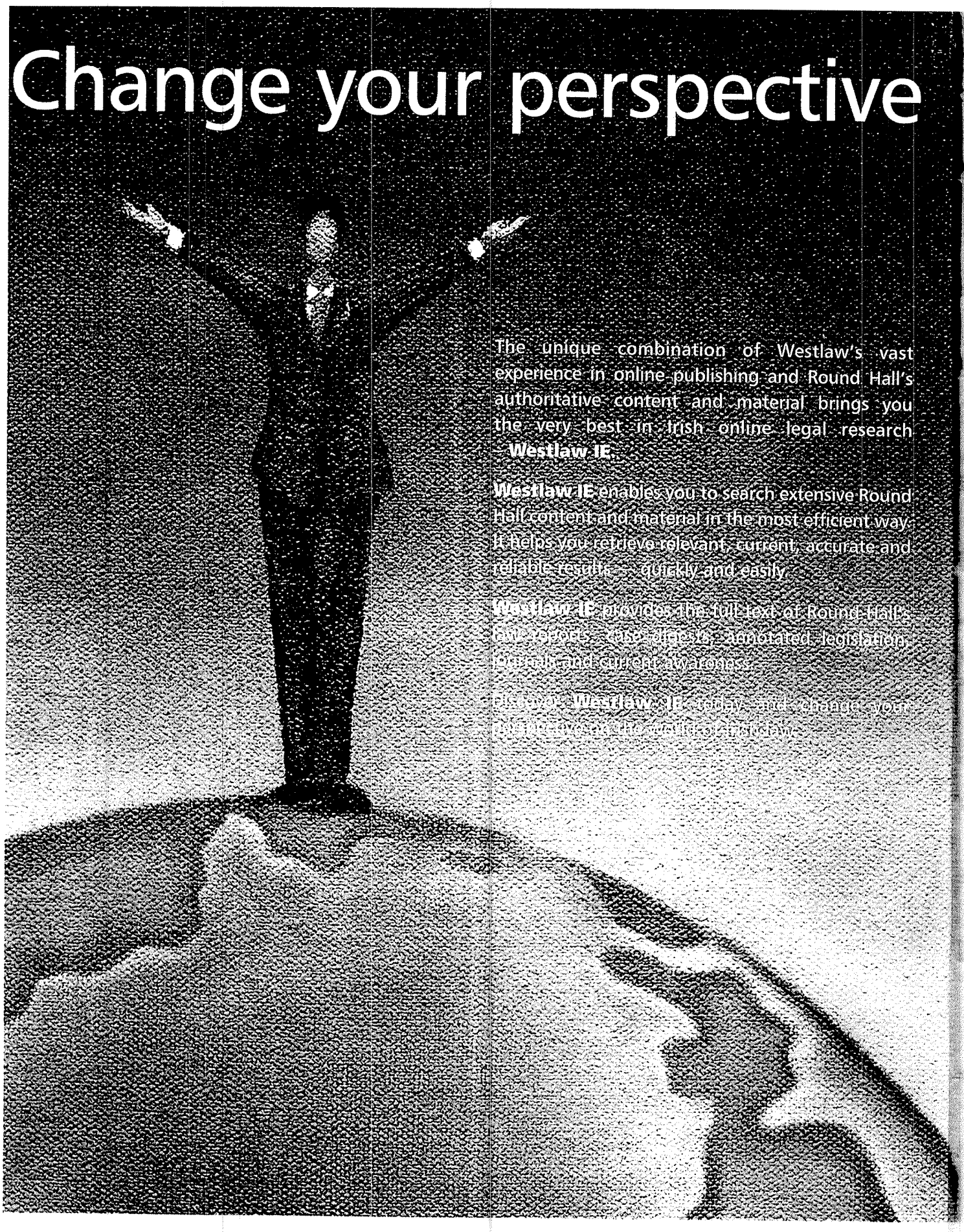

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The Competition Authority Review of the Professions

In November of 2001, the Competition Authority announced that it had formally decided to initiate a study of competition in a number of professions. This wide-ranging review focuses on eight professions in the medical, construction and legal sectors and includes barristers and solicitors. The stated aim of this study is to ascertain whether there are any potential or actual restrictions on competition and whether any such restrictions actually benefit the consumer.

The first stage of this review was a fact-finding mission by the Authority, which distributed detailed questionnaires to the bodies representing the different professions. The questionnaire received by the Bar Council contained 74 items on areas ranging from the role of the Council, professional fees, educational requirements, conduct and discipline and the advertising of services. From the outset, the Bar Council has co-operated fully with the conduct of this review and in March of 2002, it provided a very detailed response to the questionnaire. In this response, it emphasised the role of the independent Bar and the fact that the maintenance of the status of a barrister as sole trader is central to the proper functioning of the legal system and the administration of justice. It also explained the raison d'etre for the restrictions on the formation of partnerships and limited liability companies. In this questionnaire, the Bar Council explained the structure of the Bar and the rationale behind such structure to the Competition Authority.

To assist with the gathering of information for the review, the international organisation INDECON were appointed as economic consultants to the Competition Authority. As part of their fact-finding exercise, INDECON distributed a one and a half page survey to members of the Law Library. The Bar Council received a number of complaints from members about the content of this survey. The wording and form of the questions betrayed a lack of understanding about the functioning of the profession. Also, the questions, as worded, could lead to a specific and rather skewed result, while the overall survey was far too brief to elicit sufficient information to form the basis for a meaningful analysis of competition issues. INDECON requested a meeting with the Bar Council in July to clarify certain issues regarding the profession. At this meeting, the Bar Council also took the opportunity of passing along the concerns of members regarding the survey that had been distributed to them.

In August, 2002, INDECON submitted a formal request for additional information from the Bar Council – this time covering issues such as the nature of the devilling relationship and the call to the Inner Bar. This request also involved the collection of a large amount of factual data over a number of years, relating to the numbers entering King's Inns and the Law Library, the level of attrition amongst newly or recently qualified barristers and their reasons for leaving the profession. The Bar Council has again responded to this request and has supplied the requested information to INDECON.

Our understanding is that INDECON will now prepare a report on the economic aspects of its review of the professions for the Competition Authority. It seems that this report is just the first stage in a process of consultation. At the time of issuing its initial questionnaire, the Competition Authority assured the Bar Council (and the representative bodies of the other professions under review) that a "full opportunity will be afforded to your organisation to discuss your response to this questionnaire and to discuss pertinent competition issues". The Authority also pointed out that while much of the fact gathering work would be done by consultants, the final report is to be prepared by the Competition Authority itself.

We now await the Competition Authority's response. The Bar Council has co-operated fully with this review to date. Accordingly, to the extent that the information gathered raises any issues of concern to the Competition Authority, we look forward to consulting with it and addressing those concerns. ●

Financial Non-disclosure in Judicial Separation and Divorce Cases*

Inge Clissmann SC and Mary Fay BL

Introduction

When granting ancillary relief on foot of judicial separation or divorce proceedings, the court is required to take into account the conduct of each of the spouses if, having regard to all the circumstances of the case, it would be "unjust" to disregard it.[1] In the recent decision of *T v T*[2], the Supreme Court made it clear that the respective conduct of the parties should only be taken into account by the court when determining financial provision, if such conduct is "obvious and gross"[3]. What remains unclear however, are the circumstances in which that requirement is satisfied, and more importantly, what action a court can take when confronted with a case of financial misconduct or non-disclosure.

Financial misconduct by one party inevitably leads to an escalation in costs, some of which may not tax, breeds an environment of distrust which makes cases virtually impossible to settle and often substantially increases the length of court time required to bring the matter to a satisfactory resolution. In light of the above, the courts need to introduce a clear policy on the serious consequences of non-disclosure, which can be made known to parties and practitioners alike.

In order to encourage parties to comply with their discovery obligations and those set out in s. 38 of the Family Law Acts[4], there should be a corresponding sanction for failure to comply. This article proposes to examine briefly the divergent approach taken by the courts when dealing with cases of financial non-disclosure. In light of the similarities with the corresponding English legislation[5], English caselaw is also considered.

Financial Non-disclosure

(i) Irish caselaw

In *J.D. v D.D.*,[6] McGuinness J. dealt with a husband who had engaged in an affair and was less than forthcoming or truthful in relation to his finances, at page 75:

> "The financial position of the husband is more difficult to ascertain. Throughout the period prior to the actual court hearing, he was remarkably reluctant to swear an affidavit of means or to make discovery, either voluntarily or in response to orders of this Court. I do not accept his explanation that it 'did not occur' to him that he would have to reveal his assets and I find it hard to believe that his solicitor would not have impressed on him the importance of full disclosure. The case was originally listed for hearing on the 18th July, 1996. The husband's affidavit of means was sworn on the 12th July, 1996, as was his affidavit of discovery. Both were incomplete in several highly material matters."

Despite the above finding, McGuinness J. was satisfied to deal with the issue of the husband's non-disclosure by setting aside dispositions intended to defeat the wife's claim, at page 94:

> "While, therefore, in the context of the statutory provisions of the Act of 1995, I am not prepared to accept entirely the 'clean break' approach advocated by counsel for the wife, I do not accept that on the financial facts of the present case that the proper course is to rely in the main on the periodic maintenance order with the addition of a relatively small sum for furniture or what was described in evidence as 'provision for a rainy day'. In a case such as this I feel that

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* This article is based upon a paper, co-written by the authors and presented by Inge Clissmann SC, at the Irish Family Lawyers Association Conference, 16th November 2002.

1. S.16(20)(i) Family Law Act, 1995; s.20(2)(i) Family Law (Divorce) Act, 1996.
2. Unreported Supreme Court, 14th October 2002
3. Per Keane C.J. at page 35: "I would agree with the view expressed in *Wachtel v Wachtel* that the court should not reduce the financial provision which it would otherwise make to one of the parties save in cases where the misconduct has been, as the Master of the Rolls put it, "obvious and gross". The same approach should logically be adopted to a proposed increase in the level of financial support because of the suggested misconduct". Keane C.J held that the conduct of the husband in leaving the family home and having a relationship and another child outside his marriage was not so gross as to warrant increasing the wife's apportionment of his pension from 51 to 55%.
4. Section 38(7) Family Law Act,1995; s.38(6) Family Law (Divorce) Act,1996
5. Matrimonial Causes Act,1973, s. 25
6. [1997] 3 IR 64

considerable reliance should be placed on a lump sum provision, while the periodic maintenance should also play an important part. In making the necessary calculations full regard, of course, must be paid to the guidelines set out in s. 6 of the Act of 1995.

Section 16, sub-s. 2 (i) provides that the courts should have regard to 'the conduct of each of the spouses if that conduct is such that in the opinion of the court it would in all the circumstances of the case be unjust to disregard it'. At this point, I should state that I do not think that any injustice would be done in this context by disregarding the adultery of the husband. I have also carefully considered the question of his financial conduct. On balance, I have decided that I have dealt with this aspect sufficiently by making an order pursuant to s. 35 and I will not take it into account any further."

In the Supreme Court decision of *MW v DW*[7], a case dealing with discovery and the remittal of an action for judicial separation, Barron J. discussed the appropriate costs sanction to be levied against a non-disclosing party:

"The real sanction as to costs is where the liability to pay costs eats into the benefits which each party would otherwise have obtained from the court. Generally in cases where the sole issue is how the finances are to be divided both as to capital and income, the costs wasted by recalcitrant behaviour should be the responsibility of the party responsible out of his or her share. The money spent on such costs should remain notionally available when the court comes to deal with financial provisions. The court should make its order on the basis that such money still exists for division between the parties, and the share of the party responsible for the costs unnecessarily incurred shall be deemed to include such sum. In some cases there may be a smaller income. The same notional division can be applied."[8]

Barron J. also placed an obligation on the non-disclosing spouse's solicitor:

"Solicitors should advise their clients as to their obligations in relation to making full disclosure and, if necessary, the court should not be slow to make a solicitor personally liable for costs thrown away by unnecessary and unreasonable recalcitrant behaviour apparently on behalf of their clients. This applies equally to a solicitor whose client is seeking the information as to the solicitor whose client is refusing it."[9]

The above approach was adopted by O'Sullivan J. in the recent case of *CF v JDF*[10]. The husband's disclosure in this case had been far from adequate:

"The respondent agreed to a voluntary affidavit of discovery. It is acknowledged that this deliberately omitted a figure of £70,000 and the respondent apologised for this. His reason was that he wanted to ensure that he had sufficient money to pay his lawyers for this case. Furthermore he has given evidence that he directed the relevant banks in the Isle of Man to edit out of their statements and to exclude references to accounts which he held jointly with his father on the basis that the property therein belonged exclusively to his father and were therefore irrelevant. This is entirely unacceptable as I have already made plain in the course of the hearing. In addition an account with the Ulster Bank in Athy was made known to the applicants only at the commencement of this case in which at that time was lodged some €40,000. Again the respondent's explanation was that he was prepared to divulge the existence of this account only when he was satisfied that he had sufficient money to pay his legal team. The applicant maintains that it was only discovered pursuant to enquiries made by an accountant hired by the applicant. Whichever version is correct, neither is acceptable."[11]

O'Sullivan J. then went on to consider the appropriate sanction for the respondent's behaviour, at page 8:

"Furthermore evidence has been given of considerable correspondence on behalf of the applicant pressurising the respondent's lawyers for further and better discovery, much of it to no avail. During the course of the hearing, documents and financial information became available to the applicant for the first time. I regret to say that I think the respondent has not co-operated in the manner he should have with the Court. I do not think his behaviour in this regard amounts to a deliberate and systematic web of deceit: rather to an unacceptable and repeated lack of co-operation with the requirements of discovery with a view to damaging the presentation of her case by the applicant. In the result I consider that two days of a lengthy hearing were wasted. In light of the decision of the Supreme Court in *MW v DW* (2001:ILRM:416) I consider that I should assign a notional figure representing the costs of these two days hearings as being available to the respondent on the division of assets. This agreed figure is €28,000. Consequently the lump sum to be allocated to the applicant must be notionally increased by this amount".

O'Sullivan J. did not consider the husband in this case to have been engaged in "a deliberate and systematic web of deceit" and in assessing the nature of the sanction to be levied against the husband, he took into account the husband's eleventh hour efforts at co-operation. This would seem to suggest that the sanction may have been more severe had such efforts not been made.

7. [2000] 1 ILRM 416
8. at page 424
9. at page 425
10. Unreported High Court, O'Sullivan J., 16th May 2002
11. At pages 7 and 8.

"A considerable amount of evidence and documentation was produced in relation to several accounts held by the respondent either jointly with his father and the applicant or jointly with the applicant in the Isle of Man. Because of his limited and partial compliance with the principles of discovery this became a fraught and expensive issue in the course of the trial. However the respondent through his counsel did engage in ameliorative co-operative measures at the 11th hour whereby he spent time with the applicant's accountant explaining to him the sequence of events and the meaning of the statements and other documents and movements of amounts between accounts. Also the respondent through his counsel agreed that the applicant's accountant could give evidence to the court after the respondent himself had given evidence in defence. But for these co-operative measures the difficulties and expense involved in the non co-operation by the respondent with the discovery orders would have been even greater and more costly to the respondent than they actually were".

If McGuinness J.'s approach (of merely setting aside transactions under s.35) in *J.D. v D.D.* above was adopted by the courts, a spouse would have nothing to lose by attempting to conceal assets or to dispose of them, as the potential gain would greatly outweigh the potential risks. Equally, if costs are the only sanction, it may not prove a sufficient disincentive, particularly in cases of "ample resources" where the benefits of successful non-disclosure are extremely attractive. To act as a sufficient disincentive to conceal assets or make insufficient disclosure, the sanction available to the court has to have teeth and be flexible enough to reflect the seriousness of the misconduct. Some of the English cases below hint at a severe sanction in the appropriate cases and this thinking should be encouraged, and more importantly, put into practice in Ireland.

(ii) English caselaw

The traditional view in England seems to be that any non-disclosure or financial misconduct by a party should be penalised by costs. In the case of *Robinson v Robinson (No. 2)*[12], both the conduct of the wife during the marriage and the husband's financial misconduct after its dissolution were taken into account. In particular, the court held that as a result of her husband's non-disclosure, the wife had been induced to act to her financial detriment and enormous sums of money had been wasted in costs. In the circumstances, the court held it was appropriate to grant a lump sum to the wife and that the husband pay the wife's costs that had been occasioned as a result of his non-disclosure.

However, a different approach was adopted in *B v B (Real Property: Assessment of Interests)*[13]. In this case, the court held that the wife's conduct during the discovery proceedings in which she presented a false statement of income and had disregarded the registrar's order for full disclosure, should be taken into account by a reduction in her award. While accepting that the matter could be dealt with by costs (page 495, paragraph (g)), Anthony Lincon J. went on to say at page 496:

"I have no hesitation in holding that it would be inequitable to disregard the behaviour which was primarily directed at obstructing the husband's pursuit of his remedies. I have to reach an equitable conclusion and equity expects propriety from those who seek its remedies.

Having set out the detailed matters to be considered under s. 25 of the 1973 Act, it is necessary to stand back and look at the broad canvas. In so brief a marriage as this one it would be palpably unjust to resort either to a one-half or even one-third apportionment of the husband's total assets, or, indeed, any apportionment at all: *S v S* [1976] 3 WLR 775. An award should reflect the contribution made by the wife in relation to [the first-mentioned address], the two-year contribution to the family life of the working couple at [the husband's address], and the reasonable requirements of the wife in her future life. The husband is in a position to provide the capital to satisfy a reasonable award, once [his address] is sold. The award should be reduced to take into account the wife's conduct and enlarged to allow for the legal aid charge. I assess the lump sum at £35,000."

B v B was cited but not followed in the later case of *P v P (Financial relief: non-disclo*sure)[14], where it was held that where one party had failed in the duty to give full and frank disclosure, such price was to be paid in costs, although costs do not follow as a matter of course. However, Thorpe J makes it clear that part of his reasoning was that the wife in that case had not concealed from view any "substantial asset", suggesting that mere dishonesty will be dealt with by costs, but a substantial non-disclosure may require more than that. He says at page 392, after citing a passage of the court's judgment in *B v B*:

"If that passage is to be taken to establish, first, that flagrant breach of the obligation to make full and frank disclosure coupled with a dishonest presentation constitutes financial conduct which may in appropriate cases be brought into the balancing exercise, I am in complete accord. If it is to be construed as meaning that the court making primary findings of fact before applying the statutory criteria is entitled to draw inferences adverse to the party proved guilty of breach, then I am in complete accord. But I do not follow the passage so far as to conclude that if at the end of the judicial investigation the conclusion is (a) that the applicant has been dishonest, but (b) her dishonesty has failed to conceal from view *any substantial asset*[15], then on some punitive basis she should receive

12. [1986] 1 FLR 37
13. [1988] 2 FLR 491
14. [1994] 2 FLR 381
15. *Emphasis added*

less of what is available for distribution. It seems to me that in that case such price as is to be paid by the dishonest litigant is a price in costs, not in reduction of the appropriate share of the available assets. The suggestion contained in the last sentence of Lincoln J's judgment that maxims of equity should be applied to deny or reduce relief I cannot follow. It seems to me that the court has a duty to discharge a statutory function on the application of statutory criteria, and maxims of equity have nothing to do with it."

Surely, however, there are circumstances where the non-disclosure of numerous less substantial assets, when viewed cumulatively, would be just as reprehensible as the concealment of one particularly valuable asset. Indeed, in the recent case of *H v H (Financial Relief: Conduct)*[16], Singer J clearly envisaged circumstances where a spouse, through their conduct could disentitle themselves to all relief (see page 983 where he says that "this is not a case where the husband has disqualified himself from all relief because of conduct"). He later takes the husband's conduct into account by ensuring the home the husband would be provided with would benefit the children on his death.

Drawing Adverse Inferences

The cases mentioned above dealt with the appropriate penalty in proceedings where it is shown that there has been financial non-disclosure or misconduct on the part of a spouse in family proceedings. One of the more difficult issues facing the court in a non-disclosure case is how to assess the parties' financial resources where it has been shown that one of the spouses is not credible and has concealed assets from the court, but the extent of his/her actual wealth can only be estimated and not proven. This can prove particularly difficult in ample resources cases, where the difference in valuation can run to many millions. In what circumstances can and should the court draw adverse inferences against a party who has deliberately concealed, and continues to conceal, the true nature of his/her finances from the court?

(i) Irish caselaw

In *J.D. v D.D. supra.* McGuinness J. took the husband's financial non-disclosure into account by making an order pursuant to s.35 setting aside transactions intended to reduce or prevent relief available to the wife. However, she also took the husband's conduct in relation to the non-disclosure of certain aspects of his finances into account by preferring a lump sum and by assessing reasonable periodical maintenance payments by her conclusions on what the husband's income probably was, as opposed to what he declared it to be. She says at page 95:

"...it seems to me that this is a reasonable periodic payment, particularly in light of my finding that his actual income is probably quite considerably higher than that which is declared in his affidavit of means".

In *Y(M) v Y(A)*[17], the husband's inadequate disclosure had a material effect on the orders made by Budd J. He says at page 88:

"... this court's view with regard to the husband's evasion of his responsibilities towards his wife and child are crystal clear. The discovery of documents on the part of the husband in this case was inadequate, incomplete and late. Such accounts and documents as were produced were misleading, unreliable and not supported by any satisfactory vouchers. From the paucity of even these unreliable accounts and documents, while it is difficult to assess how much the husband does earn from what is an extensive business with large cash sums involved, it became clear in the careful, courteous and skilful cross-examination conducted by Ms. Brown that the husband earned infinitely more than was disclosed in the accounts which he had produced and that this net earning certainly put him in a position to be well capable of providing the relatively small sums which his wife and child require to live on in a frugal and thrifty manner. I formed the clear view that, after payment of a sum of £1,300 per month and after payments of a lump sum for the purchase of a house in Donegal for his wife and son in particular to live in, the husband would still have substantial sums with which to indulge his own extravagant lifestyle."

It is clear that the Judge felt entitled to draw his own conclusions as to the earnings of the husband in circumstances where "the husband's discovery was entirely inadequate and the accounts which he produced and other documents were works of fiction".

In the case of *P.O'D v J.O'D*[18], the husband had told his wife in a telephone conversation that "there were two women who were after his money, being the mother of the child and herself, and that neither would get his money as he had hidden his assets so well that neither of them would be able to find the assets or prove that he owned them"[19]; he had used false names in his business dealings, had forged a document with the express intention of deceiving the court, and had been in breach of an order of the High Court in the nature of a mareva injunction freezing his assets.

Budd J. concluded that "all the property transactions involving [the partnership] are more than likely to be fictitious and that the respondent is in fact the beneficial owner of these properties"[20] and that "there was a deliberate concealment of the assets which the

16. (FD) [1998] 1 FLR 971
17. [1997] 3 Fam. L.J. 86
18. Unreported High Court, Budd J., 31st March 2000
19. At page 4.
20. At page 69

respondent transferred into the names of [the partnership] in order to hide them from his wife and the court"[21].

The judge cited with approval the approach of McGuinness J. in *J.D. v D.D. supra.* and stated, at page 90:

> "In view of the conclusions reached by McGuinness J. about the policy of allowing future reviews (which I propose to follow) in the circumstances of assets probably having been hidden abroad, it seems to me that an order should be made in respect of the request for taking evidence abroad so that the applicant's advisors are enabled to pursue inquiry abroad with regard to the respondent's assets. In the meantime, it is desirable that as much certainty should be achieved as possible and accordingly, I have come to the conclusion that the parties both contributed to a partnership with regard to the building up of the property portfolio and the justice of the situation requires that a half share of the properties *known at present*[22] should be transferred in to the applicant's name".

In addition to drawing this adverse inference against the husband, Budd J. went on to consider the issue of costs:

> "I have come to the conclusion that the respondent has woven such a tangled web of deceit in this case that, rather than making an order for party and party costs or for solicitor and own client costs, the court in this particular instance should make an order for solicitor and client costs in favour of the applicant against the respondent. Many consultations more than the usual number would have been required in this case due to the devious dissembling by the respondent"[23].

(ii) English caselaw

In *F v F (Divorce: Insolvency: Annulment of Bankruptcy Order)*[24], the wife's husband was declared bankrupt before her ancillary relief application was heard. The Court subsequently set aside the bankruptcy order as an abuse of process and on the basis that the husband had presented his financial position in a fraudulent manner and had deliberately failed to disclose assets, including assets abroad, which were essential to any evaluation of his true net worth. Thorpe J. stated that while it was almost impossible to value the husband's resources in light of his concealment and non-disclosure, he was entitled to draw adverse inferences against the husband and if that resulted in an unjust order against the husband, he was the architect of his own downfall (at page 366/367):

> "The fact is that the husband has, in my judgment, so obfuscated his financial position and services that it is quite impossible for this court to be sure as to what he has now in residue. There may well be reality in the fact that he has sustained setbacks in trade and business, which are coincidental if contemporaneous with the development of these proceedings. There may well be a genuine ingredient of recessionary setback that has had the effect of eroding his declared UK capital base. But as has been emphasised in the authorities and particularly succinctly in the case of *J v J* [1955] P 215:
>
> 'The obligation of the husband in maintenance proceedings is to be full, frank and clear in his disclosure of his means to the court, and any shortcomings in this respect can and normally should be visited at least by the court drawing inferences against him on matters the subject of shortcomings.'
>
> So if he has conducted his affairs throughout the marriage in such a covert fashion as to relieve him of the ordinary obligations of citizenship to support the State through tax contribution, if he has conducted these proceedings in a vain endeavour to maintain that camouflage, if in consequence the obscurity of my final vision results in an order that is unfair to him, it is better that than that I should be drawn into making an order that is unfair to the wife. If at the end of this case, he feels that the lump sum that I order is unfair in reflection of his present retrenchment, then he should remember that he has brought that consequence upon himself by the fashion in which he has chosen to arrange his affairs over the course of the last decade, coupled with the fashion in which he has chosen to conduct these proceedings."

And at page 368, the judge continued:

> "If it were left to me in a vacuum to decide what to do for this wife in this case, I would find it a difficult decision and one without any very apparent signposts. The case has been plainly opened by Mr. Mostyn for a lump sum £150,000 to enable the wife to discharge the indebtedness on the flat for £120,000 and to give her £30,000 in reserve. That figure is not attacked by Mr. Mansfield as being in any sense excessive and I am content to make the order which is sought"

In *Baker v Baker*[25], the husband, a successful property developer, made the case that because of the fall in property prices, he no longer had any substantial assets. Ward J., at first instance, held that the husband was guilty of serious non-disclosure as to the true extent of his assets and his evidence was so unreliable that he could not accept it without corroboration, in the loosest sense of the word. Ward J. examined the husband's motive for his non-disclosure and concluded that:

21. At page 86
22. Emphasis added.
23. At page 95
24. [1994] 1 FLR 359
25. [1995] 2 FLR 829

"I am compelled to draw the adverse inference that he does not wish me to know the truth. That compels me to draw the further inference that there must be more monies available"[26].

Ward L.J. determined that the husband had in excess of £300,000 available. The husband was ordered to pay the wife a lump sum of £160,000 and periodical payments of £17,500 until the lump sum was paid, and thereafter at £15,000 for five years, despite the husband's protestation that he has no substantial assets and was living on an income of £33,000 a year. The husband appealed.

On appeal, Butler-Sloss L.J stated that it was a principle established for over forty years that in cases where a party deliberately conceals his/her true financial position from the court that the Court was entitled to draw adverse inferences against that party[27];

"Problems arise in cases where one party has deliberately failed or refused to provide the material facts and has concealed from the other party and the court his true financial position. In such a case, *J v J* [1955] P 215, Sachs J said at page 227:

'In cases of this kind, where the duty of disclosure comes to lie upon the husband; where a husband has - and his wife has not - detailed knowledge of his complex affairs; where a husband is fully capable of explaining, and has the opportunity to explain, those affairs, and where he seeks to minimise the wife's claim, that husband can hardly complain if, when he leaves gaps in the court's knowledge, the court does not draw inferences in his favour. On the contrary, when he leaves a gap in such a state that two alternative inferences may be drawn, the court will normally draw the less favourable inference - especially where it seems likely that his able legal advisers would have hastened to put forward affirmatively any facts, had they existed, establishing the more favourable alternative.'

And at page 229:
'... it is as well to state expressly something which underlies the procedure by which husbands are required in such proceedings to disclose their means to the court. Whether that disclosure is by affidavit of facts, by affidavit of documents or by evidence on oath (not least when that evidence is led by those representing the husband) the obligation of the husband is to be full, frank and clear in that disclosure. Any shortcomings of the husband from the requisite standard can and normally should be visited at least by the court drawing inferences against the husband on matters the subject of the shortcomings - insofar as such inferences can properly be drawn.'

Those passages set out the principles upon which the courts have for over 40 years approached the cases in which a spouse (not nowadays necessarily a husband) has been found to have lied and to have been guilty of material non-disclosure of relevant financial information in an ancillary relief application by the other spouse. In many decisions, reported and unreported, judges and district judges have applied those principles and drawn, where appropriate, adverse inferences from the deliberate failure of a party to give the court an accurate and complete picture of his true financial position."

She then went on to consider the burden of proof in such cases, citing the decision of Thorpe J. in *F v F supra.*:

"In *F v F (Divorce: Insolvency: Annulment of Bankruptcy Order)* [1994] 1 FLR 359, Thorpe J found that a husband had obtained a bankruptcy order on his own petition which presented a false picture of his financial circumstances. The judge set aside the bankruptcy order and said at page 366F:

'The finding that I make that the order must be rescinded involves inferentially a finding of deceitful presentation on the part of the husband. ... The standard is one that augments with the gravity of the finding, so that even on the application of the civil balance of probabilities, it is to a high standard that I must be satisfied in order to reflect the gravity of the stain on the husband's integrity. I am certainly satisfied to that standard ...'

Thorpe J then reviewed the financial resources of the husband. In doing so he directed himself:

'Now, as I approach this operation I make it plain that I am by no means satisfied to that same high standard as to the existence of this or that asset.'

I respectfully agree with the distinction drawn by Thorpe J as to the standard of proof required to prove an abuse of the process by improperly obtaining a bankruptcy order and that required to infer the existence and amount of assets that a spouse declines to reveal to the court. The latter, an all too familiar situation in family disputes, is reprehensible, but not in the same class of case as the former. The husband in this appeal was not accused of fraud and Ward J evaluated his assets on a balance of probabilities and cannot be faulted for so doing.[28]"

It is clear from the above decision that the Court can, on the ordinary civil standard of the balance of probabilities, draw an adverse inference that the party guilty of non-disclosure has something to hide, namely undisclosed assets, and can award sums that take into account the fact that there is more money available than that set out before the Court. The Court of Appeal expressly rejected the husband's argument that unless the assets can be shown positively to be available, an order cannot be made:

"Mr. Posnansky pointed to an utterly false case and asked us to consider why the husband was lying and what did he have to hide. If the cupboard was bare, it was in his interests to open it and display

26. cf Butler-Sloss L.J. at page 834
27. At page 832
28. At page 833/834

its meagre contents. But on the contrary, the husband, despite his protestations to the contrary, continued to live the life of an affluent man. I agree with the submissions from Mr. Posnansky that if a court finds that the husband has lied about his means, lied about other material issues, withheld documents, and failed to give full and frank disclosure, it is open to the court to find that beneath the false presentation, and the reasons for it, are undisclosed assets...

...To accept Mr. Holman's alternative proposition that, unless the assets can be shown positively to be available an order cannot be made, flies in the face of the principles enunciated in the judgment of Sachs J and would send a clear message to spouses unwilling to make full and frank disclosure. It would indeed, as Mr. Posnansky said, be a cheats' charter."[29]

How then does the Court go about deciding whether this burden of proof has been satisfied, particularly in circumstances where the dishonest spouse's evidence has been rejected as not being credible?

In the case of *Newton v Newton*[30], the husband's appeal against the decision of Hollis J. at first instance was dismissed on the basis that the judge was perfectly entitled, having rejected the husband's evidence as not being credible, to draw adverse inferences against him and to seek to determine his true wealth from the conflicting evidence of professional witnesses. Sir Roualeyn Cumming-Bruce acknowledged the difficulty facing Hollis J. and the unreality of the exercise, at page 41:

"The judge, after considering his attempts to review the imperfect and conflicting pictures presented by the experts, added, after stating the figures that he gave in his judgment, 'If that be right or anything like it - and I am not sure that it is' - which observation usefully illustrates the unreality of attempting anything approaching precision, an unreality which was caused by the fact that the husband, who had the best opportunity to give reality to the figures, had to be rejected as a credible witness"

Another issue facing the Court is non-disclosure in previous proceedings, and whether this should be taken in to account. In the case of *C v C (Financial provision: non-disclosure)*[31], the husband had been untruthful in relation to his finances in previous proceedings before the court and as a result, the court found it to be quite unrealistic to expect complete candor from him now. Thorpe J. says at page 279:

"It would be quite unrealistic to expect complete candor from the husband, now or in the future. Accordingly, the reality of his financial circumstances is likely to be veiled from this court indefinitely".

He went on to say at page 280, that the court was entitled to draw adverse inferences against the husband, even though he was absent from the subsequent proceedings:

"The difficulty in making orders that would provide that security to which she is manifestly entitled lie not so much in resolving the question-marks overhanging the husband's financial circumstances. In the light of his absence from these proceedings, in the light of the deceitful manner in which he has conducted these proceedings over the last 15 years, this court is entitled to draw inferences against him in the absence of evidence and is entitled to give particular weight to the wife's needs and the quantification of those needs. However, the difficulty that I encounter in quantifying and providing for those needs relates in part to the very considerable costs that have accumulated in the pursuit of what appears to be an unusually slippery fish."

By contrast, in the slightly older case of *Collins v Collins*[32], a much more restrictive view was taken in relation to considering the criteria set out in sections 23 and 25 of the 1973 Act. In this case the husband had concealed assets from the Court, protracting the proceedings and increasing the costs for both parties who were legally aided at the time. Notwithstanding that it was found as a fact by Callman J. at first instance that the husband had "set out deliberately from the beginning to defeat his wife's just case", the Court of Appeal held that Callman J. had erred in including costs in the lump sum:

"The judge, with the greatest of respect, in my opinion failed to approach the case strictly in accordance with the provisions of ss. 23 and 25 of the 1973 Act, as amended. He appreciated that the wife would receive £2,500 without it being subject to any legal charge in favour of the Law Society, but he also took the view that, having regard to the husband's conduct, it was right that he should make a substantial contribution to the amount that the Law Society would have to pay out in respect of the wife's costs of this continuing and expensive litigation, brought about solely as the result of the husband's prevarication, lying and default.

As I have said, that, I think, was an incorrect approach by the judge, although I fully understand and sympathize with the way in which he in the end dealt with this matter".

Equally in the case of *E v E (Financial Provision)*[33], in which the husband's non-disclosure had made a rigorous and expensive investigation into his affairs necessary, the costs of which he would have to pay, the Court felt that while he had been guilty of some non-disclosure, since no assets of any substance had been concealed, it would be wrong to infer from his lack of frankness that he had assets which, on the evidence, he had not got.

29. At page 835
30. [1990] 1 FLR 33
31. [1994] 2 FLR 272
32. [1987] 1 FLR 236
33. [1990] 2 FLR 233

Nevertheless, from the more recent caselaw considered above, there seems to be an emerging consensus that, where it is appropriate and reasonable to do so, adverse inferences can be drawn against a financially dishonest spouse. If however, the Irish courts truly wish to send a clear message that "cheaters will not prosper", a principle which Otton L.J. in *Baker v Baker* considered fundamental to the integrity of the legal process[34], should the drawing of adverse inferences to determine a spouse's true wealth not also be coupled with a sanction of the sort used in cases where non-disclosure has been proved? If the court seeks merely to determine what the non-disclosing spouse's true wealth is, to more properly assess what will constitute proper provision for the other spouse, the dishonest spouse is in no worse a situation than if he/she had disclosed fully at the outset, save of course in the rare circumstance where the court has inferred that he/she has greater resources than he/she actually has in reality.

A case in point is *Al-Khatib v Masry*[35] in which the wife was alleging that the husband had estimated assets in the region of £200 million and sought £24 million. It was a case involving serious non-disclosure where the husband had attempted to divest himself of properties worth in the region of £10 million net and had also abducted the children. Munby J stated at page 1072:

> "What this shows, says Mr Mostyn is that the husband has, both before and since the abduction of the children, conducted a ruthless strategy to render impotent the court's powers of property adjustment and enforcement. I agree. Not merely has the husband, deliberately as I find, failed to make a full and frank disclosure of his assets, he has done everything in his power to remove or dispose of any property of which he believes the wife may be aware. He has attempted, by means of what I am satisfied were sham transactions, to prevent the wife from receiving those assets (A prop and B prop) which are in this jurisdiction. He has compelled her in the process to run up substantial legal bills battling with his associates in a bitter struggle in the courts... ...it is difficult to imagine a worse case of litigation misconduct...Properly, in my judgment, Mr. Mostyn relies upon the husband's conduct of the litigation as reinforcing the conclusion - as if there is any need to reinforce what on the evidence as I have analysed it is obvious - that the husband has not made, and never has had the slightest intention of making, anything approaching full and frank disclosure of his assets."

While the wife was awarded assets worth over £23 million plus a sum of £2.5 million for funding litigation relating to the child abduction, this was done on the basis that the husband's assets were comfortably in excess of £50 million and probably significantly more. In drawing adverse inferences against the husband, the court pointed out that the most that the wife was getting was half of the husband's income (at a conservative estimate) and full disclosure would be more damaging to the husband than any adverse inferences the court could draw on the sums she was looking for, although her counsel specifically stated that the wife was seeking the transfer of the maximum amount of her husband's assets as the Judge thought just[36]. While accepting that the husband's conduct must properly increase the wife's award and despite his statement that it would be "difficult to imagine a worse case of litigation misconduct", Munby J. rejected the submission that it should drive him to the very top of the discretionary bracket, as it was not "the very worst kind if misconduct that can be imagined"[37]. Quite what conduct would satisfy this high threshold is unclear.

This approach unfortunately puts a spouse in the position of seeking a sum in the dark, which does not exceed half of the offending spouse's assets, without ever knowing the extent of the non-disclosing spouse's true financial position and without really providing any sanction or penalty for the non-disclosing spouse.

In matrimonial proceedings, a fine levied against a dishonest spouse would reduce the funds available for the dependent spouse and children, similarly committing the offending spouse to prison would result in a loss of maintenance and income and, as argued above, costs are very often not a sufficient disincentive for a party for whom the fruits of non-disclosure are particularly attractive. In such circumstances should the monetary sanction, the penalty for non-disclosure, be orchestrated in such a way that it benefits the non-offending spouse? Quite simply, why shouldn't the honest spouse get a greater share? If Singer J. can envisage circumstances where a spouse could, through their conduct, disentitle themselves to all relief[38], could the reverse not also hold true, that where one party has greater means and greater resources that they, through their conduct, disentitle themselves (and conversely benefit their spouse) to a part of their share.

Conclusion

Non-disclosure not only increases costs and impinges unnecessarily on the courts time but also effects the presentation of a case to the court and the basis on which the court will make its decision. In light of this, the courts should as a matter of policy, define financial misconduct as conduct which in the words of Keane C.J is "obvious and gross"[39] and on a statutory basis as conduct which would be "unjust to disregard in all the circumstances of the case"[40]. The courts should send out a message that a spouse engaging in concealment, obfuscation and lack of co-operation, depending on the scale, will suffer costs (including solicitor client costs) and sanctions in terms of property and income. When this is fully understood and appreciated by practitioners, it will be conveyed to clients and should encourage an environment of frankness and openness that will foster early settlement. ●

34. At page 837; "Under statute and from authority ... there is a duty upon a party in proceedings such as these to make full and frank disclosure of all matters relevant to the assessment of the financial position of the parties and the relief to which a spouse is entitled. The integrity of the legal process would be severely undermined if a party were permitted (and seen to be permitted) to evade that duty by a deliberate and stubborn refusal to make such disclosure to the other party and, more important, to the court".
35. [2002] 2 FLR 1053
36. At page 1082
37. at page 1080, para. [107]
38. See *H v H* supra.
39. *T v T*, unreported Supreme Court, 14th October 2002 at page 35
40. S. 16(20)(i) Family Law Act 1995; s. 20(2)(i) Family Law (Divorce) Act,1996

Criminalising Anti-Competitive Practices

Paul Anthony McDermott BL

Introduction

The Competition Act, 2002 (hereafter "the Act") aims to strengthen the hand of the prosecutor in prosecutions for anti-competitive behaviour. It does this both by granting the Competition Authority substantive new powers and by altering the ordinary rules of evidence and procedure that govern criminal trials in this jurisdiction. The purpose of this article is to outline the key changes that have occurred and to identify some areas that are likely to prove controversial.

Powers of search

Section 45 of the Act gives the Competition Authority a power of entry and search. According to s. 45(2), this power is to be used "for the purpose of obtaining any information necessary for the performance by the Authority of any of its functions under the Act." A warrant can be obtained from a District Judge "if the judge is satisfied from information on oath that it is appropriate to do so"; s. 45(4). One of the difficulties with this is that the functions of the Competition Authority are very wide and range from such matters as prosecuting offences to simply advising the Government and Ministers on matters of competition.

It is unclear whether the absence of any requirement that there be a reasonable suspicion that an offence has been committed or that evidence relating to an offence is present renders the section unconstitutional. It must at least be open to question whether any evidence obtained on such a basis could be admitted into a criminal trial.

In *Hanahoe v Hussey*[1] Kinlen J suggested that there is a constitutional aspect to the issuing of a search warrant and stated that:

> "... in the case of serious invasion of constitutional rights, the judge must be satisfied on the facts that the appropriate statute would apply and must seek to ensure that the constitutional rights of the citizen are protected."[2]

Subsequently, in *Simple Imports v The Revenue Commissioners*[3] Keane J (as he then was) (with Barrington J concurring) stated that a test of strict scrutiny applies to search warrants:

> "These are powers which the police and other authorities must enjoy in defined circumstances for the protection of society, but since they authorise the forcible invasion of a person's property, the courts must always be concerned to ensure that the conditions imposed by the legislature before such powers can be validly exercised are strictly met."[4]

The right to respect for one's private life under Article 8 of the European Convention on Human Rights can also be invoked to challenge the issue or execution of search warrants in circumstances where there is no requirement of a suspicion that a criminal offence has been committed. The ECHR would require such a draconian power to be proportional to the mischief that it is sought to counter. For example, in *Niemitez v Germany*[5] a warrant that permitted the search of a lawyer's office was held to be 'not necessary in a democratic society.' The power, which took no account of any special protection which might be desirable in relation to a lawyer's premises, was disproportionate to its purposes.

Also of potential relevance in this regard is the decision of the Supreme Court of Canada in *Hunter v Southam*.[6] Section 10(1) of the Combines Investigation Act, 1970 provided that the Director of the Combines Investigation Branch could search premises in the course of an inquiry where he believed that "there may be evidence relevant to the matters being inquired into." The Supreme Court stated that "reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that there is evidence to be found at the place of the search, constitutes the minimum standard, consistent with s. 8 of the Charter, for authorising search and seizure."[7]

It is unclear how the Competition Authority will separate its civil and criminal role during the course of a search. The constitutional safeguards that would apply to a search for civil purposes are different to those that would apply to a search used for criminal purposes. This potential confusion of roles is further increased by the fact that s. 45(9) of the Act authorises the Gardai to accompany an authorised officer on a search.

Presumptions and the burden of proof

The Act seeks to assist the prosecution of competition cases by creating a number of presumptions. The most important of these are as follows:

(a) In respect of an agreement which has the *purpose* of fixing prices, limiting output or sales, or sharing markets or customers, there is a presumption that the agreement had as its *object* the prevention, restriction or distortion of competition in trade in any goods or services

1 [1998] 3 IR 69
2 [1998] 3 IR 69 at 93
3 [2000] 2 IR 243
4 [2000] 2 IR 243 at 250
5 (1993) 16 EHRR 97; approved by Kinlen J in *Hanahoe v Hussey* [1998] 3 IR 69 at 102.
6 (1984) 11 DLR (4th) 641
7 (1984) 11 DLR (4th) 641 at 659

in the State or within the common market unless the defendant proves otherwise; s. 6(2). Thus a particular object is presumed to arise from an agreement with a particular purpose.

(b) There is a presumption that a person who was a director of an undertaking or a person employed by it whose duties included making decisions that, to a significant extent, could have affected the management of the undertaking, or a person who purported to act in any such capacity, consented to the doing of the acts by the undertaking which constituted the commission by it of an offence under section 6 or 7 of the Act; s. 8(7).

In an attempt to constitutionally copper-fasten the legislation from Constitutional attack, the Act makes two statements of general principle:

(a) Where a burden is placed on the defendant it can be satisfied on the civil standard i.e. the balance of probabilities; s. 3(3)(a).

(b) A presumption only places an evidential burden on the defendant; s. 3(3)(b). This should be contrasted with the legal burden which rests on the prosecution for the entire of the proceedings and which requires the prosecution to prove its case beyond reasonable doubt.

These sections probably do no more than recognise the basic minimum that the courts would be likely to require in any event. However it has always been a matter of doubt to this writer to what extent if any juries are capable of understanding the difference between a legal burden and an evidential burden in criminal trials. The distinction between the two is a concept that law students frequently have difficulty in grasping, let alone ordinary members of juries.

The power of arrest

It should be noted that a breach of s. 6 of the Act, if prosecuted on indictment, carries a maximum term of imprisonment of five years (s. 8(1)(b)(ii)). The choice of five years is significant. This is because s. 4 of the Criminal Law Act, 1997 provides for a power of arrest without warrant in respect of arrestable offences. An arrestable offences is defined in s. 1 of the Act of 1997 as "an offence for which a person of full age and capacity and not previously convicted may, under or by virtue of any enactment, be punished by imprisonment for a term of five years or by a more severe penalty and includes an attempt to commit any such offence."

The use of expert evidence in competition law prosecutions

The basic rule is that evidence of opinion is inadmissible. A witness (other than an expert) should confine his or her testimony to facts. The leading authority in this jurisdiction is *AG (Ruddy) v Kenny*[8] where Davitt P stated:

> "The general rule is that the fact that a witness has a certain opinion as to a fact in issue is not relevant to that fact as it is the Court's function, and not that of the witness, to draw inferences from relevant facts which have been established in evidence. There are exceptions to this rule. There are certain matters in which the law considers that the Court is not as capable as are expert witnesses in drawing inferences; matters which require special study and experience in order that a just opinion may be formed, as, for instance, matters of art, science, medicine, engineering and so forth. In regard to such matters, witnesses of whose expertness the Court is satisfied are allowed to give evidence of their opinion."

But there are other exceptions. There are certain matters in which it is considered that ordinary witnesses, who are not in the class of expert witnesses, may give evidence of opinion. They include matters such as questions of identity, age of individuals, resemblance of persons and things, speed of vehicles, the general character of a meeting and whether it is seditious, and the condition or apparent condition of persons whether mental or physical."[9]

Section 9 of the Competition Act, 2002 provides that the expert opinion is admissible if the following criteria are met:

(i) The witness appears to the court to possess the appropriate qualifications or experience as respects matters to which his or her evidence relates, and
(ii) The evidence is in respect of a matter that calls for expertise or special knowledge.
(iii) The evidence is in respect of a matter that is relevant to the proceedings.

In particular, the evidence may relate to the effects of types of agreements and to any relevant economic principles. The court is given a discretion to exclude such expert evidence in "the interests of justice".

It is crucial that any expert witness furnish to the court a proper basis for their evidence. In *The People (DPP) v Fox*[10] the prosecution relied on the evidence of a handwriting expert to establish that it was the signature of the accused that appeared on a passport application form that was alleged to have been a forgery. The Court stated:

> "Finally, there is the question of the evidence of the handwriting expert. From this it is quite clear that the most he can say is that, in his opinion, it is highly likely that the application form, the subject matter of the counts in this case, was written by the accused. Mr MacEntee has criticised this evidence and its content and quoted from an authority of a Scottish case namely *Daly v The Edinburgh Corporation* which appears at (1953) SLT 54. He quoted there from a number of very salient aspects of the case and I quote the President's judgment:
>
> 'The value of such independent i.e. expert evidence depends upon the authority, experience and qualifications of the expert and above all upon the extent upon which his evidence carries conviction and not upon the possibility of producing a second person to echo the sentiments of the first expert witness.'

8. (1960) 94 ILTR 185

9. (1960) 94 ILTR 185 at 186

10. Unreported, Special Criminal Court, 23rd January 2002

he goes on to say:

> However skilled or eminent, he can give no more than evidence. They cannot usurp the functions of the jury or judge, sitting as jury, any more than a technical assessor can substitute his evidence for the judgment of a court.'

The judge then goes on to quote from various authorities on evidence regarding expert witnesses and I quote as follows:

> 'Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the judge or jury to from their own independent judgment by the application of these criteria to the facts proved in evidence. Scientific evidence if intelligible, convincing and tested becomes a factor and often an important factor for consideration, along with the whole other evidence in the case. But the decision is for the judge or jury. In particular the bare *ipso dixit* of a scientist, however eminent, upon the issue in controversy will normally carry little weight for it cannot be tested by cross-examination or independently appraised, and the parties have invoked the decision of the judicial tribunal and not a oracular pronouncement by an expert.'

> The court is impressed by this view of the law and finds that the evidence in question was not backed by any scientific criteria which would have enabled testing the accuracy of the conclusion to which he came. It is normally cases where handwriting expert opinion is given that various aspects of the writing similarities and dissimilarities and thereto upon which the expert relies are given in evidence that they may be tested by the defence. In addition, in this case, the expert witness relies solely on lower case writing and no explanation was given for this particular aspect."

The use of documentary evidence in competition law prosecutions

Traditionally a strict application of the hearsay rule was used to exclude much documentary evidence in criminal prosecutions. For examples of this, reference should be had to cases such as *Myers*[11] and *The People (DPP) v Prunty*[12]. A more modern approach to documentary evidence is evident in *The People (DPP) v Byrne*[13] where Keane CJ stated:

> "The learned Circuit Court Judge ruled that the prosecution in the circumstances of this case were not obliged to produce a certificate under s. 6 of the 1992 Act in order to render the evidence of the persons concerned admissible. The court is satisfied that the learned trial judge was correct in so ruling. As the summary of the evidence of the persons concerned already given demonstrates, in each case the witness identified a document, which he had either personally filled in or signed. The documents produced by the authorised officer of the motor taxation office and the officer of the Revenue Commissioners were properly admitted in evidence, although not complied by the officers concerned, as documents properly in the custody of public officers. The principle laid down in *Myer's* case, accordingly, was of no application to the facts of this case and the prosecution did not have to call in aid the provisions of ss. 5 and 6 of the 1992 Act."

A statutory route to the admission of documentary evidence is to be found in Part II of the Criminal Evidence Act, 1992. Section 5 provides that information contained in a document is admissible in any criminal proceedings as evidence of any fact therein of which direct oral evidence would be admissible if the information:

(a) was compiled in the ordinary course of a business,
(b) was supplied by a person (whether or not he so compiled it and is identifiable) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with, and
(c) in the case of information in non-legible form that has been reproduced in permanent legible form, was reproduced in the course of the normal operation of the reproduction system concerned.

This section applies whether the information was supplied directly or indirectly. However, if it was supplied indirectly, each person (whether or not he is identifiable) through whom it was supplied must have received it in the ordinary course of a business; s. 5(2).

Section 4 defines the concept of "business" so as to include "any trade, profession or other occupation carried on, for reward or otherwise, either within or outside the State." Section 5 does not apply to the following categories of information:

(a) information that is privileged from disclosure in criminal proceedings,
(b) information supplied by a person who would not be compellable to give evidence at the instance of the party wishing to give the information in evidence by virtue of this section, or
(c) information compiled for the purposes or in contemplation of any:
  (i) criminal investigation,
  (ii) investigation or inquiry carried out pursuant to or under any enactment,
  (iii) civil or criminal proceedings, or
  (iv) proceedings of a disciplinary nature.

It should be noted that there are certain exceptions to the categories set out in (c), above, listed in s. 5(4).

Should either side wish to have evidence admitted under s. 5 by way of certificate, then a certificate in the terms laid down by s. 6 must be served not later than 21 days before the trial. However the other side may require oral evidence provided they serve a notice of objection no later than 7 days before the trial. Section 8 gives the court a discretion to exclude evidence produced under s. 5 and also provides that:

> "In estimating the weight, if any, to be attached to information given in evidence by virtue of this Part, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to its accuracy or otherwise."

11. [1965] AC 1001
12. [1986] ILRM 716
13. Unreported, Court of Criminal Appeal, 7th June 2000

The Competition Act 2002 provides a number of additional tools in respect of documentary evidence:

(a) A document that purports to have been created by a person shall be presumed to have been created by that person; s. 12(2).
(b) A statement in a document that purports to have been created by a person shall, unless the document expressly attributes its making to some other person, be presumed to have been made by that person; s. 12(2).
(c) Where a document purports to have been created by a person and addressed and sent to a second person, it shall be presumed that the document was created and sent by the first person and received by the second person. It shall also be presumed that any statement in such a document was made by the first person (unless the document expressly attributes its making to some other person) and came to the notice of the second person; s. 12(3).
(d) Where a document is received from an electronic storage and retrieval system, it shall be presumed that the author of the document is the person who ordinarily uses that electronic storage and retrieval system in the course of his or her business; s. 12(4).

Section 13 of the Act goes even further and provides for the admissibility of statements contained in certain documents. The section may be broken down into the following elements:

(a) a document contains a statement by a person asserting that a "relevant act" has been done, or is or was proposed to be done, by another person;
(b) the person has done a "relevant act";
(c) the "relevant act" must be one that relates to the entry into or the making or implementation of an agreement or decision, or the engaging in of a concerted practice or the doing of an act that constitutes an abuse of process;
(d) the document has come into existence before the commencement of the proceedings under the 2002 Act in which it is sought to tender the document in evidence;
(e) the document has not been prepared in response to any enquiry made or question put by a member or officer of the Competition Authority or the Gardaí relating to any matter the subject of the proceedings;
(f) the statement shall be admissible as evidence in proceedings for the "relevant act" that the "relevant act" was done by that other person or was proposed (at the time the statement was made or, as the case may be, at a previous time) to be done by him or her.

In estimating the weight to be attached to any such document the court is obliged to have regard to all of the circumstances from which any inference can be drawn as to its accuracy or otherwise; s. 13(4).

The provision of information to juries

Section 10 of the Competition Act, 2002 provides for the provision of certain information to juries if the trial judge considers it appropriate. The information may relate to any or all of the following:

(a) any document admitted in evidence in the trial,
(b) the transcript of the opening speeches of counsel,
(c) any charts, diagrams, graphics, schedules or agreed summaries of evidence produced at the trial,
(d) the transcript of the whole or any part of the evidence given at the trial,
(e) the transcript of the closing speeches of counsel,
(f) the transcript of the trial judge's charge to the jury.

A similar provision is to be found in s. 57 of the Criminal Justice (Theft and Fraud Offences) Act 2001. However s. 57 also allows the jury to have "any other document that in the opinion of the trial judge would be of assistance to the jury in its deliberations ..." It is unclear why a similar catch-all provision was not included in the Competition Act. Some persons may be of the view that to provide such an amount of material to juries is asking for trouble and that the more items a jury is given the more questions they are likely to come back to court to ask and the more confused they are likely to become. There will certainly be a heavy onus on the trial judge to ensure that the right balance is struck in any particular case. The ability to use charts, diagrams, graphics and schedules will be of particular benefit to the prosecution since it will enable juries to more easily assimilate complex economic information. One can explain economic principles all one likes, but a flow chart setting out how action one leads to action two and action two leads to action three and action three leads to the price of a bottle of milk remaining fixed can be understood by anyone.

Time limits and venue

Summary prosecutions under the Act may be brought by the Competition Authority; s. 8(9). They must be instituted within two years after the day on which the offence was committed; s. 8(11). Prosecutions on indictment would have to be brought by the DPP. There is no time limit for prosecutions on indictment in this jurisdiction, but a defendant has a constitutional right to an expeditious trial. Jurisdiction for indictable offences under s. 6 or 7 of the Act is given to the Central Criminal Court; s 11. This is a welcome development as it has long been anomalous that so-called white collar crime has been excluded from Ireland's highest ranking criminal trial court.

The Cartel Immunity Programme

Finally reference should be made to the Cartel Immunity Programme which was introduced on 20th December 2001 by the Competition Authority acting in conjunction with the DPP. Under the programme, immunity may be granted to a party that has not played the lead role in an illegal cartel and who agrees to make full disclosure to the Authority, co-operate with the investigation and, of course, to withdraw from the cartel in due course. Because cartels are, by their nature, secretive and conspiratorial, it is believed that for effective investigations to occur, co-operation from the inside is necessary. It may also be the case that knowledge of the existence of such a programme will deter undertakings from entering fresh cartels in the future out of fear that one of their members will ultimately seek immunity. It remains to be seen how the immunity programme will work in practice. Whilst the defence in any such case will seek to attack the evidence of someone under the programme by suggesting that they have a motive to see the prosecution succeed, if the person has led the investigators to independent documentary evidence, there will be little the defence can do. ●

Libel on the Internet

Patrick O'Callaghan BL

What laws apply to the Internet? Is there to be a global standard or, is regulation to take place on a territory by territory basis, with the attendant uncertainty for international business providers? These larger questions arise from the ubiquitous nature of the Internet and its all-encompassing reach. The focus of this article is to explore these issues in the context of the law of defamation and specifically, in the context of the recent judgment of the High Court in Australia in *Dow Jones v. Gutnick*[1]. This case marks the first time that the difficult question of internet jurisdiction has been tackled by a final Court of Appeal in any country.

The central question confronted by the High Court of Australia in *Dow Jones v. Gutnick* was where does publication take place in the case of material displayed on the Internet? Can material be said to be to be "published" in each jurisdiction in which it may be viewed? Or is it "published" for the purposes of the law of defamation where the material is uploaded by the producer, or, where the material is stored on a server for dissemination on the world wide web?

The fundamental thrust of the appellant, Dow Jones' argument, put forward by Geoffrey Robertson Q.C.[2] was that the common law of defamation should be reformulated in so far as it applies to publication on the Internet. Essentially, this argument was an attack on the rule that every publication of defamatory material constitutes a new and separate tort[3]. In so far as the Internet was concerned, it was argued that the common law should treat defamation as one global tort, rather than a multiple wrong committed by every single publication and every Internet hit. It was contended that this would facilitate the use and expansion of the web by business providers, for it would clarify what law governed the content of Internet sites, thereby facilitating self-regulation by service providers and ensuring free speech.

The Facts

Dow Jones publish for profit *The Wall Street Journal*, a daily financial newspaper and *Barron's*, a weekly financial magazine. The magazine edition of *Barron's* dated the 30th October, 2000 contained an article by a journalist headed "Unholy Gains", sub-headed "When stock promoters cross paths with religious charities, investors had best be on guard". This article was available publicly two days earlier on the website *WSJ.com* and *Barrons.com*. A large photograph of the respondent, Mr Gutnick, appeared in the first page of the magazine. The article of about 7,000 words, also contained photographs of other persons including Mr Nachum Goldberg, who had recently been imprisoned for tax evasion and money laundering.

Barron's has a large circulation in the United States where approximately 306,563 copies of the magazine are sold. A small number of these magazines entered Australia, some of which were sold in the State of Victoria. Subscribers to the Internet address *WSJ.com* were also able to obtain access to the article. The site had about 550,000 subscribers. Of those who paid subscription fees by credit cards, 1,700 had Australian addresses.

Dow Jones has its editorial offices for *Barron's Online* and *WSJ.com* in the city of New York. Material for publication on *Barron's Online*, when prepared by its author, is transferred to a computer located in the editorial offices in New York City. From there, it is transferred either directly or indirectly to computers at Dow Jones's premises in New Jersey. It is then loaded on to six servers maintained by Dow Jones at its New Jersey premises for distribution on the worldwide web.

The respondent, Mr Gutnick lived in the State of Victoria. He had his business headquarters there. He also conducted business outside Australia, including in the United States of America. However, it was agreed that much of his social and business life, could be said, to be focused in the State of Victoria.

The act of "Publishing"

At the outset, in determining *where* something is published, a clear distinction was drawn by the majority of the court, between the publisher's act of publication and the fact of publication to a third party. In rejecting the argument put forward by Dow Jones, Gleeson CJ, for the majority, felt it would be wrong to treat publication as if it were a unilateral act on the part of the publisher alone. He held it to be a bilateral act - where the publisher makes it available and a third party has it available for his or her comprehension[4]. It is only when a third party reads and comprehends the publication, be it on the Internet or otherwise, that publication is held to have taken place.

Single Publication versus Multiple Publication

The argument put forward by Dow Jones was that the articles published on *Barron's Online* were published in New Jersey, and became available on the servers that it maintained at that base, for the worldwide web. It was argued that the publisher of material on the worldwide web should be able to govern its conduct according to the law of the place where it maintained its web server, unless that place was merely adventitious or opportunistic. Several other parties, who by leave, intervened in support of Dow Jones such as Amazon, Yahoo!, Time, Inc. Guardian Newspaper Ltd. & The New York Times generally supported that contention. The alternative, it was submitted, was that a publisher would be bound to take account of all the laws of every country on earth, there being no boundaries in the Internet world.

This approach is based upon the United States "single publication" rule whereby legislation has deemed one edition of a book, newspaper, radio or television broadcast to be a single publication. This was the approach put forward on behalf of Dow Jones and the other media companies.

1. [2002]HCA 56(10th December 2002)
2. of Robertson and Nicholl, Media Law
3. *Duke of Brunswick v. Harner* (1849) 14 U B 185
4. at paragraph 26

This approach contrasts with the view in the rest of the common law world, most recently reiterated by the English Court of Appeal, in *Loutchansky v. Times Newspapers (Nos 2 - 5)*[5]. In the context of an Internet defamation case, the court held that each individual publication of a libel gave rise to a separate cause of action. Thus, publication could ultimately take place in more than one jurisdiction. In the context of the Internet, this potentially gave jurisdiction to each and every legal jurisdiction in which the web page containing the material could be accessed.

The arguments in favour of a change to the law, advanced by Dow Jones and the other international media organisations, included the ubiquitous nature of the internet, the promotion of trade, the preservation of free speech and the ability of internet server providers to easily self-regulate their activities. The arguments against change put forward on behalf of Mr. Gutnick, were the fact that a change would confer advantages on an Internet friendly jurisdiction. It could lead to the manipulation of the place of uploading and holding of data in that a less protective location in an under-regulated jurisdiction could end up regulating the protection of reputations in other jurisdictions. It was argued that such a change could lead to damage to reputations in general. Finally, it was put forward on behalf of Mr. Gutnick that statutory intervention would be necessary, if such a change was to be adopted.

Ultimately, the High Court came down against any change in the law in this area and decided this was a matter best left for legislation. Additionally, Gleeson CJ for the majority made clear that the origin of the single publication rule was to prevent a multiplicity of hearings and to ensure that all causes of action for a widely circulated defamation be litigated in one trial. The fact that each publication must be separately pleaded and proved, had incorrectly, owing to the passage of time, came to be regarded as affecting the choice of law to be applied in deciding the action. This approach confused two separate questions. The first, was how to prevent an excessive number of actions and the vexation of parties. The second, relates to the law that must be applied to determine substantive questions arising in an action in which there are foreign elements.

The Single Publication Rule - Where should it be localised?

Central to Dow Jones's argument that a single place of publication be adopted was the premise that it should be localised in the place from which the material that was to be disseminated was stored. In this instance, this was the State of New Jersey.

The High Court of Australia and in particular Callinan J strongly disagreed. It was held that the most important event, in defamation, was the infliction of damage. That occurs at the place where the defamation is comprehended. Statements made on the Internet were neither more nor less localised than statements made on any other media or by any other process.

Rule for Internet cases - Place of Comprehension Test

Flowing from the bilateral nature of publication, it was held that damage was only suffered in the law of defamation in the place where a person comprehends the defamatory meaning of the publication. Accordingly, in the context of libel upon the internet, damage is suffered where a person comprehends the defamatory nature of the publication. Whether this occurs in a single publication or a multiple publication in different jurisdictions, a cause of action arises in each separate jurisdiction. Accordingly, there is nothing to prevent an action being brought in the current instance where the plaintiff, Mr Gutnick resided in the State of Victoria and publication occurred in the State of Victoria. It should also be mentioned that Mr Gutnick did not seek to recover damages in respect of publication in any other jurisdiction, other than the State of Victoria.

Analysis

Ultimately the notion of global regulation is quite idealistic. Courts do not like jurisdictional choice of law issues to be dealt with at the option of one party to a dispute. Despite the persuasiveness of the arguments put forward by Dow Jones, the High Court of Australia ultimately came down in favour of the decision being placed in the hands of the individual jurisdiction. This is in accordance with pre-existing principles and treats the Internet in the same manner as other media outlets, such as television or radio. If an Internet Service Provider wishes to prevent publication in an individual jurisdiction, this can be done by blocking the relevant access in that jurisdiction. An international agreement, along the lines of an addendum to Council Regulation 44/2001, on the Jurisdiction and Enforcement of Judgments within the EU arena, would be desirable to properly allocate jurisdiction in Internet related cases.

EU Versus non-EU rules

It must be made clear that there are different regimes applicable in Ireland in relation to jurisdiction regarding EU countries and non EU countries. While the decision in *Dow Jones v. Gutnick* is strictly applicable to non-EU cases, it has wider implications given its determination of the preliminary issue regarding where the tort is committed. This preliminary issue arises when determining jurisdiction within the EU in tort cases under Regulation 44/2001. In so far as *Dow Jones v. Gutnick* supports the multiple publication rule, it may have an impact on EU cases as well.

Conclusion

Old wine in new bottles! That is the story of the law and the Internet. The arguments of the proponents for change in the application of law to the Internet, are eerily reminiscent of the same arguments made at the height of the Internet boom that the arrival of the Internet had created a "new paradigm" for business. While it may be argued that established legal rules may require tweaking in so far as they react to the new medium, it is clear that root and branch change is not what is required, nor what will be countenanced.

In the arena of libel law, when attempting to strike a balance between competing interests, there may be an argument for the introduction of defences such as innocent dissemination, removal at first opportunity and all reasonable care being afforded, in assessing whether a service provider should be held liable in damages. However, a blanket immunity based upon a system of law chosen by the service provider, will not be entertained. That is the salutary lesson of *Dow Jones v. Gutnick*.[6] ●

5. [2002] Q B 783
6. The United States Supreme Court is currently being asked to rule on the issue of jurisdiction in a case arising from acts on the Internet. The case involves a Maryland publisher of adult photographs who tried to use Maryland law to pursue an Internet service provider from Georgia. A federal appeals court ruled that the case could not be brought in Maryland, because the defendant had no ties to that state. The Appeals court dismissed the notion that a mere presence on the Internet could subject a company to suit in every jurisdiction with Internet connection. A more gradated, "sliding scale" approach was adopted, which distinguished between when a website is merely passively visible from a state, from when it is actively involved with it and subject to its jurisdiction.

Legal Update

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[Order of business: Motion re Restoration of bills to the Order paper Tuesday 18/06/2002 2:30pm]

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23/2002 Electoral (amendment) (No.2) Act, 2002
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24/2002 Minister for the Environment and Local Government (performance of certain functions) Act, 2002
Signed 03/07/2002

25/2002 European union (scrutiny) Act, 2002
Signed 23/10/2002

26/2002 British-Irish agreement (amendment) Act, 2002
Signed 29/11/2002

27/2002 European communities (amendment) Act, 2002
Signed 5/12/2002

28/2002 Appropriation Act, 2002
Signed 13/12/2002

29/2002 National development finance agency Act, 2002
Signed 19/12/2002

30/2002 Domestic violence (amendment) Act, 2002
Signed 19/12/2002

31/2002 Social welfare Act, 2002
Signed 19/12/2002

Amendments of the Constitution

Twenty-first Amendment of the Constitution Act, 2001
Signed 27/03/2002

Twenty-third Amendment of the Constitution Act, 2001
Signed 27/03/2002

Twenty- sixth Amendment of the Constitution Act, 2002
Signed 7/11/2002

(P.S) Copies of the acts/bills can be obtained free from the internet and up to date information can be downloaded from website:www.irlgov.ie

(NB) Must have "adobe" software which can be downloaded free of charge from internet

Abbreviations

BR =	Bar Review
CIILP =	Contemporary Issues in Irish Politics
CLP =	Commercial Law Practitioner
DULJ =	Dublin University Law Journal
FSLJ =	Financial Services Law Journal
GLSI =	Gazette Society of Ireland
IBL =	Irish Business Law
ICLJ =	Irish Criminal Law Journal
ICLR =	Irish Competition Law Reports
ICPLJ =	Irish Conveyancing & Property Law Journal
IFLR =	Irish Family Law Reports
IILR =	Irish Insurance Law Review
IJEL =	Irish Journal of European Law
IJFL =	Irish Journal of Family Law
ILTR =	Irish Law Times Reports
IPELJ =	Irish Planning & Environmental Law Journal
ITR =	Irish Tax Review
JISLL =	Journal Irish Society Labour Law
JSIJ =	Judicial Studies Institute Journal
MLJI =	Medico Legal Journal of Ireland
P & P =	Practice & Procedure

The references at the foot of entries for Library acquisitions are to the shelf mark for the book.

Evidence

By Ruth Cannon and Niall Neligan

Reviewed by Paul Gallagher SC

The President of the High Court, Mr Justice Finnegan, describes this work as providing a "comprehensive and meticulously careful exposition of the current law of evidence in this jurisdiction". This is certainly so. The book is part of Round Hall's Criminal Law Library and undoubtedly its major emphasis concerns evidence in the criminal law. However, it would be a grave mistake to consider this book as being for criminal lawyers only as the range of issues dealt with extends beyond the criminal law. Indeed, the analysis of some core issues of evidence in our legal system generally is dealt with so clearly and concisely that the book is also of great value to civil lawyers.

So far as practitioners and students are concerned, a vital test for any book on evidence is it ability to explain fundamental evidential issues in a clear and straightforward manner. This book meets that test admirably. Each of its seventeen chapters from Chapter 1, which deals with "Introduction of Basic Concepts" to Chapter 17, which deals with "Confessions and Admissions" is both clear and comprehensive. The exposition is greatly assisted by clear chapter sub-headings. The comprehensive nature of the treatment involves not only substantial references to Irish and English cases but also to cases in other jurisdictions. Helpfully, the authors provide a summary of the relevant facts and principles of the more important cases.

While the entire book is of an extremely high standard, two chapters in particular stand out. Chapter 11 deals with hearsay evidence. Many textbooks on evidence fail to identify the basic concepts that are relevant to hearsay evidence and manage to obscure the fundamental principles through an overload of detail. Here the authors avoid that pitfall. The clear and important distinction, often forgotten between hearsay and original evidence, is made plain. The circumstances in which hearsay evidence is admissible are carefully set out and explained. If one were to read nothing else on the doctrine of hearsay other than what is contained in Chapter 11 of this book, one would have a great understanding of a problem that frequently confuses both practitioners and students alike. The chapter deals comprehensively with hearsay evidence in the context of both criminal and civil cases and indeed very skilfully uses both civil and criminal cases to explain and exemplify the principles under consideration.

Chapter 16 on the topic of privilege is also exemplary. It provides an extensive treatment of the issue of evidential privilege and carefully distinguishes between the different types of privilege. It ranges from legal professional privilege to public interest privilege and includes such important and current topics as journalistic privilege against self-incrimination. Again the authors have little difficulty in straddling both the criminal and civil law and provide a most illuminating insight into the fundamental principles and issues that arise in the context of evidential privilege. The range of cases considered in this context is very extensive and again, the practice of identifying the relevant legal decisions, together with the principal facts and legal issues in that decision, greatly assist the exposition.

This is undoubtedly a book for any serious lawyer. It has a fundamental advantage over other purportedly more comprehensive works such as *Phipson*. This advantage derives from the great clarity with which complex topics are treated. The authors have achieved such clarity while at the same time writing a book that is most comprehensive and stimulating. ●

Corrigendum

In the last issue of the Bar Review, footnote 23 to the article "Contempt of Court and the Media" should have contained a reference to "Criminal Contempt of Court - The Eamonn Kelly case considered" by Pauline Walley, Bar Review, April 2000.

Mandatory Minimum Sentences in S. 15A Drug Cases.

Kiwana Ennis BL

Introduction

The law with respect to the illegal possession of drugs was significantly affected by new provisions in The Criminal Justice Act, 1999, which came into force on the 26th May, 1999. Section 4 of that Act inserted a new s.15A into the Misuse of Drugs Act, 1977. This new section introduced the specific offence of possession of drugs with a market value of over £10,000, (often referred to as s.15A charges) and applied for the first time the principle of a mandatory minimum sentence with respect to these offences. The sentence to be imposed ranged from a maximum of life imprisonment to a mandatory minimum of 10 years. This revealed the determination of the Oireachtas to address the issue of the growing illegal drugs trade and to impose substantial prison sentences for those involved.

Despite the presence of the mandatory minimum sentence, s.27(3)(C) of the Act of 1977, as amended, does leave an element of discretion to the trial judge to impose a lesser sentence in certain circumstances. It is the application of this discretionary element that has led to some interesting Court of Criminal Appeal decisions in this area. This article proposes to analyse a number of these decisions to determine how the new legislation has been applied by the courts and whether any clear patterns have emerged in this area.

The Legislation

Section.4 of the Act of 1999 inserted the new section 15A into the Misuse of Drugs Act, 1977, as follows:

(1) "A person shall be guilty of an offence under this section where -

(a) the person has in his possession, whether lawfully or not, one or more controlled drugs for the purpose of selling or otherwise supplying the drug or drugs to another in contravention of regulations under section 5 of this Act, and

(b) at any time while the drug or drugs are in the person's possession the market value of the controlled drug or the aggregate of the market values of the controlled drugs, as the case may be, amounts to £10,000 of more."

Section 5 of the 1999 Act amended section 27 of the 1977 Act by inserting after section 27 (3) the following subsections:-

"(3A) Every person guilty of an offence under section 15A shall be liable, on conviction on indictment -

(a) to imprisonment for life or such shorter period as the court may, subject to subsections (3B) and (3C) of this section, determine, and

(b) at the court's discretion, to a fine of such amount as the court considers appropriate.

(3B) Where a person (other than a child or young person) is convicted of an offence under section 15A, the court shall, in imposing sentence, specify as the minimum period of imprisonment to be served by that person a period of not less than 10 years imprisonment.

(3C) Subsection (3B) of this section shall not apply where the court is satisfied that there are exceptional and specific circumstances relating to the offence, or the person convicted of the offence, which would make a sentence of not less than 10 years imprisonment unjust in all the circumstances and for this purpose the court may have regard to any matters it considers appropriate, including:-

(a) whether that person pleaded guilty to the offence and, if so,
(i) the stage at which he indicated the intention to plead guilty, and
(ii) the circumstances in which the indication was given, and
whether that person materially assisted in the investigation of the offence."

This interpretation of this new section has caused much confusion in this area. This is especially the case where the court has to determine whether or not there are any "exceptional and specific circumstances" within the meaning of s.27 (3C) which would make it unjust to impose the 10 year mandatory minimum sentence.

Caselaw

(i) Renald

The leading case in this area is the Court of Criminal Appeal decision of *The People (The Director of Public Prosecutions) v. James Chipi Renald*[1]. This case concerned a South African national who had applied for refugee status on his arrival in the country. A friend, whom he met in Ireland, asked him to take delivery of a package, for which the applicant would be paid £200. Although suspicious, he agreed and

1. Unreported, Court of Criminal Appeal, Murphy, Lavan and Budd JJ., 23rd November, 2001.

subsequently a suitcase addressed to his friend, arrived at the applicant's apartment. Pursuant to a warrant, the apartment was searched by the Gardaí, and the suitcase was found, in which 9.3 kilograms of cannabis were hidden, with an estimated market value of £18,600. The applicant pleaded guilty in the Circuit Criminal Court to a s.15A charge and received five years' imprisonment.

The severity of this sentence was appealed to the Court of Criminal Appeal. In the Circuit Criminal Court, the trial judge found that this case came within s. 27(3C), as the applicant had made a full statement, assisted the Gardaí in discovering the real suspects, had no previous convictions, was not a principal party in the supply of drugs and had only received a promise of £200. The investigating officer gave evidence to the effect that it was unlikely the applicant would re-offend and the court heard of the sad family history of the applicant. There was also the fact the applicant was a foreigner with a very different cultural and political background. Although the trial judge did not specify which of the above factors in her opinion actually brought the case within s.27(3C), she imposed a lesser sentence than the mandatory minimum prescribed by the statute.

On appeal, counsel for the applicant argued that once s.27(3B) i.e. the mandatory minimum sentence of 10 years, was found not to apply, then the mandatory minimum sentence should be ignored by the court in determining the sentence. Counsel further argued that the court should have regard to the nature, value and quantity of the drug found in the applicant's possession, in deciding the appropriate sentence. Counsel's first argument was based on the wording of s.27(3C), which provides as follows "Subsection (3B) of this section *shall not apply where...*" This, it was argued, erased the mandatory minimum sentence and therefore, the trial judge was incorrect when she proceeded to use it as a benchmark by reference to which the appropriate sentence was to be fixed, having regard to all the relevant mitigating factors. The Court of Criminal Appeal, (the Court), rejected this argument. Murphy J. stated:-

> "Even where exceptional circumstances exist which would render the statutory minimum term of imprisonment unjust, there was no question of the minimum sentence being ignored. Perhaps the most important single factor in determining an appropriate sentence is the ascertainment of the gravity of the offence as determined by the Oireachtas. Frequently an indication as to the seriousness of the offence may be obtained from the maximum penalty imposed for its commission. This is particularly true in the case of modern legislation. What is even more instructive is legislation which, as in the present case, fixes a mandatory minimum sentence. Even though that sentence may not be applicable in a particular case, the very existence of a lengthy mandatory sentence is an important guide to the courts in determining the gravity of the offence and the appropriate sentence to impose for its commission. That is not to say that the minimum sentence is necessarily the staring point for determining the appropriate sentence. To do so would be to ignore the other material provision *i.e.*, the maximum sentence. It would be wrong to assume that the offence of importing controlled drugs in excess of the prescribed amount or value will attract only the mandatory minimum sentence, long though it may be."

The court went on to state that where the trial judge was satisfied that "exceptional and specific circumstances" existed which would render it unjust to impose the mandatory minimum 10 year sentence, then he could examine those circumstances to see whether a lesser sentence ought to be imposed. However, the existence of such circumstances did "not reduce the inherent seriousness of the offence."

Counsel's second argument was that the trial judge should have had regard to the nature, value and quantity of the drug concerned. The Court accepted that although s. 27(3C) specified certain matters which were material in assessing whether or not the mandatory minimum sentence would be unjust, i.e. whether there had been a plea of guilty, at what stage had it been made and whether the individual had assisted the Gardaí in their investigations, the legislation permitted the court to "have regard to any matters it considers appropriate." Counsel on behalf of the applicant argued that regard should have been had to the fact the drugs here were cannabis and as such it was less harmful than other controlled drugs. The trial judge had rejected this argument on the basis that the application of the section was determined by the value rather than the category of the drugs involved.

The court accepted that a distinction has been made in the legislation for some purposes between cannabis and other controlled drugs, for example in the sentencing of summary offences, but held that this was an argument of "very limited value." On the one hand the court stated that in cases where the value of the drugs, as opposed to their nature, determined the outcome, that made this argument irrelevant. On the other hand, it accepted that it was a factor "to which a sentencing judge in his or her discretion might attach some limited significance."

The court was satisfied that the trial judge had not erred in law in imposing the sentence of five years but felt that in all the circumstances, it was appropriate to suspend the final two years of it. The mitigating factors highlighted by the court were: the cooperation with the Gardaí, the absence of previous convictions, and the difficulties the applicant would face serving a term of imprisonment in this jurisdiction. Only the first of these reasons is specifically referred to in the legislation, the latter two coming within the remit of matters the court "consider[ed] appropriate." The court could not determine whether or not the trial judge was too rigid in her approach or whether she did not give adequate weight to the mitigating factors, which were present.

It was not made clear by this decision how exactly trial judges are to approach the mandatory minimum sentence in cases where they felt that to impose the 10 years would have been unjust. The benchmark approach, adopted by the trial judge in this case, was neither, expressly approved of or ruled out, however as no error in law was found, it could be assumed that the approach was acceptable, although not the only option open to trial judges. With respect to matters which might amount to "exceptional and specific" factors, the court included the consideration of the absence of any previous convictions and the difficulties that the applicant would face in serving his sentence in this jurisdiction as a foreign national, as well as the specific factors set out in the legislation. Throughout its judgment, the court emphasised the seriousness of these cases as evidenced by the very existence of the new mandatory minimum sentence in the legislation. However, it is to be noted that the Court of Appeal did suspend the final two years of the five year sentence, even though it was held that there had been no error in principle made by the trial judge.

(ii) Duffy

The next decision of the Court of Criminal Appeal was the case of *The People (The Director of Public Prosecutions) v. John Duffy*[2] handed down a month after the *Renald* decision by the Chief Justice. This case concerned the proprietor of a car valeting business on whose premises £130,000 worth of cannabis resin, £10,000 worth of cannabis and 135 ecstasy tablets was found. On pleading guilty, the applicant received one sentence of six years along with lesser sentences for other charges, all to run concurrently.

The court examined the procedure adopted by the trial judge in determining the sentence, which was as follows: First, he would decide on the appropriate sentence ignoring any mitigating factors, then he would take these factors into consideration and make the necessary deduction. If this resulted in a sentence of over 10 years then that would be the sentence he would impose. If, however it resulted in a sentence of less than 10 years, then he would consider whether this ought to be raised to the statutory minimum, having regard to the relevant legislation. The trial judge at first considered that the appropriate sentence was one of 20 years' imprisonment given the seriousness of the case, however he revised this downwards to 15 years, having heard from the applicant's counsel. The plea of guilty and lack of previous convictions were then taken into consideration and the sentence was reduced to six years. He finally concluded that it would be inappropriate to increase this sentence to the statutory minimum as there was no indication of a pattern of similar behaviour, the applicant had pleaded guilty and had assisted the court in pleading guilty to an additional charge for which he had not yet been returned.

The court was satisfied that this approach was essentially in harmony with the law in this area as laid down by Murphy J., in the *Renald* case (as quoted above). It stated that although other approaches may also be correct, what was important was that in assessing the appropriate sentence the trial judge took into account the statutory minimum, "as he was not only entitled but bound to do" , reiterating the point that even where "exceptional and specific circumstances" are found to exist, the mandatory minimum sentence was never to be ignored.

The court did comment that had the trial judge stuck with his original sentence of 20 years' imprisonment minus the mitigating factors, that this would have been too high. However, the reduction to 15 years and the following deductions made for the plea of guilty and the lack of any previous convictions found favour with the Court of Appeal. The court concluded with a remark emphasising the seriousness of this type of offence, stating that "[t]hose who undertake this trade must be left under no illusions as to the consequences for them when they are brought to justice."

(iii) Hogarty

The decision of *The People (The Director of Public Prosecutions) v. David Hogarty*[3], was delivered on the same day by the same court as the *Duffy* case. The law, as set out in *Renald* by Murphy J., was again endorsed by the court. Here the applicant had been involved in making deliveries of drugs for around three months prior to his arrest. The drugs here consisted of two consignments of cannabis resin with a market value of £100,000 each. The applicant was to receive £150 for his role in the deliveries. The applicant pleaded guilty in the Circuit Criminal Court and received two sentences of six years and six months, to run concurrently. The trial judge had set out exactly how he approached the case:-

> "I have taken the view, since this particular piece of legislation was introduced, that the court in dealing with these matters is effectively looking at a sentence of 10 years' imprisonment in relation to the person pleading guilty to such offence. But that in cases where a plea of guilty has been entered and where there has been cooperation, that that is a factor that the court can use to reduce that 10 year tariff."

In so far as this passage could be taken to mean that a person convicted of this type of offence should be sentenced to 10 years' imprisonment unless a plea of guilty was entered and there was cooperation with the investigation (which would then render a lower sentence appropriate), the Court of Appeal was satisfied that such would be "an erroneous construction of the provisions." The court's view was that "it is clear that the legislature envisaged that a sentence in excess of 10 years, including a sentence of imprisonment for life, may be imposed in respect of such offences." However as such an approach, although erroneous in point of law, was to the benefit and not the detriment of the applicant, it did not constitute a ground on which the court felt it could interfere with the sentences actually imposed and therefore, the court found no error in principle. It also found that every allowance had been made for the applicant's plea of guilty, his cooperation with the investigation, his lack of previous convictions and his particular family circumstances (he had a long standing relationship with his girlfriend and two children). The importance of the role of couriers in the facilitation of the illegal drugs trade was again emphasised by the court as was its own role to uphold the policy behind the legislation. Again, although the seriousness of this type of offence was emphasised by the court, it was still reluctant to impose the statutory minimum sentence of 10 years.

(iv) Benjamin and Peyton

Two more decisions in this area were handed down by the Court of Criminal Appeal *ex tempore* in January, 2002: *The People (The Director Of Public Prosecutions) v. Karen Benjamin*[4] *and The People (The Director Of Public Prosecutions) v. Mark Peyton*[5].

In the *Benjamin* case, the applicant had been sentenced to 10 years' imprisonment by the trial judge, who himself certified the case fit for an appeal on the basis that due to the cooperation given by the applicant to the Gardaí, a major drug dealer was apprehended. The actual facts of this case were not given in much detail in the judgment of the Court of Criminal Appeal, however a passage from the trial judge

2. Unreported, Court of Criminal Appeal, Keane C.J., O'Higgins and Butler JJ., 21st December, 2001.
3. Unreported, Court of Criminal Appeal, Keane C.J., O'Higgins and Butler JJ., 21st December, 2001.
4. Ex tempore, Court of Criminal Appeal, Denham, Johnson and O'Sullivan JJ., 14th January, 2002.
5. Ex tempore, Court of Criminal Appeal, Denham, Johnson and O'Sullivan JJ., 14th January, 2002.

was quoted outlining some of the circumstances of the case. It involved a South African national, found to be a very vulnerable person with little to gain from the crime. We were told the amount was "considerable", but not the actual amount involved. The trial judge went on to say that had he the power to do so, he would, after imposing a 10 year sentence, review it within one year with a view to suspending the balance, having taken into consideration any time already served. He was also of the opinion that it would not be in the best interests of this woman to deport her to South Africa as that could lead to "grievous consequences" for her. The applicant appealed the severity of this sentence on a number of grounds including the failure of the trial judge to take into account the relevant factors. These factors were in particular, that the applicant had made a full admission on arrest, that she had behaved in a manner as set out in the transcript, her plea of guilty at the earliest opportunity, that she played only a small role in the operation as a courier with little prospect of earning much money, she had a history of depression and the fact that she had no previous convictions. In her judgment, Denham J. outlined the law in this area and referred to the earlier decisions of the Court of Criminal Appeal in *Renald, Duffy* and *Hogarty*. Firstly, she determined what the appropriate sentence should be, given the seriousness of the offence. As it was not at the top end of the scale, she decided that the sentence of 10 years would be appropriate. The next step was to examine the particular circumstances of the case in light of the law in general and in light of the relevant legislation. With respect to the law in general, the plea of guilty attracted a deduction of one third, which brought it below the statutory minimum. This meant a further analysis must be made with respect to the legislation. As far as the statutory minimum sentence was concerned, the Court was satisfied that it would be unjust in all the circumstances to impose a sentence of 10 years in this case and so it came within s.27(3C) of the legislation. The early and consistent plea of guilty having already been considered, the Court referred to "all the exceptional factors which appear in the transcript" being taken into consideration. Although these factors were not listed, presumably this referred to the cooperation the applicant had given the Gardaí with respect to their further investigations. The Court also found relevant the fact that the applicant only had a small role to play and received a limited amount of money, that she had a psychiatric history and had no previous convictions. The fact that the drug in question was cannabis was found only to be of limited relevance, in accordance with the judgment of Murphy J., in the *Renald* case. The Court considered that in light of the foregoing, the sentence ought to be reduced to a sentence of five years with the final four years being suspended. It highlighted again the importance of the applicant's plea of guilty along with her cooperation with the Gardaí investigation as the reasons for their decision.

The *Peyton* case concerned a very different type of applicant who had been sentenced to 12 years imprisonment for the possession of £30,000 worth of ecstasy tablets. In this case, the applicant was found to be involved in the drugs business, had been known to the Gardaí for the last 10 years and could not be described as a mere courier (as in the previous cases). The trial judge accepted that at the time the applicant had committed the offence, he had been suffering severely from withdrawal symptoms and this had been a substantial factor leading to the offence. Referring to the rehabilitation course the applicant was undergoing at the time of sentencing, the trial judge stated that he did not have the power to sentence the applicant to carry out this course, but rather his only option was to send the applicant to prison. According to the Court of Criminal Appeal, this offence would have attracted 16 years with the plea having the effect of reducing it to 12 years. On examining the circumstances of this case, the Court felt that the trial judge had made no error in principle in the imposition of a 12 year sentence. The Court noted that whereas it did possess a degree of discretion in light of the legislation, this did not include "restorative justice in conflict with the legislation", thus rejecting the idea of a sentence of drug rehabilitation.

These two decisions highlight some of the factors (not specified in the legislation) that the court will consider relevant in deciding whether it is unjust in all the circumstances to impose the mandatory minimum sentence. These factors are; the actual role that was played in the operation, the vulnerability of the accused and whether they are a foreign national. Even though the role of couriers was considered to be very serious as stated in the *Duffy* and *Hogarty* cases, in practice the court does not seem keen to impose the mandatory minimum in such cases and appears amenable to bringing them within the scope of s.27(3C). This was particularly apparent in the *Benjamin* case where the applicant received what can be considered a lenient sentence despite the fact that the courts regularly emphasise that "those who willingly enter into the trade for financial reward ... cannot expect to receive anything but severe treatment from the courts"(*per* Keane C.J., in *Hogarty*). However, when it comes to the so-called bigger players in the drugs world, the court adopts a more rigid approach, seeking (it would seem) to more heavily penalise those who organise and profit most from the drugs trade.

(v) Heffernan

In *The People (The Director of Public Prosecutions) v. Edward Heffernan*[6], the Director of Public Prosecutions brought an appeal against the leniency of the sentence, pursuant to s. 2 of the Criminal Justice Act, 1993. The applicant had pleaded guilty to a s.15A charge of possession of drugs which had a market value of €18,000. He was sentenced to two and half years' imprisonment. In the court's judgment, Hardiman J. accepted that the trial judge had made an error in principle. The court found that the weight the trial judge gave to the mitigating factors in the case was not excessive. In reducing the sentence from the minimum of 10 down to four years, it was noted that this adequately reflected all of the mitigating factors present in the case. The problem arose when the trial judge then proceeded to further reduce the sentence to two and half years by "[h]aving regard to the matters that I have determined in mitigation." The court found that the trial judge could only have been referring to the matters which had allowed him to bring the case within the remit of s. 27(3C). The sentence of four years was considered to be appropriate in the circumstances of the case and the court substituted that for the

6. *Ex tempore*, Court of Criminal Appeal, Hardiman, Carroll and Peart JJ., 10th October, 2002.

original two and half years sentence. The Court of Appeal did not go into the facts of this case so we do not discover what were the mitigating factors. However, a sentence of four years was still considerably less than the mandatory 10 year minimum. Hardiman J. stated in the judgment that the effect of the legislation was "to trammel judicial discretion" in cases like this one. He also seemed to question the wisdom of the Oireachtas in imposing mandatory minimum sentences, and stated that the Oireachtas had

> "for reasons that seem to them sufficient, indicated a minimum sentence of a substantial nature in respect of these offences. They have presumably, in doing so considered the fact that such sentences might be regarded as harsh in certain circumstances and on certain individuals. In this Court we have to attend to the determination of the Oireachtas as expressed in the statutory language and not permit it to be gainsaid except in circumstances which the statute itself envisaged."

This is the clearest criticism of the legislation in this area, suggesting that mandatory sentences can result in undue hardship on certain individuals. However Hardiman J. noted that no doubt the Oireachtas had considered this point and, he accepted (albeit, it would appear, with some reluctance) that thereafter, it was the role of the courts to apply the terms of the legislation as set out in the statute.

In this case, the four year sentence was still considerably less than the mandatory minimum and yet there was a sense that this may have been unduly harsh on the applicant. However we do not have the facts of the case to determine exactly how. It would be interesting to see if the actual circumstances were such as to warrant a less lenient approach than that adopted in the *Benjamin* case or whether it was a case where the Court actually applied the legislation more stringently.

(vi) Dunne

In *The People (Director of Public Prosecutions) v. Rachel Dunne*[7], the applicant had received a sentence of seven years' imprisonment having pleaded guilty to possession of £570,000 of heroin. The appeal was on the basis that the trial judge erred in principle in two respects. Firstly, it was argued that she had undue regard to the statutory minimum sentence of 10 years by using it as her benchmark and secondly, that she erred by refusing to allow the sentence to be listed for review.

On the first point, the Court of Criminal Appeal noted that this case was determined prior to the *Hogarty* judgment. Finlay Geoghegan J. referred to the passage of Chief Justice Keane where he stated that using the 10 year minimum sentence as a sentencing benchmark was not the correct construction of the statutory provisions insofar as the legislature envisaged a possible maximum sentence of life. However as the approach adopted by the trial judge was again in the applicant's favour, it did not provide a ground upon which the Court could interfere with the sentence actually imposed.

The second ground of appeal was an important point and had not been raised in the Court of Criminal Appeal before. Section 27(3G) of the Misuse of Drugs Act, 1977 (as inserted by s.5 of the Criminal Justice Act, 1999) states that:-

> "In imposing a sentence on a person convicted of an offence under section 15A of this Act, a court-
>
> (a) may inquire whether at the time of commission of the offence the person was addicted to one or more controlled drugs, and
>
> (b) if satisfied that the person was so addicted at that time and that the addiction was a substantial factor leading to the commission of the offence, may list the sentence for review after the expiry of not less than one-half of the period specified by the Court under subsection (3B) of this section."

The Court of Appeal was of the view that the trial judge took the correct approach in her interpretation of this issue. Finlay Geoghegan J. noted that the wording of the section confined the listing for review to the cases in which the trial court had imposed the mandatory minimum sentence as set out in s.27(3B). The judge went on to highlight the fact that prior to the Supreme Court decision in the case of *The People (The Director of Public Prosecutions) v. Finn*[8], it had been the general practice of many judges to impose reviews as part of the sentence and therefore, it may well have been that the legislature was merely trying to clarify that where the crime had been committed by an addict, cases which had received the statutory minimum were still entitled to be listed for review after one half of the sentence had been served,. The *Finn* decision however, which was delivered post the Act of 1999, held that the practice of imposing reviews as part of the sentence should be discontinued. So although it may have been assumed that such a general power existed at the time of the legislation, in the absence of any express provision following the *Finn* case, the trial court could not impose a provision for review as part of the sentence. Finlay Geoghegan J. stated that:-

> "Subsection 3G in its terms only gives a court power to do so where a minimum sentence provided for in subs. 3B is imposed by the court as was not done in this case."

The court found that the trial judge was correct in determining that s. 27(3B) should not apply as the applicant had readily admitted possession, pleaded guilty and co-operated with the Gardaí. The applicant's personal and family history were also taken into consideration. As s.27(3B) did not apply, the trial judge had no power to impose a review as part of the sentence.

This judgment highlights the anomaly in this area brought about by the *Finn* decision. In practice, if an addict receives the minimum 10 year

7. Unreported, Court of Criminal Appeal, Hardiman, O'Sullivan and Finlay Geoghegan JJ., 17th October, 2002.
8. [2001] 2 I.R. 25.

sentence, he can have his sentence listed for review after five and this could result in his release at that stage. This means that a person upon whom the statutory minimum sentence is imposed because it is not "unjust" in the circumstances, may serve less time than someone who had, at the time of sentence, received the benefit of s.27(3C) because of the mitigating factors in his case.

Conclusion

In determining the appropriate sentence, the Court of Appeal has not laid out a specific approach and has left this to the discretion of the trial judge. However, some guidelines have been established. It has been determined that it is inappropriate to use as a benchmark the mandatory minimum sentence where to do so would be to ignore the presence of the maximum sentence of life imprisonment. Thus, a trial judge should not work from the premise that unless there has been a plea of guilty, a 10 year sentence should be imposed. Also, once the trial judge takes the view that s.27(3C) applies, he cannot then ignore the mandatory minimum sentence -- it can be appropriate in these circumstances to use the 10 year figure as a benchmark, although this is not the only approach - the key factor is that the seriousness of the offence is reflected in the sentence.

A review of the decisions of the Court of Criminal Appeal, shows that the majority of the cases are brought within the terms of s27(3C). In *Renaid*, the sentence was left at five years but the final two were suspended on the basis that the sentence seemed excessive in all the circumstances. In *Duffy* and *Hogarty*, the sentences were left unchanged at six and six and half years, respectively. The *Benjamin* case led to the most extreme reduction by the Court, down from the statutory minimum to five years with the final four suspended in light of the exceptional circumstances. In *Peyton* the applicant's sentence of 12 years was left unchanged, as the applicant was involved in the drugs business. The Director of Public Prosecution's appeal against leniency in *Heffernan* led to an increase in the sentence from two and a half years to four years, in circumstances where it would seem the trial judge gave the mitigating factors a double effect in reducing the sentence. In Dunne, the Court was unwilling to interfere with the discretion of the trial judge and left the sentence at seven years.

Six out of seven of the above cases received sentences under the statutory minimum. So even though it was at pains to assert that no leniency would be tolerated in this area, the Court of Criminal Appeal has showed a general reluctance to impose the mandatory minimum sentence in practice. On the one hand, the discretionary element of s.27(3C) leads to uncertainty in the area. On the other hand, not to allow such discretion could lead to great injustices. As far as the "exceptional and specific circumstances" are concerned, it is clear that the Court has placed a clear emphasis on the importance of the plea of guilty and any cooperation given to the Gardai, two factors specified in the legislation. However other factors which may be taken into consideration as the trial judge deems appropriate, seem to include, the timing and nature of the plea, whether the cooperation yielded any results, the actual role played by the person, the amount, and to a limited extent, the type of drugs involved, the individual's family and personal circumstances, nationality, any pattern of behaviour and whether there are previous convictions. The trial judge can therefore attach certain weight to the circumstances of the case as he considers appropriate and this can lead to sizeable differences in approach by each trial judge. However a "one size fits all approach" is clearly undesirable in an area where there is such a discrepancy between the different roles an individual may play.

In general, there can often be a wide variation in the sentences actually imposed with respect to the same crimes, depending on the circumstances of each case. It would seem that this remains the case even where the Oireachtas has specifically endeavoured to legislate against it. The fact that the court has a residual discretionary power and is entitled to take into consideration "any matters it considers appropriate" as per s. 27(3C), is probably what saved the provisions from any constitutional challenge, according to Professor Thomas O'Malley[9]. He has also stated that what was really introduced by the legislation was, "presumptive sentencing" rather than mandatory sentencing. This accords with the view that the concept of mandatory sentencing has only a limited part to play because of its inflexibility. Perhaps, then, the Oireachtas should only go so far as to provide sentencing guidelines, leaving a large measure of discretion to the trial court, which has the benefit of hearing all the evidence in each individual case.

A final point should be made with respect to the question of reviewing sentences. It would seem appropriate that this should be addressed by the legislature in order to ensure that those sentenced to the statutory minimum are not more favourably treated than those who fall within the remit of s. 27(3C), due to the mitigating circumstances of their case. ●

9. Sentencing Law and Practice, at p. 102.

The "Internal Protection Alternative" in the Irish asylum process

Sheila McGovern BCL, LLM*

Introduction

Practitioners in the field of refugee law will be familiar with the concept of "Internal Protection Alternative"(IPA) (also referred to as Internal Flight Alternative (IFA)[1]). The concept is founded on the notion that an asylum seeker should not be recognised as a refugee if protection is available to him/her in some part of his/her country of origin.

There is no reference to IPA in the 1951 Convention relating to the Status of Refugees (hereinafter referred to as the CSR51). No express provision is made for the exclusion from Convention refugee status of persons able to avail themselves of meaningful internal protection. Some argue that the notion represents an invention by states to deny refugee status and protection.[2] Others are of the view that the concept is inherent in the Convention definition of refugee, since, a refugee within the meaning of the Convention must be fleeing persecution in his/her country of origin, not merely a part or region of that country. The determination as to whether or not there is an IPA is considered to be integral to the determination as to whether or not a claimant is a Convention refugee.[3] In the past decade or so, the concept has become well established in national jurisprudence of states which are party to the CSR51.

The United Nations High Commissioner for Refugees (UNHCR) holds the view that the concept "rests on understandings which are basically at odds with those underlying the fundamental refugee protection principles."[4] Despite this fact and the fact that UNHCR does not recognise the notion as a "principle" of refugee law, it does accept that it can be a factor or possibility to be analysed in the course of status determination in some individual cases. Moreover, UNHCR's Handbook on procedures and criteria for determining refugee status[5] does refer to the possibility of a person seeking refuge in another part of their country of origin. Paragraph 91 of the Handbook provides that: "The fear of being persecuted need not always extend to the whole territory of the refugee's country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only part of the country. In such situations a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country if under all the circumstances it would not have been reasonable to expect him to do so." [6](emphasis added) The test of "reasonableness" is applied to IPA assessments in many jurisdictions.[7]

The main aim of this article is to present the findings from empirical research carried out by the author specifically addressing how the notion of IPA is being applied in practice in Ireland. As part of this research, an analysis of asylum-seekers' files (50 files in total) was undertaken between May 2002 and October 2002.[8] When sourcing cases, on average, one out of every four cases examined contained a reference to the possibility of internal relocation. The cases involved applications from 19 different countries.[9]

The paper is divided into two main sections:

(1) The Concept of Protection - Part 1 includes an overview of the "reasonableness" test applied to IPA by many jurisdictions. Alternatives to the reasonableness approach, such as the Michigan Guidelines and a broader human rights based approach are examined. We also examine the place of IPA within the refugee definition in Art 1(A) 2 of the CSR51.

(2) Substantive and Procedural issues - Part 2 covers issues of a substantive and procedural nature which surround the subject of IPA and which are evident also in the cases examined for the purposes of this article.

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1. Where possible the author uses the label IPA as it is considered to reflect best the underlying importance of protection. Reference to IPA where used, is not to be understood to connote adoption of the Michigan Guideline approach. See infra Fn 57
2. Deploying concepts within the interpretation of the CSR51 which narrow its applicability - concepts such as the "safe country of origin", "safe third country" and "Internal Protection Alternative" - represent indirect efforts to "regionalise" and "internalise" refugee movements.
3. *Rasaratnam v MEI* [1992] 1 FC 706, 709 11 (CA)
4. UNHCR Position Paper "Relocating Internally as a Reasonable Alternative to Seeking Asylum - (The so-called "Internal Flight Alternative" or "Relocation Principle") February 1999
5. UNHCR Handbook on Procedures and criteria for determining refugee status, reedited, Geneva January 1992. Although not binding on states the handbook is considered a "legitimate aid to interpretation of the Convention." See *Valerie Zgnat'ev v The Minister for Justice, Equality and law Reform*, Judicial Review 2000 No 533, Finnegan J
6. This paragraph did not introduce the Internal Flight Alternative. Rather it is considered to have been introduced as a reaction to its less than careful application. See De Moffarts G, "Refugee Status and the 'Internal Flight Alternative' in "Refugee and Asylum Law: Assessing the Scope for Judicial Protection, International Association of Refugee Law Judges, Second Conference, Nijmegen, January 9-11, 1997, p 125
7. Including Australia, Austria, Canada, France, the Netherlands, the United States and the United Kingdom.
8. The files were sourced randomly from the Refugee Legal Service. 50 asylum seekers gave their written consent to use information in their files for the purposes of the research. The files covered asylum applications made in 2000, 2001 and 2002. 28 cases were, at the time of analysing the files, at 1st instance stage. 22 cases had been decided at second instance. One applicant was granted refugee status at 1st instance stage and five applicants at second instance.
9. Nigeria, Croatia, the Czech Republic, Lithuania, Moldova, Russia, Slovakia, Estonia, Democratic Republic of the Congo (DRC), Cameroon, Albania, Sierra Leone, Kosovo, Poland, Ukraine, Togo, Algeria, Georgia and Afghanistan. The concept was more frequently invoked in the case of certain countries of origin (Nigeria, Croatia, Czech Republic, Lithuania, Moldova and Russia).

The findings from the case-study of Irish legal practice (hereinafter referred to as the case-study) are presented throughout. As a background to this study, we will first examine the history of IPA in asylum determinations in Ireland to date.

The Irish law on IPA is unsettled. It is not referred to in the law relating to refugee status (The Refugee Act 1996[10], as amended). Since July 2002, when a revised version of the questionnaire[11] issued by the Refugee Applications Commissioner (RAC) to applicants applying for asylum came into use, the concept is specifically referred to, in terms of "past flight". Question 33(a) of the questionnaire reads: "Have you ever moved to a different town or village or to another part of your country to avoid the persecution you fear? Q33(b): If Yes, please provide details.[12]

Both the Refugee Appeals Commissioner and the Refugee Appeals Tribunal are currently in the process of drawing up guidelines on the subject of IPA.[13] The RAC has indicated that its current approach regarding the application of IPA derives from Paragraph 91 of the UNHCR Handbook. Its inquiry includes (but is not confined to) whether the applicant can be safely and legally returned to the IPA area; the likelihood of serious harm in the IPA area (whether for a convention reason or not); personal factors such as age, gender and state of health; and the durability of the protection. In line with paragraph 196 of the Handbook,[14] it is sometimes the case that it is entirely up to the RAC to establish all the relevant facts regarding that area or those areas of a country which may provide an IPA.[15]

The Refugee Appeals Tribunal[16] takes note of the UNHCR Position Paper[17] on this topic but is cognisant of other views, such as the Michigan Guidelines.[18]

There has been no court case to date specifically addressing the issue of internal relocation and consequently no guidance has been given by the judiciary on this matter.[19] There have been a number of judicial review cases that have dealt with the question when applying for leave. Issues such as the requirement to give notice and the reasonableness of relocation in light of factors such as age and health have been raised. However such cases were settled and have no value as precedents.

The Concept of Protection

The Reasonableness Test

In assessing the viability of an IPA, the question arises as to what the notion of protection in an IPA implies. UNHCR states that the IPA must offer a habitable and safe environment, free from the threat of persecution, where the person can live a normal life, including the exercise and enjoyment of civil and political rights, together with family members, in economic, social and cultural conditions comparable to those enjoyed by others ordinarily living in that country.[20] As the notion became more frequently invoked in asylum determination procedures, UNHCR recognised the need to provide a tool for assessing claims. The aim of its 1999 Position Paper[21] on internal relocation was to provide such a tool. It is proposed in the position paper that an objective assessment of the situation in the proposed alternative site must be made. Relevant factors will include the actual existence of a risk free area, which must be stable, accessible and fit for habitation (ie; persons living there must not have to endure undue hardship or risk). In addition it has to be demonstrated that, in all the circumstances, it would be reasonable for this asylum-seeker to seek safety in that location. In assessing this question of reasonableness UNHCR recognised the impossibility of defining all considerations and circumstances to be taken into account. However, a list of issues which may be explored is provided which includes factors such as age, sex, health, family situation, education, past persecution suffered and its psychological effects.

At EU level, steps are being taken to finalise (during the current Greek Presidency) the proposal for a Refugee Qualifications Directive[22] which establishes an EU-wide definition of basic IPA principles, embodying the reasonableness test.[23]

There exists a considerable amount of jurisprudence which expands on the meaning of reasonableness and how the test is applied in practice. In Canada, for example, the Federal Court has provided general guidance when assessing the reasonableness of an IPA,[24] such as:

- There must be some discussion of the regional conditions which would make an IFA reasonable;
- The presence or absence of family in the IFA is a factor in assessing reasonableness, especially in the case of minor claimants;
- A destroyed infrastructure and economy in the IFA and the stability or instability of the government that is in place there are relevant factors;
- An IFA is not reasonable if it requires the perpetuations of human rights abuses;
- There is no onus on a claimant to personally test the viability of an IFA before seeking protection in Canada.

In the UK case of *Karanakaran*[25] the Court of Appeal made clear that the test is a stringent one. "Although this is not the language of "inability" with its connotation of impossibility it is still a very rigourous test. It is not sufficient for the applicant to show that it would be unpleasant for him to live there or indeed harsh to expect him to live there. He must show that it would be unduly harsh." Brooke LJ stated that the decision-maker, in answering the question as to

10. Refugee Act 1996 - as amended by The Immigration Act 1999 Act and the Illegal Immigrants (Trafficking) Act 2000
11. "Information Questionnaire for Refugee Status Application" issued by the Office of the Refugee Applications Commissioner
12. The fact that question 33 in the Questionnaire is posed in terms of past flight reinforces the erroneous idea that the notion is primarily concerned with past flight and that there is an onus on applicants to seek protection within their own country of origin prior to going abroad.
13. The RAT does not propose to issue any position paper pending a reply from the Supreme Court to the following question which has been certified to the court - whether the RAC and RAT are acting *intra vires* if they take into account the possibility of the applicant relocating within his country when determining whether or not the applicant is a refugee within the meaning of Section 2 of the Refugee Act 1996 (as amended)? (525 J.R. 2001)
14. Extract from para. 196 "While the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner"
15. Letter to author from RAC 3/10/02
16. Letter to author from RAT 16/09/02
17. *Supra*, Fn 4
18. "The Michigan Guidelines on the Internal Protection Alternative", (1999) 21(1) Michigan Journal of International Law 131
19. See *supra*, Fn 13
20. UNHCR: The International Protection of Refugees "Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees", para 13
21. *Supra* Fn 4
22. Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, COM (2001) 510 final
23. Article 10.2 provides that: "In examining whether an applicant can be reasonably returned to another part of the country ...Member States shall have regard to the security, political and social circumstances prevailing in that part of the country, including respect for human rights and to the personal circumstances of the applicant, including age, sex, health, family situation and ethnic, cultural and social links." (emphasis added)
24. Interpretation of the Convention Refugee Definition in the Case Law, IRB Legal Services Immigration and Refugee Board, December 31 2001, Chpt 8, p6. http://www.irb.gc.ca/en/about/legal/papers/credef/index_e.htm
25. *Karanakaran v Secretary of State for the Home Department*, [2000] 3 All ER 449

whether it would be unduly harsh to expect the applicant to settle in the IPA "may have to take into account the cumulative effect of a whole range of disparate considerations."[26]

From the case-study carried out, it is not clear what guidelines are being used by decision-makers. Ninty percent of cases make no reference to guidelines on IPA. Where specific reference is made, decision-makers refer to UNHCR's 1999 position paper.[27] In these cases however, the guidelines are not applied fully - in terms of country profile and an analysis of the claimant's personal profile. Reasons provided by applicants when asked why they had not internally relocated before seeking asylum abroad (eg, safety, age, language difficulties, no family, religious conflicts, registration problems, accommodation problems) are not addressed in reports. Few cases make any reference to the claimant's personal profile/circumstances, such as; age,[28] sex, health, family situation, language abilities, education and work background, ethnic and cultural group, religion,[29] political and social links, social or other vulnerabilities.[30] Nor does it appear that factors relating to the particular political, ethnic, religious and other make-up of the claimant's country of origin are adequately taken into consideration. Issues such as the potential reach of the agents of persecution, new risks of persecution and conditions which might lead to indirect refoulement were absent from assessments.

In terms of accessibility of the IPA, no case examined in the case-study makes any reference to the ability of the applicant to access the IPA physically or practically. In a number of cases, information is provided on the fact that the law provides for freedom of movement to travel internally in the country of origin. Assessors conclude from this information that it would not be a problem for the claimant to relocate/legally access the IPA. Such conclusions are drawn even where, in certain cases, a thorough reading of the country of origin information reveals difficulties to relocate in practice.

The Michigan Guidelines

The "reasonableness" test constitutes a circumstantial and flexible approach. Among the major criticisms of the test is the fact that its application has lead to inconsistent and ad-hoc decision-making.[31] The standard appears to be open to mixed interpretations since what one decision-maker may consider reasonable may not be for another.[32] The Michigan Guidelines[33] adopted in 1999 emerged from the concern that the "reasonableness" test is too vague, arbitrary and open to subjective interpretation.

The Michigan guidelines propose a more methodical and legally defensible approach, removing the need to introduce the question of reasonableness altogether. The only country to adopt the Michigan Guidelines to date has been New Zealand.[34] A four part inquiry into the viability of an IPA is proposed.[35] The inquiry must be preceded by an assessment of the well-founded fear of the claimant in the region from which s/he has fled. If it is ascertained that there exists a risk of persecution in that region, then the IPA inquiry follows.

According to part four of the inquiry, the sufficiency of protection in the IPA should be measured in relation to the duties asylum states owe to Convention refugees under articles 2 - 33 of CSR51. This approach has been criticised, *inter alia*, as representing an overly narrow benchmark.[36] A broader human rights based approach has been advocated as an alternative.[37] It has been suggested that the benchmark should be whether the claimant's basic civil, political and socio-economic human rights, as expressed both in the refugee convention and other major human rights instruments, would be protected.[38]

In the context of the international debate on the appropriate test to apply to IPA assessments, the Michigan Guidelines represent a step forward, particularly in establishing the link with the notion of indirect refoulement[39] and a human rights based approach (even if the narrowness of the latter approach is open to criticism). It is noteworthy that since New Zealand has replaced its reasonableness test with the IPA inquiry as laid down in the Michigan Guidelines this has led to far more consistent decision-making and a more meaningful inquiry, as both the decision-maker and the refugee claimant know precisely what is at issue.[40] Adoption of the Michigan guidelines approach can lead to a harsher result than under the "reasonableness" approach.[41] However, the merit in setting more parameters is not to tie decision-makers to a mechanistic approach but to ensure that their decisions do not overlook relevant factors.[42]

Diverging viewpoints exist not only as to the appropriate test to apply in IPA assessments but also regarding in what part of the refugee definition the issue of IPA arises.

26. See Sayandan (16312) IAT 5 March 1998
27. *Supra* fn 4
28. "Would you have considered moving back to your Mum's area? There is no one there - only around 20 elderly people - most died. I could not have set up home in ___ I just had to leave. I don't know the language. I am 51 years of age and I never thought I would have to do something like this." Case no 27, Croatia
29. "There's no way I could move... some places are fighting between Christian and Muslims and in other places they are fighting between the Ogboni and traditionalists." Case no 32, Nigeria
30. "Why could you not live in ____? All my property is gone" Case no 5, Nigeria
31. A recent survey of Canadian jurisprudence and the application of the reasonableness test shows contrary findings on similar fact evidence. See Kelley Ninette, "Internal/Relocation/Protection Alternative:Is it reasonable?", International Journal of Refugee Law Vol 14, No 1, Oxford University Press, 2002, p 29 and European Legal Network on Asylum (ELENA) "Research Paper on The application of the concept of internal protection alternative", London, November 1998, updated as of Autumn 2000
32. The reasonableness test, when used loosely, is seen to open the way for the return of individuals to areas of instability and to represent one more measure by western countries to further limit their protection obligations. Kelly N, Ibid, p 42
33. *Supra* Fn 18
34. Refugee Appeal No 71684/99, 29/10/99
35. *1:* Is the proposed site accessible to the individual (practically, legally and safely)?
    2: Does the proposed site of internal protection afford the asylum-seeker a meaningful 'antidote' to the identified risk of persecution?
    3: Is the proposed site of internal protection free from other risks which either amount to or are equivalent to a risk of persecution (does the claimant face any risk of refoulement to the region of origin)?
    4: Do local conditions in the proposed site of internal protection at least meet the Refugee convention's minimalist conceptualization of 'protection' (Art 2- 33 of the CSR51)?
36. Storey Hugo "From Nowhere to Somewhere" An evaluation of the UNHCR 2nd Track Global Consultations on International Protection" - paper submittted for IARLJ Conference, Wellington, New Zealand 22-25 October 2002, p11 - 12
37. Kelley Ninette "Internal/Relocation/Protection Alternative:Is it reasonable?", International Journal of Refugee Law Vol 14, No 1, Oxford University Press, 2002 and Storey Hugo "The Internal Flight Alternative Test: The Jurisprudence Re-examined", International Journal of Refugee Law, Vol 10, No 3 July 1998, p 529
38. A human rights analysis provides a benchmark against which the claimant can show what rights, which are fundamental to him/her, s/he will not be accorded in the IPA and which thereby render relocation to the IPA unreasonable/unduly harsh.
39. The Michigan Guideline approach includes assessment as to whether the applicant is likely to be forced back (refouled) to the dangerous region. See Hathaway J and Foster M "Internal Protection/Relocation/Flight Alternative as an aspect of Refugee Status Determination", ps 40, 41 Paper submitted for UNHCR Global Consultations, San Remo, 8-10 September 2001
40. Letter to author from R. Haines QC, Chairperson of the Refugee Status Appeals Authority NZ, 18/10/02
41. For example, as a result of the adoption of the Michigan Guidelines in New Zealand it is no longer possible for torture victims to be given refugee status in New Zealand simply because of the severity of their past persecution and the "unreasonableness" of the requirement that they return to their country of origin.
42. "While the Michigan approach may appear to restrict positive discretion, adjudicators might prove to be more amenable to accepting IFA counter-arguments if such arguments were more firmly based on a logical foundation." Yeo Colin, "The 'Internal Flight Alternative':Counter arguments", Immigration, Asylum & Nationality Law, Vol 15, No 1, 2001, p16

Two-Pronged Approach v Holistic Approach

The refugee definition in Art 1(A)2 of the CSR51 comprises two key clauses: the well-founded fear clause (owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion) and the protection clause (is outside the country of his nationality and is unable or owing to such fear unwilling to avail himself of the protection of that country.) [43] There is not a consensus of opinion regarding in what part of the refugee status determination the issue of state protection, and by extension IPA, arises.[44] Some, including UNHCR, regard the availability of state protection as part of the consideration of the well-foundedness of fear.[45] This is what is known as the "holistic approach". If protection is available, either in the original area or the IPA, then the fear is not considered "well-founded" and refugee status is denied. The UNHCR 1999 Position Paper on internal relocation supports this view.

Others hold the view that to collapse protection considerations into the well-founded fear element makes the protection aspect of the definition largely superfluous.[46] Once it is established that a person has a well-founded fear of persecution in one part of a country (Region A) it is considered illogical to suggest that because that person can be protected in another part of the country (Region B) this fact negates or allays that fear. Consequently it is postulated that the IPA analysis should be located in the "protection clause". This is referred to as the "two-pronged approach."[47] This approach is adopted in the Michigan Guidelines.

The holistic approach has been criticised for two main reasons, namely: "country-wide persecution" and "short-cutting."

* Country-wide persecution: where it is considered that an applicant's fear will not be well-founded if it is reasonable to relocate to another part of her country, then it could be insisted upon that she show not only a well-founded fear in her home area but throughout her country of origin (ie country-wide).
* Short-cutting: The holistic approach is also considered to encourage decision-makers to pre-empt the analysis of well-founded fear in the first region by moving directly to the question of an IPA before examining the nature and basis of the claimant's fear - in other words used as a short-cut to by-pass the determination of refugee claims. [48]

From the case study it appears, in the majority of cases,[49] that assessors are not clear as to when the issue of IPA should be raised. In the case-study, no case concludes that there is a well-founded fear of persecution in one area and then goes on to logically address the question of IPA. There is evidence of short-cutting[50] on the question of IPA. Assessors address the notion without fully addressing the issues which should precede such an inquiry (i.e is the fear well-founded, is the danger feared tantamount to persecution, is there a Convention reason, etc..).

Considerable controversy also surrounds the question as to who can afford protection in the IPA.

Who must provide protection?

In essence, the question is whether only a "State" (de jure) should provide protection or whether it can be provided by de facto state authorities[51] (eg non-governmental organisations, organised entities possessing control over territory and resources, etc..)[52] The crucial point to be addressed is whether the entity can provide meaningful protection, ie protection that is durable, organised, effective and stable.

Substantive and Procedural Issues

Manifestly Unfounded/Accelerated Procedures

In most instances, IPA will require an in-depth examination to establish whether the persecution faced by the applicant is clearly limited to a specific area and whether effective protection is available in another part of the country. In many countries in the European Union, the existence of an IPA can constitute a reason for the authorities to declare the application manifestly unfounded.[53] It is generally among a number of factors which results in the case being processed under accelerated procedures. UNHCR holds the view that due to the complexity of the issues involved, the concept of internal flight alternative should not be applied in the framework of accelerated procedures.[54] In the case study, the notion of internal flight is raised in one case, in the report at first instance deeming the case to be manifestly unfounded.

43. See *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489
44. This is related to the diverging internal protection/external protection theories and the lack of consensus on the meaning of protection within Art 1(A)2 of the Convention. There exists a school of thought which propounds that the reference made in Art 1(A)2 of the CSR51 to protection is to "external" protection. External protection can be granted by the country of nationality through, for example, the provision of diplomatic or consular protection. The travaux preparatoires of the Convention strongly support these views. See Fortin Antonio, "The Meaning of 'Protection' in the Refugee Definition", International Journal of Refugee Law, (2001) Vol 12, No 4, at 571 and Minister for Immigration and Multicultural Affairs v Khawar [2002] HCA 14.
45. Under this approach, whether the protection clause refers to external or internal protection does not affect the analysis.
46. *Supra* Fn 39, p 14
47. Lord Sedley stated in *Svazas v Secretary of State for the Home Department* [2002, EWCA Civ 74, 31 Jan 2002] that the distinction between the fear test and the protection test is "analytically useful because experience shows that adjudicators and tribunals give better reasoned and more lucid decisions if they go step by step rather than follow a recital of the facts and arguments with a single laconic assessment which others have to unpick, deducing or guessing at its elements rather than reading them off the page."
48. For counter-arguments in defense of the holistic approach see Kelley Ninette "Internal/Relocation/Protection Alternative:Is it reasonable?", International Journal of Refugee Law Vol 14, No 1, Oxford University Press, 2002, ps 8 & 9
49. There is evidence, in a small number of cases, of the adoption of a holistic approach.
50. For example: The report indicated that the applicant's shop had been looted on numerous occasions, he had been stabbed (supporting medical evidence was provided), members of his family had been raped and their whereabouts were unknown. No finding of adverse credibility was made. No analysis was made as to whether the applicant had a well-founded fear of persecution in his home area, including the question of the ability of the state to protect the applicant. The conclusion was simply drawn in the report at 1st instance that: "The applicant could have moved to another area in Cameroon for safety but did not do so". No country of origin information was relied on to support the statement that "He could have sought the protection of the Cameroonian State in another area of Cameroon. His claim that he would be targeted by Nigerians living in Cameroon is not credible." [The claimant was recognised as a refugee at 2nd instance.]
51. See Dyli 00/TH/02186, 30/08/2000 IAT, UK
52. For example in the Australian case of *Siaw [Siaw v Minister for Immigration and Multicultural Affairs*, 358 FCA (9 April 1998)] in the context of peace-keeping in Freetown, Sierra Leone, Sundberg J saw no diffference between cases where adequate protection is provided entirely by government forces, by a combination of government forces and friendly forces, by forces from a neighbouring country or ally, by mercenaries (alone or paid to assist government forces) or by UN forces invited to assist government forces.
53. European Parliament Working Paper, Directorate General for Research: "Asylum in the EU Member States", LIBE 108 EN 1-2000
54. Information Note on Article 1 of the 1951 Convention, 1 March 1995, pgh 6

Presumption against the Viability of an IPA

In the case where the agent of persecution is the State or is sponsored by the State it is generally felt that this should give rise to a strong presumption against finding that protection exists in an alternative site. In its 1999 position paper UNHCR however states that this assertion deserves a caveat in the sense that the presumption that state agents are able to act throughout the territory under the state's control is a rebuttable one. In the case study, one case concerns persecution by an agent of the state. No reference is made to a presumption against the use of IPA and whether or not, in light of the facts, it has been rebutted.[55]

Application of the Test- Past/Present?

There are varying positions as to the importance to be attached to whether the applicant sought safety in another part of his/her country of origin before seeking surrogate protection abroad. In practice, this issue is relevant to the designation of cases as manifestly unfounded within the European Union.[56] UNHCR states that the determinative consideration is "whether the asylum-seeker could reasonably live safely in the relocation site now and for the foreseeable future and not primarily whether that site was an "alternative" at the time of flight. ....The existence of the alternative at the time of flight will, nonetheless, be a relevant consideration in considering the claim in its entirety but in a practical sense, the time of decision and the time of return are more important." [57]

In more than 60% of the cases examined, the concept of an IPA is invoked in terms of assessing whether the applicant sought an IPA before coming to Ireland. Assessments focus on asking the applicant why s/he did not seek safety in another part of his/her country rather than going abroad to seek asylum. Adverse credibility findings follow in many cases on the grounds that as the refugee claimant did not "flee" internally first, his/her claim for asylum abroad is not genuine. It appears that certain assessors believe that there is an onus on applicants to seek protection elsewhere in their home country before seeking asylum abroad. Confusion may well arise due to the nomenclature "Internal Flight Alternative."[58] Where specific nomenclature is referred to, the majority of cases refer to the label IFA or IRA (Internal Relocation Alternative) rather than IPA. Among the cases reviewed, there are a number of cases where the assessor focuses on past flight during the interview and on prospective relocation in the report.[59] Where a prospective analysis is made, it is made without a comprehensive assessment into the circumstances in the new site and the reasonableness of relocating the claimant there.

Vulnerable Persons

When considering returning an applicant to an IPA, the special protection needs of vulnerable persons such as victims of trauma or torture, women, children, people who have experienced sexual violence, the execution or disappearance of family members are deserving of special consideration.[60] Many countries, for example, have adopted gender-specific guidelines which stress the fact that an asylum-seeker's gender must be taken into consideration when deciding whether IPA is a viable option. In the case study, special consideration is not given to vulnerable groups (eg a claimant with psychiatric problems,[61] and a woman exposed to the threat of female genital mutilation[62])

Notice

It is generally accepted that applicants must be given clear and adequate notice that the assessor intends to raise the issue of IPA. Notice ensures that the claimant has the opportunity to address the matter with evidence and rebut presumptions of safety.[63] However, there is conflicting authority regarding how specific the notice must be. Some take the position that an IPA finding may not necessarily be faulted because of a failure to identify a specific location to which the applicant could relocate. It may be implied from the UNHCR 1999 Position Paper that a specific area or location must be proposed as an IPA.[64]

In 20% of the cases researched, the issue of IPA is not raised at the interview at all but is a factor taken into consideration in the report[65]of the RAC. In the vast majority of cases no specific location is proposed as an alternative site. Where a specific place is proposed, the place is the capital of the country of origin (eg Lagos, Belgrade, Moscow), for no obvious reasons from the facts of the file. There is an implication that these large urban areas are automatically safe.[66] In a number of cases the concept is addressed in relation to a country other than the applicant's country of origin. None of the applicants in question have dual nationality.

55. The applicant was pressurised by the police into admitting to a murder he had witnessed but not committed in one part of Russia. He had made a formal complaint concerning this incident to an anti-corruption unit but this led to more problems. He had indicated during his interview that his persecutor "had contacts in ____ and only a person of equal influence could fight him." Without addressing the potential reach of the agent of the state and whether there was a reasonable chance that the agent would persecute the claimant in the proposed IPA, the assessor stated that the applicant could have relocated internally. (Case no 40, Russia)
56. *Supra* Fn 52
57. *Supra* Fn 4, @ Footnote 8
58. The term "Internal Flight Alternative" is considered inappropriate as it implies that the asylum seeker might have avoided leaving his or her country of origin. "Internal Protection Alternative" is considered to be the most appropriate term to use in so far as it implies that the analysis is focused on identifying asylum-seekers who do not require international protection against the risk of persecution in their own country because they can access meaningful protection in a part of their own country.
59. Report pursuant to Section 13 of the Refugee Act 1996.
60. See "Comments of the Medical Foundation for the Care of Victims of Torture on the paper Internal Protection/Relocation/Flight Alternative as an aspect of Refugee Status Determination", San Remo, September 2001 and Khalastchi Ruth, "The Internal Flight Alternative: Additional Hurdle or Realistic Option? The United States Approach, http://www.icva.ch/parinac/docs/doc00000447/en/view, Footnote 10 "When victims attempt to flee the abusive relationship or otherwise assert their independence, abusers often pursue them and escalate the violence to regain or reassert control"
61. The applicant was of ethnic Roma origin. He lived in fear of skinheads. Country of origin reports referred to in the assessment confirmed that skinheads were active in the Czech Republic. The applicant had also been the victim of police harassment. The applicant had psychiatric problems and was undergoing psychiatric treatment. Despite this fact the assessor concluded "The only block to Mr X seeking internal protection within the Czech Republic was his own unwillingness to do so." Case no 24, Czech Republic
62. It was suggested to one applicant that she could move to one of the states in Nigeria where FGM is banned. However a thorough analysis of the UK Home Office report relied on by the assessor revealed that while the Nigerian Government does not approve of FGM there are no federal laws banning this practise and it has taken no legal action to curb it. While FGM is banned in several states the punishments are minimal. Once a state legislature criminalises FGM, NGOs have found that they must convince the local government authorities that state laws are applicable in their districts. Case No 32, Nigeria
63. In the Canadian case of *Thirunavukkarasu v The Minister of Employment and Immigration* [1994] 1 FC 589, Justice Linden stated "A refugee claimant enjoys the benefit of the principles of natural justice in hearings before the Refugee Division....neither the Minister nor the Refugee Division may spring the allegation of an IFA upon a claimant without notice that an IFA will be in issue at the hearing."
64. Reference is made in the paper to "an objective assessment of the situation in the part of parts of the country proposed as alternative or safe locations. Evidence must be available to show that the risk of giving rise to the asylum-seeker's fear of persecution does not extend to that part of the country and that the area is generally habitable....It also has to be demonstrated that ...it would be reasonable for this asylum-seeker to seek safety in that location." (emphasis added). *Supra* fn 4, pgh 13 & 15
65. Report pursuant to Section 13 of the Refugee Act 1996.
66. A suggestion is made in one case that an applicant could easily have hidden in a large city to escape from her persecutors. The Canadian Immigration and Refugee Board expressly states that "large urban areas cannot be assumed to be an IFA by virtue of their population size alone" See IRB paper on"Interpretation of the Convention Refugee Definition in the Case law", Chapter (8) on Internal Flight Alternative

Burden and Standard of Proof

In practice there are diverging positions on the matter of burden of proof. In the UK, for example, the Home Office need only allege the existence of a safe area in order to place the burden of proof for disproving the safety of the proposed site of relocation on the asylum-seeker. In the Canadian case of *Chauhdry*[67] it was held that even though the burden of proof rests upon the claimant the Board cannot base a finding that there is an IFA, in the absence of sufficient evidence, solely on the basis that the claimant has not fulfilled the onus of proof." The Michigan Guidelines assert that the onus of proof should fall on the asylum state to produce evidence to establish a prima facie case that an IPA exists. The 1999 UNHCR Position Paper states that the onus should lie on the person asserting the viability of an IPA to show that it is indeed a viable option.

From the research undertaken, there is a lack of consistency concerning the burden of proof and whether it lies on the claimant or the authority. In a number of cases it is clear that the burden of proof is being placed on the applicant to prove why it would not be possible for him/her to reside in the IPA.[68] In other cases the onus is considered to lie with the authority. [69]

In general there are strong arguments in favour of maintaining the same standard of proof for IPA as the general standard in asylum cases. The same underlying rationale for lowering the standard of proof - the difficulties facing claimants in furnishing proof about past and or/present events in their country of origin - applies to IPA issues as much as other issues of fact and evidence. [70]

Country of Origin Information

In more than 10% of the cases researched, no country of origin information is relied upon. Where country of origin information is provided, it appears to be sourced from a narrow pool (almost 40% is sourced from the UK Home Office). There is a lack of IPA-specific country of origin information.[71] The information relied on with regard to Nigeria is of a general nature,[72] sourced from the UK Home Office. In a large number of cases assessors conclude that IPA is a viable option in Nigeria given its large population size and geographic area.[73] The information relied on constitutes an extract from the full report. The full report (containing information which merits consideration when assessing the viability of returning any applicant to Nigeria) is not referred to. Although the report only refers to a real possibility of IFA where individuals fear persecution by non-state entities there is evidence that this is considered, by some assessors, to mean that internal relocation is always possible, without a proper analysis being carried out on a case by case basis.[74]

In certain cases it appears that the assessor's awareness of general country of origin information regarding an IPA option results in a passive approach to fact-finding. Where an assessor is aware of such information, this can result in a disinclination to actively engage an asylum seeker in order to understand his/her personal history.

Conclusion

The integrity of any legal process is founded on its fairness, respect for due process and principles of natural and constitutional justice. The empirical findings suggest that much needs to be done in terms of the practice of invoking the IPA concept in Ireland in order to preserve the integrity of the asylum process. From the research carried out, it would seem that the IPA inquiry is frequently relied on by assessors to justify negative recommendations on asylum applications. From the facts of the cases reviewed, the appropriateness of raising the possibility of an IPA is not called into question. However in considering whether the IPA might represent a realistic option and whether meaningful protection might be available to the claimant in another part of his/her country of origin, the findings reveal the absence of a systematic, consistent and fair approach. It appears that the concept is being mis-understood and mis-applied by many decision-makers at both first and second instance.

There is an urgent need for the RAC and RAT to adopt and apply IPA-specific guidelines (which include an IPA framework for decision-makers). It is necessary that both institutions work together to ensure consistency in approach. Ireland's late entrance into this field affords it an excellent opportunity to draw from a myriad of case-law, academic writings and guidelines (including the Summary Conclusions[75] on IPA/IRA/IFA drawn up following the Global Consultations on International Protection in September 2001[76]).

In terms of monitoring application of the IPA in the Irish asylum process, the state is required under Article 35 of the CSR51 to facilitate UNHCR's duty of supervising the application of the provisions of the Convention. A solution must be found at national level to ensure proper monitoring of the application of the notion of IPA.

It would be unfortunate if the increasingly wide application of IPA by national asylum systems ends up "solving" refugee problems by requiring the persecuted to become internally displaced persons who are not protected by the Refugee Convention and remain "trapped" within the countries where they have been persecuted.[77] "To command what cannot be done is not to make law; it is to unmake law, for a command that cannot be obeyed serves no end but confusion, fear and chaos."[78] Where IPA assessments are not properly carried out and individuals are returned to places in their countries of origin which do not afford them meaningful protection, there is no doubt that this will lead, not just to confusion, fear and chaos, but the risking of human lives. ●

67. *Chauhdry, Mukhtar Ahmed v M.C.I* (E.C.D. No IMM - 3951 - 97) Wetston, August 17, 1998
68. "I am not satisfied that the applicant has adequately submitted why it would not be possible for him to reside in a predominantly Christian part of Nigeria." Case no 50, Nigeria, RAT recommendation
69. RAT recommendation: "Since it is the RAC who suggests that the applicants could have relocated the onus falls on the Commissioner to prove that it would not have been unreasonable to expect an applicant to relocate within his country of origin. It would clearly not be in accordance with best practice for the RAC simply to assert at the conclusion of a case that they were relying on this principle without giving an applicant an opportunity to respond or without testing the reasonableness of the notion in evidence." Case no 49, Moldova
70. See *Robinson v The Secretary of State* [1997] Imm AR 568, para. 21 and *Sivakumaran*, IAT 18147, 20 August 1998
71. The only cases where IPA-specific information is provided is in relation to applicants from Nigeria and one case relating to Sierra Leone.
72. "Replacing individual assessments of asylum claims with group and country profiles has been challenged by the UNHCR, NGOs and commentators ": Byrne R & Shacknove A "The Safe Country Notion in European Asylum Law", Harvard Human Rights Journal, Vol 9 (1996), Spring p. 217
73. The extract states that in the case of "individuals who fear persecution by non-state entities, for example, those involved in tribal disputes, problems with cult membership, religious difficulties and so forth, the option of internal flight is a real possibility in Nigeria, taking into account its size and population."
74. A report from the Refugee Appeals Tribunal stated that "Both UNHCR and the British Home Office report contained in the file are in agreement that relocation is always possible for Nigerians who fear they might be targeted for religious reasons." (emphasis added) (Case No 36, Nigeria)
75. "Summary Conclusions- Internal Protection/Relocation/Flight Alternative", Global Consultations on International Protection, San Remo Expert Roundtable, 6-8 September 2001
76. In light of the different international practices of invoking the IPA/IRA/IFA an expert roundtable was organised by UNHCR and the International Institute of Humanitarian Law in September 2001 as part of the Global Consultations on International Protection. A summary of eight conclusions was agreed between participants which reflected broadly the understandings emerging from the discussion.
77. Khalastchi Ruth, "The Internal Flight Alternative: Additional Hurdle or Realistic Option? The United States Approach, http://www.icva.ch/parinac/docs/doc00000447/en/view
78. Lon Fuller, The Morality of Law, Yale University Press, New Haven 1964, p 37

The Mental Health Act 2001: Involuntary psychiatric treatment and detention.

Simon Mills BL

Introduction

The gestation of the Mental Health Act 2001 was extremely prolonged and its delivery looks to be equally dilatory. This article looks at the background, current status and main provisions of the Irish Act and concludes by looking at English case law, which has experience of dealing with the concept of 'Mental Health Tribunals', a new feature of the Irish legislation. The most significant feature of the Mental Health Act 2001 is the introduction of a system of quasi-judicial supervision and review of involuntary detention of the psychiatric patient. Approximately 2500 people annually are involuntarily detained in Irish psychiatric hospitals, one of the highest per capita rates of detention in Europe.[1] This may be due to the lack of safeguards against involuntary admission and the lack of a review process for such detentions.

Background

The Mental Health Act 2001 was born out of the settlement reached in *Croke v Ireland*,[2] where the state undertook to enact legislation enshrining a system for the independent review of involuntary detention of psychiatric patients. The aim of the Act is in effect to satisfy the guarantee of liberty (and its correlative constraints) enshrined in Article 5 of the European Convention of Human Rights, in particular the requirement for speedy independent review of any process of detention.

The provisions of the Act

The key principles of the new legislation are 'second opinion' and 'independent review'. Under the Act, a patient cannot be involuntarily detained or treated without certain safeguards designed to ensure that patients' rights are maximised. The two inherent protective measures are a second medical opinion and a tribunal review of the treating doctor's decision to admit, detain or treat a patient involuntarily. The parts of the Act most relevant to this review are the following: involuntary admission of persons to approved centres (Part 2), independent review of detention (Part 3) and consent to treatment (Part 4).[3] First of all, we examine the question of who may be involuntarily admitted or detained under the Mental Health Act 2001.

Who does the 2001 Act apply to?

There is a three-step process that must be satisfied before a patient can be considered for involuntary admission. In the first place, the 2001 Act applies to those suffering from a 'mental disorder', divided for the purposes of the legislation into three categories:[4]

(i) Mental illness

A state of mind of a person which affects a person's thinking, perceiving, emotion or judgement and which seriously impairs the mental function of the person to the extent that he or she requires care or medical treatment in his or her own interest or in the interest of other persons.

(ii) Severe dementia

A deterioration of the brain of a person which significantly impairs the intellectual function of the person, thereby affecting thought, comprehension and memory and which includes severe psychiatric or behavioural symptoms such as physical aggression.

(iii) Significant intellectual disability

Arrested or incomplete development of the mind of a person which includes significant impairment of intelligence and social functioning and abnormally aggressive or seriously irresponsible conduct on the part of the person.

Secondly, one of two further conditions must be satisfied:
Either, the mental disorder must give rise to a serious likelihood of harm to the person suffering from the condition or to a serious likelihood of harm to others, or a failure to admit would result in a

1. In Ireland, the rate of involuntary detention each year is 75.3 people per 100 000: compare this with England and Wales (49 per 100 000) and Italy (26 per 100 000.
2. European Court of Human Rights, 21 December 2000. It arose out of an earlier Supreme Court decision that the absence of independent review did not violate the plaintiff's constitutional rights: *Croke v Smith* [1998] 1 IR 101.
3. Part 1 of the Act is definitional; Part 5 concerns the recognition of Approved Centres; Part 6 contains miscellaneous provisions.
4. Mental Health Act 2001, s. 3(2)

deterioration of the disorder or would prevent the administration of treatment that could only be given by such admission.

Finally, assuming either of the above conditions is satisfied there is one further test to be met, namely that the condition must be one that can benefit from, or be alleviated by, admission to an 'approved institution'.[5] There are three specific diagnoses excluded from the Act's remit, the first two of which do not meet the criterion of benefiting from treatment:[6] (i) personality disorder (ii) 'social deviants' and (iii) drug or alcohol addiction.

One somewhat surprising definition in the Mental Health Act 2001 is that for the purposes of psychiatric treatment, a child is any person under 18 years.[7] This contrasts markedly with the approach taken in other aspects of medical and surgical treatment, which is that one becomes an adult for the purposes of consent at the age of 16 years.[8]

Involuntary admission (Part 2 of the Act)

The process of involuntary admission to - or the renewal of involuntary detention in - a psychiatric hospital activates a review mechanism and puts in place other strictures, such as specific time limits within which such review must be completed.

Any person may apply to have another person admitted involuntarily to hospital, but the applicant must be over 18 and have no financial interest in the detention of the patient. Any doctor (generally a general practitioner) to whom an application for admission is made must examine[9] the patient within 24 hours of the application and decide whether to make a recommendation for admission: if she does so, her recommendation for admission remains valid for seven days.[10]

Once in hospital, the patient must been seen as soon as possible by a consultant psychiatrist and may be detained on the authority of a doctor (of whatever seniority) or nurse for up to 24 hours to facilitate that examination. The consultant who examines the patient, if satisfied that the patient is suffering from one of the mental disorders listed in the act and fulfils the other criteria for admission set out above, can make an admission order.[11] A similar procedure is involved in the process of extending the detention of a patient who is already involuntarily detained in hospital.[12] A patient who is a voluntary patient but wishes to leave the hospital may be detained if appropriate for up to 24 hours to allow a consultant psychiatrist to conduct an examination to determine whether the patient should be involuntarily detained.[13]

Independent review of detention (Part 3 of the Act)

Once a patient becomes an inmate of an institution, the differences in the new legislation become most apparent. If an order for admission or renewal of detention is made, a copy of the relevant order goes both to the patient and to the Mental Health Commission, which in turn triggers the jurisdiction of the Mental Health Tribunal. The patient's copy of any order must contain the following information:

- The section of the Act under which he is detained (s.14: admission as an involuntary; s.15: renewal of existing involuntary detention)
- That the patient is entitled to legal representation and to communicate with the Inspector of Approved Centres
- A general description of any proposed treatment
- That the admission or detention of the patient will be reviewed by a Mental Health tribunal
- That he has a right of appeal to the Circuit Court against any decision of the Tribunal (this right of appeal is limited in the case of initial admission: see below under 'Mental Health Tribunals')
- That he has the right to opt to be a voluntary patient if he prefers.[14]

The Mental Health Commission

Under the Mental Health Act 2001, the Mental Health Commission has overall responsibility for mental health treatment in Ireland. It appoints the members of Mental Health Tribunals and the panel of psychiatrists who carry out second opinion reviews of patients being admitted or whose detention is being renewed (see below). The Commission also administers a legal aid scheme for patients whose cases are being considered by the Tribunal. The Commission also has responsibility for approving psychiatric treatment facilities (referred to as 'approved centres' in the Act) and appoints an Inspector of Mental Health Services for that purpose.[15] The Commission comprises 13 members led by a chairperson.

Mental Health Tribunals

Once the Mental Health Commission receives its copy of an admission or renewal order it is obliged to refer the matter to a Tribunal and assign a legal representative to the patient (unless the patient wishes to appoint his own). It will also assign another consultant psychiatrist who will examine the patient, review the patient's notes, interview the admitting psychiatrist, and report back to the Commission within 21 days.[16]

5. i.e. approved by the Mental Health Commission.
6. Mental Health Act 2001, s. 8(2)
7. *ibid*, s. 2(1). This means that the involvement of parent or the court may be necessary as the basis for involuntary admission: ss. 25 & 26.
8. Non-Fatal Offences Against the Person Act:1997, s. 23
9. The courts have previous accepted that a general practitioner may 'examine' a patient from the relatively safe vantage point of a garden gate: *O'Reilly v Moroncy* (SC, unreported, 16th November 1993).
10. Mental Health Act 2001, s. 10. A doctor cannot make a recommendation if she has a financial interest in the centre to which the patient will be admitted, if she is a relative of the patient or if she is also the person making the application for admission. If a doctor refuses a recommendation and the applicant seeks a second opinion, the applicant must tell the subsequent doctor of the previous refusal (s. 11).
11. Mental Health Act 2001, s. 14. The consultant cannot make an admission order if she is a spouse or relative of the patient or if she is also the applicant.
12. Mental Health Act 2001, s. 15. Initial detention is for a maximum of 21 days (s. 15(1)) which can be extended for periods of between 3 months (in the first instance) and 12 months (ss. 15(2)-(3)).
13. One possible criticism of the 24-hour periods stipulated by the 2001 Act is that they take no account of and make no allowance for weekends or other holiday periods.
14. *ibid*, s. 16.
15. *ibid*, ss. 50-55
16. *ibid*, s. 17. In the UK the second doctor is known as a SOAD (second opinion appointed doctor).

The Tribunal is a three-person board consisting of a lawyer (a barrister/solicitor of seven years' standing), a consultant psychiatrist[17] and a lay member and it considers the medical and legal propriety of involuntary admission or the renewal of involuntary detention and of certain forms of treatment, especially psychosurgery. Put at its simplest, the tribunal assesses whether procedural requirements were wholly or largely complied with and whether the patient is in fact ill.[18] An omission to comply with every procedural requirement will not be fatal to involuntary detention or admission if no prejudice or injustice to the patient arises as a result.[19] The tribunal has 21 days from the making of the initial order to decide whether the admission or renewal was justified, but that time may be extended in the interests of the patient (and the patient may request a further 14-day extension) to allow a fuller exploration of matters. The tribunal's decision is communicated to the patient, to the Commission and to the psychiatrist who is caring for the patient.

The tribunal can direct the patient or any other person to appear before it. Sittings are held in private and the rules for witnesses and legal representatives (including those on privilege) are similar to those observed in the High Court. The patient is legally represented at the tribunal. The tribunal must communicate both its decision and the reasons for it to the patient (and his legal representative), the Commission and the treating consultant psychiatrist. If a patient is discharged prior to the tribunal considering or completing its consideration of his detention, then the review process will be halted unless the patient indicates in writing to the Commission that he wishes it to continue.[20]

It appears to be the case that an appeal against a decision concerning first admission to an approved institution can be taken to the Circuit Court by the patient only on the ground that he is not suffering from a mental disorder.[21] Appeals against the renewal of existing detention appear to be capable of initiation either on the ground that the patient was not suffering from a mental disorder or on the basis that fair or proper procedures were ignored.[22]

Consent to treatment (Part 4 of the Act)

Consent to any treatment in the psychiatric setting must - in keeping with the general principles of consent - be obtained voluntarily as far as is possible, but the Act nonetheless recognises the demands of the psychiatric setting. The treating consultant psychiatrist must both ensure that the patient understands the proposed treatment and that he has been given sufficient comprehensible information regarding treatment before consent to that intervention is recorded as given.[23] Consent is required unless the patient cannot or will not consent because of his condition and the consultant psychiatrist caring for the patient is of the opinion that the treatment is necessary, in which case treatment can be given. However, in certain cases, a treating consultant cannot automatically proceed to treatment without consent. If psychosurgery is proposed, the consent of the patient and of a Mental Health Tribunal must be obtained. If electroconvulsive therapy (ECT) is proposed, the consent of the patient or of a second consultant psychiatrist must be sought and obtained. Similarly, no course of treatment may proceed for longer than three months unless the patient consents or unless a second psychiatric opinion is sought.[24]

Status of the Act at present

As intimated in the introduction to this article, the Mental Health Act 2001 is only gradually coming into force. Certain sections of the Act were brought into force by Ministerial order in early 2002.[25] This has allowed the creation of the Mental Health Commission (April 2002) and the appointment of its first chief executive officer (November 2002). The next step is expected to be the establishment of the panel of psychiatrists who will provide second opinions concerning involuntarily detained patients and the subsequent constitution of the Mental Health Tribunals.

Lessons from the UK?

The UK legislation providing for compulsory psychiatric treatment is the Mental Health Act 1983. The UK jurisprudence may offer some guidance to the Irish practitioner seeking to analyse the Mental Health Act 2001, although it is important to note that the English legislation is far from identical to its Irish counterpart[26] and reforms have been proposed to the 1983 Act.[27] Nonetheless, English judicial scrutiny of the operation of the mental health tribunal may be informative for the Irish practitioner.

The English courts have recently affirmed that any decision to treat - as well as to detain - a patient against his will made by a second opinion appointed doctor must be accompanied by reasons. A second opinion doctor may shed the responsibility to give reasons in circumstances where to give reasons would severely affect the mental or physical health of the patient.[28] It has also been stressed that time limits for review must be strictly adhered to and that tribunals must not play fast and loose with them for the purposes of administrative convenience.[29]

When a Tribunal reaches a decision that a patient should be discharged, then that decision must prevail over that of the treating doctor unless there has been a material change in the patient's circumstances. Where such a change in clinical status is a strong possibility or where arrangements must be made for discharge to the community, the UK Tribunals can defer discharge for a period.[30] The idea that the tribunal's view should generally prevail is in keeping with the ECHR requirement for review of detention as the *sine qua non* of valid admission. If the review orders discharge, then there is a heavy burden on the doctor to adhere to that order. In the UK, the burden of proof is - at all times on the Tribunal to show the presence of a mental disorder that justifies involuntary detention, treatment or the extension of incarceration.[31] Whether English caselaw will translate into Irish law remains to be determined. ●

17. Who may be a consultant psychiatrist who has retired not more than 7 years previously.
18. *ibid*, s. 18
19. *ibid*
20. *ibid*, s. 28(5)(a)
21. *ibid*, s. 19
22. *ibid*, s. 16(f)
23. *ibid*, s. 56.
24. *ibid*, ss. 57-61. Where it is proposed to perform ECT or psychosurgery on a child, a court must give consent: s. 25.
25. Mental Health Act 2001 (sections 1 to 5, 7, 31 to 55) (commencement) Order, 2002 (SI 90 of 2002)
26. For example the UK Mental Health Review Tribunals do not review the process of initial involuntary detention, only continuing detention: one reason why the 1983 Act is in need of rejuvenation to bring it into line with the UK Human Rights Act 1998.
27. Draft Mental Health Bill (Cm 5538-I), HMSO, London, 2002.
28. *R v Dr Graham Fergetter and the Mental Health Act Commission, ex p. Wooder* [2002] EWCA Civ. 555 (Court of Appeal, 25 April 2001).
29. *R v The Mental Health Review Tribunal and The Secretary of State for Health, ex parte KB, MK, JR, GM, LB, PD AND TB* (23 April 2002) [2002] EWHC 639 (Admin).
30. *R v East London and City Mental Health NHS Trust, ex p. Von Brandenburg*, Court of Appeal (Civ.), 21 February, 2001. Note that s. 117 of the English Mental Health Act 1983 obliges Health Authorities to provide care to psychiatric patient after discharge, although that care may be limited by wider budgetary considerations (*R v Camden and Islington Health Authority, ex p. K*, Court of Appeal, 21 February 2001). There is no similar provision in the Irish legislation.
31. *R (H) v Mental Health Review Tribunal North and East London Region and Anor.*, Court of Appeal (Civ), 28 March 2001.

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