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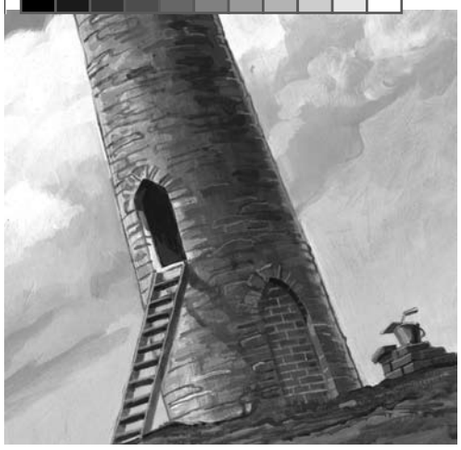
Article 13 of the EHCR

The Sex Offenders Register

The Immigration, Residence and Protection Bill 2008

THOMSON ROUND HALL



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Contents

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Article 13 ECHR: Irish Jurisprudence on the Unglamorous Right?

Jane Liddy*

I. Introductory

There may be a view that the European Convention on Human Rights Act 2003 (the 2003 Act) has little to add to Constitutional guarantees of fundamental rights. The question addressed by this paper is: would an Irish court ever agree that, apart from Constitutional rights, a non-court remedy is called for, and that it should be available under Article 13 of the European Convention on Human Rights?

The writer's argument about possible violations of Article 13, already expressed in the context of nursing home standards for older people,[1] will be developed against the background of need for care units for children. Both the elderly and children face imminent change of status: in one case, the natural end of a life span; in the other the passage into an adulthood that has been influenced by childhood experiences, without entitlements to care and education that might have helped in the formative years. Court proceedings can be lengthy; the vulnerable risk repercussions when pursuing rights. Yet, Article 13 of the European Convention on Human Rights guarantees effective remedies.

The Supreme Court's judgment of 17 December 2001 in *T.D. v Minister for Education and Others* seems to make an opening for the Irish courts – a relatively powerful judiciary compared with other democracies - to breathe new life into Article 13, the "twilight zone" guarantee whose role has been "whittled away", as developed hereunder.

II. Article 13 in Irish Law

Article 13 reads: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

For the purpose of placing that guarantee into the context of Irish law, two points of Convention law may be brought forward. First, there is to be an effective remedy before a "national authority" – not necessarily court. Secondly, "Everyone whose rights…are violated" is not to be taken literally: it suffices to make an arguable claim - not a flimsy grievance but not an established violation either.

Section 1 of the 2003 Act provides that "Convention provisions" means, subject to derogation in time of emergency, "Articles 2 to 14 of the Convention". Irish courts may entertain not only claims to substantive rights, such as the rights to life, liberty and so on, but also the procedural right to a remedy.

Yet Article 13 is not part of English law. The British Government took the view that their Human Rights Act 1998 itself fulfilled the obligation to provide remedies. In the House of Lords, Lord Lester of Herne Hill pursued the omission, pointing out that it is Article 13 that requires an effective post mortem. He was referred to the remedial amplitude of English and Scots law – there would be power to grant such relief or remedy, or make such order, within a court's jurisdiction as it considered just and appropriate. (In the House of Commons, later, it emerged that the Government was concerned that, if Article 13 were incorporated, courts might decide to grant damages in more circumstances than envisaged – perhaps exceeding the Strasbourg Court's then tendency to make awards of between £5,000 and £15,000.)[2]

At least one commentator considers Article 13 to be a provision that does not lend itself to direct application by national courts.[3] It seems fair to assume that UK practitioners and experts, including Anthony Lester, thought otherwise. Moreover (knowingly, it may be deemed) Irish legislators was prepared to allow Irish courts to interpret and apply Article 13 where their British counterparts held back.

In consequence, under Section 3, a court may award damages against Ministers whose Departments have failed to perform their functions in a manner compatible with Article 13, and under Section 5, a court may make a declaration that a statutory provision or rule of law is incompatible with the State's obligations under Article 13.

Do other jurisdictions have similar powers? In the period mid-1987 to end-1999 (when serving on the European Commission of Human Rights and participating in many thousands of cases) this writer saw no sign that there was national jurisprudence on Article 13 of sufficient significance to feed into Strasbourg case-law: no relevant national law comes to mind.

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* Former Member of the European Commission of Human Rights and of the Irish Human Rights Commission. This is an edited version of a talk given in Trinity College Dublin on 3 December 2007. The author is grateful to Frank Boughton and Pauline Walley for helpfully responding to queries, and to William Binchy and Suzanne Egan for fruitful comments on an early draft. All views are personal.

1 Jane Liddy, "Older People and the European Convention on Human Rights", *Older People in Modern Ireland*, ed. Eoin O'Dell, (Dublin: Firstlaw, 2006), 31-47.

2 Jonathan Cooper and Adrian Marshall-Williams, *Legislating for Human Rights: The Parliamentary Debates on the Human Rights Bill*, (Oxford and Portland Publishing, 2000), 234, 245.

3 E. A. Alkema, as noted by P. van Dijk and G.J.H. van Hoof, *Theory and Practice of the European Convention on Human Rights*, (Kluwer Law and Taxation Publishers, 1990), 525.

III. Failure to Invoke Article 13

Some of the potential interest of Article 13 may be illustrated by looking first at a case where Article 13 does not appear to have been invoked, and only then at cases where it was invoked.

In *Cha'are Shalom Ve Tsedek v France*, Judgment of 27 June 2000, the Strasbourg Court had occasion to set out the main principles applying to kosher food, found in the Torah. Observance of the more detailed rules set down in the Talmud necessitates special slaughter processes. The ritual is in conflict with ordinary French law requiring that the animal be stunned until it dies. Nonetheless, in accordance with French law, a Jewish representative association (the ACIP) has been given the approval necessary to authorise ritual slaughterers. A minority movement, wishing to practice their religion according to even stricter rules, require a detailed examination of the lungs of the slaughtered animal to ensure that the lungs are pure of any filamentary adhesions.

The ultra-orthodox minority group did not succeed in obtaining from the French courts the approval necessary for access to slaughterhouses in order to perform their particular ritual slaughter. The Strasbourg Court rejected their complaints under Article 9, guaranteeing freedom of religion (by twelve votes to five), and under Article 14, guaranteeing non-discrimination in the enjoyment of Convention rights (rejected by ten votes to seven for like reasons).

The Court thought that there would be interference with the freedom to manifest one's religion only if the illegality of performing ritual slaughter made it impossible for ultra-orthodox Jews to eat meat from animals slaughtered in accordance with their prescriptions. However they could obtain *glatt* meat from Belgium. Moreover, some butchers under the control of ACIP in France in fact provided some *glatt* meat. Also, it might be possible for the ultra-orthodox group to reach an agreement with ACIP whereby they themselves could perform ritual slaughter under ACIP's authority.

The dissenters would have found violations of Articles 9 and 14. They did not disregard the interest the authorities may have in dealing with the most representative organisations of a specific community, and the State's wish to avoid dealing with an excessive number of negotiating partners so as not to dissipate its efforts and in order to reach concrete results more easily. But the ultra-orthodox group was a liturgical association with two synagogues where acts of worship were regularly celebrated.

One does not have to share the conclusion of the dissenters to wonder whether they have not rightly pointed to a lack of protection stemming from the majority reasoning. If lawyers preparing such a case think that there was a violation of Article 9, they might well see no separate issue under Article 13. If, having satisfied themselves that the substantive issue is highly arguable, they think that their court might come down against a violation of Article 9, then, under Article 13, the question might arise as to whether the applicants had an effective remedy. In order to manifest their religion, the ultra-orthodox group was dependent on exports from abroad and the goodwill of ACIP, and a few of its authorised butchers. Would a tailor-made non-court remedy have helped resolve whether both the majority wing and the minority wing(s) of an established faith could have status in their relationship with the State without undue dissipation of efforts to reach accommodation with that faith's mainstream requirements?

IV. Article 13 in ECHR Law

Normally Strasbourg case-law takes account of, and can be enriched by, human rights reasoning at national level. But Article 13 seems to be impoverished in this respect, as may be deduced from a selection of authoritative views.

Van Dijk and van Hoof: In a number of cases the Court gives the impression that, once a violation of a substantive provision of the Convention has been found, it is not much inclined to consider Article 13 as well. Thus the Court reduces the independent character of Article 13 to an unwarranted extent.[4]

Karen Reid: Article 13 is a technical provision. Its role has been whittled away by interpretations and arguably not given its proper prominence. There is perhaps a suspicion that the Convention organs were, and are, seduced by the more interesting questions arising under the substantive provisions whereas they should have been encouraging domestic bodies to carry out this function. Applicants are also sometimes reticent in raising Article 13 complaints, perhaps preferring to concentrate on what they see as the core substantive issues.[5]

Ovey and White: Until comparatively recently, Article 13 occupied something of a twilight zone in the case-law of the Convention organs. They see signs of life in recent jurisprudence concerning the right to a remedy against unduly lengthy court proceedings, and also in cases largely emanating from Turkey concerning deaths or disappearances after detention and allegations of torture.[6]

Stephen Greer: He approves of the description "twilight zone" for Article 13, and apparently proceeds on the basis that judicial, particularly constitutional, proceedings are always the best means by which to integrate human rights standards.[7]

A sample case that conveniently sets out the law on Article 13 is *Doran v Ireland*, Judgment of 31 July 2003. (It may be worth remembering that the question in Strasbourg is whether the combination of relevant facts constitute a violation of a given right. The layout of judgments is: (1) "Procedure", such as dates of filing of memorials; (2) "The Facts" - a description of the particular circumstances and events relating to the individual, followed by a description of national law; and (3) "The Law" – the findings on Convention law. The focus is on what happened to the applicant in the light of the fact of what national law allowed or did not allow, not on an analysis of national law itself.)

4 Van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights*, 526.

5 Karen Reid, *A Practitioner's Guide to the European Convention on Human Rights*, (Sweet and Maxwell, 2004), 477.

6 Clare Ovey and Robin White, *Jacobs and White: The European Convention on Human Rights*, (Oxford University Press), 459, 461, 467 and 469.

7 Stephen Greer, *The European Convention on Human Rights*, (Cambridge University Press, 2006), 87.

Doran concerned proceedings in negligence against solicitors that had lasted almost eight and a half years at High Court and Supreme Court levels. The applicants argued that they had no effective remedy as regards the length of the proceedings. The Strasbourg Court did not accept that the Government had established that the Constitutional remedies they invoked would prevent future delays or establish State liability for the payment of damages. Therefore there was a violation of Article 13.

In the writer's view, a practitioner need not feel at a particular disadvantage if, initially, all to hand on Article 13 are paragraphs 55 to 59 of the *Doran* case, where the Court recalled three basic principles, fleshed out hereunder.

First, Article 13 requires a remedy that will deal with the substance of an "arguable" claim. It was not necessary for the Court to have found a violation of Article 6 (trial within a reasonable time), as it did in *Doran*, for it to reach a finding of violation of Article 13. The fact that the outcome has not been favourable to the individual does not mean that it could not have been effective. It follows that if there is merely an arguable complaint, it is not necessary to show that the substantive right (to private life or whatever) has actually been violated in order to establish that some effective remedy should have been available to the complainant.

Secondly, the remedy must be effective in practice as well as in law. This element may have been significant when the Court noted the absence of precedents to its satisfaction concerning those Constitutional remedies for court delays that had been invoked by the Government in *Doran*. The legal remedy must be both adequate and accessible in order to be effective, capable of preventing a continuation of the violation as well as providing adequate redress.

Thirdly, the authority with power to grant a remedy does not necessarily have to be a judicial authority. If it is not a judicial authority, its powers and the guarantees it offers will be examined to see is it effective. An aggregate of administrative and other remedies may suffice. As the commentator David Feldman put it: "There need not be only one procedure and the procedures need not necessarily be judicial, as long as they cumulatively offer an effective remedy for violations."[8]

This outline has emerged from over fifty years of Convention jurisprudence, of which the 1978 judgment in *Klass v FRG* represented a major development. There, the applicants argued that they had no way of being told whether the State had intercepted their telephone calls, and therefore no effective remedy to challenge any surveillance. The normal judicial remedies had been replaced by supervision by a committee of parliamentarians which was regularly informed about the cases in which the surveillance law had been applied, and which an individual could approach. The Court's finding of no violation of article 13 was influenced by the consideration that the very nature and logic of secret surveillance dictate that not only the surveillance but also the accompanying review should be effected without the individual's knowledge.

In the 1983 judgment of *Silver v UK*, the Court accepted that a right of petition to the Home Secretary against a decision by prison officers that applied the Home Secretary's own directives on censorship of correspondence might have effectively remedied the situation complained of.

In the 1989 judgment of *Soering v UK*, the Court accepted that judicial review was an effective remedy for an individual complaining that his extradition would expose him to inhuman treatment. Even though the courts in English judicial review proceedings did not reach findings of fact, the Strasbourg Court was satisfied that Soering could have put his human rights argument to the English court under the "irrationality" head of the *Wednesbury* rules. But where security considerations precluded any real examination of the merits of a similar claim, judicial review was found insufficient (*Chahal* case, 1997). As has been noted by commentators, Strasbourg offers individual States a wider margin of appreciation in some areas than in others, and the outcome depends on the context.[9]

From the late 1990's, several right to life and torture cases against Turkey had illustrated how the nature and gravity of the arguable claim has implications for what is expected under Article 13. When State agents are implicated, Article 13 entails a thorough and effective investigation capable of leading to the identification and punishment of those responsible, and including effective access for the individual to the investigatory procedure (as well as compensation where appropriate).[10]

The element of independence of the national authority may be important for the effectiveness of investigations into, say, the disappearance of a detainee in Turkey or, in Britain, the use of listening devices by police.[11] But an authority that is independent need not necessarily be a court. Just as, in Ireland, it is established that independent bodies such as the Labour Court and the Equality Tribunal should observe fair procedures, there are pointers in Strasbourg case-law that some form of adversarial proceedings may sometimes be required.[12]

Even so, *Z and Others v UK* (judgment of 10 May 2001) repeats the "not necessarily a court" jurisprudence. In that case, there had been no dispute that neglect and abuse of four children had reached the threshold of inhuman and degrading treatment, which had been brought to that authority's attention. No action lay against the authority in negligence or breach of statutory duty. The Strasbourg Court found that where the acts of people other than State agents are in issue, there should be available a mechanism

8 David Feldman, "Remedies for Violations of Convention Rights under the Human Rights Act", *European Human Rights Law Review* Issue 6 1996, 691-711 at 692.

9 The foregoing summary, from *Klass* on, been drawn from D.J. Harris, M. O'Boyle and C. Warbrick, *Law of the European Convention on Human* Rights (Butterworths, 1995); van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights*; and (the "commentators referred to) Angela Patrick, "Article 13," *Human Rights Practice*, (Sweet and Maxwell, 2007) and Alistair Mowbray, *Cases and Materials on the European Convention on Human Rights*, (Oxford University Press, 2007), 798.

10 *Aksoy v Turkey*, Judgment of 18 December 1996, as cited by Dinah Shelton, *Remedies in International Human Rights Law*, (Oxford University Press, 2005), 130.

11 Ibid. at 469, citing *Kurt v Turkey*, judgment of 25 May 1998, and *P.G. and J.H. v United Kingdom*, Judgment of 25 September 2001.

12 *Al-Nashif v Bulgaria* (20030 as cited by Philip Leach, *Taking a Case to the European Court of Human Rights*, (Oxford University Press, 2005), 344.

for establishing any liability of State officials or bodies for acts or omissions involving human rights violations. "The Court does not consider it appropriate in this case to make any findings as to whether only court proceedings could have furnished effective redress, though judicial remedies indeed furnish strong guarantees of independence, access for the victim and family and enforceability of awards in compliance with the requirements of Article 13" (para. 110).

Thus, the Court seems almost, but not quite, to say that only a court (within the meaning of Article 6, not of the Constitution) could have satisfied the requirements of Article 13 on those facts, without reversing the *Klass* jurisprudence at the other end of the spectrum. Another recent judgment, *Sürmelli v Germany* (2006), has indicated that the adequacy and effectiveness of a remedy may be affected by excessive delays.

Some commentators confine themselves to two principles as *aide memoire*: "There are two questions which must always be asked: whether there is an arguable complaint; and whether the remedy in the national legal order is effective".[13] Perhaps Irish practitioners accustomed to the background of Constitutional remedies should also consciously bear in mind that as Strasbourg law stands, the Article 13 remedy need not be a court remedy.

In *T.D. v Minister for Education,* Hardiman J. quoted Gerard Hogan as saying that Ireland has a judiciary "which is already by the standards of most Western democracies extremely powerful". This prompts the thought that some at least of the older and more secure democracies may be in a position to move beyond looking at Article 13 with the eyesight of Article 6, and into consideration of fine-tuned, non-court remedies which in certain areas could be even more effective in practice in providing timely justice.

V. *T.D. v Minister for Education and Others*

In the landmark Irish case of 2001, *T.D. v Minister for Education*, the Supreme Court set aside High Court orders to the effect that the Minister's proposed developments of support and care units for children were to be completed within a certain time-frame. The problem seen by the Supreme Court was that the orders required the executive power of the State to be implemented in a specific manner by the expenditure of money on defined objects within particular time limits – an assumption by the courts of the exclusive role of the executive and the legislature.

The mere fact that the majority did not share the dissenting reasoning of Denham J. is telling, because she expressed the greatest loyalty to ringing judicial pronouncements of the past, and followed them to a logical conclusion.

Denham J. recalled established Constitutional rights of the child, not disputed in the appeal: the rights to be fed and to live, to be reared and educated and to have the opportunity of working and realising one's full potential and dignity as a human being. She recalled earlier jurisprudence to the effect that the Courts were the custodians of such rights, that the Courts' powers in this regard are as ample as the defence of the Constitution requires, and that a remedy to enforce Constitutional rights must be deemed to be available. She was led to reason that the mandatory order was within jurisdiction: "Such a duty to guard fundamental rights should not be shirked or abdicated".

But the majority's reasoning, rather than shirking, may build up into a possible bridge between, on the one hand, perhaps a fresh sensitivity on the part of Irish courts regarding unqualified adoption of past exercises of jurisdiction, and, on the other hand, an implicit openness to the flexibility of Convention law concerning potentially effective remedies.

Keane C.J.: The difficulty created by the order of the High Court in this case is not simply that it offends against the doctrine of the separation of powers….It also involves the High Court in effectively determining the policy which the executive are to follow in dealing with a particular social problem.

Murray J.: Judicial review does not…give the Courts jurisdiction to exercise rather than review executive or legislative functions…[This] is a programme which involves, generally speaking, the design of premises, engagement of contractors, applications for planning permission, identification of the number and kind of specialised staff and their recruitment just to mention some of the elements…This [kind of order] would [involve] a negation of [a Minister's] answerability to Dáil Eireann…[Past] judicial statements as to the amplitude of the powers of the Court…can only be interpreted and applied…with due respect to the role and function of the executive and legislature.

Hardiman J.: [To] vest the Courts with powers and responsibilities in social, economic and other areas which are presently the preserve of the other organs of government… would vest responsibility… in a body without special qualifications to discharge it…It would also render technical and legalistic discussions which should properly be conducted in quite a different manner….I believe…that [the High Court's] view of the separation of powers is unduly court centred.

VI. Development Potential of Article 13

The description as "unduly court centred" of an application of the then law seems to open the way for new solutions for newly identified needs.

The 2003 Act was not in force at the time of *T.D. v Minister for Education.* It was not possible for either the High Court or the Supreme Court to consider whether T.D. had an arguable claim under, say, Article 8 of the Convention (positive obligations stemming from the right to respect for private life) or the First Protocol (no denial of the right to education). Even if no violation of any such right could be established, it was not possible for the Irish Courts to consider whether the claim was sufficiently arguable to enable judicial consideration of an associated claim of violation of Article 13.

It falls outside the purpose of this paper to explore how strong a case might be made under Article 8, but it can at least be noted that in *D.G. v Ireland*, judgment of 16 August 2002, the Strasbourg Court, while accepting that

13 Ovey and White, *Jacobs and White: The European Convention on Human Rights*, 461.

the notion of private life can cover the physical and moral integrity of the person, did not find a violation of Article 8. And with regard to the right to education under Protocol I, there is no specific obligation concerning the extent of the means of instruction or the manner of their organisation or subsidisation. What is guaranteed is the right of access to educational institutions existing at a given time; and the right to education is concerned primarily with elementary education.[14]

There is, of course, a risk that if a frail or borderline case were brought to Strasbourg under Article 8 or Protocol I, and were declared manifestly ill-founded at admissibility stage, any associated Article 13 issue would also be rejected early on as not disclosing an "arguable" claim, such as to warrant a remedy. But if such arguments were first advanced and fully explored at national level, the Strasbourg Court would surely pay careful attention to what the national courts had to say in relation to Article 13.

From an Irish law perspective, illustrious authority is already preparing the ground for new jurisprudence on remedies. Gerard Hogan and Gerry Whyte in their edition of *The Irish Constitution* cite William Binchy to say that "it has been persuasively argued that tort law, with its focus on wrongs, may be basically ineffective to protect rights and that the Constitution may not be an appropriate environment for the operation of [certain] principles of tort law…".[15]

Estelle Feldman describes the Ombudsman as a non-confrontational and inquisitorial rather than adversarial process, and quotes Gerard Hogan and David Gwynne Morgan to the effect that it seems probable that the Ombudsman is in many ways superior to the courts.[16] The Law Reform Commission has expressed reservations about "the conventional trappings and procedures" of a court for decisions on legal capacity, and preference for a tribunal.[17]

From a European perspective, there seems to be space for developments to reveal themselves at national level. The commentator Angela Patrick notes that when the Strasbourg Court finds a violation of the substantive Article, including the procedural safeguards inherent in the substantive Article, it often finds it unnecessary to consider Article 13, but in some cases has chosen to emphasise Article 13 as the more appropriate procedural right. "It may be a symptom of the Court's ever-growing case load that in these cases, it chooses now to emphasise the primary duty of the contracting states to secure the rights guaranteed by the Convention".[18]

But if the Irish courts were seen to be open to Article 13 submissions, how would the Strasbourg Court deal with an argument by the Government in any given case that there has been a failure to exhaust domestic remedies, because of failure to invoke Article 13 at national level, and hence that the complaint is inadmissible under Article 35? There is a clear link between the guarantee in Article 13 and the admissibility requirements of Article 35, but Article 35 is not necessarily rigidly applied. There is a maze to be explored here on the basis of hard facts, after reviewing the application of ECHR law on admissibility requirements (especially to Irish cases[19]), but even then, it may be that no conclusion of any confidence could be reached in the absence of readily identifiable Strasbourg jurisprudence dealing with any country's national law on Article 13.

Secondly, the Minister for Justice recently deplored as "an abdication of responsibility" the tendency to set up agencies and bodies at one remove from the Government.[20] Has there been a knock-on effect on established legal relations, on reassuring background concepts like that of breach of statutory duty, and if so does Article 13 have a role to play? No doubt new structures for the protection of individuals are evolving as entities that are "for profit" become increasingly involved in areas that traditionally were part of the State's functions or that were operations of charitable endeavours. (There is no "water-tight division" separating Convention rights from socio-economic rights.[21])

VII. Concluding Remarks

In sum, this paper seeks to suggest that non-court remedies may sometimes be more meaningful than ordinary court remedies. Further, the relatively strong Irish judiciary, with what may be an unusual jurisdiction to pronounce on Article 13, could have a rare opportunity to interpret the right to a remedy in such a way as to answer real human rights claims and needs in Irish society today. If they were given information as to what had proved feasible in other countries, they might well be inclined to pronounce on the adequacy of existing non-court remedies, using the language of European human rights law.

The commentator David Feldman indicates how national lawyers can have an influence on the norms applicable throughout Europe. Speaking of incorporation of the Convention rights into United Kingdom law, he said:

> "Once we have in place an effective system for providing primary adjudication on claims that Convention rights have been violated, the Strasbourg organs are likely to defer to our courts' decisions to the extent of exercising only secondary, supervisory review. This will allow our legal tradition to exercise a growing influence on the development of European human-rights law, a development foreseen by the President of the Court [of Human Rights]…If this happens, it will both place an added responsibility on our own remedial mechanisms, and indicate growing faith in them on the part of international bodies."[22] ■

14 Jane Liddy, "European Convention of Human Rights: Case Law on the Right to Education", *The Legal Status of Pupils in Schools*, ed. J. de Groof and H. Penneman, (Kluwer Law International, 1998), 131-136.

15 Gerard Hogan and Gerry White, *J.M. Kelly: The Irish Constitution*, (Butterworths, 1994), 708.

16 Estelle Feldman, "The Ombudsman: Redressing the Balance for Older People", *Older People in Modern Ireland*, 327-352 at 335, citing G. Hogan and D. Gwynne Morgan (eds) *Administrative Law in Ireland*..

17 Consultation Paper: "*Law and the Elderly*" (LRC CP – 2003), para 1.51

18 Patrick, "Article 13", *Human Rights Practice*, para.13.021.

19 See Anna Austin, "From Ireland to Strasbourg", *Bar Review*, March 2001.

20 Irish Times, 18 July 2007.

21 *Airey v Ireland* (1979).

22 David Feldman, "Remedies for Violations of Convention Rights under the Human Rights Act", *European Human Rights Law Review*, Issue 6 - 1996.

Entry on the Sex Offenders Register. Is it Mandatory?

JOHN NOONAN B.L.

Introduction

While the notification requirements of Part II of the Sex Offenders Act, 2001 (i.e. the "placing of the accused on the Sex Offenders Register") appear to be mandatory having regard to the wording of Sections 7 and 10 of the Act, it is not mandatory having regard to the exemptions contained in Section 3(2) and 3(3)[1]. Therefore, an application should always be made to the Court to make the convicted person subject to the part and should, where appropriate, be subject to judicial scrutiny.

In a recent decision of Charelton J., it was held that the right approach is to make an application to the Court to make an order that the accused is subject to Part II of the Act.

Facts of *DPP v D.F.*

In the recent case of D.F.[2], the accused was convicted on 7 counts of sexually assaulting, and 2 counts of indecently assaulting, a girl while she was aged between 12 and 17 years of age. He was sentenced to eighteen months imprisonment in respect of 8 of the counts, and to two and a half years imprisonment, with one year suspended, in respect of the final count. The question arose whether the notification requirements under Part II of the Sex Offenders Act, 2001 can be applied without a judicial determination[3] (i.e. that it is up to the Prison Governor to determine that a convicted person is subject to the part[4]), or whether an Order of court is required before the provisions can take effect.

The difficulty arose because, under the provisions of Section 3(2) of the Act, a sexual/indecent assault, or an offence under ss. 1 & 2 of the Punishment of Incest Act, 1908 is not classified as a sexual offence if:

> (i) the victim of or, as the case may be, the other party to the offence was aged, at the date of the offence's commission, 17 years or more, and
> (ii) the person guilty of the offence has not, in respect of the offence, been sentenced to any punishment involving deprivation of liberty for a limited or unlimited period of time or been made subject to any measure involving such deprivation of liberty.

While the victim in this case was under 17 years of age for the majority of counts, and in any event the accused had been sentenced to a punishment involving deprivation of liberty, the very fact of there being a caveat to Section 3(1) was the issue before the court.

Part II of the Act

Part II of the Act requires that persons to whom the section applies comply with the notification provisions of section 10, that they shall notify to An Garda Síochana their name(s), home address, a change of name(s) or home address, that they have stayed in another other place for a period of 7 continuous days or an aggregate of 7 days in a 12 month period, details of when they are leaving / returning to the state. The notification shall be given orally in person at any Garda Divisional or District Headquarters, in writing by post, or by such other means as is prescribed. Each such notification shall contain their date of birth, name on the date of conviction and home address on the date of conviction. These notification requirements are mandatory, and they effectively make up the "Sex Offenders Register"; there is no provision in the Act for maintaining an actual register, nor does the Act specify how the information obtained under this part should be used or distributed.[5]

Section 7 of the Act states that:

> (1) Without prejudice to subsection (2) and section 13 and 16(7), a person is subject to the requirements of this Part if he or she is convicted of a sexual offence after the commencement of this Part.

1 Note that section 3(3) of the Act relates to the offences of defilement of a girl between 15 and 17 years old, buggery of a person under 17 years old and gross indecency with a male under 17 years old, which have been repealed by the Criminal Law (Sexual Offences) Act, 2006 so that subsection no longer has any substantial effect. Section 3(10) of the Criminal Law (Sexual Offences) Act, 2006 creates a new exemption from Part II of the Sex Offenders Act, 2001 for offences under Section 3 of the 2006 Act in certain circumstances.

2 Ex tempore, Central Criminal Court, 1st February, 2008.

3 Similar to, for example, the penalty points system under the Road Traffic Act, 2002, where upon conviction for a penalty point offence it is the Minister for Justice rather than the Court who imposes the sanction.

4 When deciding to notify a person of the requirements of the part pursuant to Section 9 of the Act.

5 Note however that the proposed 28th Amendment to the Constitution, which will insert a new Article 42A, which, if passed, will permit legislation to be enacted to provide for "the collection and exchange of information relating to the endangerment, sexual exploitation or sexual abuse, or risk thereof, of children, or other persons of such a class or classes as may be prescribed by law"

Subsection (2) makes the part applicable to persons convicted before the commencement of the Act who have either not been sentenced or who have been sentenced and are still in prison, on temporary release or whose sentence is otherwise still in force. Section 13 applies the part to persons convicted of sex offences outside of the state who subsequently become resident in the state where appropriate.

The wording of Sections 7 and 10 appear to be mandatory – a person *is* subject to the requirements of Part II if he/she is convicted of a sexual offence after the commencement of Part II, and he/she shall notify An Garda Síochana of the relevant information.

The Constitutionality of imposing the requirements of Part II was upheld by Finlay-Geoghegan J in *Enright v. Ireland*, [2003] 2 IR 321. There, the Plaintiff was serving a sentence for sexual offences at the time that the requirements of Part II came into effect. He was required by the chief officer in charge of Arbour Hill Prison to sign a notification pursuant to Part II of the Act. He argued, *inter alia*, that the notification requirements are a regulatory burden and, in imposing these requirements on the plaintiff after the date of his being sentenced, his right to fair procedures was breached. Finlay-Geoghegan J. found, at p. 344, that:

> The imposition of the registration requirements on persons already convicted of sexual offences is rationally connected to the objective of the legislation of protecting society from convicted sex offenders who may relapse. The registration requirements are a minimal burden. They do not restrict the plaintiff in his movements nor do they contain any special notification provisions to the public and in particular none of the more far reaching notification provisions contained in the comparable American legislation. Whilst the existence of the obligations under s. 10 is something to which a judge is probably entitled to have regard when sentencing, given the minimal nature of the burden imposed, it is improbable that it is something which would materially affect the sentence imposed. The s. 10 requirements appear therefore to impair the plaintiff's right to fair procedures as little as possible and to be proportionate to the objectives to be achieved.

It would therefore appear that the intention as well as the wording of the act indicates that it should apply to all convicted sex offenders as an automatic, regulatory burden, which does not, unlike a Sex Offender Order[6] under Part III of the Act, require a judicial determination before being imposed.

Decision in *DPP v. D.F.*

While persons convicted of most sexual offences e.g. rape, s.4 rape, aggravated sexual assault, etc will always be subject to Part II of the Act irrespective of the circumstances of the injured party and the sentence imposed, when a person is convicted of sexual/indecent assault, or of an offence under ss. 1 & 2 of the Punishment of Incest Act, 1908, the application of the requirements of Part II is not automatic. Therefore, the Court must look at the circumstances of the offence to determine whether it falls within the exception contained in section 3(2).[7]

In ruling on the issue, Charelton J. commented that the Act was quite convoluted and that it would not be appropriate to leave it to the prison governor to decide whether or not the person is subject to the provisions of the Act. The Court found that the right approach is to make an application to the Court to make an order that the accused is subject to Part II of the Act.

Conclusion

There are four consequences which appear to flow from this decision. Firstly, it would seem that it is appropriate that the Prosecution should always make an application to the Court that the person be subject to Part II and that the Court should then determine whether the offence comes within an exception to the Act.

Secondly, it would appear that the provisions of Part II are not mandatory having regard to the exceptions contained in Section 3(2).

Thirdly, it would appear therefore that when a person is convicted of sexual / indecent assault or an offence under ss. 1 & 2 of the Punishment of Incest Act, 1908, it is not appropriate to make the person subject to the Act at the time of conviction, but rather the Court should first determine whether the complainant or other party was over 17 and, if they were, the sentence to be imposed upon the convicted person, and, in those circumstances, it is only at that stage (i.e. once the person has been sentenced) that the Court can lawfully determine whether the convicted person is subject to Part II of the Act.

Finally, it would appear that notwithstanding the decision in *Enright v. Ireland*, where a person would appear to fall within the scope of Part II but is not before the Court (i.e. a person who is already serving a sentence[8], or a person who was convicted outside of the State for a sexual offence and who is now resident within the state[9]) it may be appropriate that the person be brought before the Court where they were convicted and sentenced so that a judicial determination on whether they come within the scope of the Part should be made. ■

6 Which can be granted on the application of a member of An Garda Siochana not below the rank of Chief Superintendent, to prohibit the respondent doing one or more things where the Court is satisfied on reasonable grounds that it is necessary to do so for the protection of the public from serious harm.

7 This would also apply to the exceptions under Section 3(10) of the Criminal Law (Sexual Offences) Act, 2006 for an offence under Section 3 therein.

8 Section 7(2) of the Sex Offenders Act, 2001.

9 Section 13 of the Sex Offenders Act, 2001.

The Changing Face of Media Freedom under the ECHR

Eoin Carolan BL

Introduction

For Irish lawyers and media organisations, the European Convention of Human Rights is intuitively regarded as a document which espouses a liberal conception of media freedom. Decisions like *Sunday Times v U.K.*[1] and *Goodwin v U.K.*[2] offered a higher standard of protection for the freedom of the press than was traditionally available under either the common law or Article 40.6.1.(i) of the Irish Constitution. Strasbourg was accordingly seen by many as the ultimate guardian of its oft-affirmed principle that a free press was a necessary element of a democratic society.

In recent years, however, there have been a number of ECHR decisions which have met with the disapproval of members of the Irish and English media. *Von Hannover v Germany*,[3] with its expansive interpretation of the notion of private life, is, perhaps, the most obvious of these authorities. In part, the divergence between the Court and the industry's views of what constitutes permissible journalism may be attributable to cultural differences relating to the sort of material that is typically published by the Anglo-Irish press, on the one hand, and their continental counterparts on the other. However, a number of more recent decisions of the Court suggest that judgments like *Von Hannover* may also reflect a move in Strasbourg towards a narrower understanding of press freedom. This piece will examine two of these decisions in an effort to determine whether the ECHR may, in fact, be in the process of developing a more restrictive approach to the Article 10 freedoms.

Pfeifer v Austria

In *Pfeifer v. Austria*[4], the European Court of Human Rights continued its exploration of the outer reaches of Article 8. In recent years, the Court has interpreted "private and family life" to include both public conduct[5] and the actions of public figures[6]. The Court in *Pfeifer* held that Article 8 also protects an individual's rights in respect of his public reputation – even where that individual is criticised in the context of a political discussion in which they willingly engaged. In so doing, it allowed Article 8 to prevail over Article 10 in circumstances which seemed to fall within the Court's traditional understanding of protected media activity.

Facts

P., a professor in political science, published an article in the yearbook of the rightwing Freedom Party which alleged that the Jews had declared war on Germany in 1933. The applicant, who was editor of the official magazine of the Jewish community in Vienna, published a commentary which criticised the article for, *inter alia*, disseminating "Third Reich" ideas and "old Nazi lie[s]".

P. sued Mr. Pfeifer for defamation. At trial, the commentary was held to constitute a value judgment which had a sufficient basis in fact to warrant the dismissal of the action. P. was later charged with "national-socialist activities" arising out of his article. He committed suicide before his trial began.

A right-wing magazine accused Mr. Pfeifer and other named individuals of forming a "hunting society" which had caused P.'s death. This allegation was repeated in a letter sent to the magazine's subscribers. Mr. Pfeifer sued for defamation but lost after the magazine article was found to constitute a fact-based value judgment. He claimed that this failure to vindicate his reputation amounted to a breach of Article 8.

Reputation as an aspect of Article 8

The ECHR unanimously held that an individual's reputation was protected under Article 8 as an "aspec[t] relating to personal identity". The Court repeated its *Von Hannover* view that Article 8 aimed to ensure the "development, without outside interference, of the personality of each individual in his relations with other human beings".

Reputation is a critical aspect of an individual's social existence. A person's reputation shapes how he is perceived by others and how he perceives himself. This decision underlines the fact that the Court interprets Article 8 as animated by considerations of social interaction rather than solitude. In contrast to the solipsistic view of theorists like Gavison[7] who define privacy in terms of the inaccessibility of the individual, the Court is committed to the view that privacy is not the state of being alone. It is instead a necessary aspect of a person's identity as a socially-situated individual. This means that the right to respect for private life is sufficiently flexible to potentially apply to a broad range of activities which extend far beyond the traditional protected spaces of home or family life.

1 (1979) 2 E.H.R.R. 245.
2 (1996) 22 E.H.R.R. 123.
3 (2005) 40 E.H.R.R. 1.
4 Application no. 12556/03 (15 November 2007).
5 *Peck v. UK* (2003) 36 EHRR 41.
6 *Von Hannover v. Germany* (2005) 40 EHRR 1.
7 R. Gavison, "Privacy and the limits of law" (1980) 83 Yale L.J. 421.

The Concept of Private Life

Pfeifer is also notable for the Court's very expansive interpretation of the concept of "private life". It found that the magazine's criticism of the applicant fell within the scope of Article 8 even though it concerned Mr. Pfeifer's voluntary contribution to a vigorous public debate. The Court felt that the criticism affected his reputation and thus impacted upon his personal identity.

This is a broad reading of Article 8. The Court held in *Von Hannover* that only the "official" actions of public figures would fall outside Article 8. The decision in *Pfeifer* goes further by implying that any criticism which tends to undermine the reputation of an individual may fall foul of Article 8.

Mr. Pfeifer was attacked in relation to his actions in publishing an article as editor of a leading Jewish magazine. The article responded to a piece in a political party's yearbook. To the extent that Mr. Pfeifer could be regarded as a public figure, this would seem to constitute the very essence of his "official" duties. The Court did not, however, classify this conduct as "public" or "private". It ignored both the content of the criticism and the political context in which it was made. It instead concentrated solely on the effect of the criticism on the individual's reputation.

Treating the consequences of an act as a trigger for the invocation of Article 8 makes it virtually impossible to draw any sort of reliable distinction between zones of "public" and "private" activity. It means that actions or speech which unquestionably concern "public" matters can be brought within the scope of Article 8 as a result of the way in which they are understood by third parties.

The consequence of this is that public commentary will be guaranteed not to infringe Article 8 only when it can be characterised as criticism of an impersonal idea. Criticism which directly responds to, or identifies, a particular advocate of a political position may run the risk of offending Article 8. After all, aggressively attacking a person's views will almost always carry some implicit criticism of their beliefs, motives, intellect or abilities.

The difficulties this could pose for freedom of expression are obvious. It brings all but the most sterile abstract discourse within the potential scope of Article 8. This appears contrary to the Court's earlier jurisprudence on editorial and journalistic licence.[8]

Article 10

The majority position in *Pfeifer* also arguably gives cause for concern in respect of the way in which it balanced Article 8 with Article 10, which enshrines the right to freedom of expression. In striking this balance, the Court's approach mirrored the trend in the English authorities away from an *a priorii* prioritisation of Article 10[9] and towards a context-sensitive assessment of the competing interests.[10]

The majority found that the magazine article here could not rely on Article 10. The allegation that Mr. Pfeifer had caused P's death was a statement of fact which was without foundation. Accusing Mr. Pfeifer of "acts tantamount to criminal behaviour" went beyond what was permissible under Article 10.

In the alternative, if the statement was a value judgment, the use of the term "hunting group" alleged the existence of a co-ordinated campaign which aimed to persecute and attack P. There was no evidence of a conspiracy or of any such intention on the part of Mr. Pfeifer in writing the piece.

The majority's reasoning on all of these issues is unconvincing. It was accepted by all that P. had committed suicide. It was not suggested that Pfeifer had physically caused his death. As Loucaides J. pointed out in his dissent, the magazine could only plausibly be read to have accused Pfeifer (and others) of upsetting P and contributing to his decision to commit suicide.

Causation is a notoriously elusive concept. This is especially so when dealing with the cause of an individual's suicide. Many factors may have contributed to the deceased's decision. Contrary to the Court's analysis, it is not a "fact susceptible of proof". It is impossible to authoritatively determine the subjective sentiments of the deceased. Any accusation that an individual "caused" another to commit suicide cannot but be speculative.

Furthermore, the Court notably failed to substantiate its assertion that Mr. Pfeifer had been accused of quasi-criminal conduct. Even allowing for differences in domestic legislation, it is questionable if the magazine's accusations made out the ingredients of criminal liability. They could easily have been read as assertions of moral culpability on Mr. Pfeifer's part. As this was the basis for the Court's finding that the article went beyond the boundaries of Article 10, it could at least have been more fully developed in the decision.

Similarly, the Court's ruling that the article had alleged the existence of an organised, co-ordinated conspiracy against the deceased is suspect. In dissenting, Schäffer J. noted that the original German phrase for "hunting group" (*Jagdgesellschaft*) "very often … refers to a spontaneous social phenomenon".

Even leaving this aside, however, the majority's interpretation of this phrase seems excessively literal. It ignores other possible interpretations of the term in favour of the one reading which would put it outside the scope of Article 10. For the Court to base its decision on the most sinister (and arguably most implausible) reading of the phrase allowed no scope for exaggerated expression.

In fact, the decision of the majority in general suffers from a stifling solicitousness of Mr. Pfeifer's reputation. No allowances are made for the writer's intentions in penning the piece, or for the Austrian courts' interpretation of how it would have been locally understood. The majority's literalism takes little account of either editorial licence or local language or culture. In this, it appears to contravene not only the doctrine of the margin of appreciation but also the Court's own previous caselaw on the protection of political expression.

In fact, it could be argued that the Court's approach may have fallen into the error of treating Article 10 as an exception from Article 8 rather than as a Convention value of equal interest. It subjected the magazine article to an intensive reputation-sensitive examination, whilst failing to

8 See the discussion below.

9 See, for example, the decisions in *Venables v. News Group Newspapers* [2001] 1 All E.R. 908; *Theakston v. M.G.N.* [2002] EMLR 22.

10 *Campbell v. M.G.N.* [2004] 2 A.C. 457.

consider, *inter alia*, the voluntary nature of Mr. Pfeifer's initial intervention into a public debate, or the actual impact of the publication on his reputation. It is arguable, for example, that the exaggerated and partial nature of the publication in question could have encouraged readers to attach little credence to the claims. Furthermore, as has already been pointed out, less critical interpretations of the article were available to the Court. That these factors were not taken into account by the majority indicates that they may have been focused on the question of whether Article 10 might offer exculpatory relief, rather than on an overall balance of interests.

Stoll v Switzerland

Facts

This case concerned the prosecution of a journalist for publishing "official secret deliberations". The documents revealed the Swiss diplomatic position on negotiations about the return by Swiss banks of the unclaimed assets of victims of the Holocaust. The piece in question was headlined "*Ambassador Jagmetti insults the Jews*" and accused the ambassador of anti-Semitism. The publication included a number of extracts from the original diplomatic document which tended to support these accusations. Criminal charges were brought and the journalist was convicted and fined a total of CHF 800 (approximately €475). He claimed that this contravened his rights under Article 10 of the Convention.

Journalistic ethics

The majority of the European Court of Human Rights held that the conviction of a journalist for publishing "secret official deliberations" did not infringe Article 10. The decision was based primarily on the objectionable nature of the journalist's conduct. The Court emphasised that "Article 10 does not … guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern".

Journalists would only be entitled to invoke Article 10 in circumstances where "they are acting in good faith and on an accurate factual basis and provide 'reliable and precise' information in accordance with the ethics of journalism". The ECHR held that the law must have regard not only to the content of the publication in question but also the process according to which it was investigated, written and published.

The importance of accuracy

Where members of the media fail to follow appropriate standards of journalism, they do not fulfil their socially useful function of imparting information on issues of public interest. The court's view was that this sort of scrutiny is especially important today.

> "In a world in which the individual is confronted with vast quantities of information circulated via traditional and electronic media and involving an ever-growing number of players, monitoring compliance with journalistic ethics takes on added importance.[11]

Thus, although the article in question dealt with a topic which was in the public interest, the court felt that the journalist had edited his report in a sensationalist fashion which was liable to mislead readers. This was exacerbated by the prominence given to it as a front page report. Accordingly, the publication was not entitled to the protection of Article 10.

Implications for Article 10

This confirms that the guarantee of media freedom under the Convention is not an absolute one but is limited to situations in which the coverage in question can be said to be socially valuable. The Strasbourg Court has repeatedly emphasised the importance of a free press as a necessary element of a democratic society. A free press plays the "vital role of 'public watchdog'".[12] However, where a publication does not fulfil this function, the European Court of Human Rights has indicated that it cannot rely on the Article 10 guarantee.

This could be the case because the subject-matter of the piece is not one in which there is a public interest. This was the case, for example, in *Von Hannover v Germany*[13] where the publication of anodyne photographs of Princess Caroline of Monaco was held not to serve any useful social function. *Stoll* confirms that this notion of restricted media freedom can apply not only to the subject-matter of a report but also to the way in which it is researched or written.[14] In so doing, it further narrows the paramaters of what will be regarded by the Court as protected journalistic expression.

Conclusion

The Court's instrumentalist approach to Article 10 is not, of itself, a notable departure from its previous decisions. The ECHR has consistently emphasised the relationship between the protection of a free press and the maintenance of a democratic society. It has thus always preferred a democratic conception of media freedom over a First Amendment-style absolutist approach. The significance of these recent decisions is that they suggest that the ECHR is adopting a rigorous approach to Article 10 claims which makes little or no allowances for editorial or journalistic discretion. As other

11 Application no. 69698/01, December 10, 2007 at para. 104.

12 *Observer & Guardian v U.K.* (1991) 14 EHRR 153 at para. 59, cited with approval in *Jersild v Denmark* (1994) 19 E.H.R.R. 1 at para 31.

13 (2005) 40 E.H.R.R. 1.

14 There is some authority for this view of media freedom as an instrumentally limited concept in the Irish caselaw and in the purposive aspects of the text of Article 40. 6. 1. (i). Support for this analysis can be found in the decisions in *Hunter v Duckworth* [2003] IEHC 81, *Cogley v RTE* [2005] 4 I.R. 79, *Leech v Independent Newspapers (Ireland) Ltd* [2007] IEHC 223 and *Mahon v Keena* [2007] IEHC 348. In all of these decisions, the extent of the law's protection of media freedom was determined in part by reference to the nature and content of the publications in question. Material considered to be of public interest or importance was entitled to a higher level of legal protection.

recent decisions like *Tillack v Belgium*[15] indicate, the Court is not necessarily reducing the level of protection offered under Article 10. It is, however, narrowing the scope of the Article in a way which makes it increasingly difficult for a publication to qualify as a protected form of media expression.

In both *Pfeifer* and *Stoll*, the Court effectively ruled that the publications fell outside Article 10 because they did not correspond exactly to the Court's own conception of accurate or responsible journalism. In *Stoll*, the ECHR accepted that the publication was in the public interest. The Court did not deny that the report was correct and that the diplomat had used the language attributed to him by the piece. However, it felt that Article 10 did not apply because of the way in which the material was presented. This differed from the Court's view of what was appropriate, and accordingly fell outside Article 10.

In *Pfeifer* meanwhile, the ECHR based its finding that Article 10 did not apply on the magazine's choice of language. Not only that, but it opted to rely on its own understanding of the phrase used rather than to admit the possibility – which was supported by the interpretation of the local courts – that a less objectionable meaning had been intended by the authors.

The ECHR thus effectively denied the possibility of journalistic discretion by substituting its own view of what was appropriate and responsible journalism for that of the members of the media at issue. In both cases, the ECHR second-guessed the decisions of the impugned publishers, questioning not the material or subject-matter of the report but rather the language used and angle adopted. This contrasts with the earlier caselaw of the Court in which it acknowledged that "journalistic freedom … covers possible recourse to a degree of exaggeration, or even provocation".[16] It appears that the ECHR is increasingly unwilling to show any degree of deference to the decisions of the media but will instead subject each claim to journalistic protection to intense and rigorous scrutiny.

Of itself, this would not have profound implications for the journalistic practices of the Irish press. The fact that a publication, by reason of its content, language or presentation, is not protected by Article 10 does not mean that it is automatically impermissible to publish it. Publication will only be impermissible where it contravenes a law or interferes with a protected legal entitlement. It is in this context that the ECHR's increasingly expansive understanding of Article 8 may have particularly serious ramifications for the activities of the press. *Von Hannover* suggests that any coverage which relates to an individual's non-official duties could constitute a breach of Article 8. *Pfeifer* indicates that there may be an obligation on national authorities to prevent media commentary or criticism which might undermine the reputation of an individual, even where that individual is a public figure participating in a public discussion. The combination of an expansive approach to Article 8 with a narrower interpretation of Article 10 may considerably circumscribe the range of material which may be legitimately published by the press.

That this represents a significant retrenchment on the part of the Court is illustrated by the fact that the English courts – who have traditionally been regarded as reluctant foot-draggers on matters of press freedom – have implicitly refused to follow the recent decisions of the ECHR. It is difficult, if not impossible, to reconcile the decision in *Von Hannover* with the English courts' refusal to provide a remedy against the publication of anodyne photographs of celebrities in *John v Associated Newspapers*[17] and *Murray v Express Newspapers*.[18] In the latter case, Patten J. noted the apparent divergence between *Von Hannover* and the English authorities but attempted to show that these decisions were not contradictory. He held that "a distinction can be drawn between a child (or an adult) engaged in family and sporting activities and something as simple as a walk down a street or a visit to the grocers to buy the milk".[19] In his view, the first category of conduct is protected whereas the second is not. On the basis of the facts before him, however, this attempted justification is most unconvincing. *Von Hannover* concerned precisely the sort of anodyne activity in the second category while the facts in *Murray* (the publication of a photograph of JK Rowling with her family) would seem to fall, if anything, within the first. Publication was, however, permitted in *Murray* whereas it obviously was not in *Von Hannover*. This suggests that, despite Patten J.'s best efforts to prove otherwise, the English courts have failed to follow the ECHR in its recent move towards curtailing the scope of protected press activity. As already noted above, this is a significant reversal of historical roles. It will be interesting to see how our own courts approach these increasingly divergent authorities in the future cases that come before them. ■

15 Application no. 20477/05, November 27, 2007. The Court in this case upheld a claim that the search of a journalist's home was a violation of the Article 10 privilege against disclosure of sources.

16 *Oberschlick v. Austria* (1996) 21 EHRR 1.

17 [2006] E.M.L.R. 27.

18 [2007] E.M.L.R. 22.

19 [2007] E.M.L.R. 22 at para. 65.

Legal The Bar Review Update

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A directory of legislation, articles and acquisitions received in the Law Library from the 4th February 2008 up to 28th March 2008.
Judgment Information Supplied by The Incorporated Council of Law Reporting

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CONTRACT LAW

Interpretation

Co-ownership agreement – Whether breach of obligations under agreement - Clause regulating transfer of interest by single party – Clause regulating joint sale – Whether clause regulating transfer of interest by single party applicable on joint sale – Principles of construction – Surrounding circumstances – Commercial purpose of contract – Objective intention of parties – Evidence of prior negotiation not permissible – Definition of 'party' – Contractual status of put and call option - Nature of obligations arising on joint sale – Whether put and call option inconsistent with obligations – Distinction between put and call option and contract for sale - Validity of notice served under clause regulating joint sale – Entitlement of successor to rely on invalidity – *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989; *Kramer v Arnold* [1997] 3 IR 43; *Igote Ltd v Badsey Ltd* [2001] 4 IR 511; *Antaios Compania SA v Salen AB* [1985] AC 191; *Analog Devices v Zurich Insurance* [2005] 2 ILRM 131; *Investors Compensation Scheme Ltd v West Bromwich BS* [1998] 1 WLR 896 and *Yoshimoto v Canterbury Golf International* [2001] 1 NZLR 523 considered - Declaratory orders made (2007/385SP – Clarke J – 5/7/2007) [2007] IEHC 271
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Jurisdiction

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Jurisdiction

Court of Criminal Appeal – Criminal appeal – Fresh evidence – Application for leave to adduce fresh evidence on appeal – Principles applicable to whether such fresh evidence should be admitted – Tactical decision made by counsel not to call evidence – Whether such decision precludes fresh evidence being adduced at appeal - *People (DPP) v Willoughby* [2005] IECCA 4 (Unrep, CCA, 18/2/2005) followed; *People (DPP) v Cronin* [2003] 3 IR 377 (CCA), *People (DPP) v Cronin* (No 2) [2006] IESC 9, [2006] 4 IR 329 and *Lynagh v Mackin* [1970] IR 180 considered – Appeal dismissed (43/2007 – SC – 30/7/2007) [2007] IESC 38
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Appeal

Bias – Trial judge – Prejudgment - Allegation of objective bias – Whether made out – Charge to jury – Whether overly protracted – Evidence – Admissibility thereof – Whether records compiled in ordinary course of business – *People (DPP) v O'Brien*

[1963] IR 68 considered, *Bula v Tara Mines* [2000] 4 IR 412 applied – Criminal Evidence Act 1992 (No 12), s 5 – Leave to appeal refused (2006/241CCA & 242CCA – CCA – 9/11/2007) [2007] IECCA 98
People (DPP) v Hickey

Appeal

Court of Criminal Appeal – Leave to appeal refused – Certificate to appeal refusal to Supreme Court – Test to be applied – Whether decision of court involving point of law of exceptional public importance – *People (DPP) v Kelly* (Unrep, CCA, 11/7/1996) applied – Courts of Justice Act 1924 (No 10), s 29 – Application for certificate to appeal refused (2004/242CCA – CCA – 29/3/2007) [2007] IECCA 24
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Appeal

Court of Criminal Appeal – Leave to appeal refused – Certificate to appeal refusal to Supreme Court – Test to be applied – Whether decision of court involving point of law of exceptional public importance – Application to quash conviction on grounds that new evidence available since trial – Whether applicant producing new evidence showing that miscarriage of justice occurred – Whether exceptional circumstances permitting further evidence to be called – *People (DPP) v O'Regan* [2007] IESC 38 (Unrep, SC, 30/7/2007) and P*eople (DPP) v Willoughby* [2005] IECCA 4 (Unrep, CCA, 18/2/2005) applied –Courts of Justice Act 1924 (No 10), s 29 – Criminal Procedure Act 1993 (No 40), s 2 – Certificate refused (2005/147CPA – CCA – 31/7/2007) [2007] IECCA 80
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Appeal

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People (DPP) v Donohue

Delay

Right to fair trial – Reasonable expedition – Prosecutorial delay – Whether blameworthy delay on part of prosecuting authorities – Balancing exercise – Risk of unfair trial – Interests protected by right to expeditious trial – Public interest – Exceptional circumstances – Whether exceptional circumstances making it unfair to put applicant on trial - *DC v DPP* [2005] IESC 77, [2005] 4 IR 281, *D v DPP* [1994] 2 IR 465, *PM v Malone* [2002] 2 IR 560, *PM v DPP* [2006] IESC 22, [2006] 3 IR 172 and *SH v DPP* [2006] IESC 55, [2006] 3 IR 575 followed – Respondent's appeal dismissed (179 & 188/2006 – SC – 31/7/007) [2007] IESC 39
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Delay

Right to fair trial – Prosecutorial delay – Medical evidence of impaired memory – First trial adjourned due to indisposition of judge – Conviction quashed on appeal – Retrial adjourned pending prosecution of witnesses for perjury – Whether blameworthy delay existed – Whether delay warranted prohibition – Whether necessary to show prejudice – Whether prejudice evident – Whether loss of spontaneity in evidence was of prejudice – Whether stress and anxiety of pending prosecution warranted prohibition – Whether impaired memory and mental functioning was of prejudice – Constitution of Ireland, Artice 38.1 – European Convention on Human Rights, article 6(1) – Relief refused (2006/851JR – Ó Néill J – 23/10/2007) [2007] IEHC 349
Murphy v DPP

Delay

Right to fair trial - Sexual offences – Prohibition – Inordinate delay – Breach of constitutional rights – Breach of Convention rights - Investigative delay – Multiple complainants - Prosecutorial delay – Complainant delay – Prejudice – Effects on memory – Death of witnesses – Unavailability of documents – Media leaks – Stress and anxiety – Vilification – Risk of unfair trial – Constitution of Ireland 1937, articles 34, 38.1 and 40.3 - European Convention on Human Rights, article 8 – *H v DPP* [2006] IESC 55, (Unrep, SC, 31/7/2006) followed - *JB v DPP* [2006] IESC 66, (Unrep, SC, 29/11/2006), *K(D) v DPP* [2006] IESC 40, (Unrep, SC, 3/7/2006) and B(S) v DPP [2006] IESC 67, (Unrep, SC, 21/12/2006) applied; *PM v DPP* [2006] IESC 22, [2006] 2 ILRM 361, *DC v DPP* [2005] IESC 77, [2006] 1 ILRM 348, *AW v DPP* (Unrep, Kearns J, 23/11/2001), *Barry v Ireland* (Case-18273/04) (Unrep, ECHR, 15/12/2005), *H(T) v DPP* [2006] IESC 48 (Unrep, SC, 25/7/2006) and *Barker v Wingo* [1972] 407 US 514 considered; *OT (C) v DPP* (Unrep, Smyth J, 26/7/2005) distinguished –Relief refused (2005/774JR – Hanna J – 15/6/2007) [2007] IEHC 309
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Disclosure

Special Criminal Court – Privilege against disclosure of information where disclosure might endanger life – Whether trial court entitled to examine material not disclosed to accused – *R v H* [2004] 2 AC 134 followed - Constitution of Ireland, Article 36 –European Convention on Human Rights and Fundamental Freedoms, article 6 - Application refused (243/2004 – CCA – 26/10/2007) [2007] IECCA 97
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Endangerment

Definition of offence – Ingredients of offence – Distinction between manslaughter and endangerment – Definition of manslaughter – Definition of intention and recklessness – Role of trial judge – Adequacy of charge to jury – Jury to be satisfied of guilt beyond reasonable doubt – Whether offence sufficiently clear and precise – Whether endangerment appropriate

offence on indictment – *Attorney-General v Cunningham* [1932] IR 28, *King v Attorney General* [1981] IR 223 and *The People v Murray* [1977] IR 360 applied; *Elliott v C* [1983] 1 WLR 939 considered; *The People (Attorney General) v Byrne* [1974] IR 1 and *Woolmington v* DPP [1935] AC 462 followed - Non-Fatal Offences Against the Person Act 1997 (No 26), s 13(1) – Appeals allowed; no retrials ordered (464 & 481/2004 – SC – 25/10/2007) [2007] IESC 46
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Evidence

Admissibility – Background evidence – Evidence of misconduct other than charged – Relevance of evidence – Necessity for evidence – Whether probative value outweighed prejudice to accused – Proviso – Charge to jury – Corroboration – Credibility – *R v Pettman* (Unrep, CA, 2/5/1985), *Reg v Boardman* [1975] AC 421, *R v Straffen* [1952] 2 QB 911, *People v Dempsey* [1961] IR 288, *R v Arp* [1998] 3 SCR 339, *People (DPP) v BK* [2000] 2 IR 199, *DPP v P* [1991] 2 AC 447, *Reg v Scarrott* [1978] QB 1016, *Reg v M (T)* [2000] 1 WLR 421, *R v Campbell* (Unrep, CA, 20/12/1984), *R v Fulcher* (1995) 2 Cr App R 251, *R v Stevens* [1995] Crim LR 649, *R v Sidhu* (1994) 98 Cr App R 59 and *R v Boyles* [2004] NICA 2, [2004] NI 312 considered - Criminal Justice Evidence Act 1924 (No 37), s 1 – Leave to appeal refused (124/2004 – CCA – 31/7/2007) [2007] IECCA 95
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Evidence

Recognition evidence – Prosecution witness giving recognition evidence despite such having been ruled inadmissible – Whether gardai illegally entering accused's dwelling and that evidence obtained as result thereof inadmissible – Whether accused detained unlawfully and that evidence obtained thereby inadmissible – Publication of comments on proceedings on internet and jury's attention drawn thereto – Prosecution cross-examining hostile witness – Garda interviews not video recorded – *Dawson v Irish Brokers Association* (Unrep, SC, 6/11/1998) and *Z v DPP* [1994] 2 IR 476 applied, *People (DPP) v Kelly* (Unrep, CCA, 21/3/2001) considered – Criminal Justice Act 1984 (No 22), s 27 - Criminal Justice Act 1984 (Electronic Recording of Interviews) Regulations 1997 (SI 74) – Appeal dismissed (2006/91CCA – CCA – 24/5/2007) [2007] IECCA 49
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Extradition

European arrest warrant – Correspondence – Whether correspondence of offences made out – Ingredient of dishonesty absent from offence in requesting state – Whether offence that for which correspondence not required under European arrest warrant – Whether respondent's constitutional rights would be breached if returned – Distinction between European arrest warrant and ordinary extradition procedures – Principle of mutual trust and recognition – European Arrest Warrant Act 2003 (No 45), ss 37 and 38 – *Attorney General v Blake* (Unrep, SC, 16/11/2006) distinguished, *Minster for Justice v Brennan* [2007] IESC 21 (Unrep, SC 4/5/2007) and *Minister for Justice v Stapleton* [2007] IESC 30 (Unrep, SC, 26/7/2007) considered – Order for surrender of respondent (2007/13EXT - Peart J – 10/10/2007) [2007] IEHC 332
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Extradition

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Extradition

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Extradition

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Extradition

European arrest warrant – Request for surrender – Respondent charged in this State on charges arising out of same facts – Whether application for surrender should be adjourned until after trial in this State – Whether useful purpose could be served by adjournment – European Arrest Warrant Act 2003 (No 45), ss 13, 15, 16, 18, 41 and 42 – Adjournment refused (2006/128Ext – Peart J – 20/6/2007) [2007] IEHC 214
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Extradition

Plea bargaining – Constitution – Administration of justice in public – Whether plea bargaining breaches principle – Fair procedures – Whether coercion on accused to plead – Whether breach of constitutional right – Nature of plea bargaining system – Whether unfair and oppressive – Whether respondent plea bargaining freely and voluntarily - Extradition ordered (2006/20EXT – Peart J – 17/10/2007) [2007] IEHC 342
Attorney General v Murphy

Jury

Fair trial – Interference – Failure to discharge jury – Test to be applied – Whether test objective or subjective – Whether nature of interference with jury would lead to risk of unfair trial - *D v DPP* [1994] 2 IR 465, *Bula Ltd v Tara Mines Ltd (No 6)* [2000] 4 IR 41 and *People (DPP) v Tobin* [2001] 3 IR 469 applied; *R v Sawyer* [1980] 71 Cr App R 283 not followed – Appeal allowed, retrial ordered (90/2006 – CCA – 20/7/2007) [2007] IEHC 63
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Rape

Corroboration warning – Exercise of discretion – Whether reasoned basis for refusal of trial judge to exercise discretion to give warning to jury – *People (DPP) v Ferris* (Unrep, CCA, 10/6/2002) followed

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Fair procedures - Obligation to give reasons – Drunk driving – Submission of no case to answer – Intoxilyzer machine - Order of signatures on statement – Observation of applicant prior to sample – Rebuttal of statutory presumption - Refusal of application for directed acquittal –– Entitlement to reasons - *Christie v Leachinsky* [1947] AC 573 and *DPP v Walsh* [1980] IR 294 considered – Summary prosecution – Whether reasons necessary for decision on giving evidence –Whether reasons adequate or sufficient – Decision quashed and remitted to District Court (2006/1240JR – McCarthy J – 3/7/2007) [2007] IEHC 270
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Sentence

Leniency – Presumptive minimum sentence of ten years imprisonment – Undue leniency – Whether exceptional and specific circumstances in mitigation – Whether gravity of offence given sufficient consideration – Whether error for trial judge to have applied mitigating factors twice in imposition of sentence – Whether sentence unduly lenient – Court of Criminal Appeal – Jurisdiction – Whether CCA limited to submissions made by prosecutor in deciding what sentence to substitute for one quashed – *People (DPP) v Byrne* [1995] 1 ILRM 279 and *People (DPP) v Renald* (Unrep, CCA, 23/11/2001) applied – Criminal Justice Act 1951 (No 2), s 6 – Criminal Justice Act 1993 (No 6), s 2 – Sentence quashed and sentence of seven years imprisonment applied (2006/147CJA – CCA – 18/4/2007) [2007] IECCA 21
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Sentence

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Sentence

Rape – Maximum sentence imposed – Life sentence – Appeal from Court of Criminal Appeal – Severity of sentence – Mitigating factors – Principles applicable to sentencing – Effect of early admission and plea of guilty in mitigation of sentence – Circumstances in which maximum sentence of life imprisonment could properly be imposed if reduction in sentence by way of credit for plea of guilty to be given – Indeterminate nature of life sentence – Role of parole board – Whether imposition of maximum sentence warranted – Whether exceptional circumstances present – Whether trial judge erred in considering role of parole board – *People (DPP) v CD* [2004] IECCA 8, (Unrep, CCA, 21/5/2004) approved; *People (DPP) v Tiernan* [1988] IR 250, *DPP v G* [1994] 1 IR 587, *People (DPP) v M* [1994] 3 IR 306 and *DPP v Kelly* [2004] IECCA 14, [2005] 2 IR 321 considered - Criminal Justice Act 1999 (No 10), s 29 – Sentence affirmed (76/2006 – SC – 25/10/2007) [2007] IESC 47
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Sentence

Severity – Sense of grievance – Custodial sentence imposed – Whether accused had legitimate expectation to non-custodial sentence – Whether court had duty to remove accused's sense of grievance at receiving custodial sentence – Leave to appeal refused (140/2006 – CCA – 31/7/2007) [2007] IECCA 84
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Ingredients of offence – No evidence of ownership – No evidence of lack of permission – Whether District Judge correct to convict – Whether sufficient evidence to support conviction question of fact or law – *DPP v Nangle* [1984] ILRM 171; *Fitzgerald v DPP* [2003] 3 IR 247 and *State v Judge Ó Floinn* [1968] 1 IR 245 applied; *People (AG) v Harris* (1957) 91 ILTR 34; *People v. Cullen* (1947) 81 ILTR 45; *R v Langton* 2 QB 296; *AG v Smith [1947] IR 332* considered – Summary Jurisdiction Act 1857 (20 & 21 Vict, c 43) , ss 2 and 6 - Courts (Supplemental Provisions) Act 1961 (No 39), s 51(1) – Question answered in negative (2007/236SS – Birmingham J – 25/6/2007) [2007] IEHC 267
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Trial

Jury – Racial bias – Finding that no evidence that jury motivated by racial bias in reaching conclusion as to guilt of accused – Court of Criminal Appeal – Procedure – Application for leave to appeal – Test to be applied – Whether decision of court involving point of law of exceptional public importance – Courts of Justice Act 1924 (No 10), s 29 – Application for certificate to appeal refused (2007/15 – Court of Criminal Appeal – 27/7/2007) [2007] IECCA 65
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Verdict

Evidence - Applicants convicted of criminal damage and acquitted of violent disorder – Whether verdicts manifestly or necessarily inconsistent – *People (DPP) v Maughan* [1995] 1 IR 304 distinguished – Criminal Damage Act 1991 (No 31), s 2(1) – Criminal Justice (Public Order) Act 1994 (No 2), s 15(1) – Application for leave to appeal dismissed (2006/108CCA & 114CCA – Court of Criminal Appeal – 16/5/2007) [2007] IECCA 44
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Wrongful removal and retention – Rights of custody – Habitual residence – Unmarried father not guardian of children – Constitutional and legal position of unmarried father relative to his child – Family – Right to respect for family life – Meaning of "wrongful" and "rights of custody" – Whether person who performs custodial or parental role without established rights exercises "rights of custody" – Whether "inchoate rights" qualify – Whether rights of custody vested in District Court – Relationship between Hague Convention and Brussels IIR – Relationship between Brussels IIR and European Convention on Human Rights – *HI v MG (Child abduction: Wrongful removal)* [2000] 1 IR 110 applied; *Re H (Child Abduction: Rights of Custody)* [2000] 2 AC 291 followed; *Re B (A Minor) (Abduction)* [1994] 2 FLR 249 distinguished; *Re J (A Minor) (Abduction: Custody Rights)* [1990] 2 AC 562, *WO'R v EH (Guardianship)* [1996] 2 IR 248 and *JK v VW* [1990] 2 IR 437 considered; *Johnston v Ireland* (1987) 9 EHRR 203, *Keegan v Ireland* (1994) 18 EHRR 342, *Kroon v The Netherlands* (1995) 19 EHRR 263 and *Lebbink v The Netherlands* (2005) 40 EHRR 18 followed; *ACW v Ireland* [1994] 3 IR 232 distinguished - European Communities (Judgments in Matrimonial Matters and Matters of Parental Responsibility) Regulations 2005 (SI 112/2005) – Guardianship of Infants Act 1964 (No 7), ss 6A and 11 – Child Abduction and Enforcement of Custody Orders Act 1991 (No 6) – European Convention on Human Rights Act 2003 (No 20), ss 2 and 5 – Hague Convention on the Civil Aspects of International Child Abduction 1980, articles 3, 4, 5 and 10 – Council Regulation 2201/2003 (EC), articles 2, 8, 10, 11 and 16 – European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, articles 8 and 14 – Constitution of Ireland 1937, Articles 40.3, 41 and 42 – Declaration that removal and retention wrongful (2007/22HLC – McKechnie J – 10/9/2007) [2007] IEHC 326
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Judicial review – Disciplinary proceedings – Prohibition – Delay – Fair procedures – Prejudice to respondent –Mandatory nature of regulations – Requirement of expedition – Whether respondent guilty of inordinate and inexcusable delay in conducting disciplinary proceedings – Whether regulations to be strictly interpreted – *Re Butler* [1970] IR 45; *Ruigrok v Commissioner of An Garda Síochána* [2005] IEHC 439 (Unrep, Murphy J,19/12/2005); *McNeill v Commissioner of An Garda Síochána* [1997] 1 IR 469; *McCarthy v Garda Síochána* [2002] 2 ILRM 341; *M(P) v DPP* [2006] 3 IR 172 and *H v DPP* [2006] IESC 55 {2006] 3 IR 575 considered - Garda Síochána (Discipline) Regulations 1989 (SI No 94/1989) – Relief granted (2006/210JR – Edwards J – 30/7/2007)
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Appeal – Assessment of credibility – Whether well-founded fear of persecution on grounds of religion – Failure to produce documentation – Inconsistencies – Failure to seek state protection – Fair procedures – Absence of oral hearing - Treatment of country of origin information – Irrationality and unreasonableness – Consideration of future persecution - Delay – Hearsay – Standard of review – Whether substantial grounds for contending decision invalid – Refugee Act 1996 (No 17), ss 11 and 13 – *O'Keeffe v An Bord Pleanala* [1993] IR 39, *Nguedjo v RAC* (Unrep, White J, 23/7/2003), *Idiakheua v Minister for Justice* [2005] IEHC 150 (Unrep, Clarke J, 10/5/2005), *Moyosola v RAC* [2005] IEHC 218, (Unrep, Clarke J, 23/6/2005), *I(U) v RAT* [2007] IEHC 72, (Unrep, Murphy J, 23/1/2007), *Carciu v Minister for Justice* (Unrep, Finlay Geoghegan J, 4/7/2003), *Bisong v Minister for Justice* [2005] IEHC 157, (Unrep, O'Leary J, 25/4/2005), *Kramarenko v RAT* [2004] IEHC 101, (Unrep, Finlay Geoghegan J, 2/4/2004), *Muia v RAT* [2005] IEHC 363, (Unrep, Clarke J, 11/11/2005), *Sango v Minister for Justice* [2005] IEHC 395, (Unrep, Peart J, 24/11/2005*), da Silveira v RAT* [2004] IEHC 436, (Unrep, Peart J, 9/7/2004), *O(A) and L(D) v Minister for Justice* [2003] IR 1, *Gashi v Minister for Justice* [2004] IEHC 394, (Unrep, Clarke J, 3/12/2004), *Meadows v Minister for Justice* (Unrep, Gilligan J, 4/11/2003), *Vilvarajah v United Kingdom* [1991] (Case No 45/1990), *Z v Minister for Justice* (Unrep, Finnegan J, 29/3/2001), *Traore v RAT* [2004] IEHC 606, (Unrep, Finlay Geoghegan J, 14/5/2004), *Z v Minister for Justice* [2002] 2 ILRM 215, *Akinyemi v Minister for Justice* (Unrep, Smyth J, 2/10/2002) and *Nicolai v Zaidan* [2005] IEHC 345, (Unrep, O'Neill J, 7/10/2005) considered - Application dismissed (2006/332JR – Edwards J – 18/7/2007) [2007] IEHC 300
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Appeal – Decision of Refugee Appeals Tribunal – Refusal – Female genital mutilation – State protection – Internal relocation – Weight of evidence – Country of origin information – Decision as whole – Whether court should intervene – Standard of review – *Idiakheua v Minister for Justice* [2005] IEHC 150, (Unrep, Clarke J, 10/5/2005), *Ward v Attorney General of Canada* [1993] 2 SCR 689, *Okeke v Minister for Justice* [2006] IEHC 46 (Unrep, Peart J, 17/2/2006), *O'Keeffe v An Bord Pleanala* [1993] 1 IR 39 and *O(A) and L(D) v Minister for Justice* [2003] 1 IR 1 considered - *Certiorari* refused (2005/1166JR – Hedigan J – 19/7/2007) [2007] IEHC 299
O (H) v RAT

Asylum

Appeal – Decision of Refugee Appeals Tribunal– Refusal - Whether decision unreasonable or irrational – Weight of evidence – Alleged political persecution – Assessment of credibility - Country of origin information – Whether materials considered – Obligation to refer to evidence – Whether delay in making decision – *Bujari v Minister for Justice* (Unrep, Finlay Geoghegan J, 7/5/2003), *Kramarenko v RAT* [2004] IEHC 101, (Unrep, Finlay Geoghegan J, 2/4/2004), *Memishi v RAT* (Unrep, Peart J, 25/6/2003), *Baby O v Minister for Justice* [2002] 2 IR 169, *Banzuzi v RAT* [2007] IEHC 2, (Unrep, Feeney J, 8/1/2007), *Imafu v Minister for Justice* [2005] IEHC 416, (Unrep, Peart J, 9/12/2005), *K(G) v Minister for Justice* [2002] 2 IR 418 and *Biti v RAT* [2005] IEHC 13, (Unrep, Finlay Geoghegan J, 24/1/2005) considered - Leave to apply for judicial review refused (2005/1255JR – Dunne J – 12/6/2007) [2007] IEHC 276
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Asylum

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Deportation

Asylum – Validity – Whether deportation orders made *ultra vires* – Jurisdiction to make deportation orders – Whether minor applicants making applications for asylum – Whether decision refusing asylum made in respect of minor children of applicant for asylum – *V Z v Minster for Justice* [2002] 2 IR 135 applied - Immigration Act 1999 (No 22), s 3(2)(f) – Appeal allowed, *certiorari* granted (459/2004 – SC – 18/10/2007) [2007] IESC 44
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Deportation

Fear of political persecution – Children included in application of mother – Child

born outside IBC scheme – Refusal of application to remain temporarily – Deportation of father before expiry of fourteen day period - Whether deportation of father breached rights of family – Whether failure to consider rights of Irish born child – Best interests of child – Frustration of deportation by applicant – Delay in raising of new issue – Whether substantial grounds for review – Standard of review – Constitution of Ireland 1937, articles 40 and 41 – European Convention on Human Rights, article 8 - *O(A) and L(D) v Minister for Justice* [2003] IR 1 followed; *Uner v The Netherlands* (Case 46410/99) (Unrep, ECHR, 18/10/2006), *Lupsa v Romania* (Case-10337/04) (Unrep, ECHR, 8/6/2006) and *Adebayo v Commissioner of Garda Siochana* [2006] IESC 8, (Unrep, SC, 2/3/2006) considered – Leave refused (2005/1293JR – Peart J – 27/7/2007) [2007] IEHC 289
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Deportation

Residence - Family rights - Irish born children – Applicant refused residency under IBC scheme – Application for revocation of deportation order and for residency based on family circumstances and parentage of Irish born children - Whether deportation of applicant would breach rights of family members - Conduct of applicant - Whether applicant entitled to remain in State pending determination of proceedings – Whether fair issue to be tried – Whether damages adequate – Balance of convenience – *Bode v Minister for Justice* [2006] IEHC 341 (Unrep, Finlay Geoghegan J, 14/11/2006); *Oguekwe v Minister for Justice* [2006] IEHC 345 (Unrep, Finlay Geoghegan J, 14/11/2006); *Lelimo v Minister for Justice* [2004] 2 IR 178; *Cosma v Minister for Justice* [2006] IESC 44 (Unrep, Supreme Court 10/7/2006), *OJ v Minister for Justice* [2007] IEHC 160 (Unrep, Feeney J, 1/3/2007); – *Adebayo v Minister for Justice* [2006] IESC 8 [2006] 2 IR298, *Yau v Minister for Justice* [2005] IEHC 360 (Unrep, Ó Néill J, 14/10/2005) considered – *Awonuga v Minister for Justice* (Unrep, Finlay Geoghegan J, 4/4/2006); *Malsheva v Minister for Justice* (Unrep, Finlay Geoghegan J, 25/7/2003); *Arsenio v Minister for Justice* (Unrep, Charleton J, 22/3/2007) distinguished - Immigration Act 1999 (No 22), s 3(11) – European Convention on Human Rights Act 2003 (No 20), s 3(1) - Constitution of Ireland 1937, Articles 40 and 41 – European Convention on Human Rights, articles 8 and 14 - United Nations Convention on the Rights of the Child 1989 – Leave to seek judicial review granted (2007/794 JR – Peart J – 3/7/2007) [2007] IEHC 275
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Residence

Alien married to Irish citizen – Application for residency on basis of marriage – Indication that decision on application would take 11 months – Delay – Obligation to reach administrative decision on immigration issue within reasonable time – Whether degree of delay so unreasonable or unconscionable such as to breach fundamental human rights – Reasons for delay – Whether excusable – Judicial review – Mandamus – European Convention on Human Rights Act 2003 (No 20) – Constitution of Ireland 1937, Article 41 – Application refused (2007/321JR – Edwards J – 17/7/2007) [2007] IEHC 234
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Resulting trust

Beneficial ownership of property – Acquisition by plaintiff of land in name of defendant – Control of property given to defendant by plaintiff – Land subsequently registered in name of company - Delay in registering land in name of company - Ownership of issued shares in company – Whether plaintiff beneficial owner of land – Whether defendant held issued share capital in company in trust for plaintiff - Whether plaintiff intended to secure beneficial ownership of property for himself through company or to benefit defendant – *Battle v Irish Art Promotion Centre Ltd* [1968] IR 252; *Dyer v Dyer* (1788) 2 Cox Eq Cas 92; *Parkes v Parkes* [1980] ILRM 137; *Tinsley v Milligan* [1994] 1 AC 340; *Lowson v Coombes* [1999] Ch 373 considered – *Standing v Bowring* (1885) 31 Ch D 282 followed – Claim dismissed (2001/1017 P – Laffoy J – 19/7/2007) [2007] IEHC 272
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Judicial review

Certiorari – Issue estoppel – Grant of planning permission upheld by An Bord Pleanála – Judicial review of decision upholding grant of permission sought - Judicial review of local authority grant of permission already sought – Grounds not raised in first judicial review – Whether grounds could have been raised – Whether failure to raise grounds in first challenge precluded raising them in second – Whether prohibition on raising grounds contrary to European Union law – *Henderson v Henderson* (1843) 3 Hare 100 and *AA v Medical Council* [2003] 4 IR 302 applied - Planning and Development Act 2000 (No 30), s 50 – Relief refused (2005/291JR & 52COM – Clarke J – 5/10/2007) [2007] IEHC 327
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Permission - Permission allowing development on disused railway line — Whether applicant had substantial grounds to challenge grant of permission – Whether applicant had substantial interest – Whether reason for applicant's failure to make observations on planning application – *MacNamara v An Bórd Pleanála* [1995] 2 ILRM 125 applied – Rules of the Superior Courts 1986 (SI 15/1986), O 84, r 21(1) - Planning and Development Regulations 2001 (SI 600/2001), art 28(1) – Planning and Development Act 2000 (No 30), s 50(4)(b) – Leave to seek judicial review granted (2005/1112 JR – De Valera J – 20/7/2007) [2007] IEHC 283
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Statutory requirements - Obligation of developer – Distinction between social and affordable housing – Definition of monetary value and aggregate monetary value – Calculation of price of houses or sites to be transferred to local authority – Calculation of compensation to developer – Whether statutory obligation warranted interference with property rights – Criteria local authority had to take account of before entering agreement with developer – Whether a planning authority could have agreement imposed upon it – Whether development plan could alter legal position of entitlements and obligations under Part V of Act – Calculation of site value – Decision of planning arbitrator – Approach to be adopted by planning arbitrator – Planning and Development Act 2000 (No 30), s 96 – Planning and Development Act 2002 (No 32) - Relief granted (2007/315JR & 637P – Clarke J – 19/7/2007) [2007] IEHC 241
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Costs follow event – Test case – Public body – Whether one party responsible for legislation – Whether notice party entitled to costs – Whether court had discretion to depart from rule – Appropriate principles to depart from rule – Whether test case – No order for costs made (2007/315JR – Clarke J – 12/10/2007) [2007] IEHC 334
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Dismissal of proceedings

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B (J) v Southern Health Board

Dismissal of proceedings

Delay – Inordinate and inexcusable – Balance of justice – Conduct of parties – Whether balance of justice lies in dismissing proceedings – Whether defendant prejudiced in conduct of defence – *Primor plc v Stokes Kennedy Crowley* [1996] 2 I.R. 459 and *Stephens v Paul Flynn Ltd* [2005] IEHC 148 (Unrep, Clarke J, 28/4/2005) considered – Proceedings dismissed (2000/9508P – Dunne J – 31/7/2007) [2007] IEHC 279
Halpin v Smith

Dismissal of proceedings

Delay – Want of prosecution – Balance of justice – Conduct of parties – Whether balance of justice lies in dismissing proceedings – Whether real risk that respondent prejudiced in conduct of defence – Company law – Directors – Application to disqualify/restrict directors – Determination of civil rights and obligations within reasonable time – Companies Act 1990 (No 33), ss 150 and 160 – European Convention on Human Rights Act 2003 (No 20) – *Primor plc v Stokes Kennedy Crowley* [1996] 2 IR 459, *Stephens v Paul Flynn Ltd* [2005] IEHC 148 (Unrep, Clarke J, 28/4/2005), *Davies v United Kingdom* [2005] EHRR 29 and *Eastaway v United Kingdom* [2006] 2 BCLC considered, *Re Knocklofty House Hotel Ltd. (in liquidation)* [2005] 4 IR 497 followed, *Duignan v Carway* [2001] 4 I.R. 550 distinguished – Application to dismiss proceedings refused (1988/205COS – Murphy J – 19/10/2007) [2007] IEHC 346
McStay v Duggan

Dismissal of proceedings

Want of prosecution - Delay – Personal injury – Asbestos exposure – Prejudice to defendant – Whether obligation to give notice prior to motion – No explanation for delay – Inherent jurisdiction – Interests of justice – Onus on party seeking dismissal – Factors for consideration – Duty of courts to expedite litigation – Tests for pre-commencement and post-commencement delay - Whether delay inordinate and inexcusable – Whether balance of justice favoured dismissal - Risk of unfair trial – Delay by defendant – Acquiescence – Expense to plaintiff – Nature of injuries – *Fletcher v Commissioners of Public Works* [2003] 1 IR 465; *Primor Plc v Stokes Kennedy Crowley* [1996] 2 IR 459; *Gilroy v Flynn* (Unrep, SC, 3/12/2004); *Ó Dombnaill v Merrick* [1984] 1 IR 151; *O'Brien v Keogh* [1972] IR 144; *Kelly v O'Leary* [2001] 2 IR 526; *Toal v Duignan (No 1)* [1991] ILRM 135; *Rainsford v Limerick Corporation* [1995] 2 ILRM 561; *Southern Mineral Oil Ltd v Cooney* [1997] 3 IR 549 and *Birkett v James* [1978] AC 297 considered - Action dismissed (2002/923P – McCarthy J – 27/7/2007) [2007] IEHC 264
Donohoe v Irish Press plc

Inspection

Title to land – Adverse possession - Procedural motions – Inspection of documents – Particulars – Inspection of property – Compliance with rules – Reliance on 'normal practice' – Whether constructive engagement on procedural issues by solicitors – Whether inspection of property necessary – Attendance of non-expert witnesses – Whether circulation of expert reports to be restricted – Rules of the Superior Courts 1986 (SI 15/1986), O 50, r 4 – *Cork Plastics v Ineos Compounds* [2007] IEHC 247, (Unrep, Clarke J, 26/7/2007) and *Bula Ltd v Tara Mines Ltd (No 1)* [1987] IR 85 considered - Limited inspection allowed and no costs ordered (2006/4266P – Clarke J – 7/9/2007) [2007] IEHC 308
Charlton v Kenny

Limitations of actions

Date of knowledge of identity of defendants – Whether plaintiff having direct knowledge – Whether plaintiff ought to have ascertained identity – Whether solicitor's advice constituted expert advice for purposes of statute – *O'Driscoll v Dublin Corporation* [1999] 1 ILRM106 considered - Statute of Limitations (Amendment) Act 1991 (No 18), s 2 – Defendant's appeal allowed (522/2004 – SC – 15/11/2007) [2007] IESC 53
Byrne v Hudson

Pleadings

Particulars - Lack of sufficient particularity in pleading alleged – Application to strike out portion of statement of claim – Undated allegations - Whether fair trial of action prejudiced by lack of particularity in pleadings – *Tromso Sparebank v. Beirne* (Unreported, Costello J, 14/3/1988) considered – Rules of the Superior Courts 1986 (SI 15), O 19, r 27 – Portions of claim struck out (2005/4481P – Laffoy J – 3/10/2007) [2007] IEHC 330
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Strike out defence

Abuse of process – Title suit – Defence struck out by Circuit Court – Appeal to High Court – Whether proceedings scandalous, frivolous or vexatious – Appeal dismissed (2006/134CA - Edwards J – 8/10/2007) [2007] IEHC 329
McGlynn v Gallagher

Third party procedure

Set aside – Delay – Whether third party notice served as soon as reasonably possible – Professional negligence - Onus of proof - Relevance of prejudice – Multiplicity of actions — *Governors of St Laurence's Hospital v Staunton* [1990] 2 IR 31; *Molloy v Dublin Corporation* [2001] 4 IR 52; *Connolly v Casey* [2000] 1 IR 345; *Ward v O'Callaghan* (Unrep, Morris P, 25/2/1998) and *SFL Engineering Ltd v Smyth Cladding Systems Ltd* (Unrep, Kelly J, 9/5/1997) considered – Civil Liability Act 1961 (No 41), s 27(1)(b) – Rules of the Superior Courts 1986 (SI 15/1986), O 16, r 1(3) - Proceedings set aside (2003/6781P – Laffoy J – 10/8/2007) [2007] IEHC 255
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Time limits

Enlargement of time for delivery of statement of claim – Residential institutional abuse –Whether delay inordinate and inexcusable - Difficulty in serving proceedings – State of mind of plaintiff – Residential Institutional Redress Board claim – Onus on opposing party – Balance of justice – Prejudice – Alternative redress against solicitor – *Rainsford v Limerick Corporation* [1995] 2 ILRM 561 considered - Time enlarged (2001/9906P – Peart J – 16/5/2007) [2007] IEHC 171
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Covenant

Maintenance services – Shopping centre – Assignment of lease – Whether covenant positive – Enforceability – Enforceability of burden of positive covenant against successor in title to covenantor – Privity – Novation of contract – Whether implied – *Halsall v Brizell* [1957] Ch 169, *Rhone v Stephens* [1994] 2 AC 310, *Thamesmeade Town Ltd v Allotey* [1998] 30 HLR 1052, *Austerberry v Oldham Corp* (1885) 29 ChD 750 and *Tulk v Moxhay* (1848) 2 Ph 774 considered – Held that third parties having no liability to plaintiff in respect of covenant (2006/81CA – Murphy J – 26/6/2007) [2007] IEHC 219
Cardiff Meats Ltd v McGrath

Easements

Right of way – Nuisance – Damages – Wrongful interference with right of way – Plaintiff's entitlement to damages – Whether interference with right of way was substantial – Measurement of damages – Assessment of diminution in value – Claimant's duty to mitigate loss – Plaintiff granted declaration and damages (1997/12470 – Laffoy J – 9/2/2007) [2007] IEHC 24
Nolan Dwyer Developments Ltd v Kingscroft Developments Ltd

Resulting trust

Beneficial ownership of property – Acquisition by plaintiff of land in name of defendant – Control of property given to defendant by plaintiff – Land subsequently registered in name of company - Delay in registering land in name of company - Ownership of issued shares in company – Whether plaintiff beneficial owner of land – Whether defendant held issued share capital in company in trust for plaintiff - Whether plaintiff intended to secure beneficial ownership of property for himself through company or to benefit defendant – *Battle v Irish Art Promotion Centre Ltd* [1968] IR 252; *Dyer v Dyer* (1788) 2 Cox Eq Cas 92; *Parkes v Parkes* [1980] ILRM 137; *Tinsley v Milligan* [1994] 1 AC 340; *Lowson v Coombes* [1999] Ch 373 considered – *Standing v Bowring* (1885) 31 Ch D 282 followed – Claim dismissed (2001/1017 P – Laffoy J – 19/7/2007) [2007] IEHC 272
Stanley v Kieran

Title action

Adverse possession – Use and occupation of land – Permission of owner – Proprietary estoppel – Statute of Limitations 1957 (No 6), ss 13, 18, 51 and 58 – *Murphy v Murphy* [1980] IR 183, *Seamus Durack Manufacturing Ltd v Considine* [1987] IR 677 and *Doyle v O'Neill* (Unrep, O'Hanlon J, 13/1/1995) - Claim dismissed (2001/364SP – Laffoy J – 28/3/2007) [2007] IEHC 120
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Valuation

Valuation tribunal – Rateable valuation of cable – Revised valuations of commissioner of valuation struck out – Applicant did not participate in appeal before tribunal – Tribunal failed to serve précis of evidence on applicant – Whether précis should have been served on applicant as rating authority – Whether précis would have enabled applicant to decide whether to participate in appeal – Whether valuation tribunal considered serving précis on applicant – Whether valuation tribunal must decide appeal within six months – *McAnenley v An Bórd Pleanála* [2002] 2 IR 763; *State (Elm Developments Limited) v An Bórd Pleanála* [1981] ILRM 108; *Pettit and Son Ltd v Commissioner of Valuation* (Unrep, Butler J, 1/5/2001); *PS v Residential Institutions Redress Board* [2006] IEHC 401 (Unrep, Gilligan J, 3/11/2006) considered - *DB v Minister for Health* [2003] 3 IR 12 applied - Valuation Act 2001 (No 13), ss 36(1), 36(2), 37(2), 57(7) and 57(8) - Valuation Act 1988 (No 2), ss 3(4)(a) and (b) – Local Government (Planning and Development) Act 1992 (No 14), s 6 – Decision of valuation tribunal quashed (2005/283JR – Dunne J – 31/7/2007) [2007] IEHC 311
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Arrest of vessel

Vessel detained – Period of detention – "As soon as may be" - Whether detention lawful – Preliminary examination – Return for trial – Repeal and re-enactment of procedure – Transitional provision – Whether re-enacted legislation similar - *Southern Health Board v CH* [1996] 1 IR 219, *Stevens v General Steam Navigation Co Ltd* [1903] 1 KB 890, *R v Goswami* [1969] 1 QB 453, *Jones v Commissioner of Taxes* [1942] Tas SR 1, *Ville de Montreal v ILGWU Centre Inc* [1974] SCR 59 and *Michaels v Harley House* [1997] 1 WLR 967 distinguished - – Interpretation Act 1937 (No 38), s 20(1) – Fisheries (Consolidation) Act 1959 (No 14), ss 233, 233A and 234 – Criminal Procedure Act 1967 (No 12), ss 4A, 8 and 13 – Fisheries (Amendment) Act 1978 (No 18), ss 2 and 13 – Fisheries (Amendment) Act 1994 (No 23), s 12 – Criminal Justice Act 1999 (No 10), s 9 – Applicants' appeal dismissed (186/2005 – SC – 27/7/2007) [2007] IESC 35
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Child – Failure to provide – Assets at date of death – Circumstances of applicant – Provision made for applicant – Circumstances of siblings – Failure in moral duty to make proper provision – Just provision – Succession Act 1965 (No 27), s 117 – *XC v RT* [2003] 2 IR 250, *Re IAC* [1990] 2 IR 143 and *MPD v MD* [1981] ILRM 179 considered – Declaration granted and substitution of sum (2001/364SP – Laffoy J – 28/3/2007) [2007] IEHC 120
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Construction - Administration of estate – Whether statement declaration of belief or condition – If condition, whether condition subsequent or precedent – Whether condition void for uncertainty – Whether bequest determinable fee simple – Evidence – Whether extrinsic evidence admissible – Succession Act 1965 (No 27), s 90 – *Rowe v Law* [1978] IR 55 and *Howell v Howell* [1992] 1 IR 290 considered – Held that estate purported to be granted determinable fee simple, bequest failed and property reverted to residue (2006/64SP – McGovern J – 2/11/2007) [2007] IEHC 367
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ACTS OF THE OIREACHTAS AS AT 28TH MARCH 2008 (30TH DÁIL & 23RD SEANAD)

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Signed 27/02/2008

BILLS OF THE OIREACHTAS AS AT THE 28TH MARCH 2008 (30TH DÁIL & 23RD SEANAD)

[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.

Biofuels (Blended Motor Fuels) Bill 2007
2nd Stage – Dáil **[pmb]** *Deputies Denis Naughten, Richard Bruton, Fergus O'Dowd, Olivia Mitchell and Bernard J. Durkan*

Broadband Infrastructure Bill 2008
1st Stage – Seanad **[pmb]** *Senators Shane Ross, Feargal Quinn, David Norris, Joe O'Toole, Rónán Mullen and Ivana Bacik*

Charities Bill 2007
Committee Stage – Dáil

Civil Law (Miscellaneous Provisions) Bill 2006
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Civil Unions Bill 2006
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Climate Protection Bill 2007
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Competition (Amendment) Bill 2007
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Garda Síochána (Powers of Surveillance) Bill 2007
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Genealogy and Heraldry Bill 2006
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Land and Conveyancing Law Reform Bill 2006
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Local Government Services (Corporate Bodies) (Confirmation of Orders) Bill 2008
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Official Languages (Amendment) Bill 2005
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2nd Stage- Dáil

Twenty-eighth Amendment of the Constitution Bill 2008
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Victims' Rights Bill 2008
1st Stage – Dáil

Voluntary Health Insurance (Amendment) Bill 2007
Report Stage – Dáil *(Initiated in Seanad)*

Witness Protection Programme (No. 2) Bill 2007
2nd Stage – Dáil **[pmb]** *Deputy Pat Rabbitte*

ABBREVIATIONS

BR = Bar Review
CIILP = Contemporary Issues in Irish Politics
CLP = Commercial Law Practitioner
DULJ = Dublin University Law Journal
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
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
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

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

The Immigration, Residence and Protection Bill, 2008

Colm O'Dwyer BL

The Immigration, Residence and Protection Bill, 2008, was published on the 29th of January 2008.

The Bill aims to replace most of the current legislation on immigration[1] and international protection.[2] Major changes to the current 'multi stage' procedures for assessing applications from foreign nationals for refugee protection, subsidiary protection and humanitarian leave to remain are proposed. This is the area I intend to address in this article although there are many other aspects to the Bill which deserve close attention.

1. Applications for protection and humanitarian leave to remain – the current position.

At present, a foreign national who arrives at the frontiers of the State seeking asylum can make an application for a refugee declaration to the Minister for Justice, Equality and Law Reform ('the Minister'). Once this application is made, the applicant is granted leave to enter and remain in the State until such time as their application is determined by the Minister.

The application for a refugee declaration is investigated and processed at first instance by the Office of the Refugee Applications Commissioner (ORAC), a body independent of the Minister in the exercise of its functions under the Refugee Act.[3] An Authorised Officer of the Commissioner interviews the applicant and investigates the background to the application. He or she then produces a 'Section 13' report on the application that includes a recommendation to the Minister either that the applicant should, or should not be, granted refugee status.[4]

If the recommendation is negative, the applicant can, within 15 working days[5], appeal this decision to the Refugee Appeals Tribunal (RAT), an independent, quasi-judicial body.[6] In most cases, the appeal involves a full oral appeal hearing before a Tribunal Member (a solicitor or barrister appointed directly by the Minister as an ordinary member of the Tribunal on a part-time basis[7]). The Chairman of the Tribunal, who was also originally appointed temporary Chairman by the Minister and is a former Tribunal Member, allocates the appeals to the individual Tribunal Members.

Where an applicant fails in his refugee appeal, he is refused a declaration by the Minister and receives a written notice of intention to deport (known as a section 3 letter).[8] At this point, he can apply for a different form of international protection, known as subsidiary protection, which covers cases where the applicant may have reason to fear serious harm in his country of origin but not necessarily because of his race, religion, nationality or membership of a particular social group or political opinion (i.e. he may not qualify as a refugee but is in real danger in their home country).[9]

Unlike the refugee application, the subsidiary protection application is processed 'in house' for the Minister by the Irish Nationality and Immigration Service (INIS).[10] It can take many months or even years to get a decision although there have recently been a number of applications for *mandamus* by way of application for judicial review in these cases. A person cannot make an application for subsidiary protection without already having made an application for a refugee declaration and having this application refused.

Alternatively, or in addition to the application for subsidiary protection, the unsuccessful applicant for a refugee declaration can also apply for what is known as humanitarian leave to remain[11] (although a formal application is not necessary as the Minister, before making a deportation order, is enjoined by the provisions of section 3 (6) of the Immigration Act, 1999 to consider and have regard to humanitarian issues such as the age of the person, their family and domestic circumstances, their connection to the State, their character and general humanitarian issues so far as these issues are known to the Minister). The applicant can submit 'humanitarian representations' within 15 working days

1 The Aliens Act, 1935, the Immigration Act, 1999, the Immigration Act, 2003 and the Immigration Act, 2004, will be repealed and replaced by the Bill.

2 The Refugee Act,1996, and the European Communities (Eligibility for Protection) Regulations 2006 (SI 518 of 2006) will be repealed by the Bill.

3 See section 6 of the Refugee Act, 1996, as amended.

4 See section 13 of the Refugee Act, 1996, as amended.

5 Except where there are any "manifestly unfounded" type findings specified in section 13 (6) of the Refugee Act, 1996. Where such a finding appears in the Section 13 report, the applicant has only 10 working days to appeal and does not receive an oral hearing.

6 See section 15 of the Refugee Act, 1996, as amended.

7 Second Schedule Refugee Act, as amended by the Illegal Immigrants (Trafficking) Act 2000 section 9 (d). There is no official or transparent application process for these positions.

8 A notification of a proposal to deport under section 3 (4) of the Immigration Act, 1999

9 Regulation 4 of the European Communities (Eligibility for Protection) Regulations 2006 deals with the application for subsidiary protection and indicates that the subsidiary protection application should be made within 15 days of receipt of a proposal to deport letter.

10 See generally the European Communities (Eligibility for Protection) Regulations 2006 and/or Council Directive 2004/83/EC

11 It is not only persons who been refused a refugee declaration who can apply for humanitarian leave to remain. Almost everyone the Minister intends to issue a deportation order against has to be issued with a proposal to deport and can make such an application. See section 3 (1) and section 3 (5) of the Immigration Act, 1999.

of the receipt of the proposal to deport.[12] It is the general practice that these representations can be updated at any point before the deportation order is made. Humanitarian factors obviously change and develop over the months or years an applicant can remain in the 'humanitarian' application system – some applicants have been waiting over 5 years for a decision which means that their humanitarian case is far stronger than it was when the proposal to deport was issued because of the deeper connection with the State.

Before expelling a person from the State, the Minister must also consider the principle of *'non-refoulement'*, which is a general prohibition on the forced return of a person to a territory where the life or freedom of that person would be threatened because of his race, religion, nationality or membership of a particular social group or political opinion.[13] There are unusual circumstances, generally involving a marked deterioration in the human rights situation in the country of origin, where a person who was previously refused a refugee declaration could still make a strong claim for leave to remain on the basis of this principle.

Under section 3 of the European Convention on Human Rights Act, 2003, the Minister also has a general obligation to perform his functions under the Immigration Acts in a manner compatible with the State's obligations under the provisions of the European Convention on Human Rights (ECHR). Many humanitarian applications are linked to the ECHR Articles 2 (right to life), 3 (prohibition of torture and inhuman treatment), 7 (no punishment without law), and 8 (respect for private and family life). Occasionally, last minute 'human rights' type humanitarian applications are made to the Minister to stop the making of, or implementation of, a deportation order or the transfer of a person to another EU Member State under the Dublin II Regulations. In the case of *Makumbi v. Minister for Justice Equality and Law Reform*,[14] Finlay Geoghegan J. found that medical evidence indicating that there was a genuine risk of suicide, which was presented to the Minister prior to the transfer of the applicant, must be considered by the Minister in the context of the applicant's rights under Article 40.3 of the Constitution and Article 2 of the ECHR and, having considered this evidence, he can then determine whether a transfer should take place.

Finally, an applicant can, even after a deportation order has been made, make an application under section 17(7) of the Refugee Act, 1996, to be re-admitted to the refugee application system where new circumstances have arisen which could not have been considered in the first application. It is also possible to apply to have a deportation order revoked[15] on similar grounds.

2. The unified process proposed in the Bill

The Bill, in Part 7 (sections 61 – 104) envisages the introduction of an entirely different, unified process for the final determination of the refugee application, the subsidiary protection application and any application for humanitarian leave to remain, including any application related to the provisions of the ECHR.

a) The protection application at first instance

A foreign national arriving at the frontiers of the State[16] will be given permission to enter the State if he indicates to Immigration Officers that he intends to make a protection application.[17] He should then receive "protection application entry permission" in the form of a permit that will allow him to remain in the State for the sole purpose of having his protection application determined.[18] This permission does not confer any right on the applicant to reside in the State or oblige the Minister to grant to the applicant any form of residence permission. An applicant cannot seek or enter employment or leave the State without the permission of the Minister and he can be ordered by an Immigration Officer to dwell in a particular place in the State[19] (although not generally in a place of detention as had been discussed before the Bill was published).

Where the Immigration Officer is not in a position to provide a permit to the applicant, as is the likely situation at airports and ports, the applicant can be arrested and detained in prison until the permit can be issued. Although the Minister must give priority to the issuing of a permit in such circumstances,[20] it would appear that an applicant could be detained indefinitely on this basis The arbitrary and open ended nature of such detention, which is a new proposal in the Bill, must give rise to Constitutional concerns and may not comply with Article 5 (1) (f) of the ECHR which provides that no person shall be detained or deprived of their liberty in such circumstances except to prevent his effecting an unauthorised entry to the country or with a view to deportation or extradition.

Having entered the State, the protection applicant[21] will make a protection application directly to the Minister. The Minister, in the guise of the INIS, will subsume the functions of the independent Refugee Applications Commissioner and investigate this application.[22]

12 See section 3 (4) of the Immigration Act, 1999.
13 See section 5 of the Refugee Act, 1996
14 Unreported, High Court, Finlay-Geoghegan J., 15th November 2005.
15 See section 3 (11) of the Immigration Act, 1999.
16 It is not entirely clear from the Bill whether a person who is already in the State will be able to make a protection application and receive a permit. Section 73 (1) does mention that a foreign national even if unlawfully in the State may apply for protection but section 54 which relates to removal from the State does not indicate that removal would be suspended by the protection application.
17 See section 21 (10) of the Bill. Section 25 (4) indicates that a person who is already the subject of an exclusion order will not be allowed to re-enter without the permission of the Minister.
18 See generally section 68 of the Bill. Significantly, there appears to be no appeal from a decision refusing entry to a person who, for whatever reason, does not satisfy the Immigration Officer that they intend to apply for protection. Such an appeal exists in the majority of EU Member States under the Schengen Borders Code Regulation (EC) No 562/2006.
19 See section 68 subsections (5) and (6).
20 See section 70 (6) of the Bill.
21 This would not include a programme refugee who will already have been granted permission to remain in the State as part of a group. See section 47 of the Bill. There are also very detailed provisions in the Bill for dealing with 'temporary protection' for a mass influx of displaced foreign nationals who may not qualify as refugees but cannot in the short term return to their country of origin.
22 See section 73 (1) of the Bill.

The precise format of the protection application has been left for another day, but it is clear that the application form must include all details of the grounds on which either sort of protection is being claimed and, in the event of protection not being granted, the grounds upon which the applicant considers that he or she should nevertheless be permitted to remain in the State[23] (it is difficult to see how an applicant, without the benefit of legal advice, would know what to include in such a comprehensive and complex application).

The protection application will be deemed to cover all of the dependants of the applicant who are under 18 years, whether present in the State or arriving subsequently.[24] Under the current system, the children of refugee applicants can make a separate and independent application for a refugee declaration. While the EU Asylum Procedures Directive 2005/85/EC, which will be transposed into law in this State by the Bill, indicates that an application may be made by an applicant on behalf of his dependants and that a Member State may determine in national legislation the cases in which a minor can make an application on their own behalf, it is hard to see how a provision which prohibits a child from making an independent application because one of their parents has already made an application can be compatible with the 1951 Refugee Convention. The child's application could, for example, relate to events that occurred in the country of origin after the parents had left or to a fear of persecution or serious harm that was not relevant to the parents or to adults in general. The recent decision of the Supreme Court in *Nwole*[25] would also suggest that children can make separate and independent applications for refugee status from their parents and should not always be tied to the parent's application.

After the protection application has been made, an Officer of the Minister (i.e. the INIS official) will interview the applicant. Where it appears to the Officer that the applicant is an unaccompanied minor, the Officer shall "as soon as practicable", contact the Health Service Executive (HSE) and the Child Care Acts 1991 – 2007 will be invoked.[26] A protection application will not then be made by the HSE on behalf of the child unless it is satisfied that it is in the best interests of the child to do so. International best practice in this regard, to which the Government committed to in the National Children's Strategy in 2000, is that an independent guardian (not the social worker) be appointed to assist the child in dealing with legal counsel and deciding whether he or she should submit an application. In this way, the opinion of the child is given due weight in the process in accordance with the provisions of the UN Convention on the Rights of the Child.

There is still no specific procedure in the Bill for age assessment where the initial assessment of a Garda or Immigration Officer is disputed. Even though Article 17 of the Procedures Directive specifies that an official with the necessary knowledge of the special needs of minors interview the minor and prepare the decision of the determining authority on the application of an unaccompanied minor, there are no special procedures or rules put in place for the assessment of protection claims made by children and interviews with children in the Bill. Indeed, section 74 (10) (b) of the Bill proposes that the Minister can dispense with an interview altogether where the minor applicant "is of such an age and degree of maturity that an interview would not (in the Minister's view) advance the investigation". It is worth noting that the whole issue of training, qualification and expenence of officials within the INIS who will be expected to have a knowledge of refugee law, subsidiary protection law and humanitarian/human rights law is not addressed in the Bill.

The way in which the need for protection is to be considered by the Minister, and the nature and source of the information that must be taken into account, is outlined in Sections 63, 64 and 65 of the Bill. These sections are taken directly from Regulations 5,6, 7,9 and 10 of the European Communities (Eligibility for Protection) Regulations which already apply to the ORAC and RAT. In essence, the Minister must consider the individual position and personal circumstances of the applicant, all relevant facts about the applicant's country of origin at the time of making the determination and all statements made and documentation presented by the applicant during the course of the application. The burden of proof that he is entitled to protection lies with the applicant[27] although the Bill states that the Minister shall "in cooperation with the applicant" assess the relevant elements of the application.[28] It will be interesting how far this cooperation extends.

Matters that may taken into account in the all important assessment of the personal credibility of the protection applicant are almost identical to those specified in section 11B of the Refugee Act, 1996[29] (whether the applicant has provided a reasonable explanation of identity documents etc.) although it is stated that these are only examples. It is interesting that no mechanism to disclose to the applicant country of origin information and other evidence upon which the Minister intends to rely in rejecting their application has been included in the Bill. This lack of fair procedures has been the subject of many judicial reviews of the ORAC.

The protection application also includes other humanitarian or human rights reasons why the applicant believes they should be allowed to remain in the State. There are no specific examples of humanitarian reasons that the Minister might have regard to. Section 83 (1) of the Bill simply provides that the Minister will not make a determination that the applicant is entitled to remain unless there are "compelling reasons" to let him stay. The explanatory memorandum at the beginning of the Bill states at paragraph 7 that the non-protection issues would cover "all other aspects of the desire of the protection applicant to remain in the State (at present dealt with under the Immigration Act, 1999)" which would suggest that the Minster will have regard to the issues listed in section 3(6) of the Immigration Act, 1999, referred to above. However, section 83 (2) (b) of the Bill states that the Minister "shall not be obliged to take into account factors in the case

23 See section 73 (14) of the Bill.
24 See section 73 (13)
25 *Nwole* (a minor) v *Minister for Justice, Equality and Law Reform and Anor* [2004] IEHC 433 (decision of 17 October 2007)
26 See section 73 subsections (6) – (11)
27 See section 75 (1) of the Bill.
28 See section 75 (3) of the Bill.
29 See section 76 of the Bill.

which do not relate to reasons for the applicant's departure from his or her country of origin or that have arisen since that departure" If this section is applied literally, it is hard to see which (if any) humanitarian issues will be considered by the Minister. However, the Bill does not seem to envisage any other way that an application for humanitarian leave to remain or a human rights type application can be made by a protection applicant prior to deportation.

In the UK they have a dual application and appeal system that covers the refugee and subsidiary protection applications and what is known as the 'human rights' application. This would appear to have been the original intention of the Bill with the incongruous section 83, which effectively abolishes the humanitarian application procedure, introduced at later stage.

A real life example of where an unfortunate person could fall foul of section 83 is where a flood or drought has occurred in their homeland since they came to this State but which could potentially result in the loss of their own or their children's lives.

b) The decision at first instance

Following consideration of the protection application, the Minister will make a determination and produce a report of the investigation of the application similar to the current Section 13 report.[30] The determination can be that the applicant is entitled to protection as a refugee, the applicant is entitled to subsidiary protection, the applicant is not entitled to protection but (whether to comply with the rule against *refoulement* or otherwise) will be granted residence permission or leave to remain, or that the applicant is not entitled to protection and will not be permitted to remain in the State.[31] The report may also include a number of specific findings that will disentitle the applicant to an oral appeal.[32] These findings are based on the "manifestly unfounded" type findings that already appear in section 13(6) of the Refugee Act, 1996. The contentious "safe countries of origin" finding (relating to countries designated as safe by the Minister under section 102) is included in this section.

c) The protection appeal

A protection applicant may appeal against the determination of the Minister to a new body called the Protection Review Tribunal (PRT) but only in respect of the decisions that they are not entitled to refugee or subsidiary protection.[33] The decision in respect of other humanitarian factors cannot apparently be appealed[34] (this may give rise to judicial reviews of one part of the decision while the other parts proceed to appeal).

The appeal must be brought in the prescribed form within 15 working days of notification of the determination at first instance or 10 days if there is a "manifestly unfounded" type finding under section 79 (3) and the applicant is not going to receive an oral hearing.

The protection appeal will usually involve an oral appeal hearing similar to the current RAT hearing[35] except, of course, that the Tribunal Member will also be dealing with subsidiary protection. There is in fact really very little difference between the RAT and the PRT and this has been identified by the Irish Refugee Council and the UNHCR as one of the key problems with the Bill.

The operation of the RAT has been mired in controversy for the past few years and it is a body against which more than 1000 successful judicial reviews[36] have been taken over the past few years on the basis of lack of transparency,[37] lack of fair procedures[38] and, perhaps most significantly, bias against applicants. The recent settlement of the long running *Nyembo* cases highlighted the latter issue. It was claimed in these cases that there was a perception of bias among applicants and their legal advisors because the Tribunal Member who dealt with the most appeals had never given a positive decision during the period under examination, which was effective from January 1, 2002 to June 30, 2004. A secondary question arose which was why a Tribunal Member who always, or almost always, said no was allocated many more cases than other Tribunal 'Members'.[39] When the Supreme Court ruled that statistics on these issues should be provided to the applicants, all 3 cases settled with the appeals being re-assigned to another Tribunal Member. The issue of bias against applicants therefore remains un-resolved.

The lack of transparency in the appointment of Tribunal Members has also been, and will remain, a real issue. These highly paid part-time positions, which can generate a higher salary than that of the Minister, do not involve any official application process or transparent selection process. The general perception is that the positions are within the gift of the Minister and that some lawyers have been appointed to the Tribunal on the basis of their political affiliation or personal connections to political figures rather than any experience in or interest in refugee law. The Bill indicates that part-time members of the PRT will still be appointed directly by the Minister in this manner[40] yet the PRT will now be reviewing his decisions at first instance. This has given rise to serious concerns about independence and impartiality.

The payment system, where part-time Tribunal Members are paid by the decision, also looks set to remain in place. In the past, this system seems to have encouraged a practice of delivering as many decisions as possible Where speed is of

30 Now a section 74 (19) report,
31 See section 79 (2) of the Bill.
32 See section 79 (3) and section 81(7) of the Bill.
33 See section 84 of the Bill.
34 This may force applicants to seek judicial review of one part of the decision at first instance.
35 Except where there were "manifestly unfounded" type findings made under section 79 (3).
36 See an Irish Times Article entitled "Asylum Judicial Reviews costing the State €20 million" by Carol Coulter March 18 2008.
37 *Atanasov and Ors v the Refugee Appeals Tribunal and Ors* [2006] IESC 53 Supreme Court 26 July 2006
38 For an overview, see the decision of Clarke J in *Imafu v the Refugee Appeals Tribunal and Ors* (Unreported, High Court, Clarke J, 27/05/2005) or the decision of Edwards J in *Simo v The Minister for Justice Equality and Law Reform and RAT* (Unreported, High Court, Edwards J. 4th of July, 2007).
39 See the Irish Times of the 4th March, 2008 p6 "Evidence of disharmony among members of the refugee appeals process".
40 See section 92 (4) of the Bill. There may also be full-time Tribunal Members who will be appointed through the Public Service Appointments Service.

the essence, basic mistakes can be made such as, for example, referring to the wrong country or the wrong tribe throughout the decision (the latter in the context of the Hutu/Tutsi genocide in Rwanda). These errors have led to successful and expensive judicial reviews against the Tribunal taken on the basis of a lack of fair procedures or a failure to take into account evidence presented by the applicant. Despite the expense and the damage to the reputation of the Tribunal itself, there appears to be no repercussions for any individual Tribunal Member. They do not appear to be allocated any fewer cases. Section 93 (13) of the Bill does state that a PRT Member may be removed from office by the Minister for "stated reasons" but does not go on to provide examples of what these reasons may be. This is the flip side of the coin where the Minister directly appoints the Members. Will he want to sack them ?

On a related subject: despite the High Court and Supreme Court decisions in *Atanasov and Ors v the Refugee Appeals Tribunal and Ors* which paved the way for publication of and access to previous RAT decisions as a matter of basic fairness of procedure and equality of arms, the Bill seems to seek to maintain the greatest degree of secrecy possible in relation to decision making at the PRT. Section 95 (8) indicates that the Minister may by regulation provide that previous decisions of the PRT in redacted form, which the Chairman must first be satisfied is legally relevant to the individual applicant's appeal[41], will only be made available to an applicant where the applicant's legal advisors provide an undertaking that the decisions will only be used for bona fide legal advice in the applicant's case and will not be published or provided to other legal representatives. These provisions make general research on the workings of the Tribunal and efforts to encourage consistency in decision making impossible. Why can't the Tribunal operate in a transparent manner? The equivalent body in the UK makes redacted decisions available on-line. UK Appeals Tribunal decisions are often cited in judicial review cases and are even used by the RAT Members in their decisions.

It was anticipated by many practitioners that the Bill would scrap the RAT and effectively start again. This appeared to be what the last Minister intended to do when he published an earlier version of the Bill in 2006. However, the Bill now allows for the transfer of the administration and business of the RAT to the Review Tribunal. Despite all of the controversy, the Bill has changed to allow the Chairman of the RAT to be deemed to be the Chairman of the PRT[42] who will allocate the cases to individual Tribunal Members. The Chairman will be able to review draft decisions and suggest changes where there is an error of law or fact but he cannot insist that the decisions be changed. He can, however, on notice to the applicant, refer any final decision to the High Court for a direction on the law. It is not clear whether this means that the decision isn't actually final or whether the applicant can be represented before the Court for such an application, or who will pay for this.

d) Judicial Review

It is judicial review cases which have allowed the flaws in the ORAC and RAT to come to light. Many of these judicial reviews are successful, usually through settlement, and are taken without the benefit of legal aid.

Rather than focusing on the cause of the problem, the new Bill aims to restrict access to judicial oversight of the asylum or protection system and discourage solicitors and barristers from taking judicial review cases. Section 118 (3) attempts to limit the Court's discretion to extend the 14 day time limit for the issue of proceedings while Section 118 (8) permits the Court to award costs against the applicant's legal representatives where the grounds for trying to quash a decision are found to be frivolous or vexatious. There is no equivalent provision which relates to a situation where the legal representatives of the defendants prolong or fight cases unnecessarily, which would seem to represent a breach of the principle of equality of arms.

3. Conclusion.

This Act proposes a far-reaching overhaul of refugee law in this state. However, many of its provisions are highly questionable and may fall foul of constitutional or European Convention provisions. It is to be hoped that this Bill will be extensively discussed and amended as it passes through the Houses of the Oireachtas. ■

41 See section 95 (2).

42 See section 137 of the Bill.

Taking Notice of the Decisions of the Strasbourg Court: problems and processes

Patrick Mair BL

Introduction

As with several key aspects of the European Convention on Human Rights Act 2003 (the "Act"), the UK experience of reconciling domestic precedent with the jurisprudence of the European Court is of relevance to the Irish Courts. In largely the same manner as Section 2 of the UK Human Rights Act 1998 (the "HRA"), Section 4 of the 2003 Act obligates Irish Courts to take notice of the jurisprudence of the Strasbourg Court in actions under the Act. But there is no obligation to follow this jurisprudence, only to "take due account of the principles" that it contains.

Because of the great similarity between the UK and Irish models, the decisions of the House of Lords on this are instructive. In particular, the judgment of the Lords in *Leeds City Council v. Price & ors.* ([2006] UKHL 10) may help to elucidate problems surrounding the interaction of domestic precedent and the jurisprudence of the Strasbourg Court: how is an Irish High Court judge to deal with an uncontroversial Supreme Court precedent if that precedent is inconsistent with a decision of the European Court of Human Rights? After all, as recognized by the Lords in the case, where Convention rights are in question, the Strasbourg Court "is the highest judicial authority on the interpretation of those rights, and the effectiveness of the Convention as an international instrument depends on the loyal acceptance by member states of the principles it lays down".

Leeds City Council Case

Leeds City Council v. Price & Ors. arose as follows: the appellants were a family of travelers who had occupied property belonging to the respondent without its permission. The respondent, who was the Council, duly sought an order for possession in the High Court. The Council claimed possession as freehold owners of the site against the family as trespassers while they in turn sought to base their defense on Article 8 of the European Convention, claiming that the order for possession was an interference in their private lives but was neither necessary nor proportionate. The trial judge disposed of the point in favor of the Council, holding that he was bound by a previous decision of the House of Lords, namely *Harrow London Borough Council v. Qazi* ([2004] 1 AC 983). In that case, the Lords held that where contractual and proprietary rights create an unqualified right to possession, an Article 8 defense cannot be successfully raised against it. The trial judge recognized, however, that the holding of the Lords in *Qazi* was incompatible with a later decision of the European Court of Human Rights, *Connors v. United Kingdom* ([2004] 40 EHRR 189) and hence gave leave for appeal. In *Connors*, the Strasbourg Court had held that, regardless of the Council having an absolute right to possession, an eviction from a local authority site must be accompanied by certain procedural safeguards, the principal one of which is the need to establish proper justification for the interference with the rights of the evictees.

When the case arrived in the House of Lords, it was held that departing from the established system of binding precedent in favour of Convention principles would result in uncertainty and inconsistency and was a move that ought not to be undertaken by the lower courts of their own volition. Hence, in cases where a Convention provision is incompatible with precedent, the latter shall be the rule of decision and merely providing leave to appeal will discharge the lower Court's duty under the HRA. Lord Bingham, who delivered the judgment, went on to cite the margin of appreciation afforded to state parties to the Convention as a key justification for the decision. He indicated that it was for national authorities to determine how principles developed in the Strasbourg jurisprudence ought to be applied in the national context.

The Irish Approach?

This focus in the judgment distracts attention from the dynamic at the centre of the case, namely the oscillation between maintaining the power of domestic precedent and empowering the lower courts to depart from precedent in circumstances where it appears to be required by Convention principles. Although declarations of compatibility may only be issued in Ireland by the High and Supreme Courts, and therefore the multifarious nature of the precedent problem is less severe, it seems likely that the Supreme Court would take the same approach as the House of Lords. It will allocate decision-making responsibility in this regard to itself rather than the more ambitious and decentralized alternative.

Ostensibly, the reason for concentrating the decision-making authority in the hands of the Lords – that national courts operate within a margin of appreciation in setting the initial standards for adherence to the Convention, and that the ordinary rules of precedent ought therefore to apply – is sound. It is probable, however, that the Court

was also motivated by a reluctance to have its decisions departed from by lower courts on foot of the jurisprudence of a transnational court. In other words, if the power over precedent is to be in effect ceded to Strasbourg at the Lords' expense, then it is the Lords themselves who will decide how and when it will be done. One can easily imagine the Supreme Court of Ireland taking the same view.

A further justification offered by the Lords was one of certainty: the avoidance of disagreement among courts or within the same court among differently constituted benches as to the compatibility of precedent with the jurisprudence of the Strasbourg Court. This, however, ought not to be countervailing. The examples of disagreement cited by the Court were no more pernicious than disagreements on points of law and fact that ordinarily arise in the normal course of legal proceedings in relation to precedent.

Further problems of precedent

It is of significance for the process of judicial review under the Act that there are few categorical rules enunciated by the Strasbourg Court. The Court's reasoning is heavily influenced by balancing and as a result, the judgments arrived at are very particular to the facts in question. Similarly, the Strasbourg Court has on occasion been criticized for not elaborating on its reasoning in arriving at certain important decisions, which is problematic for national courts that must be guided by those very decisions. As such, a potential problem exists with regard to the duty of the Irish courts to take into account the European Court's jurisprudence: how is the High or Supreme Court to properly fulfill its duty under Section 4 of the Act if in a given situation there is considerable difficulty in extracting a suitably concrete principle from the relevant case-law?

This problem was keenly felt by the House of Lords in *N v. Secretary of State for the Home Department* ([2005] UKHL 31), in which Lord Hope expressed his frustration that the Strasbourg authorities were "in a not altogether satisfactory state". He went on to suggest that in response to such ambiguity, the Court must stoically recognize that: "It is for the Strasbourg court, not for us, to decide whether its case law is out of touch with modern conditions and to determine what extensions, if any, are needed to the rights guaranteed by the Convention. We must take its case law as we find it, not as we would like it to be." This seems to indicate that the Lords felt inclined towards conservatism in their distillation of core rules from the Strasbourg jurisprudence. But this is because of the desire for uniformity of interpretation among the national courts of state parties to the Convention. Indeed, Lord Bingham stated in an earlier case *(R (Ullah) v. Special Adjudicator*, [2004] 2 AC 323) that: "It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it."

Tied into this is the uncertainty from the Irish perspective about the extent to which Irish courts will draw on authorities from other Council of Europe members in their interpretation of the case-law of the Strasbourg Court. If firm principles are not plainly forthcoming from the case-law of the Court, guidance might well be sought from national courts in other jurisdictions which have previously interpreted the relevant Strasbourg jurisprudence. There is no provision for this in the Act and it would appear that all things being equal, the ordinary rules of precedent will apply to such situations. As such, the decisions of, for example, the House of Lords in a HRA case involving similar facts to that before an Irish Court would be of persuasive authority and could serve to illuminate the Court's interpretation of the relevant decision of the Strasbourg Court. Indeed, this practice was abundantly evident in *Carmody v. Minister for Justice* [(2005) IESC 10], in which extensive treatment was given by the High Court to the House of Lords interpretations of Convention provisions.

It remains to be seen how some problematic features of the Section 4 provision will be dealt with by the Supreme Court. The examples of the UK experience cited here serve to illuminate some options open to it. ■

Pupil Exchange in Paris

Doireann Ní Mhuircheartaigh BL

Doireann Ní Mhuircheartaigh BL was sponsored by the Bar Council, as part of the Bar's Pupil Exchange Programme, to participate in a special exchange scheme run by the French Bar. Below, she shares her experiences.

Le Début…

The prospect of spending two months in Paris at the invitation of the Paris Bar was enticing. The Napoleonic system, professional judges, inquisatorial justice as opposed to adversaries arguing the corner of their clients: the law from an entirely different perspective. I had spent some years living in France in the past, and I thought I knew what to expect. *Quelle erreur.*

Mid-October found me in the firm of Chemouli Dauzier, a small select firm in the chic Saint-German area of Paris, specialising in commercial law, media law and intellectual property. The offices were elegant, the staff, from the receptionsist to the managing partners, incredibly friendly, and the coffee-machine dispensed perfect espressos (essential). Upon arrival, I was introduced to some of the *avocats*, involved in cases which were of interest to me, and asked to prepare a comparative paper on copyright and artists' rights in Ireland for a continuing study the firm were conducting. I was assigned a nice big comfortable office. So far so good.

In Paris, as in all of France there is a clear divide between private and the professional. The emphasis on a work-life balance, sometimes seems to be a work-life divide. The culture of after-work drinks does not exist at all, and as the ambiance in a workplace is rather formal, even lunch with colleagues is planned in advance. Interaction between colleagues during the day is largely work related apart from the odd *bonjour*. Working conditions are faultless: quiet, calm – for an Irish barrister – eerie...

Droit et Procédure…

It was in the Chambres correctionels – the seat of criminal law - that I saw two of the most interesting cases I came across while in France. The first case had four defendants, all of whom were being prosecuted under a provision of an act on the Freedom of the Press that makes defamation of a sitting politician a specific crime. As in Ireland, defamation in France may be civil or criminal, although in France this is at the instigation of the alleged defamed. Where it is a criminal prosecution, the State is represented by the public prosecutor and the complainant is represented separately by an *avocat*. A losing defendant may be liable to pay civil damages to the complainant. Public figures are well protected in France. Article 9 of the Civil Code enshrines respect for the private sphere. The right to one's image, as an attribute of one's personality, is considered part of that sphere. Everyone has an exclusive right over his or her image and can therefore challenge (*à la* Nicholas Sarkozy & Carla Bruni) any use of such an image without express authorisation. Article 226 of the penal code makes publication of images or quotes from private conversations a crime. Accordingly, France is home to many a media-shy celebrity choosing to live away from the glare of the Paparazzi.

This case saw the great and good of the defamation specialists of the Paris Bar. All four defendants were represented individually along with the complainant. The state however was not represented by an avocat, but by a magistrate, the public prosecutor. The alleged defamed deputy herself was present, and gave an explanation of her complaint directly to the judges. The trial went on until after 8pm, staunchly defended on the basis that the television programme alleged to be defamatory was not in fact defamatory and in the measure that it was, was protected by meeting the four tests that characterised good faith in journalism – legitimacy of the goal pursued, the absence of personal animosty, the seriousness of the journalistic investigation and prudence in expression. Although the judges sat late, judgement was reserved, verdicts in such cases being always written and never delivered immediately.

Another case I attended was pure theatre. A large tobacco firm was being taken to court on violation of the Public Health Code regarding advertising on tobacco products. The tobacco firms were clinically and persuasively represented by the managing partner of Chemouli-Dauzier, *Maître* Pierre-Louis Dauzier. Along with the State's position which was argued by the public prosecuter, the National Committee Against Tobacco was represented by a legal professor, who took the cause very much to heart. An animated *avocat*, he marched around the courtroom, articulating at length on why errors in procedure should be overlooked in the name of justice while waving cigarette packets in the air and expounding against the past and present activities of the tobacco firms. He was met by a very contrasting style: a considered yet concise explanation of fair procedure and civil liberties.

The structure of the courtroom itself deserves a mention. The atmosphere in the *Chambres Correctionnels* or criminal courts is steeped in the Empire and firmly marked by the Era of Napolean III. Courtrooms are lavishly decorated with allegoric paintings and symbols of Justice, Truth and the Power of the State. The raised bench seats three judges, even where the court is reserved for less serious crimes and a judge sitting alone would be exceptional. The front four benches are reserved for the *avocats* representing the parties, as at home. On the right hand side of the courtroom, elevated to the same level as the judges, sits the public prosecutor, the *magistrat débout* who will plead the case of the State.

The judges, known as the *magistrats de siège* (as they are sitting), and the public prosecutors, known as the *magistrats débout* (as they plead their cases on their feet) all belong to the judiciary. Their roles are effectively interchangeable and a *magistrat* can change between one role and the other during the course of their careers, without losing any seniority. Thus the judge and the prosecutor belong to same profession, a profession entirely apart from that of lawyers. Even the symbolism of the courtroom elevates the prosecutor above the other parties, and places him or her at the level of the presiding judges. A famous defence *avocat* once opined to his opposite number: "remember, if you are sitting in an elevated position to me, it is only because of a carpenter's error". This carpenter's error has been the topic of much debate in France, but as recently as 2001, the Paris Appeal Court declared the symbolic structure not to be in breach of the principle of Equality of Arms as envisaged by the European Convention on Human Rights.

The view from above

Before I left France, a former colleague invited me to spend a day with her at work. She is a *magistrat débout* (an elevated prosecution colleague) and worked in Chartres, outside Paris. Eight magistrats worked together under the guidance of the president of the local office. Although the office's closest equivalent in Ireland would probably be that of the DPP, the *magistrats débout* are part of the judiciary – a profession independently trained in the prestigious *École de la Magistrature* in Bordeaux.

Selection to the school is by way of a very competitive set of entrance exams – and those who succeed in gaining one of the coveted places are seen as being at the pinnacle of the elite in France. Once accepted into the school, the young trainee magistrates are on a state salary, and for the duration of their careers are effectively civil servants.

Once qualified, the *magistrats* can elect to work as either judges in the judicial courts or as prosecutors. The public face of the prosecutor or *magistrat débout* is that of prosecution counsel but the role involves far wider duties, responsibilities and powers. The *magistrat débout* will lead a criminal investigation into a crime and is the ultimate decision maker in all police inquiries. Following such investigation the *magistrat débout* will make the decision on whether or not to prosecute and, if a prosecution is pursued, will argue the case of the State in court.

Magistrates form an independent branch of government in France, however magistrates practicing as prosecutors are ultimately answerable to the Minister for Justice. This raises some question as to the independence of the third arm of government in the home country of Montesquieu.

The role of defence counsel is a challenging one in France. The system of inquisitorial justice is a difficult one to accept coming from a common law background; the judge is given complete power over the investigation and there are very limited options open to the defence. Defence lawyers describe the criminal justice system as a smooth-running, well-oiled machine bringing the suspected person systematically through the system from arrest to conviction. "We (defence counsel) are like grains of sand, and at best we can hope to occasionally derail the machine," I was told. Both defence counsel and prosecution magistrates admit that acquittals for any reason other then legal technicalities are almost non-existent in France. The magistrates claimed this was because they did their job thoroughly in leading the investigation, and would not bring prosecutions unless they were convinced of the guilt of the accused. Defence counsel are hampered by lack of time to prepare their defence, difficulty in accessing the files of their clients, and restricted consultation times with clients. Cross-examination of witnesses, in the sense of what we would see in an Irish court is rare, and on the occasions it does arise, more muted and restrained than one would expect.

Ongoing debates on the merits of the Napoleonic System continue to divide the public in France. Judges are very highly regarded and their independence is percieved on some fronts to be so irreproachable as to dispense with the need for *avocats*. The investigating *magistrat* has extraordinay powers and his "intimate conviction" of a suspect's guilt is sufficient to have that suspect incarcerated**.** Provisional detention and the fast-track route of *coparution immédiate* when a suspect can go from arrest to conviction and sentence in three days for certain crimes are criticised by some on the grounds of civil liberty and lauded by others as providing effective justice. Nevertheless, even in France, the system may not always function as it should. In the northern town of Boulogne-Sur-Mer the case of an alleged paedophile ring led to a scandal described by the then Presidant Chirac as "an unprecedented judiciary disaster". Thirteen innocent people were imprisoned for periods of between one and three years. One committed suicide in prison and another has attempted suicide three times, once since he has been acquitted. In the televised parlimentary investigation of the affair, watched by five million viewers, over-dependence by the investigating *magistrat* on weak witness evidence and even weaker court-appointed psychiatric experts emerged as the genesis of the monumental scandal.

En conclusion…

The legal system in France is going through a period of rapid change: European Union Law and obligations under the European Convention of Human Rights has brought about changes in procedure, and the rationalisation of courthouses around the country has led to unease among lawyers and the judiciary. Recent legislative changes regarding repeat offenders and mandatory sentencing appear to mirror development in Irish legislation. However, by far the most striking parallell is in the development of the Legal Profession. Two years ago the training of *avocats* was overhauled, numbers are growing in the legal profession and it is increasingly competitive. There are now 20,000 *avocats* in Paris (I was informally told that ¼ of those are earning under the minimum wage – I was unable to discover whether the abundance of lawyers at the Bar had anything to do with European Competition Law…!). Although since 1971 *avocats* may be employed, many work as independent associates in a firm, dealing with their own

continued on p.50

Pupil Exchange in Paris—continued from p.49

personal clients or feeing for the work they do. A merging of *avocats* with the professions of inhouse commercial lawyers and intellectual property advisors has been canvassed from time to time, but was not favoured by most *avocats* with whom I broached the subject.

The *Stage International* is a wonderful initiative and also provides an opportunity to interact with legal colleagues from Scandinavia, Eastern Europe and Africa. I greatly appreciate the work done by the Bar Council, and by Turlough O' Donnell SC, Noel MacMahon SC and Inga Ryan in particular, in developing and supporting this programme. I would strongly recommend the experience to anyone with an interest in French or European Law. ■

News

Top Human Rights Experts to Address World Bar Conference

A number of renowned speakers have been confirmed to participate in the forthcoming World Bar Conference which is to take place from the 27th to the 30th of June this year.

The conference, which is being held in Dublin and Belfast, and hosted by the International Council of Advocates and Barristers, has secured the most dynamic speakers in the area of Human Rights.

With more than 150 delegates already registered, there has been a strong interest in the event with delegates intending to travel across the globe to participate in discussions with colleagues on issues facing the Referral Bar.

Attending are acclaimed international speakers including Human Rights defender, Beatrice Mtetwa and Liberty director Shami Chakrabati.

Ms Mtetwa's background in Human Rights stems from her activity in her home country of Zimbabwe. In particular, she has an exemplary record in defending press freedom. Her expertise has assisted her in the defence of journalists who have been silenced while reporting acts against Human Rights.

Ms Shami Chakrabati remains an active figure for the campaign against the "War on Terror" and the defence and promotion of human rights values in Parliament, the Courts and Wider Society. Since becoming Liberty's Director she has written, spoken and broadcast widely on the importance of the post World War II Human Rights framework as an essential component of a democratic society.

The conference will consist of a stream of discussions during Business Sessions while delegates will be encouraged to participate in the various networking events that have been arranged, including drinks receptions and gala dinners in both cities.

In previous years, the international conference was held in Cape Town, Hong Kong and Shanghai. The Cross Border conference is widely viewed as a coup for Ireland.

ISEL Public Conference on Treaty of Lisbon

The Irish Society for European Law (ISEL) will hold a public conference on the TREATY OF LISBON on Friday, 18 April 2008 at 2.30 p.m. – 5.30pm at the President's Hall, Law Society of Ireland, Blackhall Place, Dublin 7. The conference is open to all and is free of charge. Speakers include former EU Commissioner, Peter Sutherland, Mary Lou McDonald, MEP and Anthony Coughlan, Senior Lecturer Emeritus in Social Policy, Trinity College Dublin.

To reserve your place and for further details, please contact: Dr. Elaine Fahey, Committee member, ISEL by email: elaine.fahey@dit.ie or telephone: (01) 402 7183.

Obtaining Appointment As An Arbitrator

Arran Dowling-Hussey BL.*

It is always the case that the range of legal work available to Barristers in this State is diverse, changing and fluid in nature and it is important to be aware of the various opportunities available at any one time. A number of members of the Law Library have an interest in Arbitration and either work as Arbitrators or would like to do so from time to time. It can be difficult at first instance to make progress in this field and gain the necessary experience needed so as to cut ones teeth. The paper offers some suggestions as to how to obtain such work in the Republic of Ireland.[1] What follows does not consider how one might appear in an arbitral reference as a Barrister but rather focuses on how to gain work as an Arbitrator. Any comments offered hereafter are indicative only and are not meant to be exhaustive in their scale and scope. At a certain stage in Barristers' careers, a small amount of Arbitration work may well come their way without them taking any action and this point will be discussed first.

Solicitors and/or colleagues may well assist by nominating Barristers that they know as an Arbitrator in small scale holiday and motor car claims. Once a member of the Law Library has been in practice for say eight to ten years or more it can be the case that one or two appointments a year might be obtained this way. This will not place any significant demands in time on those who have been so selected, nor will it be particularly lucrative, but it may well be of interest and help to many to be in such a position because they are interested in this area of law. The exact nature of each Arbitration will vary and so it is impossible to be precise, but the Arbitrator may end up being paid in and around €1,000; they will have had to arrange via a number of letters, the date of the oral reference, and then have to sit for a morning or afternoon so as to deal with the claim and then write up their award if required.[2]

This avenue is not of much immediate interest to more junior members of the Bar and they may well have to take different approaches to get work. Such work will tend to flow to those members who are 'known', trusted and somewhat established in their career and the criteria applied in allocating same is somewhat subjective. Canvassing appointments of this type may not be productive too early on in a career at the Bar if such appointments should ever be canvassed at all. A more immediate and obtainable route to follow is to seek an institutional appointment from the Chartered Institute of Arbitrators.

All Barristers who studied in the King's Inns between 1991 and 2005 or thereabouts took Arbitration as part of their Barrister-at-Law degree course and depending on the mark they obtained in the examination are eligible to become an associate member of the Chartered Institute of Arbitrators (hereafter referred to as CIArb) . Once they are a member, they may be appointed as an Arbitrator in those institutional schemes that the CIArb administer; but to increase the chance of gaining an appointment, it is of assistance if associate members work their way through the ranks so as to qualify as a Fellow. If committed to doing so, it is possible to qualify relatively quickly. The emphasis in the CIArb at the time of writing has not fully moved towards the use of Panels of Arbitrators but so as to maintain standards, there is a definite intention from the Institute that they will just nominate Fellows and Chartered Arbitrators for appointments all other things being equal.[3] A Chartered Arbitrator is seen as someone who has:

> " demonstrated to a Interview Panel, advanced knowledge and understanding of arbitration and its practical application, evidencing a professional approach to parties and the public interest."[4]

More specific guidance and information is available, suffice to say the issue is not likely to be of immediate concern to those who are attempting to gain initial experience in this area. The appointment of a Member of the CIArb to Chartered Arbitrator rank is a benchmark of quality, arguably somewhat akin to becoming a silk. Of the approximately 750 members of the CIArb in the Republic of Ireland, perhaps 10 hold Chartered Arbitrator status.[5] Other institutions are involved in appointments though various difficulties may arise in getting work from them.

The Law Society of Ireland maintains a Panel of

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1 No advice is offered as to how to obtain work in International Arbitration.

2 There is no requirement for an arbitrator to give a reasoned award in the Republic of Ireland but it is increasingly seen as good practice see inter alia *Marshall v Capitol Holdings Limited* [2006] IEHC 271

3 There are a number of different grades of membership of the CIArb and full details are set out at http://www.arbitrators.org/Membership/Upgrading.asp. It costs approximately €365 per annum to become an associate member of the CIARB, €450 to become a member and €510 to become a Fellow. Once Fellowship is obtained it is possible to become a Chartered Arbitrator a definition of which is offered in the main paper.

4 http://www.arbitrators.org/courses/chartered%5Farbitrator.asp

5 www.arbitration.ie/

Arbitrators and unlike their Panel of Mediators, there is no rule that stops Barristers from being appointed to the Panel. However along with a number of other institutes that maintain such lists, there is a requirement that is normally expressed in mandatory terms that the applicant shall have held a professional qualification for ten years.[6] Engineers Ireland is another body which sets out this requirement along with a number of other criteria; they ask that in addition, an applicant show that they are sufficiently familiar with construction and engineering:

> "3.2 Criteria for Admission to the IEI List of Arbitrators
>
> 3.2.1 Applicants should, at the time of admission to the list,
>
> (i) Be CEng, FIEI or equivalent or
> (ii) Have been CEng, MIEI, for at least 10 years or
> (iii) Be the holder of a legal or other professional qualification for at least 10 years and be knowledgeable in engineering and construction matters; and
> (iv) Be able to demonstrate knowledge of Arbitration and Court Procedures.
>
> and
>
> (i) Be a Fellow of the Chartered Institute of Arbitrators;
> (ii) Have passed either:
> the ICE examination on Law and Contract Procedure (Papers 1 & 3) or equivalent post-graduate examination (such as the Diploma Course in Construction Law and Contract Administration at Trinity College, Dublin); or
> Be able to demonstrate an equivalent level of knowledge; and
> (iii) Have worked with either the Engineer's or the Contractor's organisations, and preferably with both, on IEI or ICE or FIDIC Contracts to appreciate the different interests and motives."[7]

The Bar Council is asked from time to time to appoint Arbitrators, though due to the significant nature of the cases at issue, those appointments that become public seem to have been made amongst the ranks of " senior juniors" and Senior Counsels. Particularly high profile sporting disputes have frequently been resolved by Senior Counsels sitting as Arbitrators in recent years.Those Barristers who are caught out by the requirement to have been a professional for ten years or more may well be able to obtain experience in the interim, as already stated, via appointments proffered by the CIArb and other bodies. One route that can help in this process is to qualify to join the Panel of Adjudicators and/or Mediators of the Residential Tenancies Board. Unfortunately, the Board has appointed new panels in December 2007 and is not due to recruit again until near the end of the current panels three year term in and around March 2010. Nevertheless, in due course, if one did qualify, such work would allow for the chance to gain occasional ADR experience whilst being paid a daily fee of €628.

Much of the arbitration work that is available is only currently available to Barristers who have been practicing for eight to ten years or more. *Ad hoc* appointments could go to anyone but will tend to go counsel who are known and established and to be seen in this light takes time. Institutional work such as that offered by the Law Society and Engineers Ireland and others, by way of appointments given to those on their Panel of Arbitrators, will often, as has been set out, go to those called in 1998 or earlier. There are other more immediate means of gaining experience in this area; the CIArb administers institutional schemes dealing with small disputes over holidays and cars such that Members and Fellows are normally well placed to obtain the occasional reference and the PRTB will be a source of work for those successful when the next recruitment process is run in 2010. It is also possible to do *pro-bono* work in this area to gain experience; the Dispute Resolution Authority[8] is a source of such work and the Bar Council's ADR committee recently sought applications from those who were willing to act *pro-bono* in sports arbitration.[9] It can be seen that whilst there are some obstacles for the young barrister who wishes to sit as an arbitrator, not all doors are closed. ■

6 http://www.lawsociety.ie/displayCDAContent.aspx?node=561&groupID=561&code=society_committees. It is outside the scope of this paper to consider the appropriateness or legality of any such rules all that is intended is to merely set these rules out.

7 E-Mail from Membership Executive of Engineers Ireland to the author on March 3, 2008.

8 Obviously those unfamiliar with the rules of GAA may feel less well placed to become involved with the DRA than GAA fans. See http://sportsdra.ie/index.htm

9 Bar Council ADR newsletter, Issue 2.