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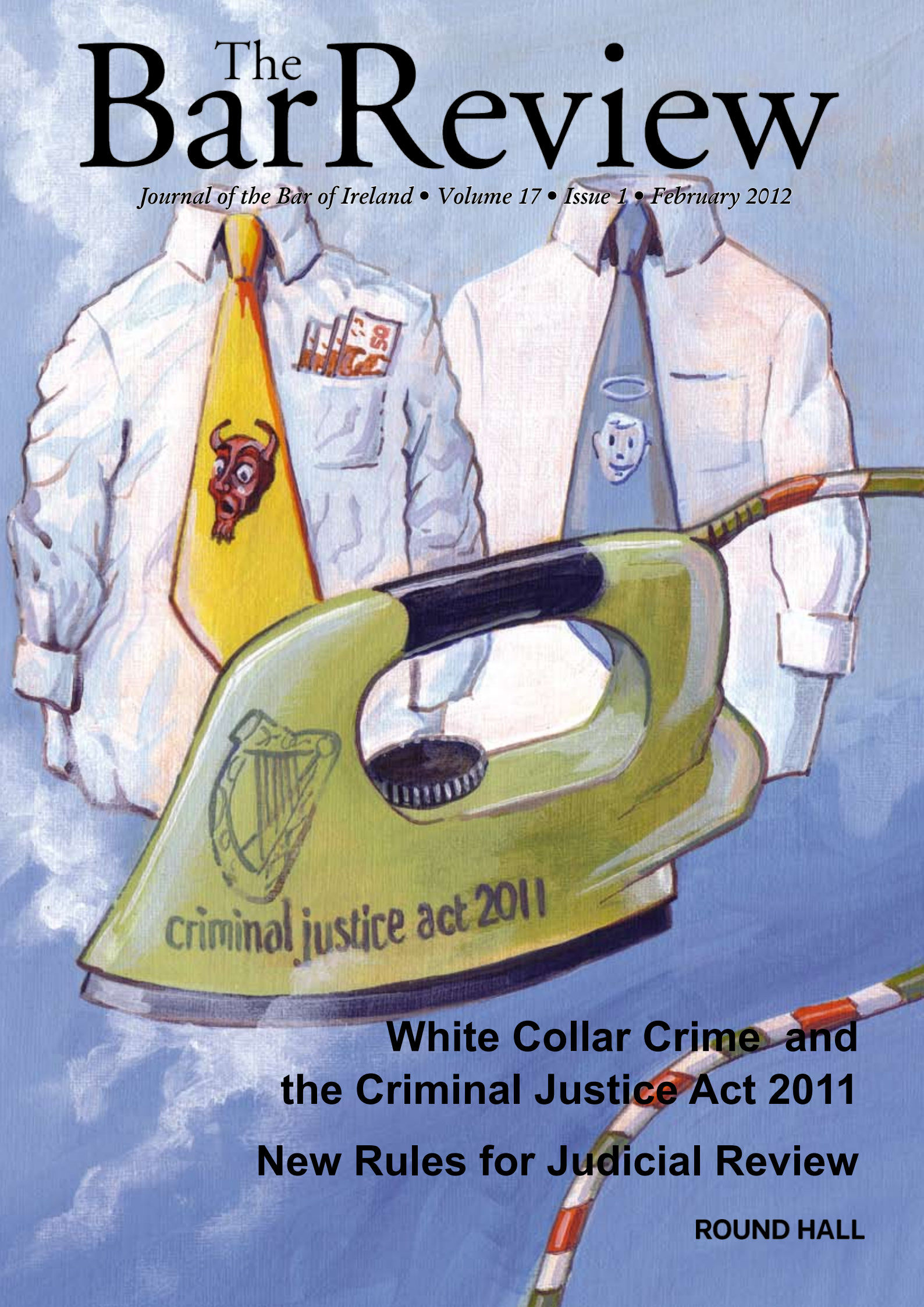

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Changes to Judicial Review procedure

Daniel Donnelly BL

The Rules of the Superior Courts (Judicial Review) 2011[1] completely replace the previous Rules 18 to 28 of Order 84 of the Rules of the Superior Courts 1986. The new rules came into operation on the 1st January 2012 and apply to applications for leave for judicial review and applications for judicial review made after that date.

The changes to the procedures are not fundamental in nature, but will nonetheless have important consequences for practitioners and deserve attention.

The most important changes appear to be the following:

1. The time period in which applications for leave to seek certiorari must be made is reduced from six months to three months (with a saver for cases where the grounds for the application arose prior to 1st January 2012).
2. Where an extension of time is required to seek leave for judicial review, it will now be necessary to show that there is good and sufficient reason for this to be done and that the delay is due to circumstances outside the applicant's control or which he could not reasonably have anticipated.
3. Greater precision is required in drafting a statement grounding an application for judicial review and a statement of opposition.
4. Where leave is granted, the new rules envisage that the statements and affidavits and written submissions will have been exchanged by the return date of the judicial review application.
5. The Court is empowered, even in the absence of the consent of the parties, to treat an application for leave for judicial review as being the application for judicial review.
6. The rule relating to the operation of the granting of leave as a stay on proceedings is modified. This would appear to resolve any doubt as to the criteria applicable by the Court in granting a stay, by assimilation to the test applicable to the granting of an interim or interlocutory injunction.

This article will examine and comment briefly on the changes in the rules that appear most significant. Before proceeding, it should first be noted that no change has been made to the "threshold" that an applicant must pass in order to be granted leave for judicial review. Unless statute imposes a different test, the general test is that the applicant must establish "an arguable case in law" that he will be found entitled to the relief sought on the grounds pleaded at the hearing of a "substantive" judicial review application.[2]

Order 84 Rule 20: Leave to apply for Judicial Review

The principal changes that have been made in the new rule 20 relate to the drafting of the statement grounding the application for judicial review and the exercise of the Court's discretion to grant a stay or interim or interlocutory relief upon the granting of leave.

Rule 20(1) (the requirement to apply for leave) is unaltered. There is a change in rule 20(2) relating to the contents of the statement grounding the application for judicial review. While the former rule 20(2) required that the statement should set out the relief sought and the grounds upon which it is sought, the new rule (Order 84 rule 20(2)(a)) requires the statement to contain:

> "(ii) a statement of each relief sought and of the particular grounds upon which each such relief is sought
> (iii) where any interim relief is sought, a statement of the orders sought by way of interim relief and a statement of the particular grounds upon which each such order is sought."

As will be seen later, equivalent precision is required in the statement of opposition to be delivered by the respondent.[3]

There is a new rule 20(3) which provides a gloss on rule 20(2)(a):

> "It shall not be sufficient for an applicant to give as any of his grounds for the purposes of paragraphs (ii) or (iii) of sub-rule (2)(a) an assertion in general terms of the ground concerned, but the applicant should state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground."

The new wording in fact reflects an approach that has been demonstrated by the Courts in recent years, under which the Courts have declined to accept broad or imprecise assertions as constituting valid grounds of judicial review.

In *A.P.* v. *Director of Public Prosecutions*,[4] Murray C.J. noted:

> "In short it is incumbent on the parties to judicial review to assist the High Court, and consequentially this Court on appeal, by ensuring that grounds for judicial review are stated clearly and precisely and that

1 S.I. No. 691 of 2011.
2 *G.* v. *Director of Public Prosecutions* [1994] 1 I.R. 374, 378.
3 The new Order 84 rule 22 (5).
4 [2011] IESC 2.

any additional grounds, subsequent to leave being granted, are raised only after an appropriate order has been applied for and obtained."

Similar sentiments were expressed shortly afterwards by Cooke J. in the High Court in *Lofinmakin* v. *Minister for Justice, Equality and Law Reform*[5]:

> "8. The Court would take this opportunity to emphasise that judicial review under O. 84 of the Rules of the Superior Courts is not a form of a forensic hoopla in which a player has at once tossed large numbers of grounds in the air like rings in the hope that one at least will land on the prize marked '*certiorari*.' In the judgment of the Court a Statement of Grounds under O 84, is inadmissible to the extent that it fails to specify with precision the exact illegality or other flaw in an impugned act or measure which is claimed to require that it be quashed by such an order."[6]

It is certainly unsatisfactory that an applicant's statement might allege in a general manner that a decision was made "unlawfully" or "in breach of fair procedures." Hitherto, to some extent, an applicant might have sought to base a general ground of judicial review on more specific particulars of the facts in his grounding affidavit. This practice, which was never really satisfactory, is no longer sufficient to comply with the requirements of the new rule 20(2)(a).

It may be hoped that the requirement to specify the grounds on which each relief is sought will lead to greater clarity in drafting and perhaps a reduction in the number of superfluous reliefs that are sought (for example, numerous declarations being sought when an order of certiorari of the impugned decision would be sufficient to remedy the injustice alleged by the applicant).

In cases where interim or interlocutory relief is sought, the reasons why such relief is said to be appropriate must now be stated. This will require some thought to be given to the criteria applicable to the granting of interlocutory relief (more will be said as to this below). This may prove to be of assistance to the respondent and the Court in understanding the nature of the arguments being made for the granting of interlocutory relief at the earliest stage.

The new rule 20(4) incorporates the former rule 20(3) which provided that, on the hearing of the application for leave, the Court might allow the statement grounding the application to be amended. However, it now contains an additional paragraph (b) which empowers the Court to *require* the statement to be amended by setting out further and better particulars of the grounds on which any relief is sought. This merely reflects a practice that has developed under which some Judges have been reluctant to grant leave on general grounds, but rather have required the applicant to amend the statement so as to specify more particular grounds on which he might be entitled to relief.

5 [2011] IEHC 38.

6 See also *Saleem* v. *Minister for Justice, Equality and Law Reform* [2011] IEHC 55.

Order 84 Rule 20(8): Interim and Interlocutory Relief

This sub-rule is superficially similar to the former rule 20(7). However, there are a number of changes in wording. An examination of the changes suggests that some doubtful issues have been clarified. The new Order 84 Rule 20(8); states:

> "Where leave to apply for judicial review is granted then the Court, should it consider it just and convenient to do so, may, on such terms as it thinks fit—
>
> (a) grant such interim relief as could be granted in an action begun by plenary summons,
>
> (b) where the relief sought is an order of prohibition or certiorari, make an order staying the proceedings, order or decision to which the application relates until the determination of the application for judicial review or until the Court otherwise orders."

The new wording emphasises the Court's discretion in granting either interim relief or a stay: "should it consider it just and convenient to do so..." It is accordingly clear that the granting of a stay or interim injunction is not an automatic consequence of the granting of leave. Indeed, under the former rule 20(7), a stay was not automatically granted upon the granting of leave, as the former rule clearly referred to the requirement that the Court should so direct. However, the new wording clarifies that a stay or interim relief should only be granted if the Court considers it just and convenient to do so. The new wording also seems to resolve any doubts as to the test to be applied in deciding whether or not to grant a stay or injunction. This topic is considered below.

Before considering that issue, a preliminary point relates to the potential subject-matter of a stay. The former rule 20(7)(a) had referred to a stay of "proceedings." There was no doubt that court proceedings or proceedings of a quasi-judicial character such as a hearing before a statutory tribunal were susceptible to a stay. Judicial views differed, however, as to whether the Court could effectively grant a stay to prevent the implementation or enforcement of an executive decision.[7]

In Ireland, Hogan J. had recently expressed preference for a broad interpretation of the word "proceedings" in this context so as to include the enforcement of a deportation order made by the responsible minister: *P.J.* v. *Minister for Justice, Equality and Law Reform.*[8] Hogan J. stated that, as the then Order 84 rule 20(7)(a) was "essentially a remedial, procedural provision designed to protect the rights of

7 In *Minister of Foreign Affairs, Trade and Industry* v. *Vehicles and Supplies Ltd.* [1991] 1 W.L.R. 550, the Privy Council held that a stay was not an appropriate relief to prevent the application of an executive decision that had been made. On the other hand, in *R.* v. *Secretary of State for Education and Science, Ex parte Avon County Council* [1991] 1 Q.B. 558, the Court of Appeal held that a stay could be granted to prevent implementation of a Minister's decision. The cases are referred to and discussed in *De Smith's Judicial Review* (6th ed., Woolf, Jowell, Le Sueur and Donnelly, 2007), paragraphs 18-017-18-018 and note 45.

8 [2011] IEHC 443.

litigants, it seem[ed] appropriate that it should be interpreted as widely and liberally as can fairly be done."[9]

The new rule 20(8)(b) refers to a stay of the "proceedings, order or decision" to which the application relates. The wording is accordingly broader than that of the former rule 20(7)(a) which referred to a stay of the "proceedings." The new wording therefore appears to support the broader view of the scope of application of a stay.

On the other hand, where an administrative or executive decision consists of a declaration or finding of fact or status, and does not result in any form of enforcement "proceedings," it does not seem appropriate to "stay" the effect of the decision. For example, a decision granting or refusing planning permission or granting or refusing a declaration of refugee status is a discrete determination which does not entail any enforcement proceedings. Following this logic, it has been held that the Court could not grant a "stay" on deportation based on a challenge to a decision to refuse subsidiary protection[10] because that decision did not in itself give rise to any continuing process which was amenable to a stay: *O.C.O.* v. *Minister for Justice and Equality*.[11] While the new rule 20(8)(b) refers to a stay on an order or decision, it is felt that it remains the case that a stay can only effectively be imposed on a decision which is capable of execution or enforcement and not one which is merely declaratory.

In most cases, an applicant will not be too concerned as to whether he is awarded a stay or an injunction. However, there may be some practical differences. It should be noted that both the former rule 20(7)(a) and the new rule 20(8)(b) contemplate the Court granting a stay until the determination of the proceedings at the leave stage. By contrast, where "interim relief" is contemplated, it will only be initially for a brief period, pending a hearing of an application for interlocutory relief. Accordingly, an applicant may secure a significant procedural advantage if awarded a stay rather than an interim injunction at the leave stage.[12] The respondent would in any event be entitled to apply to have the stay discharged, but it would fall to him to take this step.[13] In practice, a Court might choose only to grant a stay for a limited period, which would have the same practical effect as an interim injunction.

It is possible that an undertaking in damages need not be given by an applicant for judicial review who seeks a stay of proceedings, whereas such an undertaking must in general be given by an applicant for an interim or interlocutory injunction.[14]

Another distinction, which may be more theoretical than practical, is that the stay is not an order *in personam* in the same manner as an injunction. Rather, it operates to halt the procedures of a court or decision-maker. It is therefore doubtful if it can be enforced by contempt proceedings.[15]

While there may have been a potential procedural advantage to an applicant in obtaining a stay at the leave stage, the actual test applied by the Courts in considering whether to grant or discharge a stay or to grant an interlocutory injunction appears in most cases to have been the same. In either situation, the Courts appear usually to have applied the familiar "*Campus Oil*" principles.[16] These are generally summarised as containing three elements, each of which must be determined in the applicant's favour in order to justify an injunction: (i) that there is a fair issue to be tried that the applicant will be found entitled to the relief sought at the hearing of the application, (ii) that damages would not be an adequate remedy and (iii) that the balance of convenience favours the granting of the relief. Thus, in *McDonnell* v. *Brady*,[17] the Supreme Court upheld the High Court's decision to vacate a stay on the proceedings of an Oireachtas sub-committee by applying the "*Campus Oil*" principles.[18]

The Courts have applied the *Campus Oil* test in applications for interlocutory injunctions in judicial review proceedings both *prior* to the grant of leave[19] and after leave has been granted.[20] Indeed, in some cases, the High Court has granted an interlocutory injunction to restrain the holding of an appeal hearing, which might have been thought to be more typically the appropriate subject for a stay.[21] These cases are consistent with the view that there is no difference in principle between the test applicable to the granting of a stay and an interlocutory injunction.[22]

However, an issue of considerable practical importance arose recently in the context of judicial review of deportation orders. The position is complicated by the statutory requirement that applications for judicial review of such orders are required to be made on notice to the respondent minister,[23] and the long delays in the listing of such applications as a result of the abundance of applicants and the limitations on judicial resources. Accordingly, applications to restrain deportation are frequently heard in advance of the application for leave for judicial review.

In *Adebayo* v. *Minister for Justice, Equality and Law Reform*,[24] Geoghegan J., with whom McGuinness J. agreed, expressed

9 Paragraph 24, citing *Bank of Ireland* v. *Purcell* [1989] I.R. 327, 333 (per Walsh J.). The judgment is under appeal.

10 A form of "complementary protection" analogous to refugee status which may be available in limited cases to persons who do not meet the legal requirements to qualify for refugee status.

11 [2011] IEHC 441.

12 See the discussion in Hogan and Morgan, *Administrative Law in Ireland* (4th ed., 2010), paragraphs. 16-81-16-97.

13 The question of whether the respondent bears the onus of persuading the Court to vacate the stay, or whether the applicant bears the onus of persuading the Court to continue the stay was discussed in *McDonnell* v. *Brady* [2001] 3 I.R. 588.

14 See the discussion of the issue in G. Simons, *Planning and Development Law* (2nd ed., 2007), 11-257 – 11-263.

15 *Minister of Foreign Affairs, Trade and Industry* v. *Vehicles and Supplies Ltd.* [1991] 1 W.L.R. 550, 556; *De Smith's Judicial Review*, para. 18-018.

16 *Campus Oil Ltd.* v. *Minister for Industry and Energy (No. 2)* [1983] I.R. 88.

17 [2001] 3 I.R. 588.

18 See also *R.* v. *Pollution Inspectorate, Ex parte Greenpeace Ltd.* [1994] 4 All E.R. 321, 327 and *Coll* v. *Donegal County Council* [2008] 1 I.L.R.M. 58 and the discussion in Hogan and Morgan, *op. cit.*, 16-82 - 16-87 and H. Delany, *Judicial Review of Administrative Action* (2nd ed., 2008), 373-5.

19 *Harding* v. *Cork County Council* [2006] 1 I.R. 294, referring to and following *M.* v. *Home Office* [1994] 1 A.C. 377.

20 *Ryanair* v. *Aer Rianta c.p.t.* [2001] IEHC 12 and *Martin* v. *An Bord Pleanala* [2002] 2 I.R. 655.

21 *Martin* v. *An Bord Pleanala* [2002] 2 I.R. 655 and *Harding* v. *Cork County Council* [2006] 1 I.R. 294.

22 For a discussion of the case law relating to stays of criminal proceedings when leave is granted, see D. Dunne, *Judicial Review of Criminal Proceedings* (2011), 14-95 – 14-103.

23 Illegal Immigrants (Trafficking) Act 2000, section 5(2)(b).

24 [2006] 2 I.R. 298.

the view, *obiter*, that an applicant who initiated proceedings to seek leave to challenge a deportation order within the statutory time period of fourteen days, was entitled to remain in the State until the conclusion of the proceedings. Geoghegan J.'s view was based principally on his interpretation of the effect of the relevant statute, more than on the wording of rule 20(7) (although he quoted that rule).[25] Fennelly J. expressly differed from Geoghegan J.'s observations and the remaining two members of the Court[26] refrained from expressing an opinion as it was not necessary to determine the matter.

More recently, the view has been expressed in a series of cases in the High Court that, while an applicant who brought a timely challenge to a deportation order should not be deported until the leave application *is first listed before the Court*, he had no statutory entitlement to remain in the State after that time. In order to prevent his deportation after that time, he had to satisfy the Court that he was entitled to an interlocutory injunction on "*Campus Oil*" principles.[27]

On the other hand, Hogan J. differed from this view and held that, where an applicant challenged a deportation order within time or in circumstances where he was likely to be granted an extension of time, he was entitled to a stay on the implementation of the deportation order pending the determination of the proceedings "absent special circumstances."[28] Hogan J. accepted that, based on the wording of former rule 20(7)(b), the *Campus Oil* principles were applicable to applications for interim relief where an order *other than* certiorari or prohibition was sought. However, Hogan J. felt that the Superior Court Rules Committee must have intended that different principles would apply to the granting of a stay under rule 20(7)(a) where certiorari or prohibition was sought, as there would otherwise have been no requirement for two sub-rules. Hogan J. was of the view that, unless special circumstances were present, rule 20(7)(a) contemplated that the granting of leave would operate in a stay in cases where certiorari or prohibition was sought. Hogan J. was of the view that an applicant should not be disadvantaged by the delay in the hearing of his application for leave for judicial review and that, accordingly, the same position should pertain pending the application for leave for judicial review.

Similarly, Hogan J. envisaged that the same situation would obtain if the applicant had brought proceedings out of time but it was likely that the Court would be disposed to extent time to the necessary extent.[29] The practical effect seemed to be that an applicant in such a case was effectively presumed to be entitled to a stay on his deportation, unless the respondent minister could identify "special circumstances" militating against the grant of a stay. This effectively reversed the onus that would apply under *Campus Oil* principles.

It should be noted that Hogan J.'s analysis would have been applicable to all judicial review proceedings, not simply those involving a challenge to deportation orders, as Hogan J.'s conclusions were on his interpretation of the former rule 20(7), rather than on the construction of the immigration legislation.[30]

The new rule 20(8) appears to render this controversy redundant. While the issue will undoubtedly be fully tested in the Courts in the near future, the view offered here is that the new wording assimilates the test for the granting of a stay to that for the granting of an injunction. In other words, the approach suggested by Hogan J. based on the wording of the former rule 20(7) is no longer tenable based on the wording of the new rule 20(8).[31]

The wording of the new rule 20(8) contemplates the granting of an injunction in a judicial review irrespective of the relief sought. In the recent case of *P.I.* v. *Minister for Justice and Law Reform*,[32] Hogan J. expressed the view (*obiter*) that, under the new rule 20(8), the *Campus Oil* test applied to all applications for interlocutory relief in judicial review proceedings, irrespective of the substantive relief sought. Hogan J. also concluded from the order of the new paragraphs (a) and (b) that the power to stay should now be considered to be supplementary to the primary remedy of an injunction.[33]

The Court's power under the new rule 20(8) either to grant interim relief or a stay is premised upon the Court's being satisfied that it is "just and convenient" to do so. It is felt that this language clearly envisages the Court making a determination to exercise its discretion to grant either form of relief. Given that no distinction arises in the wording applicable to the Court's discretion to grant either form of relief, it is felt that there is no basis on which it should be concluded that the Court should apply a different test to the granting of a stay from that which it would apply to the granting of an injunction.[34]

It is felt that the adoption of the expression "just and convenient" in rule 20(8) and its application without distinction to a stay and other interim relief indicates that it is contemplated that the rules applicable to the granting of an interim or interlocutory injunction apply in either case. The only distinction that appears to arise is that, while an injunction is in principle available in any judicial review, a stay is only available where prohibition or certiorari is sought.

Order 84 rule 21: Time Limit

The new Order 84 rule 21(1) makes a significant change to

25 [2006] 2 I.R. 298, 315-316. Geoghegan J. accepted that his view was *obiter*.

26 Denham and Hardiman JJ.

27 Among other cases, see *A. (A minor)* v. *Minister for Justice, Equality and Law Reform* [2010] IEHC 297, *Akpata* v. *Minister for Justice, Equality and Law Reform* [2010] IEHC 392 and *O.C.O.* v. *Minister for Justice and Equality* [2011] IEHC 441.

28 *P.J.* v. *Minister for Justice, Equality and Law Reform* [2011] IEHC 443, and more recently *S.Z.* v. *Minister for Justice and Law Reform* (Hogan J., 14th November 2011) and *F.L.* v. *Minister for Justice and Equality* (Hogan J., 23rd November 2011).

29 *S.Z.* v. *Minister for Justice and Law Reform* (Hogan J., 14th November 2011).

30 Hogan J.'s judgment in *P.J.* v. *Minister for Justice, Equality and Law Reform* [2011] IEHC 443 has been appealed, but the practical consequences of the judgment would appear to have been diminished by the change in wording in new rule 20(8).

31 As will be seen, Hogan J. expressed this view himself (albeit *obiter*) in the recent case *P.I.* v. *Minister for Justice and Law Reform* (Hogan J., 11th January 2012).

32 Hogan J., 11th January 2012.

33 *P.I.* v. *Minister for Justice and Law Reform* (Hogan J., 11th January 2012), at paragraph 9.

34 This point was also made by Hogan J. in *P.I.* v. *Minister for Justice and Law Reform* (Hogan J., 11th January 2012), paragraph 9.

time limits for judicial review. It requires that "An application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose."

Accordingly, the time period for applying for certiorari is reduced from six months to three months and the general obligation to move promptly (even within the permitted time period) is dropped.

It should be noted that the six month time period continues to apply where the grounds for the application arose before the 1st January 2012.[35] It was not an entirely satisfactory situation that, under the previous rules, different time periods could apply to different reliefs sought in the same application for leave. The time period for making an application for leave has now been standardised at three months in all cases save for those where statute imposes a different time period.

The omission of the requirement to move "promptly" does not mean that expedition is no longer required of an applicant for leave for judicial review. The new rule 21(6) plainly preserves the Court's discretion to refuse judicial review on the ground of delay which has caused prejudice to a respondent or third party. However, an application for leave for judicial review which has been brought within time can no longer be refused on the sole ground that it was not brought sufficiently "promptly." This requirement was often referred to by the Courts,[36] but it seems to have been comparatively rare for an application for leave otherwise brought within time to fail solely on the basis that it had not been brought sufficiently promptly.[37]

However, in Case C-406/08, *Uniplex (U.K.) Ltd.* v. *N.H.S. Business Services Authority,* [38] the Court of Justice of the European Union held that the requirement that proceedings had to be brought promptly in the United Kingdom's Public Contracts Regulations 2006 was too vague to comply with the requirement of legal certainty in limitation periods applicable to proceedings for the review of public supply and works contracts. The Court came to a similar conclusion in relation to the requirement in Order 84A rule 4 of the Irish Rules of the Superior Courts that such proceedings had to be brought at the earliest opportunity.[39] As a consequence of these decisions, the stand-alone criterion of "promptness" effectively ceased to apply to judicial review proceedings where an applicant claimed an infringement of European law.[40] The excision of the obligation of promptness as a requirement for the granting of leave is undoubtedly a response to those judgments.

Order 84 Rule 21(3) – (5): Extension of Time

Rules 21(3) – (5) deal with extension of the three month time period. The former rule 21(1) empowered the Court to extend the period within which the application might be made, but did not specify any criteria that the Court should apply. The new rules 21(3) – (5) are far more specific. They provide that the Court may, on application, extend the time limit, but only if it is satisfied that there is "good and sufficient reason" for doing so, and that the circumstances that resulted in the failure to make the application for leave were outside the control of, or could not reasonably have been anticipated by the applicant for such extension. In considering whether good and sufficient reason exists, the court may have regard to the effect which an extension of time might have on a respondent or third party. An application for an extension of time must be grounded upon an affidavit sworn by or on behalf of the applicant setting out the reasons for the applicant's failure to make the application for leave within time.

These latter requirements do not really involve any significant change in procedure. However, they serve to remind applicants and their lawyers that it is necessary formally to seek an extension of time and set out an explanation for any delay on affidavit. It cannot be assumed that the Court will extend the time period as a matter of course. The application for an extension of time can be made in the same ex parte docket or notice of motion as the application for leave for judicial review.[41]

The new wording is, in fact, similar to statutory provisions which have permitted extensions of statutory time periods for judicial review.[42] The substitution of the expression "good and sufficient reason" for the previous "good reason" also suggests a greater degree of judicial scrutiny of the adequacy of the reason offered for the delay. The test of "good and sufficient reason" has applied to the extension of time for leave in the planning and immigration contexts for some years.[43] A considerable body of case law has built up dealing with the approach to be taken by the Courts in considering applications for the extension of time under the relevant legislation. Those cases will now be directly relevant all extensions of time for applying for leave for judicial review.

In *Kelly* v. *Leitrim County Council*,[44] Clarke J. attempted a summary of some of the relevant factors:

35 Rules of the Superior Courts (Judicial Review) 2011, Order 4.

36 *E.g.*, R. v. *Herrod, ex parte Leeds City District Council* [1976] Q.B. 540, 557; *de Róiste* v. *Minister for Defence* [2001] 1 I.R. 190, 203 (*per* Denham J.); *O'Connell* v. *Environmental Protection Agency* [2001] 4 I.R. 494, 500; *Dekra Eireann Teo.* v. *Minister for the Environment* [2003] 2 I.R. 270, 284-5; *Openneer* v. *Donegal County Council* [2006] 1 I.L.R.M. 106. See H. Delany, "The Requirement to act 'promptly' in Judicial Review proceedings," [2005] I.L.T. 229 and D. Dunne, *Judicial Review of Criminal Proceedings* (2011), 14-35 – 14-42.

37 Examples include *O.S.T.* v. *Minister for Justice, Equality and Law Reform* [2008] IEHC 384 and *J.A.* v. *Refugee Applications Commissioner* [2008] IEHC 431. See also: *Dekra Eireann Teo.* v. *Minister for the Environment* [2003] 2 I.R. 270, *O'Brien* v. *Moriarty* [2006] 2 I.R. 221 and Delany, *op. cit.*

38 [2010] E.C.R. I-00817.

39 Case C-456/08, *Commission* v. *Ireland* [2010] E.C.R. I-00859. See the comment on both cases by G. Anthony, (2011) 48 C.M.L.Rev. 569.

40 See *R. (Buglife)* v. *Medway Council* [2011] EWHC 746 (Admin.), paragraph 63.

41 *Kelly* v. *Leitrim County Council* [2005] 2 I.R. 404.

42 The new rule 21(3) is very similar to the existing provision relating to planning judicial reviews (section 50(8) of the Planning and Development Act 2000, as substituted by section 13 of the Planning and Development (Strategic Infrastructure) Act 2006).

43 Planning and Development Act 2000, section 50(8)(a) (the current text as substituted by section 13 of the Planning and Development (Strategic Infrastructure) Act 2006); Illegal Immigrants (Trafficking) Act 2000, section 5(2)(a).

44 [2005] 2 I.R. 404. At the time, the relevant provision was section 50(4)(a) of the Planning and Development Act 2000 which prevented the Court from extending the applicable period (8 weeks) unless there was good and sufficient reason. It did not contain the

(a) the time period for making the application; the shorter the period, the easier it would be for an applicant to demonstrate that, despite reasonable diligence, he could not comply with the time limit;
(b) whether any third party rights were affected by the delay;
(c) the absence of any prejudice to a third party did not confer on a court any wider jurisdiction to extend time;
(d) the applicant's personal responsibility for the delay in initiating proceedings;
(e) the import of the proceedings for the applicant; and
(f) where the respondent was on notice of the application, it could raise an issue as to whether there was an arguable case for the granting of leave.

It should be noted that the following were subsequently identified as also being relevant factors for consideration:[45]

(g) whether the applicant had decided to commence proceedings within the time period, or could reasonably have been expected to have been able to decide whether or not to commence such proceedings
(h) whether the applicant had access to legal advice available during the period.

As regards (f), there appear to have been divergent approaches as to whether the Court should consider the merits of the application for leave when considering whether or not to extend time for the making of the application. However, in a context where an applicant bore the burden of demonstrating substantial grounds for the granting of leave, the Supreme Court recognised that it was relevant to consider whether the applicant had disclosed an arguable case that he was entitled to the relief sought.[46] The logic is clear: if the case has no merit, the Court's time should not be wasted even if the applicant might otherwise have qualified for an extension of time.[47]

By way of gloss on (g), it has been held by the High Court that the mere fact that the applicant was an infant did not mean that a different approach should be taken to the extension of time from that applicable to an adult, if the infant had access to legal representation.[48]

It should be noted that these factors have been identified and applied in cases subject to statutory time limits which were shorter than those applicable under the Rules of Court. Where statute does provide for a shortened time period, this is also a relevant consideration, as it demonstrates a legislative intent that applications of a type affected by the statute should be brought more promptly than would be the case in the absence of the statutory provision.[49]

Rule 21(6) confirms that the fact that the Court has extended the time for making the leave application does not prevent the Court hearing the substantive judicial review from dismissing it on grounds of delay if this has caused or is likely to cause prejudice to the respondent or a third party. It should be noted that the Court may exercise its discretion in this way even if the application for leave was brought within the three month period. The wording of sub-rule 6 does not envisage that delay in the absence of actual or potential prejudice should be a ground in itself to dismiss a judicial review application. It is felt that the wording of the Rule cannot fetter the discretion of the Court in this regard and a sufficiently long delay may justify the refusal of judicial review in itself. This was the view of Fennelly J. in *de Róiste* v. *Minister for Defence,* a case where there was extreme delay and undoubted prejudice.[50] Denham J. did not specifically address a situation of delay without prejudice, but her judgment emphasised the Court's discretion having regard to all relevant factors, so it does not appear to be inconsistent with the view of Fennelly J.[51]

Order 84 Rule 22: Application for Judicial Review

The principal changes in this rule are as follows:

1. Where leave is granted, the proceedings will be returnable for a date seven weeks later. It is anticipated that pleadings, affidavits *and written submissions* will have been exchanged by the return date.
2. The Court has now been empowered to direct whether or not it will require oral submissions on any of the points of law arising from the written submissions.

The first significant change in the new rule 22 occurs in rule 22(3), which requires the notice of motion (or summons) seeking judicial review to be served on the respondent within seven days of the grant of leave unless extended by Court order (previously the period was fourteen days). In default of service, any stay of proceedings granted by the Court lapses. The notice of motion seeking judicial review is returnable

additional requirement introduced by the 2006 amendments that the circumstances resulting in the delay were beyond the applicant's control.

45 *F.A.* v. *Refugee Appeals Tribunal* [2007] IEHC 290.

46 *G.K.* v. *Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418, 423 *per* Hardiman J. For a detailed discussion, see H. Delany, "Extension of Time for Bringing Judicial Review Pursuant to s. 5 of the Illegal Immigrants (Trafficking) Act 2000," [2002] I.L.T. 44.

47 For an example of the application of this reasoning, see *B.F.* v. *Refugee Appeals Tribunal* [2008] IEHC 126. See also *Collins* v. *Clare County Council* [2011] IEHC 3, at pages 9-10.

48 *J.A.* v. *Refugee Applications Commissioner* [2009] 2 I.R. 231.

49 *Kelly* v. *Leitrim County Council* [2005] 2 I.R. 404, 412; *F.A.* v. *Refugee Appeals Tribunal* [2007] IEHC 290; *B.F.* v. *Refugee Appeals Tribunal* [2008] IEHC 126; *J.A.* v. *Refugee Applications Commissioner* [2009] 2 I.R. 231, 240.

50 [2001] 1 I.R. 190, 221.

51 Keane C.J. treated the case as one involving inordinate and inexcusable delay and noted the prejudice suffered by the Respondent as a result of the delay of 29 years in bringing proceedings. On delay as a discretionary factor to refuse judicial review, see, further, Hogan and Morgan, *Administrative Law in Ireland* (4th ed., 2010), 16-150 – 16-162, Delany, *Judicial Review of Administrative Action* (2nd ed., 2008), 343-5, and Delany (2000) 22 D.U.L.J. 236.

for the first motion day after seven weeks from the grant of leave, unless the Court directs otherwise.

Rule 22(4), dealing with the statement of opposition, has been modified so that the respondent has three weeks from service of the motion to file the statement of opposition. The period was formerly one week, a requirement more honoured in the breach than the observance. The new rule 22(4) omits the former injunction that the statement of opposition should "concisely" set out the grounds of opposition. Concision may have to be sacrificed in the interests of clarity as a result of the new rule 22(5).

Rule 22(5) applies, with modifications, Order 19 rule 17 (dealing with the pleading of a defence) to a statement of opposition. The new rule clarifies that it is not sufficient for the respondent simply to deny generally the grounds alleged by the applicant. It also states that the respondent's statement must deal specifically with each fact or matter pleaded by the applicant which the respondent does not admitted (save damages, where claimed). This represents something of a departure from former practice. A statement in a judicial review application was not generally considered to be a pleading,[52] and therefore most of Order 19 was not considered applicable to judicial review. Therefore statements of opposition were not necessarily drafted in such a way as to traverse the contents of the statement grounding the application for judicial review. It is clear that, in light of the new rule 22(5), it would be prudent for the respondent's lawyers expressly to deny or insist on proof of all matters of fact that they do not intend to admit. However, most judicial review applications do not in practice involve contentious issues of fact.

Of greater significance is the requirement in rule 22(5) that the respondent should state precisely each ground of opposition, giving particulars where appropriate and identifying "in respect of each such ground" the facts or matters relied upon as supporting that ground. This reflects the traditional approach in drafting a statement of opposition that positive grounds of opposition are set forth (by contrast to the traditional negative style of drafting a defence to plenary proceedings). However, rule 22(5) is clearly intended to require as much precision of the respondent as is required of the applicant in the statement grounding the application for judicial review under rule 20(3).

Rule 22(5) in this regard reflects the recent judgment in *Saleem* v. *Minister for Justice, Equality and Law Reform*,[53] where Cooke J., though accepting that it was legitimate for the respondent to traverse the applicant's statement, continued:

> "Nevertheless, because in judicial review the High Court is exercising its constitutional and public law function of ensuring that delegated executive decision making powers have been validly exercised in accordance with law, it behoves the respondent to assist the court not only by identifying the issues of fact, if any, which it contests but also by stating frankly and clearly in its pleading, so far as this can reasonably be done, the view or stance it proposes to adopt on the questions of law or issues of interpretation which it considers to be raised by the claim and to require determination by the Court... In this regard the pleading of statements of grounds and opposition could be considered to differ from pleadings in the fully adversarial forum of civil proceedings where it appears to have become accepted that parties are entitled to keep their cards as close to the chest as possible in order best to preserve the opportunity of victory by surprise at the trial."[54]

In that case, Cooke J. found fault with the obscurity created in the respondent's statement by a series of alternative assertions as to the legal basis of a long term residency scheme operated by the respondent Minister.

There does not appear to have been any uniform style of drafting statements of opposition, but it may be fair to say that the tendency has been to include a summary of the arguments directed against the granting of judicial review as well as a denial of the contents of the statement grounding the application. It would appear that under the new rule 22(5), the safest course is for the respondent to take care to deny each allegation which is in issue. Given that a bare denial is not a sufficient answer to a ground of judicial review, it may be found most convenient then to assert the converse of the denial, giving details of the matters relied on in support of the assertion. For example:

> "1. It is denied that the respondent acted unfairly and in breach of natural and constitutional justice as pleaded at paragraph 1 of the Statement Grounding the Application for Judicial Review.
> 2. The respondent acted fairly and consistently with the requirements of natural and constitutional justice at all material times.
> 3. In particular, the respondent provided the applicant with the opportunity to make representations or submit any evidence he considered relevant prior to making his determination.
> 4. The respondent was not under any obligation to advise the applicant of the proposed grounds of his decision prior to the making of the said decision."

The new rules are clearly intended to require the parties to set out in full all matters of fact and law on which they intend to rely. However, a by-product of this requirement is likely to be an increase in the length of the applicant's and respondent's statements. While rule 20(3) is undoubtedly intended to eliminate vague or generalised assertions in the applicant's statement, there may be a tendency in response to plead specific grounds as well as general grounds. The rule may not, therefore, lead to the intended discipline of specifying precise grounds of challenge. Rather, general assertions will still be pleaded, but additional detail will be included in relation to more meritorious grounds. It is to be

52 Order 125 rule 1 RSC provides that "'pleading' includes an originating summons, statement of claim, defence, counterclaim, reply, petition or answer." It does not refer to a statement in a judicial review application.

53 [2011] IEHC 55

54 At paragraph 17.

hoped, however, that the Courts will exercise their power under rule 20(4) to require compliance with rule 20(3).

The next innovation in rule 22 is contained in rule 22(7), which requires written submissions to be exchanged within three weeks of the delivery of the statement of opposition. It is accordingly envisaged that the submissions will have been exchanged by the return date for the judicial review application (which could in theory be heard on that date). In practice, it may be difficult to comply with this timeframe.

The former rules did not refer to the exchange of written submissions. However, by practice direction HC03 of the 25th November 1993, written submissions were required in all judicial review applications. That practice direction required the filing of submissions seven days before the hearing, followed by the exchange of same. The new rule accordingly requires submissions to be prepared at a far earlier stage. The rationale is doubtless connected with the new rule 22(8) which anticipates the Court giving directions in relation to the content of the submissions on the return date.

The new rule 22(8) is somewhat curious. It provides:

> "The Court may on the return date of the notice of motion, or any adjournment thereof, give directions as to whether it shall require at the hearing of the application for judicial review oral submissions in respect of any of the written submissions of the parties on points or issues of law."

This is presumably not intended to suggest that the Court can dispense with any oral argument. Such a change would be a fundamental departure from the common law tradition of oral advocacy. It would also lead to unfair consequences. Given that the parties are required to exchange submissions (rule 22(7)) and therefore will normally prepare submissions without sight of the other party's submissions, each should be entitled to supplement its own written submissions orally and to reply to the contents of the other party's submissions.

However, it would appear that subrule 8 is designed to allow the Court to take a more active role in the management of the case and to advise the parties of issues which it believes require elaboration or explanation at the hearing. Subrule 8 seems to contemplate that the judge giving the directions would be the same judge who would hear the judicial review application. This may require a modification of the current listing practices.

Order 84 Rule 24: The Court's powers on the hearing of an application for leave for Judicial Review

The new Order 84 rule 24 is a new provision which increases the Court's options at the hearing of the application for leave. To some extent, the new rule reflects some developments that have occurred in practice. It also mirrors changes that were introduced into planning judicial review practice by the Planning and Development (Amendment) Act 2010.[55] The principal provisions appear to be the following:

1. The Court may direct that the leave application be heard on notice to the respondent or another party.
2. The Court may treat the leave application as being the judicial review application, either by consent, or on the application of a party or of its own motion and may make consequential directions.

The first of these matters is set out in the new rule 24(1). Rule 24(1) provides that the Court hearing the leave application may, having regard to the issues arising, the likely impact of the proceedings on the respondent or another party or for other good and sufficient reason, direct that the application should be heard on notice and may adjourn the application for that purpose. This rule largely reflects section 50A(2)(b) of the Planning and Development Act 2000, a provision inserted in that Act in 2010. Prior to the 2010 amendments, applications for leave for judicial review governed by section 50 of the Planning and Development Act 2000 were required to be brought on notice to the respondent. The 2010 amendments provided that such applications should thenceforth be brought *ex parte*, but that the Court could direct that the application should be brought on notice. The objectives were, presumably, to expedite the hearing of leave applications and reduce the costs burden on the respondents. Even prior to that amendment, it was quite common for the Courts to direct that certain leave applications should be made on notice to the respondent.[56] This was perhaps especially likely if the applicant intended also to seek a stay or interim relief which would affect the respondent.[57]

Rule 24(2) is more of a departure from previous practice. This subrule now formally provides that the Court may treat an application for leave as the hearing of an application for judicial review. While this was not an uncommon practice heretofore, the consent of the parties was required (even if there was considerable judicial encouragement).[58] The Court is now empowered to decide to treat the leave application as the judicial review application either on the application of one party (without the consent of the other) or *on its own motion*.

If the Court is minded to make such a direction on an *ex parte* leave application, it is obvious that the application would then have to be adjourned to allow for service on the respondent and for other steps to be taken (indeed, rule 24(2) so provides). However, in this situation, the respondent will not have been represented at the initial hearing of the leave application and therefore will not have had an opportunity to offer its view as to the appropriateness of having the leave application treated as the judicial review application. While the

55 Planning and Development (Amendment) Act 2010, section 32, inserting a new section 50A into the Planning and Development Act 2000.

56 See, *e.g.*, *D.C.* v. *Director of Public Prosecutions* [2004] IEHC 245, *Potts* v. *Minister for Defence* [2005] IEHC 72. For an example under section 50A(2)(b) of the Planning and Development Act 2000, see *Collins* v. *Clare County Council* [2011] IEHC 3.

57 A variation on this approach was the "telescoped hearing," under which, if the Court granted leave, it would proceed to determine the judicial review application, possibly without a further hearing. This practice developed in the Commercial Court. See S. Dowling, *The Commercial Court* (2007), 13-69 – 13-73. A prominent recent example was the "McKillen" case, *Dellway Investment Ltd.* v. *National Asset Management Agency* [2010] IEHC 364.

58 A recent example is *T. v. Minister for Justice and Equality* (Hogan J., 2nd November 2011).

rules do not specifically address the question, fair procedures would appear to require that the respondent should be permitted to address the Court as to whether or not it was appropriate that this step should be taken. Where a leave application is made on notice, the respondent will obviously have the opportunity to address the Court in relation to this issue at the hearing.

While one cannot predict the types of case in which the Court may exercise this power, it would seem more suitable in cases where the factual background is not in dispute and where discrete issues of law are raised, which can satisfactorily be determined in a single hearing. The more numerous and complex the grounds pleaded, the less appropriate it may be to direct that there should be a single hearing. It is important to recall that the Court's role in "screening" unmeritorious grounds at the leave stage fulfils an important function in identifying the matters which are really at issue. It also serves to direct the attention of both parties to the most cogent grounds of challenge of the impugned decision. Where this "filtering" process does not occur, a respondent may potentially be prejudiced if required to address very many pleaded grounds of judicial review at a leave application which is treated as the substantive judicial review. Therefore, it is felt that cases where clear issues are identified in the applicant's statement are more likely to be suitable for a "single stage" procedure.

Where the Court does determine that the leave application should be treated as the application for judicial review, rule 24(2) provides it with appropriate powers to assimilate the application to an application for judicial review.

Rule 24(3) is a "case management" provision which empowers the Court, on the hearing of a judicial review application or a leave application heard on notice, to make orders and give directions for the expeditious and economical determination of the proceedings. These include routine matters such as directions in relation to affidavits and service on affected third parties, as well as directions in relation to the exchange of memoranda for the purposes of agreeing issues to be determined by the Court.

Appraisal of the Amendments to the Rules

It is apparent that the modifications to the rules relating to judicial review have been made in response to developments in practice since 1986. Since that time, the number of judicial review applications (and applications for leave) has increased enormously.

The emphasis on greater precision in drafting both the applicant's and respondent's statements is to be welcomed. It may, however, prove difficult to police in practice. If the tendency to prolixity continues, it is to be hoped that the Courts will exercise their powers under rule 20(4) to require amendment of the applicant's statement. This should in turn encourage precision in the drafting of the respondent's statement.

It is felt that the standardisation of the time limit for judicial review at three months (save where statute otherwise provides) is appropriate. There seems to have been little justification for differing time limits for different reliefs even where the grounds for judicial review were the same in either case. It is hoped that the somewhat more stringent approach to the extension of time for applying for leave will lead to a general consistency in approach as between judicial review regulated by statute and judicial review solely regulated by the rules.

The greater role given to the Court in "case management" is also welcome. In practice, one suspects that it may prove difficult for the Courts to engage in very active management of the large numbers of cases that come before them. However, the greater the degree of adherence to the requirements of the new rules, the less active the Court may have to be in managing cases. The Court's power to decide to treat a leave application as the substantive judicial review is also a welcome development, provided that care is taken to ensure that neither side is unfairly disadvantaged in the pursuit of efficiency.

Nothing in the new rules is likely to lead to any great reduction in the number of applications for leave for judicial review, but it is to be hoped that they will serve to promote greater rigour in the formulation of grounds of judicial review and opposition and will lead to increased efficiencies. If so, they will lead to some savings of time and expense for the parties to judicial review applications and a possible reduction in the demands on limited judicial resources. ■

Paris2Nice Cycle Challenge 2012

Saturday 29th September to Thursday 4th October

This year, the Paris2Nice Cycle challenge starts in Paris on Saturday 29th September and will finish in Nice on Thursday 4th October. The aim is to recruit 100 riders for the cycle in 2012 and to raise €1 million Euros for Special Olympics Europe/ Eurasia, Special Olympics Ireland and Cerebral Palsy Sport Ireland. We are asking you join the team from last year and cycle to raise money for the nominated charities.

The total cycle is 700kms and will involve six days cycling averaging 120 kms per day. For those sharing a twin room the cost is €1750. Should you wish for a single room the cost is €2000. This includes accommodation and meals but flights and insurance are NOT included in this figure. In addition to the cost of the challenge, you will be expected to fundraise. We would hope that each participant raises a minimum of €3000 (over and above the entry cost) towards our goal of €1million.

If you would like more information on the challenge please contact the cyclist team leader Tom Kennedy on 087 238 1906 or Irene Breen, cyclist co-ordinator on 087 969 8480

The Legal Services Regulation Bill

Shelley Horan BL*

Introduction

The Legal Services Regulation Bill ('the Bill') has been published under the mantle of an EU/IMF requirement and has been presented as necessary reform in the public interest based on the premise that it will reduce legal costs.

There is, without doubt, a basic need for an efficient legal system so that the consumer of legal services can gain access to lawyers at a competitive price. The Bill, in its present form, will prevent this objective rather than promote it. The contents of the Bill far exceed the requirements of the EU/IMF and the structural reforms proposed in the Bill go much further than what was required by the Legal Costs Working Group or by the Competition Authority.

Some reform of the market for legal services and ancillary matters is needed. However, the proposed Bill does not introduce the kinds of reform that are required and, in its present form, defies international principles of how legal professions should be regulated. Other sections are contra-competitive and, if enacted, would give rise to grave problems for consumers and for the legal profession.

Proposed New Structures

By proposing to dismantle the 'independent referral bar', the Bill will serve to carve up the legal services market, which will push costs up for consumers. At present, barristers are equal participants in an 'independent referral bar', based in the Law Library, where a barrister must take a case referred to him or her by a solicitor in an area in which he or she normally practices, irrespective of the client. This obligation is known as the 'cab-rank rule' and it ensures access to barristers for all. Moreover, the system allows the Law Library operate as a 'centre of excellence' whereby a solicitor, having knowledge of the industry, will recommend a particular barrister to his client who he or she knows has the requisite experience or skills for the case in question.

If the restrictions on barristers forming partnerships with other barristers, solicitors, accountants, tax advisers, etc or on being employed by companies are removed, the concept of the 'independent referral bar' will be eroded. The proposal to remove these restrictions is based on the premise that this is essential from an economic or free market standpoint. However, the reality is that competition law or free market ideologies cannot be neatly applied to the legal profession and in fact such ideals could hamper competition by providing for a closed shop system of legal superstructures. The proposed structural changes would not be in the interest of the consumer of legal services as they would impede access to barristers and would not lower costs. In addition, the structures would constitute a barrier to entry to the profession and present challenges for those practitioners who want to remain in the profession.

In October 2011, *Banco Espirito Santo* published a report predicting that the effect of the introduction of multi-disciplinary partnerships in the UK will reduce the number of competitors in the market to 5-10 commercial firms with a turnover of more than £1 billion per year. It also predicted that an additional 5-10 general service law firms will emerge, with similar turnover and with offices throughout the country akin to the chain stores or supermarkets that can be seen all over the UK and which have successfully crept into the Irish market also. Consider what deregulation and the removal of the barriers which had prevented firms in the US financial industry from merging with each other did for the financial services sector in the US. By the late 1990s, the financial sector had consolidated into a few gigantic firms, with few competitors who enjoyed monopoly-like powers over the market. Smaller banks had been taken over by bigger ones. For example, JP Morgan took over Bear Stearns and then WAMU; Bank of America took over Countrywide and Merrill Lynch; Wells Fargo took over Wachovia.

By allowing partnerships involving barristers to form, the Bill will not change 'Big Law' and could completely eradicate 'Small Law'. The Bill is likely to make the divide between the high fee earners and the low fee earners worse. Small, local or rural solicitors' firms would find themselves in competition with new legal superstructures, which could force them to close down. This would not necessarily be beneficial for the consumer of legal services either –the standards of the profession would reduce under the proposed new system of multi-disciplinary partnerships and there would be challenges in terms of how these entities would be regulated, given that they involve multiple disciplines and, in theory, could be providing legal advice, tax advice and accountancy advice, as the case may be.

A chambers system is not the answer; the chambers system in the UK is very much a closed shop with barristers' chambers only taking a handful of young barristers in each year so that they can 'pupil'. When the chambers system took over in the UK, nearly 75% of those who qualified as barristers ended up unable to practice because they could not obtain a pupillage or tenancy in chambers. Results set out in the English Bar Council's 2006 Report found that even today, a mere 17.5% of all graduates were likely to secure a position within chambers. What would such a closed shop system do for those starting out in practice who will need to have completed a pupillage and subsequently gained a tenancy in chambers in order to be able to practice? Moreover, what would such an eventuality here do for the serious unemployment problem in this country and the consequent strain on State resources?

There are few barriers to entry in the present regime.

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Once a person has the requisite legal education, he or she is entitled to practice and finding a barrister to pupil with is relatively easy. Accordingly, under the existing system, newly qualified barristers can readily enter into practice on the legal services market without having to overcome the hurdle of getting into chambers first. The 'independent referral bar' is a competitive model as it provides easy access for market participants, in addition to ease of access for consumers to barristers, while also ensuring that some 2,300 barristers compete against each other for work, all the while forcing prices to come down, provided that the consumer shops around for reduced legal quotes from practitioners and thereby takes advantage of the efficient market that exists.

If chambers are permitted, what will emerge is a concentration of talent in a few chambers linked to the big law firms. This will impede access to justice for all and will not reduce legal costs but will only serve to increase them. Moreover, there is a serious risk that a chambers system would institutionalise nepotism and give rise to oligopolies. Oligopolies are the antithesis of competition.

Under the present system, a barrister will take on a case *pro bono* or on a no win-no fee basis because he or she is not subject to any higher authority and is free to act in any case he or she pleases. In addition, the need to appease solicitors in order to gain further work means that the barrister will invariably take on a case under these terms to ensure that the connection with the solicitor is maintained. These aspects will deteriorate if the structural changes are introduced; barristers would need approval from a higher authority before taking on a non-profit making case. This is not to the advantage of the consumer.

Government Regulation of the Legal Profession

The Bill proposes the creation of a new frontline, overarching, regulatory structure in the form of the Legal Services Regulatory Authority ('LSRA'), which is effectively another quango and will be paid for by practitioners through a levy.

However, of crucial importance is that the LSRA will not be independent but will be entirely Government or Minister for Justice ('Minister') controlled. Take for example the following aspects of the governance of the Authority under the proposed Bill:

- Section 8(2) governs the appointment of members to the LSRA and provides that the eleven members of the Authority must be appointed by the Government, which must appoint one of the lay members of the LSRA as chairperson. Under s.8(4), four of the members must be nominated by the Bar Council and the Law Society in equal measure, which leaves at least seven of the eleven members to be directly appointed by the Government. There is a specific role of 'officer of the Minister' in the Bill, who will be one of the eleven members of the LSRA.
- Under s. 8(6), the Government determines the term of office for members of the LSRA under the proposed Bill. They are to be appointed for four years and can be reappointed for a further term of four years.
- Section 8(11)(b) provides that the LSRA appointees are to be remunerated by whatever sums the Minister determines (with the consent of the Minister for Public Expenditure and Reform).
- Section 8(11) provides that each member of the LSRA shall act on 'on such other terms and conditions … as the Government may determine'.
- Under s. 8(12), the members can be removed by the Government on the rather vague basis that their removal is necessary for the 'effective performance of the functions of the Authority'. This is a wide-ranging and subjective provision, which would cause any judicial review of whether a dismissal on these grounds was lawful, to be problematic. Arguably, because the Government could take such an opinion at any time, the member will be conscious of this and it will impede him or her in his ability to be independent of the Government in the performance of his or her role.
- The Minister must be kept informed by the LSRA of developments in relation to the provision of legal services by lawyers under s. 9(2)(g).
- Under s. 13, the Minister approves the appointment of consultants or advisors to the LSRA. With the consent of the Minister for Public Expenditure and Reform, the Minister approves fees to be paid to committee members, consultants and advisors.
- Pursuant to s. 16, the LSRA's three-year strategic plan must be approved by the Minister and the LSRA must comply with any directions, from time to time, of the Minister in relation thereto.
- The Minister can, in accordance with s. 17, direct the content and form of the annual report by the LSRA.
- The Minister can, under s. 18, request the LSRA to prepare or approve a code of practice or a professional code, and the LSRA is required to oblige. The LSRA must then submit the draft code to the Minister, for consent to its publication or approval, with or without modifications. The Minister's consent is required for the LSRA to amend, revoke or withdraw approval for a code of practice or professional code.
- Under s. 19, the Minister appoints the CEO of the LSRA on the recommendation of the Public Appointments Service, for a period of office not exceeding five years, as specified by the Minister. The CEO of the LSRA is accountable to the Public Accounts Committee and the Oireachtas Committee on Justice. Under s. 23, in giving evidence to the Committee, the CEO is *specifically proscribed from questioning or expressing opinion on the merits of any policy of Government, or on the objectives of such a policy*.
- Section 20 provides that the Minister appoints the staff (as oppose to members) of the Authority and determines their grades, remuneration, terms and conditions.

continued on p.13

Legal The Bar Review Update

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A directory of legislation, articles and acquisitions received in the Law Library from the 21st November 2011 up to 31st January 2012
Judgment Information Supplied by The Incorporated Council of Law Reporting

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ADMINISTRATIVE LAW

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Company – Right of access to courts – Assumption that proceedings will take full and normal course – Special circumstances where oppressive and unjustly restrictive of plaintiff's rights – Stay on proceedings pending payment of security – *Prima facie* defence – Delay in taking application – Not necessary for defendants to take full active part in conduct of defence – Companies Act 1963 (No 33), s 390 –Rules of the Superior Courts 1986 (SI 15/1986), O 29 – Security for costs refused (2007/2511 P – Herbert J – 10/2/2011) [2011] IEHC 83
Ronbow Management Company Limited v Sorohan Builders Limited and Ors

Summary judgement

Bona fide defence – Arguable basis to absolve from liability – Frustration – Estoppel – Whether all matters can be resolved at summary application without causing injustice to defendant – Whether insufficient evidence at time of summary application to advance defence in full- *First National Commercial Bank Plc v Anglin* [1996] 1 IR 75; *Banque de Paris v de Naray* [1984] 1 Lloyd's Law Report 21; *National Westminster Bank Plc v Daniel* [1993] 1 WLR 1453; *McGrath v O'Driscoll* [2007] 1 ILRM 203; *Central London Property Trust Ltd. v. Hightrees House Ltd.* [1947] 1 KB 130*; Ringsend Property Ltd. v Donatex Ltd. and Bernard McNamara [2009]IEHC 568,* (Unrep, Kelly J, 18/12/2009) and *Allied Irish Banks v Higgins and Ors[2010] IEHC 219,* (Unrep, Kelly J, 3/6/2010) considered. *Aer Rianta CPT v Ryanair Limited* [2001] 4 IR 607 and *Danske Bank a/s trading as National Irish Bank v Durkan New Homes and Others [2010] IESC 22* (Unrep, SC, 22/4/2010) applied – Central Bank Act 1942 (No. 22), s 16 –Central Bank and Financial Services Authority of Ireland Act 2004 (No.21), s 10 – Consumer Credit Act 1995 (No.24), s 30 and 38 – Summary judgement granted (2010/5690S – Birmingham J – 4/3/2011) [2011] IEHC 75
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PROFESSIONS

Partnership

Dissolution of partnership – Date of dissolution – Undertakings – Ostensible authority –

Obligation of notice – Ordinary course of business – Indemnity and contribution – Causation – Concurrent wrongdoer – Damages – Mortgage and lending transaction – Negligence – Whether partnership still in being when undertakings given – Whether unambiguous intention to dissolve partnership – Whether partner had authority to bind partnership – Whether implied or ostensible authority – Whether giving of undertakings within ordinary scope of solicitor's practice – Whether concurrent wrongdoer – *ACC Bank plc v Johnston* [2010] IEHC 236, (Unrep, 1/6/2010); *Stewart v Gladstone* [1878] 10 Ch D 626; *Re Hall* [1865] Ir Ch 287; *Martin v Sherry* [1905] 2 IR 62; *People (DPP) v McLoughlin* [1986] IR 355; *Allied Pharmaceutical Distributors v Walsh* [1991] 2 IR 8; *Kooragang Investments Pty Ltd v Richardson* [1982] AC 462; *Parkin v Carruthers* 3 Esp NPC 248; *Carter v Whalley* (1830) 109 ER 691; *Tower Cabinet Co Ltd v Ingram* [1949] 2 KB 397; *United Bank of Kuwait v Hammond* [1887] 1 WLR 1051; *Moloney v Liddy* [2010] IEHC 218, (Unrep, HC, Clarke J, 1/6/2010) and *Canole v Redbank Oyster Company Ltd* [1976] 1 IR 191 considered – Civil Liability Act 1961 (No 41), s 11 – Partnership Act 1890 (53 & 54 Vict. c. 39), s 36(1) – Indemnity and contribution given (2008/10559P – Clarke J – 4/3/2011) [2011] IEHC 108
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SI 544/2011

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SI 540/2011

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SOLICITORS

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Complaint – Professional responsibilities – Failure to discharge – Solicitors disciplinary tribunal – Tribunal found no *prima facie* case of misconduct made out – Appeal to High Court – Whether decision of tribunal deficient – Whether any material to cast doubt upon findings – Appeal dismissed (2010/100SA – Kearns P – 17/1/2011) [2011] IEHC 19
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Children

Proper provision – Will – Moral duty – Whether provision made by testator amounted to proper provision for children – Severe medical condition – Applicable legal principles – Value of estate at time of death – Current value of assets – Whether relevant date for ascertaining whether failure to make proper provision is date of death – Circumstances of relevant parties at date of death and date of hearing – Whether testator acting immorally or wrongly or capriciously in seeking to make provision for defendant – *XC v RT (Succession; Proper Provision)* [2003] 2 IR 250; *MPD v MD* [1981] ILRM 179 and *AC (A minor) v JF* [2007] IEHC 399 (Unrep, Clarke J, 23/11/2007) applied – Direction that assets be converted into cash and distributed 50% for third plaintiff and 16.66% for first and second plaintiffs and defendant – Succession Act 1965 (No), s 117 (2002/22SP – Birmingham J – 21/1/2011) [2011] IEHC 22
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Article

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AT A GLANCE

European Directives implemented into Irish Law up to 31/01/2012

Information compiled by Clare O'Dwyer, Law Library, Four Courts.

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DIR/2009-147, DIR/1992-43, DIR/2006-105
SI 534/2011

European Communities (conservation of wild birds (Killala Bay/Moy Estuary special protection area 004036)) regulations 2011
DIR/2009-147
SI 522/2011

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DIR/2009-72
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SI 535/2011

European Communities (road transport) (working conditions and road safety)(amendment) regulations 2011
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REG/765-2006
SI 549/2011

European Union (Cote d'Ivoire) (financial sanctions) (no. 5) regulations 2011
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SI 528/2011

European Union (Syria) (financial sanctions) (No.3) regulations 2011
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SI 537/2011

Financial transfers (Belarus) (prohibition) (no. 4) order 2011
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SI 550/2011

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REG/442-2011
SI 538/2011

BILLS OF THE OIREACHTAS AS AT 31ST JANUARY 2012 (31ST DÁIL & 24TH SEANAD)

Information compiled by Clare O'Dwyer, Law Library, Four Courts.

[pmb]: Description: Private Members' Bills are proposals for legislation in Ireland initiated by members of the Dáil or Seanad. Other Bills are initiated by the Government.

Advance Healthcare Decisions Bill 2012
Bill 2/2012
1st Stage – Dáil **[pmb]** *Deputy Liam Twomey*

Advertising, Labelling and Presentation of Fast Food at Fast Food Outlets Bill 2011
Bill 70/2011
2nd Stage – Dáil **[pmb]** *Deputy Billy Kelleher*

Bretton Woods Agreements (Amendment) (No. 2) Bill 2011
Bill 75/2011
Committee Stage – Dáil

Burial and Cremation Regulation Bill 2011
Bill 81/2011
Order for 2nd Stage – Dáil **[pmb]** *Deputy Thomas P. Broughan*

Central Bank and Credit Institutions (Resolution) Bill 2011
Bill 11/2011
2nd Stage – Seanad *(Initiated in Seanad)*

Central Bank and Financial Services Authority of Ireland (Amendment) Bill 2011
Bill 67/2011
1st Stage – Dáil **[pmb]** *Deputy Michael McGrath*

Central Bank (Supervision and Enforcement) Bill 2011
Bill 43/2011
Committee Stage – Dáil

Civil Registration (Amendment) Bill 2011
Bill 65/2011
Committee Stage – Seanad **[pmb]** Senator Ivana Bacik

Competition (Amendment) Bill 2011
Bill 55/2011
Committee Stage – Dáil

Construction Contracts Bill 2010
Bill 21/2010
2nd Stage – Dáil **[pmb]** *Senator Fergal Quinn (Initiated in Seanad)*

Coroners Bill 2007
Bill 33/2007
Committee Stage – Seanad *(Initiated in Seanad)*

Corporate Manslaughter Bill 2011
Bill 83/2011
2nd Stage – Seanad **[pmb]** Senator Mark Daly

Criminal Justice (Aggravated False Imprisonment) Bill 2012
Bill
1st Stage – Dáil

Criminal Justice (Female Genital Mutilation) Bill 2011
Bill 7/2011
Committee Stage – Dáil *(Initiated in Seanad)*

Debt Settlement and Mortgage Resolution Office Bill 2011
Bill 59/2011
Committee Stage – Dail

Dormant Accounts (Amendment) Bill 2011
Bill 46/2011
2nd Stage – Dáil *(Initiated in Seanad)*

Education (Amendment) Bill 2012
Bill 1/2012
Committee Stage – Seanad

Electoral (Amendment) (Political Donations) Bill 2011
Bill 13/2011
Committee Stage – Dáil **[pmb]** *Deputies Dara Calleary, Niall Collins, Barry Cowen, Timmy Dooley, Sean Fleming, Billy Kelleher, Seamus Kirk, Michael P. Kitt, Brian Lenihan, Micheál Martin, Charlie McConalogue, Michael McGrath, John McGuinness, Michael Moynihan, Willie O'Dea, Éamon Ó Cuív, Seán Ó Fearghaíl, Brendan Smith, Robert Troy and John Browne.*

Electoral (Amendment) (Political Funding) Bill 2011
Bill 79/2011
Order for 2nd Stage – Seanad

Energy (Miscellaneous Provisions) Bill 2011
Bill 54/2011
2nd Stage – Seanad *(Initiated in Dáil)*

European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Bill 2011
Bill 45/2011
Order for 2nd Stage – Dáil

Family Home Bill 2011
Bill 38/2011
Order for 2nd Stage – Seanad **[pmb]** *Senators Thomas Byrne and, Marc MacSharry*

Family Home Protection (Miscellaneous Provisions) Bill 2011
Bill 66/2011
2nd Stage – Dáil **[pmb]** *Deputy Stephen Donnelly*

Fiscal Responsibility (Statement) Bill 2011
Bill 77/2011

2nd Stage – Seanad

Health (Provision of General Practitioner Services) Bill 2011
Bill 57/2011
2nd Stage – Seanad *(Initiated in Dáil Éireann)*

Human Rights Commission (Amendment) Bill 2011
Bill 52/2011
2nd Stage – Dáil **[pmb]**

Immigration, Residence and Protection Bill 2010
Bill 38/2010
Committee Stage – Dáil

Industrial Relations (Amendment) Bill 2011
Bill 39/2011
Committee Stage – Dáil **[pmb**] Deputy Willie O'Dea

Industrial Relations (Amendment) (No. 3) Bill 2011
Bill 84/2011
2nd Stage – Dáil

Jurisdiction of Courts and Enforcement of Judgments (Amendment) Bill 2011
Bill 10/2011
2nd Stage – Dáil *(Initiated in Seanad)*

Legal Services Regulation Bill 2011
Bill 58/2011
2nd Stage – Dáil

Local Authority Public Administration Bill 2011
Bill 69/2011
2nd Stage – Dáil **[pmb]** *Deputy Niall Collins*

Mental Health (Amendment) Bill 2008
Bill 36/2008
2nd Stage – Dáil **[pmb]** *Senators Déirdre de Búrca, David Norris and Dan Boyle (Initiated in Seanad)*

Mobile Phone Radiation Warning Bill 2011
Bill 24/2011
Order for 2nd Stage – Seanad **[pmb]** *Senator Mark Daly (Initiated in Seanad)*

NAMA and Irish Bank Resolution Corporation Transparency Bill 2011
Bill 82/2011
2nd Stage – Seanad **[pmb]** *Senator Mark Daly*

National Tourism Development Authority (Amendment) Bill 2011
Bill 37/2011
Committee Stage – Seanad *(Initiated in Dáil)*

Ombudsman (Amendment) Bill 2008
Bill 40/2008
2nd Stage – Seanad *(Passed by Dáil Éireann)*

Patents (Amendment) Bill 2011
Bill 17/2011
2nd Stage – Seanad *(Initiated in Dáil Éireann)*

Privacy Bill 2006
Bill 44/2006
Order for 2nd Stage – Seanad *(Initiated in Seanad)*

Protection of Employees (Temporary Agency Work) Bill 2011
Bill 80/2011
Committee Stage – Dáil

Public Service Pensions (Single Scheme) and Remuneration Bill 2011
Bill 56/2011
Committee Stage – Dáil

Qualifications and Quality Assurance (Education and Training) Bill 2011
Bill 41/2011
Committee Stage – Seanad *(Initiated in Seanad)*

Reduction in Pay and Allowances of Government and Oireachtas Members Bill 2011
Bill 27/2011
2nd Stage – Dáil **[pmb]** *Deputy Pearse Doherty*

Registration of Wills Bill 2011
Bill 22/2011
Committee Stage – Seanad **[pmb]** *Senator Terry Leyden (Initiated in Seanad)*

Regulation of Debt Management Advisors Bill 2011
Bill 53/2011
2nd Stage – Dáil **[pmb]** *Deputy Michael McGrath*

Reporting of Lobbying in Criminal Legal Cases Bill 2011
Bill 50/2011
Order for 2nd Stage – Seanad **[pmb]** *Senator John Crown*

Road Transport Bill 2011
Bill 68/2011
Committee Stage – Seanad *(Initiated in Dáil)*

Scrap and Precious Metal Dealers Bill 2011
Bill 64/2011
2nd Stage – Dáil **[pmb]** *Deputy Mattie McGrath*

Smarter Transport Bill 2011
Bill 62/2011
2nd Stage – Dáil **[pmb]** *Deputy Eoghan Murphy*

Spent Convictions Bill 2011
Bill 15/2011
2nd Stage – Dáil **[pmb]** *Deputy Dara Calleary*

Statistics (Heritage Amendment) Bill 2011
Bill 30/2011
Order for 2nd Stage – Seanad **[pmb**] *Senator Labhrás Ó Murchú*

Thirtieth Amendment of the Constitution (Houses of the Oireachtas Inquiries) Bill 2011
Bill 47/2011
Committee Stage – Seanad *(Initiated in Dáil)*

Thirty-First Amendment of the Constitution (The President) Bill 2011
Bill 71/2011
2nd Stage – Dáil

Tribunals of Inquiry Bill 2005
Bill 33/2005
Report Stage – Dáil

Twenty-Ninth Amendment of the Constitution (Judges' Remuneration) Bill 2011
Bill 44/2011
Committee Stage – Seanad *(Initiated in Dáil)*

Twenty-Ninth Amendment of the Constitution (No. 2) Bill 2011
Bill 14/2011
2nd Stage – Dáil **[pmb]** *Deputy Micheál Martin*

Veterinary Practice (Amendment) Bill 2011
Bill 42/2011
2nd Stage – Seanad *(Initiated in Dáil)*

Water Services (Amendment) Bill 2011
Bill 63/2011
Passed by Dáil Éireann

Whistleblowers Protection Bill 2011
Bill 26/2011
Order for 2nd Stage – Dáil **[pmb]** *Deputies Joan Collins, Stephen Donnelly, Luke 'Ming' Flanagan, Tom Fleming, John Halligan, Finian McGrath, Mattie McGrath, Catherine Murphy, Maureen O'Sullivan, Thomas Pringle, Shane Ross, Mick Wallace*

ABBREVIATIONS

A & ADR R = Arbitration & ADR Review
BR = Bar Review
CIILP = Contemporary Issues in Irish Politics
CLP = Commercial Law Practitioner
DULJ = Dublin University Law Journal
ELR = Employment Law Review
ELRI = Employment Law Review – Ireland
GLSI = Gazette Law Society of Ireland
IBLQ = Irish Business Law Quarterly
ICLJ = Irish Criminal Law Journal
ICPLJ = Irish Conveyancing & Property Law Journal
IELJ = Irish Employment Law Journal
IIPLQ = Irish Intellectual Property Law Quarterly
IJEL = Irish Journal of European Law
IJFL = Irish Journal of Family Law
ILR = Independent Law Review
ILTR = Irish Law Times Reports
IPELJ = Irish Planning & Environmental Law Journal
ISLR = Irish Student Law Review
ITR = Irish Tax Review
KISLR = King's Inns Student Law Review
JCP & P = Journal of Civil Practice and Procedure
JSIJ = Judicial Studies Institute Journal
MLJI = Medico Legal Journal of Ireland
QRTL = Quarterly Review of Tort Law

- All estimates, financial information and accounts of the LSRA are subject to the approval of the Minister and the Minister can appoint any person to examine the accounts of the LSRA (ss. 22 and 23).
- The Minister can require reports on specified and other matters, including interim reports (s. 30).

The above examples present a shocking proposal for Government and Ministerial control of the legal profession. As Ronan Keane, former Chief Justice, put it, it is of crucial significance that regulators of legal professions must not be merely labelled 'independent' -they must be truly independent in the way their staff are appointed, remunerated and removed, by their answerability to government, by their rules of conduct and by the manner in which they manage their affairs.

Some commentators have cited the system in England as an example of a similar model to what is proposed in the Bill. Contrary to this common misconception, the fact is that the English Legal Services Act 2007 ensures that primary responsibility for regulation rests with the approved regulators and that the Legal Services Board is only entitled to interfere in certain defined circumstances, which is entirely different from the model proposed in the Irish Bill and should be considered as a model of regulation for this jurisdiction. Specifically, in England, ministers made concessions during the drafting stages so that the aims of Sir David Clementi's report on the profession could be achieved without threatening the independence of the legal profession in that jurisdiction.

The International View

We have already heard the views of the visiting representatives from the Council of Bars and Law Societies of Europe, the International Bar Association and the American Bar Association who came to Dublin at the end of last year to warn Ireland against the dangers of Government control of the legal profession. These visitors did not merely propagate some lofty notions about a vague concept of independence. They stated that the provisions of the proposed Legal Services Regulation Bill 2011 were liable to violate the very clear and well-settled recommendations and decisions of the United Nations, the Council of Europe, the European Court of Human Rights and the Court of Justice of the European Union on the fundamental need, in the interest of the public and the protection of human rights, for a genuinely independent legal profession.

The Council of Europe's Committee of Ministers' *Recommendation to Member States on the freedom of exercise of the profession of lawyer* contains numerous recommendations for its 47 member countries to ensure that the essential requirement of an independent legal profession is safeguarded. Just one example is the requirement that:

> 'All necessary measures should be taken to respect, protect and promote the freedom of exercise of the profession of lawyer without discrimination and without improper interference from the authorities or the public, in particular in the light of the relevant provisions of the European Convention on Human Rights.'

The United Nations also adopted *Basic Principles on the Role of Lawyers* for its 193 member states, which contains uniform provisions for the practice of the legal profession at an international level, including the crucial requirement that legal professions remain independent of external or executive interference. For example, the *Principles* state the following on the requirement that bodies like the Bar Council and the Law Society should be able to regulate without external interference:

'Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.'

In addition, the European Court of Human Rights and the Court of Justice of the European Union have repeatedly delivered judgments emphasising the basic need for the independence of lawyers.

The visiting representatives were deeply troubled that a developed, democratic nation like Ireland, which operates the rule of law, is seeking to exert executive control over the legal profession, which, it was stated, brings us in line with the legal systems of Iran, China, Gambia and Vietnam. Moreover, Dr. Mark Ellis, Director of the International Bar Association, announced that the contents of the Bill represent one of the most extensive and far-reaching attempts in the world by an executive to control the legal profession.

A concern for the existing serious unemployment issue in this country was exposed by Bill Robinson, the President of the American Bar Association, who warned that foreign companies will be loath to bring their business to Ireland if they cannot have access to a truly free legal profession to defend their interests.

The importance of this issue is not about lawyers; it is about the public. It is about the people who need access to lawyers who are free to defend their interests. This is particularly important in this country given that over 50 per cent of all litigation involves the State at some level.

New Levies and Insurance Costs

The Bill proposes the introduction of new levies for practitioners and increased insurance costs, which would either drive participants out of the market or increase the prices charged by those that remain in it. If the proposed LSRA is established, it will give rise to a levy on market participants to fund it. No regulatory impact analysis has been conducted by the Government as to what the impact of such a levy on practitioners would be. This is very surprising. Take by analogy the statement made by the Department of Justice (albeit under the reign of Dermot Ahern) when considering introducing a corporate manslaughter bill in its *White Paper on Crime Discussion Document No 3 'Organised and White Collar Crime'* (October 2010):

> 'The Commission's recommendations are currently the subject of consultations with Government Departments. As is normal practice, any legislative proposals in this area would have to be the subject of a Regulatory Impact Analysis, including consultations with stakeholders.'

In addition to the cost of a levy, the Bill contains a new system for specialised (as oppose to general) insurance, which will increase insurance costs for barristers that in turn would be passed on to the consumer of the service. Barristers would otherwise have to turn down work that was not within the remit of their insurance, which would restrict access to barristers, result in the loss of skills in discrete areas of the law which do not come before the courts regularly and preclude the operation of the 'cab-rank rule'.

Concluding Remarks: Protecting New Entrants, the Junior Bar and Consumers

Many legal practitioners are finding it nearly impossible to sustain their existence, as, in the case of solicitors, local law firms see profits shrink and insurance increase, and, in the case of barristers (particularly junior barristers), they are finding it hard to gain work and are encountering difficulties getting paid. The Bill in its present form will make it harder for fledgling barristers to enter into practice and is likely to cause a number of junior barristers to leave practice in the event that they cannot find employment in a chambers or partnership.

The 'independent referral bar' is a very competitive market; it is completely saturated which means that costs must be kept down by practitioners so that they can survive in the market. The public badly wants to see legal costs reduce further and legal fees continue to become cheaper in line with the effects of the recession -but consumers need to be aware that they can obtain fee estimates and quotes from a variety of practitioners before deciding which practitioner to engage. In addition, the public need to be made aware that the proposals in the Bill will not reduce costs but will only serve to increase them. The Bill will also remove the essential requirement of an independent legal profession. ■

The Criminal Justice Act 2011: A Boon to Investigators

Mark Byrne BL

Introduction

White collar crime has become a matter of great public interest in recent times as people endeavour to assess its role in the creation of the economic and financial crises currently facing the country. As part of its approach to tackling these crises, the government has sought to introduce new initiatives to combat this type of crime, and the Criminal Justice Act 2011, signed into law at the beginning of August 2011, has been presented as one such measure.

The term "white collar crime" peppers a press release from the Minister for Justice and Equality issued in the days after the passing of the 2011 Act into law, the Minister describing the legislation as "an important step in ensuring that the white collar criminal will be vigorously pursued by the authorities of the State"[1].

However, it would be a mistake to think that the presentation of the 2011 Act as a new and effective weapon in the fight against white collar crime means that the legislation is niche in nature. Rather, it entails a significant expansion of the powers of investigators in relation to a large number of "relevant offences", some of which are clearly associated with the description "white collar crime", but many more of which might be thought of as "mainstream" crimes including, for example, the offence of theft under section 4 of the Criminal Justice (Theft and Fraud Offences) Act 2001. The 2011 Act also introduces important changes to the investigation of criminal offences more generally.

In relation to the investigation of "relevant offences" under the 2011 Act, some of the more eye-catching measures include the power of investigators to "stop the clock" on detention for questioning under section 4 of the Criminal Justice Act 1984 and the ability to apply for a court order for the disclosure of documents or information that may assist in the investigation of an offence. An application may be made to the court that such disclosure be categorised in a particular way as a means of tackling the phenomenon of "snowing" investigators with huge volumes of unsorted material in an effort to thwart an investigation.

As regards the investigation of crime more generally, the most significant provisions concern developments to the right of a detained person to access to legal advice and clarification on the question of a rest period between midnight and 8am during detention for questioning under section 4 of the Criminal Justice Act 1984. The inclusion of provisions affecting the investigation of crime more generally sees a

1 Department of Justice and Equality Press Release, 5th August 2011.

continuation of the Oireachtas practice of recent times of passing omnibus legislation in the field of criminal justice, as was the case, for example, with the Criminal Justice Act 2006 and the Criminal Justice Act 2007.

The purpose of this article is to provide an overview of the 2011 Act and to consider the likely impact of the various provisions contained therein.

"Part 1 – Preliminary and General"

Of note in this Part is section 3 dealing with "relevant offences" for the purposes of the Act. It provides that most of the provisions of the Act will only apply to arrestable offences (offences carrying a maximum penalty of five years or more) detailed in the substantial Schedule 1 to the Act. However, section 3(2) further provides that, as regards a wide range of specified areas, the list of relevant offences may be added to by ministerial order.

A raft of relevant offences are set out in Schedule 1, including offences relating to banking, investment of funds and other financial activities, company law offences, money laundering and terrorist offences, theft and fraud offences (including many frequently prosecuted offences detailed in the Criminal Justice (Theft & Fraud Offences) Act 2001), bribery and corruption offences, consumer protection offences and criminal damage to property offences.

Section 3(2) allows for the list of the relevant offences to be added to for all arrestable offences of the type referred to in Schedule 1, but also competition offences, criminal acts involving the use of electronic communication networks and information systems or against such networks or systems or both, and offences concerning the raising and collection of taxes and duties.

In order to add to the list of relevant offences, the Minister for Justice and Equality must consider that the powers under the Act are, by reason of the nature of the arrestable offence concerned and the prolonged period of time that may be required for the investigation of such offences as a result of the complexity of such investigations, necessary for the investigation of that offence. The Minister must consult with any other relevant Minister before making such an order.

Notwithstanding the liberal use of term "white collar crime" in relevant Dáil speeches and the press release publicising publication of the Act, the breadth of the range of "relevant offences" covered by Schedule 1 and those that could potentially become relevant offences by operation of section 3(2) stretches any traditional definition of the term at the seams.

Of course, the definition of "white collar crime" is not set in stone, but it is clear that key provisions of the 2011 Act can be used in a very wide range of situations that are well beyond Edwin Sutherland's seminal, and rather quaint, 1940s definition of white collar crime as "a crime committed by a person of respectability and high social status in the course of his occupation"[2]. It is clear, for example, that investigators may avail of all of the developments introduced by the 2011 Act when investigating a straight forward theft offence, a point noted in a Seanad debate on the Bill leading to the 2011 Act.[3]

"Part 2 – Detention"

The most significant aspect of Part 2 – Detention is the extent to which it amends and extends the operation of section 4 of the Criminal Justice Act 1984 in relation to "relevant offences".

As regards the investigation of crime more generally, it clarifies the position on rest periods between midnight and 8am for suspects detained under section 4 of the Criminal Justice Act 1984. It also strengthens a suspect's right of access to legal advice and extends this protection, not just to detention for questioning under the 1984 Act, but also to detention for questioning under analogous provisions, including the Offences Against the State Act 1939, the Criminal Justice (Drug Trafficking) Act 1996 and the Criminal Justice Act 2007.

The Historical Context for Part 2 of the 2011 Act

We have come a long way since the days when a suspect could not be detained for questioning by the relevant investigative arm of the State.

Save for the relatively rare situation whereby an individual was happy to voluntarily "help gardaí with their enquiries", properly collected confession evidence was seldom available to the prosecution under the old common law regime. In any case where there was an argument that an accused had not voluntarily "assisted gardaí", the onus was on the State to prove beyond a reasonable doubt that the person knew of his right to leave at any time until he was told to leave the garda station or until he was arrested[4].

The rationale for this common law position appears to have arisen from a concern to uphold the rights of a suspect, particularly the right to liberty, a right which came to be protected by Art. 40.4.1 of the Constitution. However, few rights, if any, are protected absolutely, and the strong degree of protection provided by the traditional common law position for an individual suspected of a crime came to be eroded in this jurisdiction over the years, starting with the Offences Against the State Act 1939. This reshaping of the rights of the individual has gathered pace in the last few decades, the most recent development in this regard being the passing of the 2011 Act.

Section 30(3) of the Offences Against the State Act 1939 provided for a right of detention for up to a maximum of seventy-two hours. Any admission against interest made during questioning is *prima facie* good evidence against the suspect in any prosecution under the well established

2 Sutherland, E H, (1949) *White-collar Crime*, New York: Holt, Rinehart and Winston, at p.9.

3 Second Stage Seanad Debate on 27th July 2011; Senator Bacik stated:

> "We all have a very clear idea about the sort of offences this Bill is designed to cover. The suspension of detention periods in section 7 should be used for offences where investigations are complex and the Garda may have to pause to examine documents or computer files. There is a valid concern that the Bill would allow for section 7 to be operated even in respect of an offence that may ultimately be quite minor".

4 This position was confirmed in *People (DPP) v. Coffey [1987] ILRM 727*.

exception to the rule against hearsay allowing for the admissibility of confession evidence.

The 1939 Act was challenged in *People (DPP) v. Quilligan and O'Reilly (No.3) [1993] 2 IR 305* but the Supreme Court upheld the constitutionality of the legislation. The court rejected arguments that the Act violated the right to be held equal before the law[5], the right to personal liberty[6] and the right to silence[7].

Section 4 of the Criminal Justice Act 1984 saw a further extension of the investigative tool of "detention for questioning", this time allowing for detention for questioning for periods of up to 12 hours where the investigation of serious offences (offences carrying a maximum of 5 years' imprisonment or more) was concerned. This period was extended further to 24 hours by the Criminal Justice Act 2006.

Section 2 of the Criminal Justice (Drug Trafficking) Act 1996 introduced detention for questioning for a period of up to one week if necessary for the proper investigation of serious offences covered by the Act.

Section 50 of the Criminal Justice Act 2007 expanded the concept of detention for questioning further by providing for detention for questioning for periods of time of up to one week if considered necessary for the proper investigation of serious offences covered by the Act (predominantly serious offences involving the use of firearms).

In relation to the various provisions set out above, the legislature has always provided for a series of "checks and balances" within the "detention for questioning" provisions.

The safeguards take various forms, including a requirement that extensions of time for detention are sought at regular intervals and that adequate periods of rest are allowed.[8]

A set of comprehensive regulations was adopted governing the treatment of persons in this form of custody[9].

Changes Introduced by Part 2 of the 2011 Act

Section 4 of the Criminal Justice Act 1984 is perhaps the most utilised of the "detention for questioning" provisions, mainly because of its extremely broad ambit. Whereas, for example, the Criminal Justice (Drug Trafficking) Act applies in the main, as the name of the Act suggests, to drugs offences, and section 50 of the Criminal Justice Act 2007 applies largely to serious offences involving firearms, the 1984 Act provides for a power of detention for questioning if it is necessary for the proper investigation of any offence that carries a maximum sentence of 5 years or more. There is a multitude of offences, diverse in nature, that fall into this category.

Part 2 of the 2011 Act, specifically section 7 thereof, makes substantial changes to section 4 of the Criminal Justice Act 1984, but only with regard to "relevant offences" within the meaning of the 2011 Act.

Section 7(a) of the 2011 Act inserts a substantial addition to section 4 of the 1984 Act in the form of subsections 3A to 3F. It was commenced on 9th August 2011[10]. Section 4(3) of the 1984 Act provides for the detention for questioning of a person for up to a maximum of one day, excluding the possibility of a rest period of up to 8 hours between midnight and 8am. However, there is no provision for any break in time in the calculation of the period of detention. Further, section 10 of the 1984 Act prohibits the rearresting of a person for the purpose of detaining them for questioning afresh, save on application for an arrest warrant to a District Court Judge who must be satisfied that further information has come to the knowledge of the gardaí since the original period of detention that would justify a fresh period of detention. This means that gardaí generally have just one shot at making the most of what is an extremely powerful investigative tool.

The effect of section 7(a), however, is that, where it is deemed necessary for the further and proper investigation of a "relevant offence" for the purposes of the 2011 Act, the gardaí may suspend the period of questioning on up to two occasions so long as not more than 4 months elapses from the date that the detention is first suspended. In other words, in relation to a large number of offences, the gardaí can now stop the clock running on the maximum of 24 hours of questioning available to them and take a generous amount of time to make further enquiries before resuming questioning of the suspect. And they may do so on not one, but two, separate occasions. As the explanatory memorandum to the first draft of the Bill leading to the 2011 Act puts it: "The purpose of these provisions is to allow the gardaí to follow up on information obtained during questioning".

At first blush, this development would seem to be very investigator friendly, in that gardaí are not under pressure to achieve results from a sequence of questioning that must be carried out in one "unstoppable" period of time. The ability to suspend questioning gives them time to carry out further necessary investigations and check facts, but a by-product of the legislative development is that they also have time to evaluate the approach taken to date during questioning and also introduce other investigators at a later stage if a new or different approach to questioning is felt to be in order.

However, such a development might also be positive from a suspect's point of view. If the gardaí exercise the new entitlement to suspend questioning, the suspect may feel less pressurised as a result of being detained for less time in one go than would otherwise be the case. Further, even if the suspect has availed of the right to legal advice during the period of questioning, a suspension of questioning would allow for more in-depth and considered legal advice away from the potentially oppressive setting of a garda station. On any resumption of detention for questioning, the suspect has at least the possibility of a strategy or approach to the detention informed by the experience of the initial period of detention as well as any additional legal advice received in the interim.

As regards the practicalities of suspending questioning, section 7(a) states that it is to be done on notice in writing to the suspect, with the notice to provide details of when and where the suspect should return for a resumption of the balance of time allowed for detention for questioning. There

5 See Art. 40.1 of the Constitution.
6 See Art. 40.4.1. of the Constitution.
7 Protected by Art. 38.1 of the Constitution.
8 See, for example, Reg. 12(7) of the Criminal Justice Act 1984 (Treatment of Persons in Custody) Regulations 1987.
9 See the Criminal Justice Act 1984 (Treatment of Persons in Custody) Regulations 1987.
10 Commenced by S.I. 411 of 2011.

are provisions for either the gardaí or the suspect affected by any suspension in questioning to seek to change the time and place of any resumption of the balance of the period of detention allowed for questioning, although the gardaí may only seek to do so on one occasion during each such period of suspension.

Procedures to ensure compliance with the command to return at an appointed time and place for further detention for questioning are provided for by section 8 of the 2011 Act, which inserts sections 4A - 4C after section 4 of the 1984 Act. These provisions give the gardaí the power to arrest without warrant a suspect who has not complied with a notice to return for questioning (and return the suspect directly to the garda station for a resumption of the balance of the period of detention allowed for questioning) and also make it an offence to fail to return to a garda station for a further period of detention for questioning.

Greater Clarity on Rest Periods Between Midnight and 8am

The next significant provision of the 2011 Act is section 7(c), which has not, as of the time of writing, been commenced yet. It affects the investigation of crime more generally. When commenced, it will insert a new section 6 into the Criminal Justice Act 1984. The aim of section 7(c) would seem to be to bring clarity and certainty to the issue of detaining a suspect during the period midnight to 8am.

Currently, section 6 of the 1984 Act only provides that questioning may be suspended during the aforementioned period where the member in charge is of the "opinion" that this should be done in order to allow the suspect to rest. The suspect must consent in writing to a suspension of questioning to a point in time not later than 8am. If such consent is obtained, the suspect is given a written notice of the suspension of questioning until a specified time not later than 8am. The notice has the effect of stopping the clock and the rest period does not form part of the time allowed for detention of the suspect.

Section 6 currently states that this notice may be withdrawn for "serious reasons", in which case questioning may resume and the clock starts running again on the period of detention. However, there is no elaboration within the section as regards what might constitute a "serious reason" justifying the withdrawal of a notice providing for suspension of questioning.

Although Regulation 12(7) of the Criminal Justice Act 1984 (Treatment of Persons in Custody) Regulations 1987 puts some flesh on the bones of section 6, the primary legislation is not as clear as it might be.

When commenced, section 7(c) will introduce a new section 6 that will remove some of the uncertainties inherent in the current section 6. First, questioning will be suspended during the period midnight to 8am unless the suspect objects to such a suspension. Thus the discretion of the member in charge to allow questioning to continue during the period midnight to 8am, if he is not of the opinion that it is reasonably necessary to allow the suspect to rest, is removed.

Secondly, the grounds on which An Garda Síochána may continue to question a suspect during the aforementioned period are described. The new Section 6(d) will provide that a member in charge of a Garda Síochána station may authorise the questioning of a person detained between the hours of midnight and 8 a.m. where the member concerned has reasonable grounds for believing that to suspend the questioning would involve a risk of injury to other persons, damage to property, interference with evidence, accomplices being alerted or hindering the recovery of property.

This provides greater clarity than the situation under the current regime, whereby a member in charge may authorise continued questioning of a suspect during the period midnight to 8am for an unspecified "serious reason".

Improvements to the Right of Reasonable Access to Legal Advice

Again, as regards the investigation of crime more generally, section 9 of the 2011 Act, which at the time of writing has not yet been commenced, inserts new provisions after section 5 of the Criminal Justice Act 1984 that bolster and improve a suspect's right of reasonable access to legal advice during a period of detention for questioning.

These changes bring Irish law more clearly into line with European standards. As recently as 2010[11], the Irish courts have held that questioning of a suspect may commence before the arrival of a solicitor. However, the European Court of Human Rights took a strict line on the importance of access to legal advice in the case of *Salduz v. Turkey (2008) 49 EHRR 421*. In a clear reference to this jurisprudence, the Minister for Justice and Equality explained the thinking behind section 9 as follows:

> "It is, of course, generally Garda practice to delay questioning to facilitate [legal] consultations. However, recent jurisprudence of the European Court of Human Rights emphasises the importance of detained persons having, as a rule, access to legal advice in advance of questioning. Exceptions are permitted but they must be based on a compelling reasons arising from the circumstance of the particular case. In order to ensure that laws are fully compliant with our obligations under the convention and have the degree of certainty required it is necessary to clarify this matter in legislation."[12]

When commenced, the new section 5A of the 1984 Act will provide that no questioning of a person detained for questioning shall occur until after the person has consulted with his or her solicitor, where they have requested a solicitor. In ease of the gardaí, the clock will stop running (for a maximum of up to six hours, depending on the circumstances and subject to any future reduction by way of ministerial regulation) on the reckonable period of detention from the time of the request for a solicitor until the conclusion of a consultation with the solicitor. A member in charge may authorise questioning of a suspect before the suspect has had an opportunity to consult with a solicitor where one or more

11 See *DPP v. Gormley* [2010] IECCA 22.

12 Second Stage Dáil Debate on Criminal Justice Bill 2011, 18th May 2011.

grounds identical to those set out in the new section 6(d) of the 1984 Act, as outlined above, are present.

It is clarified in section 9(a)(8) of the 2011 Act that a consultation with a solicitor may be in person or by telephone and that a "consultation in private" is within sight of a member of An Garda Síochána but out of hearing distance.

Without prejudice to the Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations 1987, provision is made in the new section 5B of the 1984 Act for the creation by the Minister for Justice and Equality of regulations in relation to access to a solicitor by persons detained in Garda stations. These regulations would concentrate in particular, but not exclusively, on procedures to be applied where difficulties arise with contacting a nominated solicitor, or where suspects fail to nominate a solicitor or where issues arise concerning the waiver of the right to consult a solicitor

It is provided for in section 9(b), section 13 and section 14 that the new section 5A, when commenced, shall also apply to detention for questioning under section 30 of the Offences Against the State Act 1939, section 2 of the Criminal Justice (Drug Trafficking) Act 1996 and section 50 of the Criminal Justice Act 2007 respectively.

Section 9(c), section 9(d) and section 9(e) of the 2011 Act amend sections 18, 19 and 19A of the 1984 Act (as amended by the Criminal Justice Act 2007) in order to make it clearer that an inference adverse to an accused arising from his or her failure or refusal to account for suspicious circumstances, amongst other matters, on being questioned by a garda, cannot be drawn in proceedings unless the accused was informed before such failure or refusal occurred that he or she had the right to consult a solicitor and was afforded an opportunity to do so (other than where he or she waived the right).

"Part 3 – Provisions Relating to Documents and Information"

Part 3 of the 2011 Act only applies to "relevant offences" for the purposes of the Act. It is comprised of sections 15 to 22 of the Act. It was commenced in full on 9th August 2011.[13]

Section 15 is a wide-ranging provision that compels a person, in certain circumstances, to provide documents or information that may assist in the investigation of a relevant offence. The word "document" is defined broadly in the interpretation section of the Act and clearly takes account of the widespread use of computers and other digital equipment to store data and information.

In the words of the Minister for Justice and Equality, section 15 is "targeted at witnesses, not suspects"[14]. In recognition of the right against self-incrimination, section 15(10) provides that a statement or admission made by a person pursuant to an order under section 15 is not admissible as evidence in proceedings against the person for an offence (other than an offence under subsection (15), (16) or (17)). Respectively, these latter subsections make it an offence for a person to fail or refuse to comply with an order under section 15, or to provide false or misleading information, or to fail to comply with an undertaking to keep documents safely and securely given by him or her under section 15(8).

In *Dunnes Stores Ireland Company v. Ryan [2002] 2 IR 60*, Kearns J. in the High Court considered the constitutionality of aspects of section 19 of the Companies Act 1990, a statutory provision analogous in many ways to section 15 of the 2011 Act, save in one key respect. Under section 19 of the 1990 Act, potentially incriminating information could not only be compelled (as is the case under section 15 of the 2011 Act) but also later be used in evidence against the person who provided it (a situation section 15 protects against where a person cooperates with investigators). Kearns J. held that this latter part of section 19 involved an unacceptable infringement of the privilege against self-incrimination.

However, as regards that part of the statutory provision that provided for the compulsory production of documents and the provision of explanations at the request of inspectors appointed by the Minister, Kearns J. upheld its constitutionality, as it satisfied the proportionality tests established in *Heaney v. Ireland [1996] 1 IR 580* and *Re National Bank [1999] 3 IR 145*, and was, therefore, a reasonable incursion on the privilege against self-incrimination. It would seem, then, that section 15 would likely pass muster on an application of the approach taken by Kearns J. in the *Dunnes Stores* case.

Section 15(1) allows the gardaí to apply to the District Court for an order compelling a person to disclose documents or provide information relevant to the investigation of a relevant offence. On the basis of the Minister's comments that section 15 is targeted at witnesses, it appears that, to take one scenario, an innocent employee of a commercial organisation might be made the subject of such an order in an effort to investigate white collar crime suspected to have been committed within the organisation.

Section 15(2) allows for orders to be made in relation to the production of documents or allowing access to them. Section 15(3) gives power to the District Court to make an order concerning the provision of information to the gardaí by answering the questions specified in the application or making a statement setting out the answers to those questions, or both, and the making of a declaration of the truth of the answers to such questions.

In either case, the District Court judge must be satisfied, on information on oath from the garda concerned, that there are reasonable grounds for believing that the document or information is relevant to the investigation and for suspecting that the document or information may constitute evidence of or relating to the commission of that offence. The District Judge must also be satisfied that the documents or information should be provided, having regard to the benefit likely to accrue to the investigation and any other relevant circumstances.

Where the judge orders the production of documents, he or she may order the person to identify and categorise the documents in the particular manner (if any) sought by the gardaí or in such manner as the judge may direct.

The requirement to provide documents in a particular manner would seem to be an effort to inhibit the practice of "snowing"[15], a practice whereby investigators are

13 By virtue of S.I. 411 of 2011.

14 Second Stage Debate in Seanad Éireann on 26th July 2011.

15 The term appears to have been coined by the academic John

inundated with huge volumes of unsorted material with the consequence that the investigation is, at a minimum, slowed down, and potentially thwarted altogether. It is a very practical development in the law that gives effect to the comments of the Minister for Justice and Equality, where he stated, "My intention is to ensure that the new procedures and powers set out in the Bill will speed up future investigations and prosecutions."[16].

It is clarified in section 15(4) that an order to provide information may only be made in respect of information that the person concerned has obtained in the ordinary course of business.

Sections 15(5) - (7) concern garda access to material once an order is made. An order may require that a garda be allowed to enter a particular place to obtain access to the documents covered by the order. Gardaí may be entitled to access to passwords where the documents concerned are in non-legible form, for example where they are contained in a computer. Gardaí may make copies of documents and take the copies away. An order does not confer any right to production of, or access to, any document subject to legal professional privilege. An order has effect notwithstanding any other obligation as to secrecy or other restriction on disclosure of information imposed by statute or otherwise.

Under section 15(8), there is provision, in certain circumstances, for the retention by, or return to, a person of documents which may otherwise be taken away by the gardaí where the documents are required for the purposes of a person's business or other legitimate purpose. The person must undertake in writing to keep the documents safely and securely and when requested, to furnish them to the gardaí in connection with any criminal proceedings for which they are required. This provision also applies to third parties affected by an order under section 15. Section 15(9) provides that documents taken away by a garda may be retained by the member for use as evidence in any criminal proceedings.

Determining Claims of Legal Professional Privilege over Documents or Information

Section 16 covers the issue of legal professional privilege and makes provision for determining legal professional privilege issues which arise in relation to District Court orders under section 15 requiring disclosure of documents to the gardaí. Insight into the thinking behind section 16 is found in the Minister for Justice and Equality's contribution to the Second Stage Dáil debate on the Bill leading to the 2011 Act[17], where he stated:

> "Access to documents by the Garda Síochána can be severely delayed by claims of legal privilege which give rise to applications to the High Court. Section 16 contains provisions aimed at reducing such delays by making provision for determining legal professional privilege issues which arise in District Court orders under section 15 requiring the disclosure of documents to the Garda."

Section 16(1) defines "privileged legal material" as a document which, in the opinion of the court concerned, a person is entitled to refuse to produce or to give access to it on the grounds of legal professional privilege. Under sections 16(2) and section 16(3), if a person refuses to disclose a document or give access to it pursuant to an order under section 15 on the grounds that it is privileged legal material, a garda, or the person concerned may apply to a District Court judge for a determination as to whether the document is privileged legal material. It seems reasonable to assume that such applications will be dealt with quite expeditiously by the District Court, or at least more quickly than might be the case if such applications were to be made to the High Court.

Section 16(5) allows a District Court judge, pending the final determination of an application under subsection (2) or (3), to give interim or interlocutory directions, including, where a case involves a substantial volume of documents, the appointment of an experienced, independent person with legal qualifications to examine the documents and prepare a report for the judge with a view to assisting or facilitating the judge's determination as to whether the documents are privileged legal material.

This is an interesting development that provides that a District Court judge may seek external professional assistance, which would likely expedite decisions on such applications in circumstances where District Courts, as courts of summary justice, already have heavy workloads. It is consistent with the Minister's stated aim of speeding up the investigation and prosecution of white collar crime.

Section 16(6) allows the District Court judge to direct that an application under subsection (2), (3) or (5) be heard otherwise than in public and section 16(7) sets out the notice requirements for applications under this section.

The next two sub-sections of section 16 provide further evidence of a desire on the part of the legislature to introduce processes that expedite the investigation of white collar crime. Section 16(8) provides that an appeal against the determination of a District Court judge under this section shall lie to the Circuit Court. No further appeal shall lie from an order of the Circuit Court made on such an appeal. Section 16(9) provides that rules of court may make provision for the expeditious hearing of applications to a District Court judge, and any appeals against the determinations of such a judge, under this section. These provisions reveal an eagerness to reduce the amount of time that investigations remain delayed by court applications.

Section 16(10) enables the Minister to make regulations for the purposes of this section relating to the awarding, and payment, of costs to or by any party pursuant to an application or an appeal under this section.

Section 17 creates an offence relating to the falsification, concealment or destruction of documents relevant to a garda investigation into a relevant offence (other than an offence to which section 51 of the Criminal Justice (Theft and Fraud Offences) Act 2001 applies).

In a provision that strives for an easier and faster process for adducing evidence, section 18 allows for certain evidential

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Braithwaite who used it to describe the interaction between a particular company and the Food and Drug Administration in the USA: (1984) *Corporate Crime in the Pharmaceutical Industry,* London: Routledge & Kegan Paul, p.361.

16 In a contribution to the Second Stage Dáil Debate on the Criminal Justice Bill 2011 on 18th May 2011.

17 18th May 2011.

presumptions to arise where documents are admitted as evidence in proceedings for a relevant offence. It provides for presumptions on the creation, ownership, receipt and other matters relating to documents. These presumptions may be rebutted by the defendant.

Creation of an Offence of Failing to Report Information

Section 19 creates a significant new offence which relates to the failure to report information to the Gardaí where "relevant offences" are concerned. A person who has information which he or she knows or believes might be of material assistance in preventing the commission by another person of a relevant offence or in securing the apprehension, prosecution or conviction of another person for such an offence, and who fails without reasonable excuse to disclose such information as soon as practicable to the Gardaí will be guilty of an offence that is punishable by an unlimited fine and imprisonment for up to five years.

A similar offence is contained in section 9 of the Offences Against the State (Amendment) Act 1998, but in that Act it is limited to certain serious offences.

Section 19 gives teeth to the legislation and it was accorded centre stage in the press release publicising the passing into law of the Act, where the Minister for Justice and Equality was quoted as saying:

> "People who have information relating to current investigations into financial wrongdoing, even if it predates the enactment of this legislation, who have not made that information available to An Garda Síochána, need to be aware that following the commencement of this Act, they will be under a legal obligation to assist the Gardaí in their investigations. Should it emerge, following the commencement of this Act, that they failed to do so, they themselves will be liable to criminal charges. This is just one of the reasons why this Act is so important in the context of current investigations."[18]

Protection for Whistleblowers

In an important protection for whistleblowers, section 20 guarantees protection for employees from penalisation for disclosing information relating to relevant offences.

Section 20(1) specifies that an employer shall not penalise or threaten penalisation against an employee for making a disclosure or giving evidence in relation to such disclosure in any proceedings relating to a relevant offence. Nor shall an employer cause or permit any other person to penalise or threaten penalisation against such an employee.

It is provided in section 20(2) that an extensive mechanism set out in Schedule 2 to the 2011 Act shall apply as regards any alleged contravention of section 20. Schedule 2 provides for any initial complaint to be made to a Rights Commissioner, who will determine the complaint and apply one of a range of remedies, if appropriate. An appeal from any decision of a Rights Commissioner shall lie to the Labour Court.

Section 20(6) defines "penalisation" broadly, describing it as any act or omission that affects an employee to his or detriment with respect to his or her employment and including but not limited to an array of specified actions, including dismissal, demotion, unfair treatment and threats of reprisals. Further, section 20(4) provides that, where the "penalisation" of an employee is a dismissal, the employee shall have a choice of using the Rights Commissioner mechanism set out in Schedule 1 of the Act or the more traditional routes of an action under the Unfair Dismissals Acts or a common law action for wrongful dismissal.

Section 21 creates a number of new offences arising out of the operation of the 2011 Act. Under section 21(1), it is an offence for an employee to make a disclosure knowing it to be false or being reckless as to whether it if false. Further, an employer who contravenes section 20 of the Act shall be guilty of an offence. Further offences arise if, where the mechanism set down in Schedule 2 to the Act is invoked, a person makes a false statement in the context of a complaint that comes before the Labour Court or fails to engage with the Labour Court as required.

Neither section 20 nor section 21 were included in the original draft of the Bill leading to the 2011 Act. They came to be added in an effort to ensure the efficacy of the measures introduced by the legislation. The addition of the sections strengthens protection for employees. This protection extends to those who might be described as willing "whistleblowers", but also those who find themselves caught up unexpectedly and reluctantly in an investigation involving their employer that, even where there is ultimately a successful prosecution, reveals absolutely no wrong doing on the part of the employee. The protection afforded by section 20 but also the offences outlined in section 21 (a classic "carrot and stick" approach) greatly increase the chances of cooperation by both employers and employees regarding any investigation of "relevant offences" under the 2011 Act.

Section 22 covers the question of liability for offences by bodies corporate and provides that, where a body corporate is found guilty of an offence under the Act, liability may also be ascribed to an individual, if that individual has a prescribed level of involvement with the commission of the offence.

Conclusion

Clearly, the Criminal Justice Act 2011 has a significance and reach well beyond so-called white collar crime. Rather, the Act is both a refinement and expansion of the powers of investigators in relation to a very broad range of offences.

Perhaps the strongest provision will prove to be section 19, which makes it an offence to fail to report information to the gardaí in regard to relevant offences. Speaking in relation to section 19 in a Seanad debate on the Bill leading to the 2011 Act, the Minister for Justice and Equality said:

> "It will impose obligations on accountants and auditors. One of the mysteries to me with regard to banking matters is how it was that accounts of financial institutions were audited in circumstances

18 Department of Justice and Equality Press Release, 5th August 2011.

in which the validity of those accounts were seriously questionable."[19]

The introduction of section 19 of the Act will certainly give such professionals pause for thought.

19 Second Stage Seanad Debate, 26th July 2011.

It is too early to say how effective the 2011 Act will be in achieving the government's stated aims of strengthening garda investigative powers and reducing the delays associated with the investigation and prosecution of complex crime. However, it is clear that, on the face of it, it is an important development in our laws governing the investigation of a broad range of criminal offences. ■

The Criminal Justice Act 2011, Criminal Discovery, and egalité des armes

Michael Mulcahy SC

Introduction

The Criminal Justice Act, 2011, was signed by the President on the 2nd day of August 2011, and most of the provisions came into operation on 9th August 2011 (S.I. No. 411/2011). This article focuses mainly on Part III of the Act which contains new provisions concerning documents and information, the intention being, as stated in the accompanying Explanatory Memorandum, to "assist in reducing the delays associated with the investigation and prosecution of complex crime, in particular white collar crime."

Section 15 enables a member of the Garda Síochána, for the purposes of the investigation of a relevant offence (Schedule I of this Act lists 30 offences relating to banking, theft, fraud, bribery corruption, money laundering, terrorism, companies, investment of funds and other financial activities), to apply to a Judge of this District Court for an Order requiring a person to make particular documents available and/or answer questions or make a statement concerning particular information.

Section 15(2) empowers the Judge, if he is satisfied (in summary) that the person has the documents in question and that they are "*relevant* to the investigation", and that the documents "may constitute *evidence of or relating to the commission of that offence*", to order the person both to produce and if necessary categorise them, and give the member of the Gardaí access to them.

Section 15(3) (in summary) empowers the Judge to order a person to "provide the information" to the Gardaí, either by "answering the questions specified in the application or making a statement setting out the answers to those questions or both".

Whereas the primary focus of the Act may be to obtain documents and information from innocent (i.e. non-accused) persons, it is clear that these provisions apply also to a person who is under investigation and/or a person who may be charged with an offence listed in Schedule I of this Act.

The Act does contain provisions protecting privileged legal material [Section 16] but also provides for a process where the Gardaí can challenge that claim for privilege in the District Court [Section 16(2)], as well as a procedure for a person seeking to uphold that privilege to make a similar application [Section 16(3)].

Furthermore, Section 15(10) states:

> "A statement or admission made by a person pursuant to an order under this section shall not be admissible as evidence in proceedings brought against the person for an offence…"

The constitutionality or otherwise of Section 15 of this Act is not the focus of this article. It is interesting, however, to draw attention to the judgment of Murray J. in *Curtin v Dáil Éireann* [2006] IESC 14, where he states:

> "…it is appropriate to draw attention to the distinction between a requirement that a person make a statement or give evidence which may tend to incriminate him and a requirement that a person produce for inspection whether by the Garda Síochána or other organs of the State a physical article, including a document. The first right or privilege is recognised in our law and protected by the Constitution and, incidentally by the European Convention on Human Rights and Fundamental Freedoms…"

These are undoubtedly powerful new weapons in the armoury of the prosecution. The documents and/or statements obtained by prosecuting authorities may be wide ranging and voluminous and the issue arises as to whether or not a person who is charged with an offence scheduled in the Act has a right to obtain and examine the statements and/or documents which the prosecuting authorities have obtained pursuant to their (new) powers contained in this Act, particularly if such documents do not form part of the 'book of evidence'.

Criteria for Discovery

The criteria for discovery in civil cases is well known: One can do little better than quote the definition given by Brett L.J. in *Compagnie Financiere du Pacifique v Peruvian Guano Co.* [1882] 11QBD55, namely, that a document relates to the matters in question in the action

> "which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary".

This statement was approved by Fennelly J. in *Ryanair plc. v Aer Rianta C.P.T.* [2003] IESC, and by Geoghegan J. in *Taylor v Clonmel Healthcare Ltd.* [2004] IESC 13, and most recently, by Kelly J. in *Astrazeneca AB and Another v Pinewood Laboratories Ltd. And Others* [2011] IEHC. In this judgment, Kelly J. also stated that "the onus is on the moving party to establish that the documents sought are both relevant and necessary for the fair disposal of the case or to save costs".

Furthermore, a party to civil proceedings can also apply for "non-party" discovery, ie. discovery of documents from a person who is not a party to the proceedings. The principles involved in such discovery are well set out in *Allied Irish Banks v Trust & Whinney* [1993] I IR 375**.**

The regime in criminal cases is entirely different. Despite the fact that the Rules of the Superior Courts appear to allow an accused seek discovery of documents (Orders 31 and 125), the Supreme Court decided otherwise, in *DPP v Sweeney* [2001] IR 101. In the judgment of the Court, Geoghegan J. overturned a decision of the Central Criminal Court (Smith J.) to grant to the accused non-party discovery against the Rape Crisis Centre, holding that the High Court did not have jurisdiction to make an order for discovery in connection with criminal proceedings. He stated, given that

> "…the Defence is entitled to spring surprises" and "…pending the trial, to give no indication as to what issues might be raised"…that in such a state of affairs "…discovery of documents under the Rules of Court is wholly inappropriate…"

Geoghegan J. cited with approval the decision of Moriarty J. in *People (DPP) v Flynn* [1996] 1I.L.R.M.317, and described his reasoning as "impeccable". In that case, Moriarty J. had refused the accused access to documents in the possession of Aer Lingus, (the notice party). The Judge gave five reasons, his third reported reason being perhaps the most important:

> "Thirdly, discovery is intended to be a mutual procedure. However, in a criminal case it is far-fetched to suppose that an order for discovery would be made against an accused in the light of factors such as the right to silence, the presumption of innocence and the privilege against self-incrimination.
>
> It would therefore be inequitable to require a third party to comply on the application of an accused with an obligation that could not be required of the accused himself."

(Perhaps it is appropriate to note here that this is precisely what the Criminal Justice Act 2011 provides for!)

Geoghegan J. added "…it is well established in recent years that he (the accused) has a right to see relevant documentation in the hands of the prosecution".

DPP v Sweeney was emphasised by the Supreme Court in *D.H. v His Hon. Judge Raymond Groarke* [2002] 3 IR 522. In giving the judgment of the Court, Keane C.J. repeated the argument concerning the lack of mutuality to bar discovery in criminal proceedings:

> "But in every other respect, while the prosecution must disclose comprehensively and in detail the case they propose to make against the accused, he is under no such obligation.
>
> Discovery, accordingly, in a trial on indictment would be a wholly one-sided process, which was certainly not what was envisaged by the procedure for *inter partes* and third party discovery provided under the Rules of Court."

Messrs. Abramsons, Dwyer and Fitzpatrick in their book "*Discovery and Disclosure*" (Thomson Round Hall 2007) have ascribed the absence of a fixed procedure for seeking disclosure as "regrettable".

The 'Book of Evidence' sets out the list of witnesses, statements etc. which must be served on the accused prior to the trial. But what if the prosecution is aware of evidence relevant to the trial of the accused, but which it does not intend to call, and accordingly which does not appear in the 'Book of Evidence'?

Furthermore what if the accused is aware of relevant evidence, which might assist his or her case and/or damage the prosecution case, but which is unavailable to him or her because of the absence of discovery procedures in criminal cases? It is submitted that this is an especially important question in the context of 'white collar prosecutions', which of their very nature involve a very large number of documents, and complex commercial issues.

It is not difficult to imagine that an accused in such a case will be substantially disadvantaged by not having access to all relevant documentation, whether or not such documents are going to be used by the prosecution in the presentation of their case.

As a general rule, the prosecution is under a duty to disclose all relevant documents in their possession to the accused, whether or not they intend to use them at the forthcoming trial. Carney J. in *Ward v Special Criminal Court 1999 1 IR*, appears to have accepted the principle that

> "the prosecution must disclose any document which could be of assistance to the Defence in establishing a Defence, in damaging the prosecution case or in providing a lead on evidence that goes to either of these two things".

Efforts to Obtain Disclosure in Criminal Cases

To circumvent the prohibition against discovery in criminal proceedings, some parties have initiated judicial review proceedings to try to obtain documentation to assist their

case. One example is *Traynor v Judge Catherine Delahunt, the DPP and the Garda Síochána Complaints Board* [2008] IEHC272. In this case, the applicant was accused of assault and violent disorder, and had been refused access to documents which the Garda Síochána Complaints Board had sent to the DPP. The applicant had alleged that a Garda had assaulted her, when she tried to intervene in an altercation between that Garda and her daughter. The applicant had made a complaint to the Garda Síochána Complaints Board. In an important judgment, Judge Bryan MacMahon reviewed the authorities, and ordered that the documents which the Garda Síochána Complaints Board had sent to the DPP, be furnished to the accused. Initially, the Circuit Court Judge had refused the documents to the accused, on the assurance of the DPP that it was not going to rely on any of that documentation in presenting its case. However, Judge MacMahon rejected that argument, stating that "reliance is not the test for excusing disclosure".

The following principles with regard to disclosure in criminal cases can be extracted from his judgment:

I "The prosecution must disclose to the Defence any material of possible relevance to the guilt or innocence of the accused" (Fennelly J. *DPP v Kelly* [2006] 3IR 115)
II The duty to disclose applies only to relevant or material evidence.
III The prosecution is under a duty to make witness statements available to the Defence, even if it is not proposed to call that witness.
IV The duty on the prosecution to disclose extends to preparatory notes and previous inconsistent statements made by witnesses.
V Transcripts of previous trials must also be provided.(Hardiman J. *B.J. v DPP* [2003] 4 IR 525)

However, it is to be noted that MacMahon J. regarded this case as a disclosure case (not a discovery case) and only made an order directing that the applicant be furnished by the DPP with all documents received by it from the Garda Síochána Complaints Board. No order was made against the GSCB, as had been sought by the applicant.

In the case of *Health Service Executive, Applicant, and His Honour Judge Michael White and the DPP and others (notice parties),* [2009] IEHC 242, Judge John Edwards granted the applicant an order of *Certiorari* quashing an order of the respondent which "directed the Health Service Executive to make available to the DPP, for onward transmission to the Defendant's Solicitors"…material arising from a HSE investigation which the accused (the notice parties) believed would assist them in their defence to a criminal charge. The matter was appealed, and subsequently compromised, the order of Mr. Justice Edwards being set aside and the documents were handed over to the DPP, who dealt with the documents under the Prosecutors' Guidelines.

In the case of *Adam Thompkins, Applicant and the DPP and District Judge John O'Neill, Respondents* [2008] No. 1420 JR, O'Neill J. underlined the rule in *The People DPP v Sweeney* and stated that "orders for disclosure cannot be made against persons or entities who are not a party to the proceedings". He outlined this rationale for this rule as follows:

> "disclosure must be confined to evidence that already exists. Otherwise, Courts will be asked to become involved in the investigation of the particular criminal matter. The judicial function in this jurisdiction excludes that kind of role for the judiciary and reserves all matters pertaining to the investigation of crime to agencies of the executive, namely An Garda Síochána and the Director of Public Prosecutions".

In this case, the applicant sought information, while defending an alleged offence contrary to Section 49(1) and (6)(a) of the Road Traffic Act 1961 (as amended), from the Medical Bureau of Road Safety, which he claimed was of relevant and importance to the defence of his prosecution.

Egalité des armes

The European Court of Human Rights has described the principal of equality of arms as:

> "part of the wider concept of a fair hearing within the meaning of Article 6.1 of the Convention. It requires a "fair balance" between the parties: each party must be afforded a reasonable opportunity to present their case under conditions that do not place them at a disadvantage vis-à-vis their opponent or opponents" (case of *Gorraiz Lixarraga and others v Spain)* (Appliction No. 62543-00-ECHR).

In *O'Brien v PIAB* [2009] 2ILRM 22, Macken J., stated that "… the principle of 'equality of arms' is but one representation or example of the umbrella of rights which are now recognised as applying to all types of proceedings".

Judge Macken also stated that the concept of equality of arms is:

> "founded particularly in jurisprudence of the European Court of Human Rights, arising from the right of defence guaranteed in Art. 6 of the European Convention on Human Rights …it has its origin in the use of documents in the hands of one party which were undisclosed to, and used against, the other party in legal proceedings,…"

(This case involved the right of a claimant to have legal representation in a PIAB case).

In *J.F. v DPP* [2005] IESC24, Hardiman J. stated that "egalité des armes" is not a new concept but rather a new and striking expression of a value which has long been rooted in Irish procedural law." In the previous paragraph in this case, Hardiman J. quoted from his own judgment in *O'Callaghan v Mahon and Others* [2005] IESC 9 as follows:

> "A major issue in civil and procedural law is the extent to which either side must make disclosure to the other. This has led to the development of an impressive body of jurisprudence both in the United Kingdom and in Strasbourg. The latter has significantly influenced the former and will no doubt influence our jurisprudence too, in particular through the concept of 'egalité des arms', which might be regarded as the

opposite of that state of imbalance and disadvantage described by O'Dálaigh C.J. as clocha ceangailte agus madrai scaoilte."

Judge Hardiman then quoted from the judgment in *Rowe and Davis v United Kingdom* [2000] 30 EHRR 1, which states that "…Article 6.1 requires, as indeed does English law, that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused."

Conclusions

The High Court does not have jurisdiction to grant orders for discovery (particularly non-party discovery) to an accused in a criminal case. (*DPP v Sweeney* [2001] IR 102) and *DH v Groarke* [2002] 3 IR 522). Attempts to circumvent the prohibition of discovery in criminal proceedings by taking judicial review proceedings have been largely unsuccessful.

The Criminal Justice Act 2011 enables prosecuting authorities to obtain an order for discovery (and disclosure) against a person, who is or may become accused of a crime. The orders which the investigating Gardaí can obtain against an accused person pursuant to S.15 of the Criminal Justice Act 2011 undermine the argument (ie. mutuality) which underpins the rationale against the availability of discovery for the accused in criminal cases contained in *Flynn* and *Sweeney*. These new powers are precisely those which Moriarty J. described as "far-fetched" in *Flynn*.

It is well established that an accused has a right to see relevant documentation in the hands of the prosecution (*Sweeney,* Geoghegan J.)

Documents and/or information obtained by Gardaí pursuant to S.15 of the Criminal Justice Act 2011, even if they are not contained in the 'book of evidence', should be made available to the accused on the basis that, to deny the accused access to such material would be to deny him or her access to material which the Gardaí have, in their application to the District Court, stated to be "relevant" and/or "evidence". To so deny the accused would amount to a breach of the equality of arms principle.

Accordingly, where a person is accused of a white collar crime, and has had orders pursuant to S.15 of the Criminal Justice Act 2011 made against him, logic and the principle of egalité des armes, would tend to suggest that he should be entitled to an order for discovery, if such is necessary for his defence. ■

THE HONORABLE SOCIETY OF KING'S INNS

THE HONORABLE SOCIETY OF KING'S INNS NOTICE OF DECISION OF BENCHERS TO DISBAR MR PATRICK RUSSELL, BARRISTER AT LAW

Pursuant to Rule 37(4) of the Society notice is hereby given that the Bar Council made the following complaints to the Disciplinary Committee of the Society in relation to Mr Patrick Russell.

1. Mr Russell had acted unprofessionally in purporting to conduct an appeal to the Supreme Court on behalf of a named person ("the Complainant"), in particular that he acted without the intermediary of a solicitor, although he falsely informed the Complainant that a named solicitor was, in fact, acting; that he caused the Complainant to make a substantial payment to him for the purpose of pursuing the appeal; that he deceitfully told the Complainant that a notice of appeal had been lodged and continued the deception by informing him that the Supreme Court had ruled in his favour and had remitted the Complainant's claim to the High Court; that he lied to the Complainant by telling him that a settlement was available and caused him to sign a purported settlement document and led him to believe that his claim had been settled and that he would be paid a substantial amount of compensation;
2. Mr Russell failed to pay to the Bar Council a fine of €25,000 imposed on him in 2008 by the Barristers' Professional Conduct Tribunal in respect of a previous finding of misconduct.

The Benchers of the Honorable Society of the Kings Inns at its meeting of 11 January 2012 confirmed the report of the Disciplinary Committee in which it upheld the two complaints made and decided that they constituted professional misconduct by Mr Russell. The Benchers confirmed the sanction recommended by the Disciplinary Committee and resolved that Mr Patrick Russell be removed from the Register of Members and be expelled from the Honorable Society of the Kings Inns and thereby be prohibited from practice as a barrister and from enjoyment of all rights and privileges granted to him by virtue of being a barrister and be prohibited from holding himself out as being a barrister and that he be disbarred.

Mr Patrick Russell is now disbarred.

A fuller statement of the procedure and findings made is on the Society's website *www.kingsinns.ie* pursuant to Rule 37(3).

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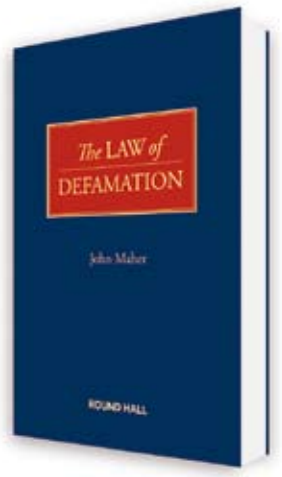

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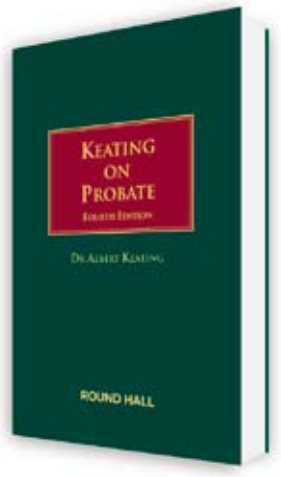

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