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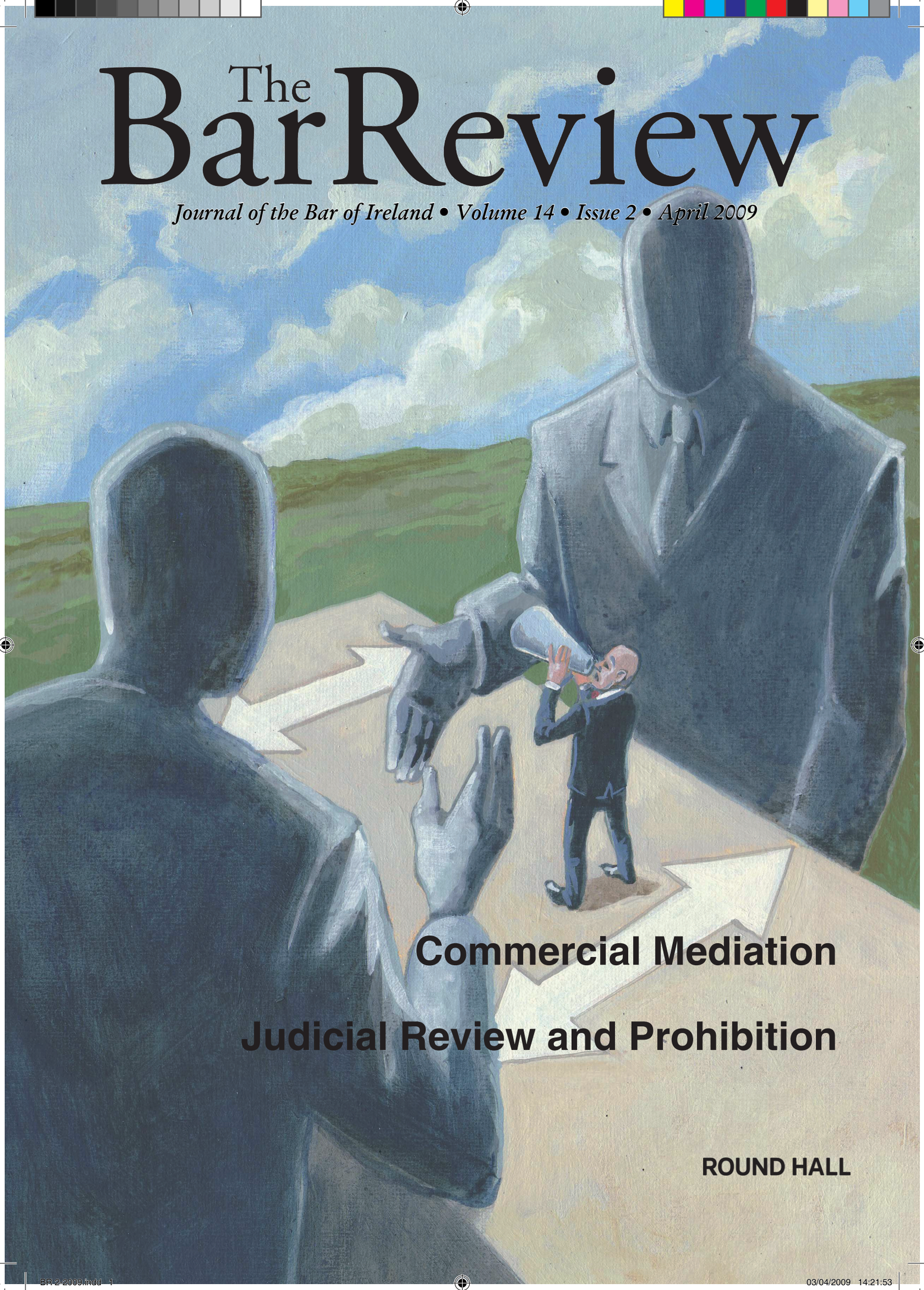

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Judicial Review and Prohibition

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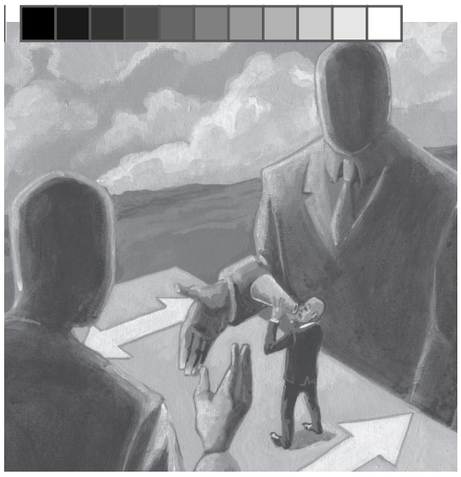

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Putting the Chief Justice on Trial

Recent Developments in the law of prohibition*

Part 1.

Mícheál P. O'Higgins SC

This article discusses recent caselaw dealing with the prohibition of criminal trials. The first part of this article discusses cases where the DPP reviews an earlier decision to prosecute and also analyses recent court decisions on the failure to preserve evidence and delay. The second part of this article will deal with repeat trials, abuse of process and the issue of disclosure.

Introduction

Trinidad and Tobago, an independent republic in Her Majesty's Commonwealth, was in 2006 caught in the grips of a constitutional storm. The Chief Magistrate heard a case in which Mr. Basdeo Panday, then leader of the opposition and a former Prime Minister, was charged with failure to disclose certain assets, contrary to the Integrity in Public Life Act, 1987. The Chief Magistrate convicted Mr. Panday and imposed a severe sentence of imprisonment. In May, 2006 the Chief Magistrate signed a statement to the effect that on three occasions, one before, one during and one after the Panday trial, the Chief Justice, Mr. Satnarine Sharma had endeavoured to influence the decision in favour of the defendant. The statement was sent to the Prime Minister. The Prime Minister expressed the opinion at a private meeting on the 5th of April, 2006 that the Chief Justice had endeavoured to influence the outcome of the Panday trial and that he should resign. The Attorney General and the Prime Minister urged the Chief Justice to resign rather than face the prospect of prosecution.

At about the time of the Panday trial, but before the decision to prosecute was given, the Chief Magistrate found himself embarrassed by a real property transaction from which he was extricated by the Attorney General, giving him (it was said) a motive to fall in with the wishes of the Attorney General. A detailed and colourful sequence of events ensued culminating with the Deputy DPP concluding that an offence was made out and a prosecution was then initiated by the police.

That is how it came to pass that in July, 2006, the Chief Justice of Trinidad and Tobago faced the imminent prospect of prosecution on a charge of attempting to pervert the course of justice. The State's main witness was the Chief Magistrate, Sherman McNicholls. The Chief Justice's defence involved an accusation of politically motivated interference in the prosecution process by the Prime Minister and the Attorney General; of politically inspired dishonesty by the Chief Magistrate, who was a subordinate but important figure in the judicial hierarchy; and of improper, politically inspired decision making and conduct by the Deputy Director, the Assistant Commissioner and the Commissioner of the police.

The Chief Justice elected to pursue a judicial review, seeking orders to halt his trial. He was initially successful, Jones J. at first instance granting leave to challenge the decision to prosecute. However, on appeal, the Court of Appeal set aside the grant of leave but granted the Chief Justice leave to appeal to the Judicial Committee of the Privy Council.

It was in that fraught and rather tense constitutional atmosphere that the relevant legal issues fell to be decided by the Privy Council. Measured against the comparatively minor political squabbles that occur in this jurisdiction, Chief Justice Sharma's case presented constitutional issues of acute sensitivity and moment. The Privy Council was at pains to emphasise that the interests of the State of Trinidad and Tobago and of all those involved in the crisis required the Court to avoid forming any premature opinion as to where the truth may lie, but scrupulously to apply what were perceived to be the legal principles applicable to the situation. The Board delivered two separate judgments.[1] It unanimously affirmed the decision of the Court of Appeal and dismissed the Chief Justice's appeal with costs. Their lordships were at pains to emphasise their decisions were made on legal grounds. They cast no aspersion on the integrity of the Chief Justice, whose innocence of the conduct alleged against him at that stage was to be presumed. As matters transpired, those were wise caveats.

The Privy Council held that, although a decision to prosecute was in principle susceptible to judicial review on the ground of interference with the prosecutor's independent judgment, such relief would in practice be granted extremely rarely. In considering whether to grant leave for judicial review, the court had to be satisfied that the complaint could not adequately be resolved within the criminal process itself, either at the trial or by way of an application to stay the criminal proceedings as an abuse of process. The court held that the court's power to stay criminal proceedings for an abuse of process should be interpreted widely enough to embrace an application challenging a decision to prosecute

* This is an edited version of a paper delivered by the author at a Bar Council CPD Seminar on Judicial Review on Wednesday, the 3rd of December, 2008.

1 The *Sharma* case is reported at (2007) 1 WLR 780.

on the ground that it was politically motivated or influenced. The leave judge had erred in failing to evaluate the extent to which the appellant's challenge could be resolved within the criminal process. Since, in the circumstances, all the issues could best be investigated and resolved in a single set of criminal proceedings, permission for judicial review ought not to have been granted and had rightly been set aside.

Leaving aside its colourful facts, the *Sharma* case is important for what it says about the jurisdiction to challenge a decision to prosecute, by way of judicial review. The thrust of the Privy Council's decision – that judicial review of a decision to prosecute should be granted rarely, and only where the grievance can not be dealt with by the trial judge – has an echo in many of the recent pronouncements of the superior courts in this jurisdiction. A somewhat similar situation obtains in the United States[2] and also closer to home in Northern Ireland[3]. Accordingly, the starting point for any challenge to a decision to prosecute is that the Director of Public Prosecutions enjoys a *quasi* immunity in relation to decisions to bring charges.[4]

Reviewing the DPP's Change of Mind

The leading case in this jurisdiction is *Eviston v. DPP*. Mrs. Eviston was driving from Kilkenny to Killarney and she had her three year old son strapped into a baby seat in the rear of the car. Near a crossroads her car was in collision with another car and the driver of that other car tragically died as a result of the collision.

The DPP decided no prosecution should be initiated and that decision was notified to the solicitor for the defence. After this decision, the father of the deceased third party wrote a letter to the DPP asking him to reconsider the decision. That was done and the decision was reviewed. It was then decided to charge the applicant with dangerous driving causing death and the decision was then notified to the applicant. The applicant's solicitor sought an explanation as to why the decision was reversed and then subsequently, the applicant sought an order from the High Court prohibiting her prosecution.

In the High Court Kearns J. held that for the DPP to remake his original decision and to reinstate a prosecution without any new fact, material or witness coming to light, was arbitrary and perverse, and he stopped the prosecution. The DPP appealed Kearns J's findings to the Supreme Court and that Court held, in dismissing the appeal, but in finding for the DPP on many of the broader issues, that the Director was entitled to review an earlier decision not to prosecute and to arrive at a different decision even in the absence of new evidence and was not obliged in either instance to give reasons for his decision.

Secondly, the Supreme Court held the stress caused to the applicant by the initiating of the prosecution following the communication to her of a decision not to prosecute would not, of itself, afford her legal grounds for an injunction restraining the continuance of the prosecution. There was no actual estoppel where the applicant had not acted to her detriment in reliance on the decision not to prosecute. Further, there could be no legitimate expectation in the absence of a departure, without prior notice, from a legitimately expected particular procedure.

Thirdly, and this is the ground upon which *Mrs. Eviston* was successful in holding her order of prohibition, the Court found that the DPP was required to apply fair procedures in the exercise of his statutory functions in the particular circumstances and that, on the facts of the particular case, the DPP had failed to accord the applicant fair procedures. On that basis the prosecution should be stopped.

Giving the majority judgment of the Court[5] Keane CJ. stated as follows:

> It was undoubtedly open to the respondent in this case, as in any other case, to review his earlier decision and to arrive at a different conclusion, even in the absence of any new evidence or any change of circumstances, other than the intervention of the family of the deceased. The distinguishing feature of this case is the communication by the respondent of a decision not to prosecute to the person concerned, followed by a reversal of that decision without any change of circumstance or any new evidence having come to light. In the light of the legal principles which I have earlier outlined, I am satisfied that the decision of the respondent was *prima facie* reviewable by the High Court on the ground that fair procedures had not been observed.

McGuinness J. also delivered a judgment in which she found that the *particular circumstances* of the case required fair procedures on the part of the DPP. Geoghegan J. agreed with the judgments of Keane CJ. and McGuinness J. Mr. Justice Frank Murphy gave a dissenting judgment in which he expressly disagreed with the proposition that the decision of the DPP is reviewable for want of fair procedures. Murphy J. held that the DPP has not only the right, but the duty, in a proper case to alter his decision to prosecute or not to prosecute in a particular case and that that was so notwithstanding that his original decision may have been made public. The fact the change of mind may have a positive or negative result for an accused would not impinge on the validity of the decision nor impose any novel obligation on the DPP to justify it where, as here, the accused was not embarrassed in her defence.

From the point of view of pure principle, it is difficult to find a chink in Murphy J's analysis in *Eviston*. It is difficult to see how the fact of the prosecutor's change of mind could impact one way or the other the validity of the decision to prefer charges. Having said that, one could only feel sympathy for the applicant's position.

2 *US v. Armstrong* (1996) 517 US 456.

3 See *R v. DPP ex-parte Kincaid*, Unreported, High Court, Northern Ireland, 19th April, 2007.

4 For a discussion of the special position enjoyed by the DPP see *State (McCormack) v. Curran* [1987] ILRM 225, *H v. DPP* [1994] 2 ILRM 285 and *Monaghan v. DPP*, Unreported, High Court (Charleton J.) 14th March, 2007.

5 Murphy J. delivered an interesting dissent.

Post *Eviston* Cases

Eviston was relied upon successfully in *MQ v. Judges of the Northern Circuit and the DPP*[6], *LON v. DPP*[7] and *Keane & Keane v. DPP*[8]. In *LON,* the interval of time between the two decisions was 13 years. In *MQ*, the interval was 4 and a half years. The delay issue loomed large in both cases. In *MQ,* McKechnie J. identified two additional features in that case, beyond the facts of *Eviston*, which favoured the applicant. First, the DPP's decision to proffer charges followed what was in effect a second review rather than a single original view. McKechnie J. doubted whether the DPP's review procedure as set out in the Director's Annual Report of 1998 envisaged a second review. Secondly, McKechnie J. emphasised the much greater period of time which had elapsed between the communication of the decision not to prosecute and the subsequent decision to prosecute.

Similar exceptional circumstances arose in *LON*, leading McMenamin J. to conclude that case came within the category of exceptional cases envisaged by *Eviston* where because of the nature of the communication and overall conduct, an issue of fair procedures arose, and that on the facts the prosecution should be stopped.

Similarly in *Keane & Keane v. DPP,*[9] Hanna J. granted an order of prohibition in circumstances where the DPP initially decided not to prosecute and then changed his mind, but the initial decision was communicated to the defence and it was never suggested the decision might be revisited. The case concerned a criminal prosecution against the owners of a rented dwelling. The tenants of the dwelling had died in their sleep from inhaling fumes from an unserviced boiler situate in the house. The case is a salutary lesson to the owners of rented property.

On the other side of the coin, prohibition was refused by Peart J. in *Hobson v. DPP*[10]. Whilst that case is distinguishable on the basis of the court's finding that fresh evidence emerged in between the initial decision not to prosecute and the subsequent decision to charge the applicant, the case is also noteworthy in the light of Peart J's observation that:

> "…since the *Eviston case* it has become public knowledge that the respondent may review decisions made by him, and that the applicant cannot successfully complain that the respondent failed to indicate when he made his first decision that he was entitled to review and alter that decision."

Whilst lawyers may well be aware of the possibility of review, it is by no means certain that members of the public are.

In *Carlin v. DPP*[11], the applicant sought an order of prohibition on an *Eviston* type ground as well. He argued that where there was a communicated and uncaveated decision not to prosecute, the DPP could not as a matter of fair procedures go back on that decision. On the facts of that case, Murphy J. rejected that contention, holding that the fair procedures to be applied were not those applicable to a court and that the applicant had failed to establish that there was a real or serious risk that he could not obtain a fair trial.

Bringing matters right up to date, the DPP was restrained from prosecuting an accused person on a rape charge in *GE v. DPP*[12]. In that case, the complainant and the applicant met outside a disco in Wexford in February, 2003. A sexual encounter allegedly took place a short time later in a van in the centre of Wexford. The applicant had borrowed the keys to the van from a friend and both he and the complainant walked to the van where it was alleged some kissing developed into a more intimate event which involved the removal of the complainant's clothing and also an attempt at full penetrative intercourse by the applicant. The complainant subsequently alleged that the applicant had raped her, whereas at all times the applicant maintained that any sexual contact was consensual in nature. The applicant was aged 20 on the night in question and the complainant was just short of her 17th birthday. By summons dated February, 2004, the applicant was charged with attempted unlawful carnal knowledge contrary to s.2 (2) of the Criminal Law (Amendment) Act, 1935 as amended by s.13 of the Criminal Law Act, 1997. The maximum sentence following conviction for this offence is 2 years. The defence were informed by an Inspector that the DPP had directed summary disposal of the charge if the applicant were to plead guilty. However, the applicant elected for trial on indictment. The case first came before the Circuit Criminal Court in April, 2005 and thereafter was adjourned from time to time pending the judgment of the Supreme Court on the constitutionality of s.1 (1) of the Criminal Law (Amendment) Act, 1935 in the case of *CC v. Ireland, the AG and the DPP*[13]. The applicant was given bail throughout this period.

In May, 2006, the Supreme Court delivered judgment in the *CC* case in the course of which s.1 (1) of the Criminal Law (Amendment) Act, 1935 was declared unconstitutional. In the aftermath of that decision, a number of Article 40 applications were brought by persons in custody on foot of prosecutions brought pursuant to the struck down legislation. Subsequently the Supreme Court gave judgment in the so called *A* case: *A v. Governor of Arbourhill Prison*[14].

On the 3rd of October, 2006 a *nolle prosequi* was entered in respect of the s.2 (2) charge. A week later on the 10th of October, 2006 the applicant was re-arrested and charged with rape arising out of the same event. Obviously, the maximum sentence following conviction for this offence is imprisonment for life. The applicant brought judicial review proceedings seeking to restrain the DPP from proceeding further with the rape charge.

Having lost in the High Court, the applicant appealed to the Supreme Court and argued that the trial judge had applied the wrong test. It was argued the test was not to determine whether or not an unavoidably unfair trial might take place but rather to enquire whether the decision of the respondent to charge the applicant with attempted unlawful carnal knowledge, then enter a *nolle prosequi* and subsequently charge

6 Unreported, High Court (McKechnie J.), 14th November, 2003.
7 Unreported, High Court (McMenamin J.), 1st of March, 2006.
8 Unreported, High Court (Hanna J.) 10th July, 2008.
9 Unreported, High Court (Hanna J.), 10th July, 2008.
10 [2006] 4 IR 239.
11 *Ex-tempore* judgment of the High Court (Murphy J.), 25th February, 2008.
12 Unreported, Supreme Court, 30th October, 2008.
13 [2006] 4 IR 1.
14 [2006] 4 IR 88.

the applicant with rape, was a breach of fair procedures to such a degree that the prosecution should be restrained. It was argued that the case was analogous to *Eviston*.

Giving the judgment of the Court, Kearns J. stated as follows:

> "The substitution in the instant case was akin to the withdrawal of a Road Traffic Act prosecution for driving through a red light and the substitution instead of a charge of dangerous driving causing death. In current parlance, the "disconnect" between the original charge and the substituted charge is of such an order as to put the applicant in a far worse position than he was in under the original charge.
>
> I would emphasise that this is not a case where ongoing investigations have yielded up further information or evidence which justifies the laying of further charges in addition to a preliminary charge. That is quite a different situation and not one addressed by this judgment."

Interestingly, the Supreme Court would apparently not have intervened if the DPP had preferred an alternative charge, of a less serious nature. In the course of the appeal, the Supreme Court enquired if the DPP had considered availing of the Criminal Law (Sexual Offences), Act, 2006 to prosecute the applicant. Section 3 of that Act creates the new offence of defilement of a child under the age of 17 years and provides that, in the case of an attempt to engage in a sexual act with a child under 17 years, a person may be liable on conviction to imprisonment for a term not exceeding 2 years. That Act was introduced in response to the *CC* case and provides for a defence of honest mistake as to the age of the child, but it is otherwise similar to the statutory rape offence which preceded it. Counsel for the DPP responded that the Act of 2006 created a new offence and that it was not intended to have retrospective effect.

The Supreme Court were undoubtedly influenced by the DPP's candid acknowledgement that the Director's office was firmly of the view initially that a rape charge against the applicant was not warranted and would not succeed. That fact featured heavily in the case.

From the point of view of pure legal principle, however, it is difficult to identify a judicial review ground in the Court's decision. The Court appeared to be of the view that it was perfectly alright for the DPP to substitute a new charge altogether, even in the absence of fresh evidence or any change of circumstance, but that what was objectionable, and which led to an order of prohibition being granted, was the "ramping up" of the charge from the statutory rape offence to the profoundly serious charge of rape, potentially carrying a tariff of life imprisonment.

Whilst the facts in *GE* were unusual, it is submitted that the approach of the Supreme Court in the *GE* case is illuminating. From the point of view of the law on challenging decisions to prosecute, the decision represents a significant advance on the principles in *Eviston*. As the Court itself noted in *GE*[15], this was not a case (unlike *Eviston*) in which a decision not to prosecute for any offence had been communicated to the applicant followed by a reversal of that decision. In *GE,* while a *nolle prosequi* was entered in the Circuit Court in respect of the charge of unlawful carnal knowledge, it was never contended on behalf of the applicant that he believed or was led to believe that any prospect of a criminal conviction arising out of the incident in County Wexford was thereby at an end. The applicant was well aware that his own particular case had been adjourned from time to time to await the full outcome of *CC*, and he must have been advised of the possibility that a further charge was coming down the tracks. And yet, the Supreme Court decided to intervene and prevent the DPP from proceeding with the charge which he, in the exercise of his prosecutorial discretion, had decided should be brought.

Commenting upon the *Eviston* decision, Kearns J. noted that:

> "(The Eviston case) was thus determined on 'fair procedures' grounds rather than on grounds of abuse of process, this Court taking the view that there was a disposition evident on the part of the Director to a particular prosecution which had the consequence if not the intent to avoid or circumvent due process. Clearly courts must intervene where circumstances of this nature arise. This was made very clear in the judgment of Finlay P. in *State (O' Callaghan) v. O' hUadhaigh* [1977] 1 I.R. 42." [16]

From the point of view of practitioners seeking to advise their clients, particular guidance can be taken from the above extract. Even if it might be difficult to locate an accused's grievance within a recognisable judicial review box, it will be worthwhile seeking prohibition if the accused is able to demonstrate the DPP's decision had the effect of circumventing fair procedures, even if that consequence was not intended.

Applications to Restrain a Trial

Moving away from challenges to the prosecutorial decision itself, over the past decade and a half a large number of applications have come before the Irish Courts in which accused persons have sought to prevent their criminal trial from taking place, usually on the basis of a claim they cannot get a fair trial. There have been three main categories of cases brought: delay cases, lost evidence or *Braddish* cases and prejudicial media coverage cases.

Of course the category of cases in which prohibition can be sought is not closed. Other types of challenges can be initiated, for instance prohibition actions in the context of multiple or repeat trials[17] and abuse of process applications[18], which will be discussed in part 2 of this article. The so-called "lost evidence" and delay cases have also sparked a number of prohibition applications, and given rise to much caselaw in the area.

15 See p.10 of the unreported judgment.

16 P.8 of the Supreme Court's judgment in *GE*.

17 *DS v. DPP*, Unreported, Supreme Court, 10th June, 2008.

18 e.g. *Ryan v. Director of Public Prosecutions* and *State (O'Callaghan) v. O'hUadhaigh* (1977) IR 42.

Braddish Diluted

Lost evidence cases cover situations such as where gardai fail to preserve video evidence of a crime being committed, or fail to retain for inspection by the defence engineer the motor car involved in the crash from which charges have emerged. The thrust of recent pronouncements, particularly from the Supreme Court, has been to discourage *Braddish*[19] type applications, largely on the basis that an applicant's grievance can be accommodated at the court of trial. An analysis of recent cases shows a number of recurring themes, the effect of which has been to narrow considerably the parameters for bringing judicial review.

Delay

On the delay side as well, cases such as *H v. DPP*[20], *PM v. DPP*[21], *McFarlane (No. 2)*[22] and *Devoy v. DPP*[23] illustrate the extent to which the delay jurisdiction has been emasculated. In some of those cases, concerns have been expressed about the dangers of bringing unmeritorious and tactical applications that have more to do with tripping up prosecutions than a genuine desire to vindicate an accused's entitlement to a trial in due course of law.[24] Even in summary cases, the delay jurisdiction has been impacted. Recently the Supreme Court decided that *Arthurs v. DPP*[25] which had for years guided district judges and litigants alike as to the level of tolerable delay for summary prosecutions, was no longer to be followed, preferring instead the balancing test evident in *PM v. DPP*[26]. In *Cormack v. DPP and Farrell v. DPP,*[27] the Supreme Court reviewed the law on delay as it applied to proceedings in the District Court. The court found there was no basis for applying a separate legal regime to summary prosecutions than that which arises in the case of indictable offences. However, the Court emphasised that delay will more rapidly be characterised as blameworthy and intolerable where summary proceedings are concerned. The Court expressly disapproved of the judgment in *Arthurs*, on the basis that that judgment did not set out any criteria to determine what might constitute an exorbitant delay in the context of the prosecution of summary offences. The Court should not act as legislator to frame a subjective limitation period for the prosecution of criminal offences, even offences of a summary nature, and should in every case where delay is established conduct the balancing exercise indicated in *Barker v. Wingo*[28].

Similarly on the *Braddish* front, the increasing number of cases that have come before the Court have led to the emergence of a number of themes, usually invoked with a view to turning down an accused's application to stop his trial:

(i) An applicant must engage with the prosecution case, that is he must identify in clear-cut terms, by reference to the prosecution case set out in the book of evidence, how the loss of the evidence concerned has impaired his ability to defend the charges. He must show that a particular line of defence has been lost to him, or that his ability to contest the charges has been irretrievably damaged. (*Scully v. DPP*[29] and more recently *Perry v. Judges of the Circuit Court and the DPP*[30]).

(ii) Prohibition will not be granted where the applicant can, by alternative means (other than by recourse to the lost evidence in question) make the point in his defence that he wishes to make (*McFarlane v. Director of Public Prosecutions*[31] and *PH v. DPP*[32]).

(iii) It is not enough for the applicant to identify a possible area of difficulty, said to arise on foot of the lost evidence. He must show that, because of the loss of the evidence, there is now a real risk of an unfair trial. (*DC v. DPP*[33], *Braddish v. DPP*[34], *Z v. DPP*[35] and *D v. DPP*[36]).

(iv) To succeed in having a prosecution prohibited, an applicant must do more than merely invoke a remote, fanciful or theoretical possibility that exculpatory evidence at one time existed. He or she must establish a real risk of an unfair trial. (*Braddish v. DPP* [37]and *Scully v. DPP*[38]).

(v) The threshold that an applicant must meet is a high one. Such an application may only succeed in exceptional circumstances. (*Z v. DPP*[39] and *DC v. DPP*[40])

(vi) In general, prohibition will not be necessary as the trial judge maintains at all times the duty to ensure due process and a fair trial. It should be assumed that the trial judge will conduct the proceedings fairly, and will give all necessary rulings and directions to ensure a fair trial. (*DC v. DPP*[41] and *Blanchfield v. Hartnett*[42] and *Perry v. DPP*[43]).

(vii) In general, eve of trial applications are to be deprecated. Unexplained delays in issuing proceedings may result in applications being refused *in limine*. An applicant's delay will be relevant not just to the issue of compliance with Order 84 Rule 21 of the RSCI, but also

19 [2001] 3 IR 127.
20 [1994] 2 I.L.R.M. 285
21 [2006] 3 IR 174
22 Unreported, Supreme Court, 5th of March, 2008.
23 Unreported, Supreme Court, 7th April, 2008.
24 See the observations of Fennelly J. in *Dunne v. DPP* [2002] 2 IR 305 and Hardiman J. in *Scully v. DPP* [2005] 1 IR 242.
25 [2000] 2 ILRM 363.
26 [2006] 3 IR 174.
27 Unreported, Supreme Court, 2nd December, 2008.
28 1972 407 US 514
29 [2005] 1 IR 242.
30 Unreported, Supreme Court, Fennelly J., 28th October, 2008.
31 [2007] 1 IR 134.
32 Unreported, Supreme Court, 29th January, 2007.
33 [2005] 4 IR 281.
34 [2001] 3 IR 127.
35 [1994] 2 IR 476.
36 [1994] 2 IR 465.
37 [2001] 3 IR 127.
38 [2005] 1 IR 242.
39 [1994] 2 IR 476.
40 [2005] 4 IR 281.
41 [2005] 4 IR 281.
42 [2002] 3 IR 207.
43 Unreported, Supreme Court, 28th October, 2008.

for what it says about an applicant's true view of the lost opportunity to obtain the missing evidence in issue (*Scully v. DPP*[44] and *Bowes v. DPP*[45]).

The relevant legal principles were considered in two cases before the Supreme Court recently in *Savage v. DPP*[46] and *Ludlow v. DPP*[47]. In *Ludlow* Denham J. summarised the relevant principles as follows:

(i) Each case requires to be determined on its own particular circumstances.
(ii) It is the duty of the Court to protect due process.
(iii) It is the duty of An Garda Síochána to preserve and disclose material evidence having a potential bearing on the issue of guilt or innocence, as far as is necessary and practicable.
(iv) The duty to preserve and disclose, as qualified by Lynch J. in *Murphy v. D.P.P.*, cannot be defined precisely as it is dependent on all the circumstances of the case.
(v) The duty does not require An Garda Síochána to engage in disproportionate commitment of manpower and resources and must be interpreted in a fair and reasonable manner on the facts of the particular case.
(vi) In the alternative to keeping large physical objects as evidence, such as motor vehicles, it may be reasonable in certain circumstances for the Garda to have a forensic report on the object.
(vii) However, an accused should, in general, be given an opportunity to examine or have examined such evidence.
(viii) If the evidence no longer exists, the reason for its destruction is part of the matrix of the facts, but it is not a determinative factor in the test to be applied by the court.

These principles are subject to the fundamental test to be applied by the court, that being whether there is a real risk of an unavoidable unfair trial, as described by Finlay C.J. in *Z. v. Director of Public Prosecutions* [1994] 2 I.R. 476 at p. 506, where she endorsed the view set out in *D. v. The Director of Public Prosecutions* [1994] 2 I.R. 465 that the onus of proof is on the applicant to establish there is such a real risk.

Chief Justice Sharma

One man who didn't have to worry about an unfair trial was the Chief Justice of Trinidad and Tobago, with whom we started. As it turned out, things ended happily for the Chief Justice. His trial was due to start on the 5th of March, 2007 in the port of Spain, Trinidad. Before the State's main witness in the case (Chief Magistrate Sherman McNicholls) could take the oath, prosecution senior counsel rose to his feet and informed the court the case was being withdrawn. A startled senior magistrate, Lianne Lee Kim then told the Chief Justice he was discharged. In an immediate reaction to the court case, the Criminal Bar Association for Trinidad and Tobago called for the immediate resignation of McNicholls and the immediate reinstatement of the Chief Justice. The Deputy Director of Public Prosecutions, Carle Browne-Antoine told reporters that a statement would be issued soon. ■

Part 2 of this article will be published in the next edition of the Bar Review.

44 [2005] 1 IR 242.
45 [2003] 2 IR 25.
46 Unreported, Supreme Court, 3rd July, 2008.
47 Unreported, Supreme Court, 31st July, 2008.

Bar Council Scholarship

David Nolan SC presents the Bar Council Scholarship to Danielly Gaughran.
This award is presented annually to students from the local area to fund their continuing education.

Suspended sentences following the 2006 and 2007 Criminal Justice Acts

Rebecca Smith BL and James B Dwyer BL

Introduction

Section 99 of the Criminal Justice Act 2006 placed suspended sentences on a statutory footing for the first time.[1] In many respects, the section restates existing principles[2] but there are some innovations worthy of comment. Firstly it provides for an automatic procedure for the revocation of a sentence when there has been a conviction recorded in another court. Secondly there is now a discretion vested in the sentencing court whether or not to revoke the suspended sentence. Thirdly a court can now partially revoke the suspended sentence. Fourthly the section requires that the sentence for the later offence must be consecutive to the revoked suspended sentence. Finally the Act also introduced formal notification procedures and gave the court the power to issue a bench warrant in the event of a non-attendance at an application to revoke.

While formalising the procedure is welcomed, there have been a number of practical difficulties encountered by practitioners in the operation of the section. Amendments made by s.60 of the Criminal Justice Act 2007 did little to remedy these difficulties. This article seeks to set out the general principles governing suspended sentences and examine its current application under the new legislation and the difficulties which have arisen since it transformed into a complicated statutory procedure.

Development of the suspended sentence

Under the common law, a suspended sentence could be imposed in any court for any offence with the exception of mandatory sentences to be served.[3] As a sentencing tool, it is of some antiquity and has its roots in the Irish common law of the nineteenth century.[4] Thus in *In re Robert McIlhagga*,[5] Ó Dálaigh C.J. noted that the suspended sentence had been long recognised as "*a valid and proper form of sentence*".

The guiding principle governing the suspended sentence is that it should not be imposed unless the sentencing court is satisfied that a custodial sentence is merited in the first place. The sentencing judge should consider whether or not given the particular circumstances of the offence and the offender a custodial sentence is justified and, if so, what length is appropriate. Only then does the judge go on to consider whether there are reasons which would justify suspending the sentence imposed.

During the 1980s and 1990s, the concept of the 'reviewable sentence' gained currency. A court would pass sentence and set a date in the future for review, with the power to suspend the balance of the sentence on that future date. Commonly known as a 'Butler Order',[6] the practice was abolished by the Supreme Court as a sentencing procedure in *People (DPP) v Finn*.[7]

General principles governing suspended sentences

The following general principles can be derived from the case law regarding suspended sentences:

- A suspended sentence is to be treated in the first instance as a recognition that an offence has been committed which would warrant an immediate custodial sentence.[8] There is no limit on the length of the sentence that may be suspended.
- A court should not increase the term of imprisonment for the sole reason that the term is to be suspended.[9]
- A court can suspend a sentence for a longer period than the sentence actually imposed but there should be special circumstances for so doing.[10]
- If a sentence is suspended or partially suspended on appeal by the Court of Criminal Appeal, any application for revocation should be brought

1 Section 50 of the Criminal Justice Bill 1967 did propose the introduction of the suspended fine or sentence of imprisonment. However the bill was never enacted.

2 See the comments of Finnegan J. in *People (DPP) v Gordon Ryan* [2009] IECCA 21; unreported Court of Criminal Appeal (Finnegan, Herbert and De Valera JJ.), March 20, 2009.

3 *e.g.*, the imposition of a life sentence for murder. This would also seem to include the new mandatory sentencing provisions under the Criminal Justice Act 2007, discussed below.

4 For a more detailed look at the history of the suspended sentences in Ireland, see Osborough, "A Damocles Sword Guaranteed Irish" (1982) *Irish Jurist* 221. See also O'Malley, *Sentencing Law and Practice* (2nd ed., Round Hall Sweet & Maxwell, 2006), chapter 22.

5 Unreported Supreme Court (Ó Dálaigh C.J., Walsh, Budd, FitzGerald and McLoughlin JJ.) July 29, 1971.

6 Originating from the decision of Butler J. in the case of the *State (Woods) v Attorney General* [1969] I.R. 385.

7 [2001] 2 I.R. 25. Although there remains a statutory provision for review of sentences passed under the Misuse of Drugs Act (ss.27(3)(g) and 27(3)(h) of the 1977 Act as amended) which survived the *Finn* decision.

8 *Moore v Judge Brady and DPP* [2006] IEHC 434; unreported, High Court, (Feeney J.), November 16, 2006.

9 *People (DPP) v Carl Loving* [2006] 3 I.R. 355.

10 *McCarthy v Judge Brady and DPP* [2007] IEHC 261; unreported, High Court (De Valera J.), July 30, 2007.

before the court of trial and not to the Court of Criminal Appeal.[11]

- There is power to suspend consecutive sentences imposed pursuant to s.11 of the Criminal Justice Act 1984.[12]
- Where a part-suspended sentence is imposed, for the purposes of calculating remission or temporary release, the relevant period is the actual time spent in custody.[13]
- A suspended sentence can be imposed in respect of presumptive mandatory minimum sentences in certain circumstances.[14]
- When imposing a condition attached to the suspended sentence, it must be one which is concrete and discrete.[15]
- If the judge who sentenced the offender in the original sentence has retired or died, then another judge of the same court sitting in the same area may deal with the application.[16]

Section 99 of the Criminal Justice Act 2006

Part 10 of the Criminal Justice Act 2006 commenced on October 2nd 2006.[17] It was later amended by s.60 of the Criminal Justice Act 2007 which came into effect on May 18th 2007.[18] Sections 99(1) and (2) provide a statutory basis for the imposition of suspended sentences and provide thereof:

> "(1) Where a person is sentenced to a term of imprisonment (other than a mandatory term of imprisonment) by a court in respect of an offence, that court may make an order suspending the execution of the sentence in whole or in part, subject to the person entering into a recognisance to comply with the conditions of, or imposed in relation to, the order.
>
> (2)It shall be a condition of an order under subsection (1) that the person in respect of whom the order is made keep the peace and be of good behaviour during-
>
> (a) The period of suspension of the sentence concerned, or
>
> (b) in the case of an order that suspends the sentence in part only, the period of imprisonment and the period of suspension of the sentence concerned,
>
> And that condition shall be specified in the order concerned."

Section 99 goes on to provide that a court can impose any condition it sees fit and appropriate to the nature of the offence and what it considers may reduce the likelihood of the person committing another offence.[19] The court may also make an order ordering the person to co-operate with the Probation Service or undergo treatment, therapy, education for their rehabilitation, but this must be specified in the recognisance.[20] Interestingly the Probation Service can apply to the court that imposed the sentence to apply for conditions to be imposed.[21] When a suspended sentence is imposed, a copy order shall be given to An Garda Síochána, the governor of the relevant place of detention (if partly suspended) and to the Probation Service if relevant conditions apply.[22]

The revocation of suspended sentences under the 2006 Act

Section 99(9) of the 2006 Act (as amended by s.60 of the 2007 Act) states that where a person is convicted of an offence during the period of suspension the court shall remand the person back to the court that imposed the suspended sentence in custody or on bail *before* imposing a sentence.[23] Section 99(9) as amended provides:

> "(9) Where a person to whom an order under subsection (1) applies is, during the period of suspension of the sentence concerned, convicted of an offence, the court before which proceedings for the offences were brought, shall before imposing sentence for that offence, remand the person in custody or on bail to the next sitting of the court that made that order."

11 *People (A.G.) v Grimes* [1955] I.R. 315.

12 *People (DPP) v Dennigan*, unreported, Court of Criminal Appeal (Hederman J.), November 27, 1989, *People (DPP) v Farrell* [1992] 2 I.R. 32.

13 *State (Beirnes) v Governor of the Curragh Military Detention Barracks*, unreported, High Court (Carroll J.), February 23, 1982, *O'Brien v Governor Of Limerick Prison* [1997] 2 I.L.R.M. 349.

14 *People (DPP) v McGinty* [2007] 1 I.R. 633. In that case the Court of Criminal Appeal upheld a five year sentence wholly suspended in respect of a charge contrary to Section 15A of the Misuse of Drugs Act (as amended) stating that where there were special reasons of a substantial nature and wholly exceptional circumstances, the imposition of a suspended sentence might be appropriate in the interests of justice. By contrast, under some of the new mandatory sentencing regimes pursuant to the Criminal Justice Act 2007, there is specific reference in certain sections which state that in imposing mandatory sentencing the sentence is referred to as "*served*". This implies that the mandatory sentence cannot be suspended.

15 In *People (DPP) v Alexiou* [2003] 3 I.R.513, a condition compelling a person to leave the state was held to be a valid condition of a suspended sentence which was within the discretion of the trial judge to impose.

16 In *People (DPP) v Stewart* unreported, Court of Criminal Appeal (Hardiman, O'Sullivan and Herbert JJ.), January 12, 2004, the court upheld the Circuit Court judge's revocation of suspended sentences when she was not the presiding judge in the original sentence hearing. The court stated that it was "*perfectly clear that she had jurisdiction to do this*". This is also reflected in the wording of s.99(10).

17 commenced by S.I. 390 of 2006.

18 commenced by S.I. 236 of 2007. The explanatory memorandum to the 2007 Act describes s.60 as making amendments that are "*of a technical nature and are aimed at improving the operation of the section*".

19 s.99(3).

20 ss.99(4) and 99(5).

21 s.99(6). Previously it had been common practice for sentencing judges to purport to give explicit power to re-enter to the Probation Service in their orders.

22 ss.99(7) and 99(8).

23 Section 99(9) of the 2006 Act originally provided for the remand of a defendant back to the court that imposed the suspended sentence *after* sentence was imposed. This inevitably caused problems as judges were in a difficult position regarding sentence in that they could not second guess whether or not the original sentencing judge would revoke the suspended sentence or not.

Section 99(10) states that the court who imposed the suspended sentence shall revoke the sentence unless it considers it unjust to do so. Section 60 of the Criminal Justice Act 2007 amended this to insert a new s.99(10A) which provides that when a person has been dealt with in the court that imposed the suspended sentence (whether it is revoked or not) that court shall then remand the person back to the court for sentencing for the subsequent offence.

The section provides for a stand-alone right of appeal against the order of revocation.[24] A garda, a governor or a probation officer can apply to the court to fix a date for the application to revoke if he has reasonable grounds for believing the defendant is in breach.[25] This must be in writing and on notice.[26] If the person fails to appear for the hearing, the court may issue a bench warrant for his arrest.[27] At the hearing, if the court is satisfied that the person has contravened a condition of the order, it may revoke the order, unless it considers that in all of the circumstances of the case it would be unjust to do so.[28] The section does not interfere with temporary release[29] or certain provisions in the Misuse of Drugs Acts.[30]

Discretion of the court in revocation

Pursuant to ss. 99(10) and 99(17), discretion is now vested in the court to not revoke the suspended sentence where to so do would be "*unjust in all the circumstances of the case*". Otherwise it must revoke. With common law revocations, a breach of the suspended sentence which was not *de minimus*, required revocation with no discretion inhering in the court.[31]

Furthermore now the court may revoke the sentence imposed in part only. This was not permissible under the common law regime. A court can now order a person to serve the entire sentence of imprisonment originally imposed "*or such part of the sentence as the court considers just having regard to all of the circumstances of the case*", less any period already served for the original offence:

> "The object of the section as a whole is to deal with a perceived injustice where reactivation of a suspended sentence or a suspended portion of a sentence could be perceived as disproportionate in the absence of a power in the court to reactivate the sentence in part."[32]

There is no guidance given as to the operation of this subsection. However it is submitted that the court hearing the application to revoke should conduct an enquiry into the nature of the alleged breach and in particular how it relates to the original offences as well as a review of the current personal circumstances of the offender.

It is noted that the section refers to the "*court*" throughout and not "*judge*". This suggests that once a breach occurs the case need not necessarily be remanded back to the original sentencing judge who imposed the suspended sentence. Ordinarily the original sentencing judge will hear the application for revocation but as the section only states "*court*", another judge dealing with the application would appear not to be in excess of jurisdiction.[33]

Of note also is that once a breach occurs the defendant should be remanded back to the original sentencing court only. A practice has evolved of 'double remanding' an accused: one remand to the court for revocation and a simultaneous remand to a future date before the same court. There is no provision for remanding an accused to two separate dates once a breach has been established thus requiring two separate bail bonds. Section 99 only provides for a single remand. It is only after the original court has considered whether or not to revoke that the defendant is further remanded to the original sentencing court.[34]

Relevant date is date of conviction

Section 99(9) provides that if a defendant "*is, during the period of suspension of the sentence concerned, convicted*" of an offence, he shall be remanded to the next sitting of the court that imposed the suspended sentence. This is so irrespective of the date of commission of the offence. The mechanism provided by the Act allows for a conviction to be recorded (absent sentence imposed) which triggers s.99(9).

The word "*convicted*" is not defined in Part 10 of the 2006 Act but it suggests the date upon which a person pleads guilty to an offence or is found guilty by a court or jury. There has been confusion in the past as to when precisely the conviction occurs. In *DPP v Cawley*,[35] Herbert J. in the Central Criminal Court held that a plea of guilty constituted a "*conviction*" within the meaning of Section 14(1) of the Sex offenders Act 2001 notwithstanding that it occurred on a date prior to the imposition of sentence.

Under s.99. a defendant who is convicted of an offence during the currency of a bond must be remanded back for

24 s.99(12).
25 ss.99(13) and 99(14).
26 ss.99(15) and 99(18). The written notice must be either delivered in person, left at the address where the defendant ordinarily resides or sent by ordinary registered pre-paid post.
27 s.99(16).
28 s.99(17). Discussed below in more detail.
29 Section 99(19) of the Act states that the section shall not affect the operation of s.2 of the Criminal Justice Act 1960 which allows the Minister to make rules for the temporary release of prisoners.
30 s.99(19)(b).
31 *People (DPP) v Stewart* unreported Court of Criminal Appeal (Hardiman, O'Sullivan and Herbert JJ.) January 12, 2004. Also, in *People (DPP) v Murray* unreported Court of Criminal Appeal (McCracken, Kearns and Ó Caoimh JJ.), March 18, 2003, the sentencing judge released the applicant on certain conditions after a term in prison for the balance of a seven year sentence, under the old review system. The applicant had breached two of the conditions and when the matter was re-entered before the sentencing judge, she held that the breach was not trivial and the applicant should serve the remainder of the sentence. On appeal, the court held that although this might prove unjust, the trial judge had no discretion to do anything other than revoke the suspended sentence in its entirety, after the fact of the breach had been established.
32 *People (DPP) v Gordon Ryan* [2009] IECCA 21; unreported Court of Criminal Appeal (Finnegan, Herbert and De Valera JJ.), March 20, 2009.
33 *c.f.* the remarks of the Court of Criminal Appeal in *People (DPP) v Stewart supra.* at footnote 16.
34 s.99(10A) of the 2006 Act as inserted by s.60 of the 2007 Act.
35 [2002] 4 I.R. 321.

revocation, even if the commission of the breach offence pre-dated the bond. This anomalous situation provides that a defendant in those circumstances must rely on the court exercising his discretion not to revoke as provided. The remarks of Dunne J. in *McManus v O'Sullivan and DPP*.[36] in describing the position at common law are apposite:

> "The second and perhaps somewhat self-evident point to note is that the alleged breach of the bond must occur prior to the operational period of the bond. It seems to me that from time to time there maybe some condition as to this particular point. For example, is a conviction recorded during the period of the bond in respect of an incident which occurred prior to the operational period of the bond a breach of the bond? It is difficult to see how this could be so given that the bond entered into requires the accused to be of good behaviour during the period of the bond and the recording of a conviction for an offence committed outside the period of the bond would not appear to be a breach of the bond."[37]

A second anomaly arises from the use of the phrase "*convicted*" in the subsection. If an offence is committed within the period of the bond, but no conviction is imposed until the period has elapsed, s.99 does not require an order remanding the defendant for revocation. The question arises as to whether a prosecutor could then seek to revoke the sentence using the common law method notwithstanding the non-applicability of s.99(9).

Retrospectivity of the section

A problem encountered is the operation of s.99 in relation to suspended sentences imposed under the common law. Sections 99(9) and 99(17) refer to "*a person to whom an order under subsection (1) applies*". Therefore, it would appear that the section does not apply to a suspended sentence imposed prior to the commencement of the 2006 Act. Similarly, where the sentence was suspended after the commencement of the 2006 Act but prior to the commencement of the 2007 Act, should the defendant be treated under the 2006 Act regime or the 2007 Act regime? Similar questions arise in relation to the date of the offence which is in breach of the suspended sentence. While the law's abhorrence of retrospectivity in a criminal sphere does not usually extend to procedural provisions, there is arguably a penal aspect to the 2007 Act (mandatory consecutive sentencing) which is (admittedly slightly) less restrictive in s.99 of the 2006 Act as promulgated.

Previously it was thought that s.99 did not apply to the revocation of sentences suspended under the common law.[38] However in the recent case of *People (DPP) v Gordon Ryan*,[39] the Court of Criminal Appeal was asked to consider whether the provisions of s.99 could be applied to a partially suspended sentence imposed in 2000. The applicant had been sentenced to 12 years, the final six of which were suspended. Following his release, he was convicted of a number of offences, only one of which convictions post-dated the commencement of s.99. The court held that the provisions of s.99(17) could apply to common law suspended sentences and the court could therefore partially revoke a sentence in accordance with s.99:

> "There is nothing in the wording of subsection (17) to impose a temporal restriction on the jurisdiction thereby conferred so that only those whose sentences are imposed after the commencement of section 99 should benefit. To give full effect to the ordinary meaning of the wording of subsection (17) and to the statutory intention it is appropriate that it should apply to post-commencement applications to reactivate where subsection (9) has no application. It is also consistent with the scheme of the statute that the power conferred by subsection (17) should apply where there has been a breach of condition, including a breach of a condition to keep the peace and be of good behaviour, on an application for reactivation of a suspended sentence or portion of a sentence where the condition was imposed prior to commencement of section 99 but the application to reactivate is made after commencement of the section. In such circumstances the court is given power, additional to those powers which existed at common law, to treat the breach as de minimis or to reactivate the sentence in full, to reactive in part a suspended sentence."[40]

Consecutive element of the subsequent sentence

A new aspect introduced in legislation was the mandatory consecutive element of the sentence imposed after a case is remanded for sentence for the subsequent offence. Section 99(11)[41] provides that after the defendant has been dealt with by the court that imposed the suspended sentence (whether the suspended sentence be revoked or not), that court must remand the person back to the court for sentencing for the subsequent offence.

The section specifically provides that the sentence for the subsequent offence shall not commence until the expiry of any of the suspended sentence that has to be served. This new consecutive element to the subsequent sentence could be interpreted as a harsh on first reading, but this can be

36 [2007] IEHC 50; unreported High Court (Dunne J.), March 5, 2007.

37 *ibid.*, at pp.8-9 of the judgment.

38 *DPP v Mark Dillon*; unreported judgment of His Honour Judge Michael White of the Circuit Court delivered on March 3, 2008 who held, in a reserved judgment, that s.99 was not retrospective and that the common law power to revoke a suspended sentence subsisted despite the passage of the 2006 Act. Also, the High Court had, on occasion been minded to prohibit the process of revocation where the District Court has sought to apply the provisions of the 2006 Act and 2007 Act retrospectively: *Owen Oglesby v Judge Miriam Malone, Judge Frank O'Donnell and DPP* unreported High Court *ex tempore* April 28, 2008 (record number 2008/106JR) and *Vitaliy Glebov v Judge Cormac Dunne, Judges of Limerick District Court and DPP* unreported High Court *ex tempore*, February 18, 2008 (record number 2007/1397JR). Neither *Oglesby* nor *Glebov* were opposed.

39 [2009] IECCA 21; unreported Court of Criminal Appeal (Finnegan, Herbert and De Valera JJ.), March 20, 2009.

40 *ibid.*

41 as amended by s.60 of the 2007 Act.

balanced with the fact that courts now have the discretion to not revoke (or to partially revoke) a suspended sentence. Anecdotal evidence would suggest this provision is not being applied in a uniform manner in practice.

While s.99 provides for the remand of the defendant for revocation where he is "*convicted*" of an offence during the currency of the bond, s.99(11)(a) as promulgated provided for the imposition of a mandatory consecutive sentence only where the breach offence was "*committed*" during the currency of the bond. The insertion of a new s.99(11)(a) by s.60(d) of the 2007 Act has done away with this distinction.

Section 99 and non-severability

It has been suggested that the operation of s.99 offends the principle that conviction and sentence cannot be severed. This argument proceeds on the basis that after convicting a person, it makes no sense to then separate the sentence, which should follow, by remanding the defendant to another court for possible revocation prior to the imposition of penalty.

This issue has been considered by the High Court in *Harvey v Leonard and DPP*.[42] There, the applicant brought judicial review proceedings seeking *certiorari* to quash the order of the District Judge who had remanded the applicant pursuant to s.99(9). It was argued that there was no jurisdiction to remand him for revocation of a suspended sentence absent an order sentencing him as the conviction could not stand alone. The applicant had pleaded guilty to a summary offence in the District Court. It was disclosed that the applicant had committed the offence during the period of a suspended sentence and he was therefore remanded back before the original court that imposed the suspended sentence under s.99(9) (as amended).

The applicant argued that this was in excess of the court's jurisdiction as, in summary procedure, a conviction could not stand alone as a valid ordered divorced from penalty because of the principle of non-severability.[43] In refusing the application, Hedigan J. found that conviction and sentence existed independently and did not offend the principle of non-severability:

> "The challenge is based on what I consider the mistaken view that conviction and sentence are so inextricably linked that nothing of substance can occur between them. That proposition cannot be correct. Experience over many years shows practitioners that District Judges regularly convict and put back for sentence. There may be sought probation or other reports or all manner of further evidence before sentence is imposed. The procedure contemplated by s. 99 is obviously different but nonetheless clearly occurring within the same hiatus between conviction and sentence. The reality in all such cases is that the accused has been convicted and awaits sentence. The wording of the Act could not be clearer and its meaning is also clear. The requirement on the District Judge is mandatory and the District Judge's actions were exactly in accordance therewith."[44]

The shortcomings of the operation of the section are best illustrated by example. A defendant is given a suspended sentence by the Central Criminal Court. He is subsequently convicted of an offence during the period of suspension after contesting the charge in the District Court. The court then remands the defendant to the Central Criminal Court pursuant to s.99(9) as amended. The Central Criminal Court then revokes the suspended sentence in full. The defendant then appeals his District Court conviction *de novo* to the Circuit Criminal Court. If his appeal is successful, how can the matter be revisited again by the Central Criminal Court? If his appeal is unsuccessful, does the Circuit Court have jurisdiction to reconsider sentence or must it await the decision of the District Court following remand back from the Central Criminal Court?

Conclusion

The codification of suspended sentences is welcome as it provides reasonable and much needed changes to the common law position notwithstanding its description as being "…*no more than a restatement in statutory form of the position at common law rather than as the creation of a statutory jurisdiction*".[45] The provision of discretionary elements, partial revocation and notification procedures are most welcome additions to what were haphazard procedures under the common law system. Nonetheless, it is unfortunate that given the subsequent amendment in 2007, no steps were taken to clarify the confusion surrounding the operation of the section. It remains to be seen as to whether a coherent operation of the section can be described by the courts without the need for further legislative intervention. ■

42 [2008] IEHC 209; unreported High Court (Hedigan J.), July 3, 2008.

43 *State (Sugg) v O'Sullivan*, Unreported, High Court (Finlay P), June 23, 1980, *State (O'Reilly) v Delap*, unreported High Court (Gannon J), December 20, 1985, *State (de Búrca) v Ó hUadhaigh* [1976] 1 I.R. 85.

44 *per* Hedigan J., at p. 8 of his judgment.

45 *per* Finnegan J. in *People (DPP) v Gordon Ryan* [2009] IECCA 21; unreported Court of Criminal Appeal (Finnegan, Herbert and De Valera JJ.), March 20, 2009.

Legal The Bar Review Update

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Debt - Monies due and owing to company - Experienced trader in stock market - Whether defendant acted as agent for other persons – Whether full and final settlement made of all monies outstanding – Whether instructions carried out – Whether plaintiff company in breach of obligations – Whether defendant entitled to claim monies due as set off - Whether defendant owed money from plaintiff company - Whether defendant responsible for debts incurred as result of acting as agent - Decree granted (2000/780S & 791S - McMahon J - 13/6/2008) [2008] IEHC 181
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owed on eve of hearing inequitable – Whether failure to inform defendant of intention to dispute entitlement to require lease inequitable - Whether agreement that plaintiff could carry out installation of kiosks without entering into lease – Whether entitlement to relief had lapsed because of change in circumstances – Whether balance of convenience favoured granting of relief – Whether *prima facie* case established – Whether damages adequate remedy – Whether retention of sum owing evidenced adequacy of damages – Whether relief sought in effect mandatory - *Campus Oil Ltd v Minister for Energy (No 2)* [1983] IR 88, *Pasture Properties v Evans* (Unrep, Laffoy J, 5/2/1999), *Ryanair Ltd v Aer Rianta CPT* (Unrep, Kelly J, 25/1/2001), *Boyhan v Tribunal of Inquiry into the Beef Industry* [1993] 1 IR 210 and *Maha Lingham v Health Services Executive* (2006) 17 ELR 137 applied; *B&S Ltd v Irish Auto Traders Ltd [1995] 2 IR 142* considered - State Airports Act 2004 (No 32), ss 8 & 9 – Air Navigation and Transport (Amendment) Act 1998 (No 24), s 23 – Relief refused (2008/104IA – MacMenamin J – 29/10/2008) [2008] IEHC 338
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CONSTITUTIONAL LAW

Fair procedures

Prosecution – Reversal of decision not to prosecute – Decision not to prosecute given without indication of possible reversal – Lack of new evidence to ground reversal – Reversal of decision cause of great stress and anxiety to applicants – Whether reversal of decision not to prosecute in breach of fair procedures having regard to all circumstances – Lack of reasons for reversal *State (O'Callaghan) v. O'hUadhaigh* [1977] IR 42; *Hobson v DPP* [2005] IEHC 368, [2006] 4 IR 239 and *Eviston v DPP* [2002] 3 IR 260 applied – Relief granted (2007/1323JR – Hanna J – 10/7/2008) [2008] IEHC 244
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CRIMINAL LAW

Appeal

Application for leave to appeal against conviction – New ground of appeal – New evidence - Adverse publicity – Extensive press and media coverage during and after trial - Application to adduce new ground of appeal during course of leave hearing – No requisition raised at trial -Credible reasons - Interests of justice – Failure to include new ground in the original grounds of appeal – Factors to be considered - Procedural requirements - No evidence on affidavit - Whether any exceptional circumstances to hear application - Nature of application - Criteria – Whether failure to raise requisitions occurred as result of inadvertence on part of legal advisers – Whether reasons tendered to court to explain failure - Whether new ground of appeal should have been the subject matter of requisition - Rules of the Superior Courts 1986 O 86 r 4 – *People (DPP) v Foley* [2006] IECCA 72, (Unrep, CCA, 1/6/2006) followed - *People (DPP) v Cronin* (Unrep, CCA, 16/5/2003); *People (DPP) v Moloney* (Unrep, CCA, 2/3/1992); *People (DPP)) v Noonan* [1998] 2 IR 439; *People (DPP) v Boyce* [2005] IECCA 143, (Unrep, CCA, 21/12/2005); *DPP v Cooke* [2006] IECCA 32, (Unrep, CCA, 15/3/2006); *People (DPP) v Dundon* [2006] IECCA 14, (Unrep, CCA, 13/2/2008) considered - Application to admit new evidence - Applicable principles - Criteria - Whether exceptional circumstances established - Whether evidence sought to be adduced in existence at time of trial - Reasonable diligence - Whether evidence influential - *DPP v Cooke* [2006] IECCA 32, (Unrep, CCA, 15/3/2006); *Murphy v Minister for Defence* [1991] 2 IR 161; *Lynagh v Mackin* [1970] IR 180 and *People (DPP) v Willoughby* [2005] IECCA 4, (Unrep, CCA, 18/2/2005) considered - Applications refused (106/2007 - CCA - 24/7/2008) [2008] IECCA 112

People (DPP) v Griffin

Director of Public Prosecutions

Charges – Fair procedures – Decision not to prosecute offence of rape – Applicant charged with lesser offence – Summary trial on plea of guilty directed – Applicant elected for trial by jury – Offence similar to that charged subsequently declared inconsistent with Constitution – *Nolle prosequi* entered – Applicant subsequently rearrested and charged with rape – Whether charge permissible – *The State (O'Callaghan) v O' hUadhaigh* [1977] IR 42, *The State (Healy) v Donohue* [1976] IR 325 and *Eviston v DPP* [2002] 3 IR 260 applied - Prosecution of Offences Act 1974 (No 22) s 2 – Criminal Law (Rape) Act 1981 (No 10) s 2 – Applicant's appeal allowed (329/2007 – SC – 30/10/2008) [2008] IESC 61
E (G) v DPP

Director of Public Prosecutions

Reversal of decision not to prosecute – Decision not to prosecute given without indication of possible reversal – Lack of new evidence to ground reversal – Whether Director subsequently prevented from bringing charges – Whether applicants prejudiced in raising defence as a result of decision not to prosecute – Whether required to give reasons for reversal - *State (O'Callaghan) v. O'hUadhaigh* [1977] IR 42; *Hobson v DPP* [2005] IEHC 368, [2006] 4 IR 239 and *Eviston v DPP* [2002] 3 IR 260 applied – Relief granted (2007/1323JR – Hanna J – 10/7/2008) [2008] IEHC 244
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Evidence

Admissibility - Detention - Whether lawful – Whether accused detained – Whether accused free to leave - Voluntary assistance given by suspect to gardaí – Caution – Self incrimination –Whether applicant in unlawful custody – Whether applicant should have been expressly informed that he was not under arrest and free to leave at any time – Whether absence of such warning resulted in applicant being detained in unlawful custody - Whether gardai acting lawfully – Failure to give warning against self incrimination - *People (DPP) v Coffey* [1987] ILRM 727 distinguished - *People (DPP) v O'Loughlin* [1979] IR 85 considered - *People (DPP) v Walsh* [1980] IR 294*; People (DPP) v Shaw* [1982] IR 1 and *People (DPP) v Lynch* [1982] IR 64 mentioned - Criminal Law (Rape) Act 1981 (No 10), s 2 – Sex Offenders Act 2001 (No 18), s 37 - Appeal dismissed (62/2007 – CCA - 30/7/2008) [2008] IECCA 143
People (DPP) v Ero

Evidence

Destruction of evidence – Dangerous driving causing serious harm – Destruction of car – Prosecution not relying upon condition of vehicle – Independent witness evidence of manner of driving – Car examined by prosecution prior to destruction – Affidavit of applicant asserting belief that steering locked prior to accident – Whether applicant had discharged burden of showing real risk of unfair trial – Whether mere assertion as to belief in affidavit sufficient - *Z v DPP* [1994] IR 476, *Savage v DPP* [2008] IESC 39 (Unrep, SC, 3/7/2008), *Ludlow v DPP* [2008] IESC 54 (Unrep, SC, 31/7/2008) and *Scully v Director of Public Prosecutions* [2005] IESC 11 [2005] 2 IR 242 applied – Relief refused (164/2007 – SC – 28/10/2008) [2008] IESC 58
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Evidence

Disclosure – Domestic disclosure – Disclosure from overseas agencies – Late disclosure of garda surveillance notes – Real risk of unfair trial – Role of appellate court adjudicating on disclosure – Whether disclosure obligation on prosecution in relation to overseas agencies discharged by "good faith efforts" – Whether overriding obligation on court to ensure fairness – Whether delayed disclosure caused unfairness in trial – Whether conviction unsafe in light of disclosure made - Credibility – Credibility of key prosecution witness – Duty to give reasons – Whether credibility finding rational – Whether error in failing to give adequate reasons for belief that witness was credible – Whether error in failing to expressly particularise each credibility finding rendered verdict unsafe - *DPP v Special Criminal Court* [1999] 1 IR 60 applied; *R v Ward* [1993] 1 WLR 619 and *Z v DPP* [1994] 2 IR 476 considered – Appeal dismissed (467/2006 – SC – 30/2008) [2008] IESC 51
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Failure to seek out evidence – Telephone records – Allegation of sexual assault against minor – Failure to seek complainant's telephone records – Failure of applicant to raise matter during questioning - Records no longer retained by telecommunications operators - Delay – Delay in charging – Delay in applicant raising issue of phone records - Whether right to fair trial prejudiced – Whether failure to seek records of consequence where consent not defence – Whether unconscionable or blameworthy delay on part of prosecution - *Dunne v DPP [2002] 2 IR 305, Braddish v DPP* [2003] 3 IR 127, *Scully v DPP* [2005] IESC 11 [2005] 1 IR 242, *O'Callaghan v Judges of Dublin Metropolitan District Court* [2004] 2 IR 442, *McFarlane v DPP* [2006] IESC 11 [2007] 1 IR 134, *PM v. DPP* [2006] IESC 22 [2006] 3 IR 172, *Barker v Wingo* 407 US 514 (1972), *PG v DPP* [2007] 3 IR 39 [2006] IESC 19, *O'C v DPP* [2006] 1 IESC 54 (Unrep, SC, 27/07/2006) and *Blood v DPP* [2005] IESC 8 (Unrep, SC, 02/03/2005) considered; *Bowes v DPP* [2003] 2 IR 25 *and Murphy v DPP* [1989] ILRM 71 distinguished-
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Refusal of certificate for legal aid - Gravity of charge - Opinion expressed as to risk of imprisonment by prosecution – Whether trial judge failed to consider all relevant matters – Judge decided applicant not at risk - Whether question of gravity of charge entirely a matter for trial judge - Whether trial judge's decision on gravity of offence capable of review by High Court - Function of District Court Judge - *O'Neill v McCartan* [2007] IEHC 83, (Unrep, Charleton J, 15/3/2007) and *State (Daly) v Ruane* [1988] ILRM 117 applied; *DPP (Kearns) v Maher* [2004] IEHC 251, [2004] 3 IR 512, *Cahill v Reilly* [1994] 3 IR 547 and *Costigan v Brady* [2004] IEHC 16, (Unrep, Quirke J, 6/2/2004) considered - Criminal Justice (Legal Aid) Act 1962 (No 12), s 2 - Relief refused (2007/1445JR - Hedigan J - 11/6/2008) [2008] IEHC 182
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Legal Aid

Refusal of certificate for legal aid – Opinion expressed as to risk of imprisonment by prosecution – Gravity of offence – Whether offences charged likely to result in custodial sentence – Circumstances where judge entitled to refuse legal aid - Role of prosecution - Role of judge - Knowledge and experience of District Court Judge – Whether judge entitled to take view charges not likely to result in custodial sentence – Whether judge entitled to refuse application for legal aid certificate - *Neeson v Brady* [2008] IEHC 182, (Unrep, Hedigan J, 11/6/2008) considered - Relief refused (2007/1369JR – Hedigan J - 11/6/2008) [2008] IEHC 180
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Public order offence

Failure to specify power – Failure to provide name – Whether garda making demand for name and address must specify power to make demand and that if particulars not given offence is committed – Whether person obliged to submit to demand pursuant to police powers where information not provided that such power exists – *DPP v Rooney* [1992] 2 IR 7, *DPP v Galligan* (Unrep, Laffoy J, 2/11/1995), *Bates v Brady* [2003] 4 IR 111, *Christie v Leachinsky* [1947] AC 573 and *DPP v Cowman* [1993] 1 IR 335 considered - Criminal Justice (Public Order) Act 1994 (No 2), ss 8 and 24 – Accused's appeal by way of case stated allowed (2008/645SS – Charleton J – 29/10/2008) [2008] IEHC 334
DPP (Ryan) v Mulligan

Road traffic

Drunk driving – Requirement to give two

specimens of breath – One specimen given but test rendered incomplete – Two further specimens given – Whether certificate based on second and third specimens admissible – Whether more than one requirement made – Whether permissible to seek two further specimens after one specimen already given in incomplete test – Penal statute - Interpretation – *DPP v McGarrigle* [1996] 1 ILRM 271 and *DPP v Moorehouse* [2006] IESC 52, [2006] 1 IR 421 applied; *Howard v Hallett* [1984] RTR 353 approved - Road Traffic Act 1994 (Section 17) Regulations 1999 (SI 326/1999), reg 3 – Road Traffic Act 1994 (No 7), ss 3, 13, 17, 21 and 23 – Answered in favour of accused (173/2006 – SC – 16/10/2008) [2008] IESC 57
DPP v McDonagh

Road traffic

Offence – Proof – Opinion – Validity – Arrest – Subsequent failure to provide specimen of breath – Whether request to provide breath sample lawful – Whether fact of driving mechanically propelled vehicle in public place prerequisite to requirement to provide breath specimen – Whether court entitled to convict in absence of proof of driving – Good and sufficient reasons – Whether accused could rely on lack of proof of driving as defence *Director of Public Prosecutions v Joyce* [2004] IEHC 264, (Unrep, Quirke J, 15/7/2004); *Gallagher v O'Hanlon* (Unrep, Finlay P, 10/7/1965), *DPP v Breheny* (Unrep, SC, 2/3/1993) and *DPP v Penny* [2006] IEHC 230, [2006] 3 IR 553 followed; *Hobbs v Hurley* (Unrep, Costello J, 10/6/1980) considered - Road Traffic Act 1961 (No 24), s 49(8) – Road Traffic Act 1994 (No 7), ss 13 and 23 – Case stated answered in favour of prosecutor (2008/188SS – Clark J – 5/11/2008) [2008] IEHC 347
DPP v Finnegan

Sentence

Severity – Assault – Four year custodial sentence imposed - Guilty plea - €1,000 paid by way of compensation – Appropriate sentence for offence - Facts of incident - Background circumstances – Appeal allowed; two year sentence imposed with total balance suspended from date of hearing (130/2008 - CCA - 24/10/2008) [2008] IECCA 132
People (DPP) v Twomey

Sentence

Severity – Assault - Seriousness of offence - Ongoing psychological *sequelae* of victim - Sum of €12,000 in compensation paid over to victim – Mitigating factors - Fifteen years of non-offending - Responsible member of society - Behaviour result of medication capable of producing mood swings and sudden uncontrollable bouts of anger – No element of premeditation – Whether payment of significant compensation factor to which due weight must be given by sentencing judge - Maximum sentence of five years - Whether sentence represented an error of principle – Whether larger portion of sentence should have been suspended - Appeal allowed; four year sentence imposed with two years suspended (99/2008 -CCA - 24/10/2008) [2008] IECCA 131
People (DPP) v Hill

Sentence

Severity - Child pornography - Maximum five year sentence - Three year term of imprisonment imposed with two years post-release supervision - Whether sentence excessively severe - Principles to be applied - Mitigating factors - No previous convictions- Gravity of offence – Medical evidence suggesting more lenient view should be taken of case - Child Trafficking and Pornography Act 1998 (No 22), s 6 – Appeal allowed; sentence reduced to 18 months with 18 months suspended (96/08 - CCA - 24/10/2008) [2008] IECCA 130
People (DPP) v Smith

Sentence

Severity - Drugs offences - Co-accused – Discrepancy in manner co-accused sentenced - Consistency and proportionality of sentence between co-accused - Whether person with equal or greater culpability in offence received significantly lesser sentence – Whether lack of proportionality between sentences involved – Whether error in principle - Misuse of Drugs Act 1977 (No 12), ss 3 and 15 - Appeals allowed; sentence of three years imprisonment imposed with 2 suspended for first applicant and increased sentence of four years imprisonment with two suspended substituted for second applicant (241/2007 & 145/2008 - CCA - 31/7/2008) [2008] IECCA 117
People (DPP) v Mungon & Laval

Sentence

Severity - Drugs offences - Error in principle – Court unable to evaluate reasons for sentence - Appropriate sentence for offence - Circumstances of case - Value and nature of drugs - Seriousness of offence - Mitigation – Value of early plea where applicant caught red handed - Co-operation with gardaí - Personal circumstances - *DPP v Dunne* (Unrep, CCA, 17/10/2002) and *DPP v Galvin* (Unrep, CCA, 14/2/2005) considered - Misuse of Drugs Act 1977 (No 12), s 15A - Appeal allowed; sentence of 8 years imprisonment substituted (243/2007 - CCA - 31/7/2008) [2008] IECCA 118
People (DPP) v Nelson

Sentence

Severity - Drugs offences – Mandatory minimum sentence – Exceptional circumstances – Whether unjust to impose minimum sentence - Immediate plea - Admissions of considerable value and material assistance to prosecution – Whether exceptional circumstances adequately taken into account - Applicant recently bereaved with added burden of attending to two teenage children– Whether sentence unduly harsh – Whether sentence adequately reflected exceptional circumstances – *People (DPP) v Power* [2007] IESC 31, [2007] 2 IR 509 considered - Misuse of Drugs Act 1977 (No 12), s 15A – Appeal allowed; sentence of five years imprisonment imposed (74/2008 - CCA - 13/10/2008) [2008] IECCA 127
People (DPP) v Brodigan

Sentence

Severity - Drugs offences - Sentence of seven years imprisonment with one year suspended imposed - Carrier of consignment of cannabis to Dublin Airport - Gravity of offence -Circumstances of offender – Whether sentence just and equitable and had regard to requirements of statute, public policy and justice - Significant mitigating nature of background circumstances - Immediate plea of guilty - Inducement to carry due to dire financial circumstances - Foreign national – Children in impoverished circumstances in South Africa – Whether any role for partially suspended sentence where accused foreign national with no connection to country - Appeal allowed; sentence reduced to period of three years and six months imprisonment (94/2008 - CCA - 20/10/2008) [2008] IECCA 123
People (DPP) v Whitehead

Sentence

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Severity - Possession of firearm and unlawful driving of stolen vehicle – Sentenced to consecutive terms of imprisonment – Sentencing judge erroneously advised of maximum sentence – Error in principle - Seriousness of offence – Mid sentence range - Charges arose out of same event – Whether more appropriate to impose concurrent sentences - Appeal allowed; five years imprisonment and three years imprisonment to run concurrently imposed (121/2008 CCA - 13/10/2008) [2008] IECCA 129

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Severity - Rape - Whether trial judge fell into error in placing offence at level of seriousness meriting term of imprisonment of 15 years prior to taking into account any mitigating factors - Circumstances of offence - Seriousness of offence - Effect upon victim – Age of accused - Foreign national - Co-operation at trial in relieving State of obligation to have 20 witnesses present - Possibility of rehabilitation – Appeal allowed; term of nine years imprisonment imposed (58/2007- CCA 14/10/2008 [2008] IECCA 119
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Undue leniency – Assault - Application of provisions of Probation Act - Whether sentencing judge had inadequate regard to gravity or seriousness of offence – Whether undue regard had to existence of offer of compensation – Whether fact that compensation was offered and accepted factor which court must take into account when sentencing - Whether sentencing judge had adequate information or evidence upon which he could conclude that accused was person of considerable character – Failure to designate clearly and explicitly which provision relied on - Whether exercise of discretion was perverse or unjustified - *DPP v McLoughlin* [2005] 3 IR 19 considered - Criminal Justice Act 1993 (No 6), s 2 - Probation of Offenders Act 1907 (7 Edw 7, c 17), s 1(2) - Application by prosecutor for review of sentence refused (87CJA/08 - CCA - 13/10/2008) [2008] IECCA 128
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Undue leniency – Assault - Four year prison sentence with two years suspended imposed - Extremely serious injury imposed on victim with long term consequences – Whether substantial departure from appropriate sentence - Gravity of assault - Gravity of injury – 25 previous convictions - Criminal Justice Act 1993 (No 6), s 2 - Appeal allowed; sentence increased to term of eight years with four years suspended (119CJA/2008 - CCA - 20/10/2008) [2008] IECCA 122
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Undue leniency – Drugs offences - Five year prison term with three years suspended imposed - Mandatory minimum sentence of ten years – Whether any specific and exceptional circumstances – Whether substantial departure from appropriate sentence in the circumstances – Whether requirement to facilitate rehabilitation factored into sentence - Criminal Justice Act 1993 (No 6), s 2 - Application granted; eight years imprisonment with four years suspended substituted (104CJA/2008 - CCA - 20/10/2008) [2008] IECCA 121
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Undue leniency - Seriousness of offences - Premeditated nature of offences - Escalation of activities - Whether trial judge had sufficient regard to aggravating element of offences – Sentenced to 3 years imprisonment with one suspended to run concurrently - Whether sentences unduly lenient – Criminal Justice Act 1993 (No 6), s 2 - Appeal allowed; two sentences of three imprisonment with no suspension, and two sentences of five years with one year suspended to run concurrently imposed (10CJA & 188CJA/2008 - CCA - 13/10/2008) [2008] IECCA 125
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IMMIGRATION

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Appeal - Judicial review – Application for leave - Country of origin material – Credibility – Applicant previously refused asylum in England – Failure to disclose previous application – Internal inconsistencies – Errors of fact made by respondent as to country of origin information – Extension of time – Burden of proof – Whether error of fact constituted substantial grounds when decision viewed holistically - *Imafu v Minister for Justice* [2005] IEHC 416 (Unrep, Peart J, 9/12/2005), *F v Minister for Justice* [2008] IEHC 126 (Unrep, Peart J, 02/05/2008), *Silveira v Refugee Appeals Tribunal* [2004] IEHC 436 (Unrep, Peart J, 09/07/2004), *Z v Minister for Justice [2002] 2 IR 135 and O v Minister for Justice* [2008] IEHC 311 (Unrep, Hedigan J, 15/10/2008) applied; *Zhuchkova v Minister for Justice* [2004] IEHC 414 (Unrep, Clarke J, 26/11/2004), *Simo v Minister for Justice* [2007] IEHC 305 (Unrep, Edwards J, 04/07/2007) and *Horvath v Secretary of State for the Home Department (UNHCR Intervening)* [1999] INLR 7 considered; *Kramarenko v Refugee Appeals Tribunal* [2004] IEHC 101 (Unrep, Finlay Geoghegan J, 02/04/2004) distinguished - Refugee Act 1996 (No 17), ss 11A and 16 – Immigration Act 2003 (No 26), s 7 – Leave refused (2006/1277JR – Hedigan J – 30/10/2008) [2008] IEHC 339
E (PI) v Refugee Appeals Tribunal

Asylum

Credibility – Mention of internal relocation in tangential manner in decision of respondent – Whether mention of internal relocation caused unfairness to applicant – Whether obligation to furnish applicant with Operational Guidance Note – Whether fair procedures - *Olatunji v Refugee Appeals Tribunal* [2006] IEHC 113 (Unrep, Finlay Geoghegan J, 07/04/2006), *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39 and *Ogunniyi v Minister for Justice, Equality and Law Reform* [2008] IEHC 307 (Unrep, Hedigan J, 9/10/2008) considered - Refugee Act 1996 (No 17), s 16 – Relief refused (2006/673JR – Hedigan J - 4/11/2008) [2008] IEHC 343
W (EA) v Refugee Appeals Tribunal

Asylum

Credibility of applicant – Alleged failure to take account of documentation – Alleged failure to adequately consider medical report – Substantial grounds - Obligation to take account of all relevant statements and documentation presented - Whether for tribunal member to decide whether or not document merits specific reference - Whether obligation on decision maker to refer to every aspect of evidence or to identify all documents within written decision - Whether applicant produced any direct or inferential evidence that tribunal member did not take account of documents submitted - Whether medical report of significant probative value - Assessment of probative or corroborative value - Whether any irrationality in assessment of credibility - *Khadazi v Refugee Appeals Tribunal* (Unrep, Gilligan J, 19/04/2005) distinguished; *Muanza v Refugee Appeals Tribunal* (Unrep, Birmingham J, 8/2/2008), *Banzuzi v Minister for Justice* [2007] IEHC 2, (Unrep, Feeney J, 18/1/2007), *GK v Minister for Justice* [2002] 2 IR 418, *ME v Refugee Appeals Tribuna*l [2008] IEHC 192, (Unrep, Birmingham J, 27/6/2008), *Bujari v Minister for Justice,* [2003] IEHC 18 (Unrep, Finlay Geoghegan J, 7/5/2003) and *Imafu v Minister for Justice* [2005] IEHC 416, (Unrep, Peart J, 9/12/2005) considered - Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 - European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), art 5 - Leave refused (2007/66JR – Hedigan J - 15/10/2008) [2008] IEHC 310
A (J) v Refugee Appeals Tribunal

Asylum

Judicial review – Alternative remedy - Appeal - Decision of Refugee Appeals Commissioner – Existence of alternative remedy - Whether complaints capable of being dealt with on appeal - Whether judicial review appropriate remedy - Whether applicant demonstrated clear and compelling case that injustice done not capable of being remedied on appeal - Whether breach of fair procedures at initial stage *per se* entitled applicant to judicial review - Whether existence of statutory right of appeal fundamental reason not to grant judicial review – Whether court should intervene before statutory asylum process completed - *Stefan v Minister for Justice* [2001] 4 IR 203, *State (Abenglen Properties Ltd) v Dublin Corporation* [1984] IR 381, *Kayode v Refugee Applications Commissioner* [2005] IEHC 172 (Unrep, O'Leary J, 25/4/2005) and *Z v Minister for Justice* [2008] IEHC 36 (Unrep, McGovern J, 6/2/2008) considered - Fair procedures - Quality of decision rather than defective application of legal principles - Whether officer failed to specifically put relevant information to applicant – *Audi alteram partem* - Failure to call back applicant after interview - *Anochie v Refugee Applications Commissioner* [2008] IEHC 261 (Unrep, Birmingham J, 2/7/2008) followed; *Idiakheua v Minister for Justice* [2005] IEHC 150, (Unrep, Clarke J, 10/5/2005), *Olatunji v Refugee Appeals Tribunal* [2006] IEHC 113 (Unrep, Finlay Geoghegan J, 7/4/2006), *Moyosola v Refugee Applications Commissioner* [2005] IEHC 218, (Unrep, Clarke J, 23/5/2005), *PS (a minor) v Minister for Justice* [2008] IEHC 235, (Unrep, McMahon J, 11/7/2008) and *DH v Refugee Applications Commissioner* [2004] IEHC 95, (Unrep, Herbert J, 27/5/2004) considered - Whether assessment of credibility was flawed – Onus of proof on applicant - Whether decision makers best placed to make assessments as to credibility *Imafu v Minister for Justice* [2005] IEHC 416 (Unrep, Peart J, 9/12/2005), *Bujari v Minister for Justice* [2003] IEHC 18, (Unrep, Finlay Geoghegan J, 7/5/2003) and *Banzuzi v Minister for Justice* [2007] IEHC 2 (Unrep, Feeney J, 18/1/2007) considered - Factors to which decision maker is required to have regard when assessing the credibility of applicant - *Ajoke v Refugee Applications Commissioner* (Unrep, Hanna J, 30/5/2008) and *Akpata v Refugee Applications Commissioner* (Unrep, Birmingham J, 9/7/2008) considered - Refugee Act 1996 (No 17) , s 11B - Leave refused (2006/1065JR – Hedigan J - 9/10/2008) [2008] IEHC 308
NN (B) v Minister for Justice

Asylum

Judicial review – Alternative remedy - First instance decision – Fair procedures - Delay of six months – Appeal instituted – Applicant associated with political party in Iran – Applicant asserting lack of legal advice and medical problems as cause of delay – First safe country – Certain matters not put to applicant - Whether appropriate to extend time – Whether substantial grounds – Whether breach of fair procedures - Whether appeal adequate remedy – Whether applicant entitled to primary decision in accordance with fair procedures – Whether applicant estopped having invoked appeal - *GK v Minister for Justice [2002] 1 ILRM 81, Re the Illegal Immigrants (Trafficking) Bill 1999 [2000] 2 IR 360 and Stefan v Minister for Justice* [2001] 4 IR 203 *applied; Nguedjdo v Refugee Applications Commissioner* (Unrep, White J, 23/7/2003), *Idiakheua v Minister for Justice [*2005] IEHC 150 (Unrep, Clarke J, 10/5/2005), *Kouaype v Minister for Justice* [2005] IEHC 380 (Unrep, Clarke J, 9/11/2005), *Kayode v Refugee Applications Commissioner* [2005] IEHC 172 (Unrep, O'Leary J, 25/4/2005), *AKPOMUDJERE V MINISTER FOR JUSTICE* [2007] IEHC 169 (Unrep, Feeney J, 1/2/2007), *McGoldrick v An Bord Pleanala* [1997] 1 IR 497 and *Chuknuemeka v Minister for Justice* (Unrep, Birmingham J, 7/10/2007) considered - Illegal Immigrants (Trafficking) Act 2000 (No 29) s 5 - Refugee Act 1996 (No 17), ss 2, 11, 13 & 16 – Leave granted (2006/1521JR - Herbert J - 08/05/2008) [2008] IEHC 138
F (A) v Minister for Justice, Equality and Law Reform

Asylum

Judicial review – Leave - Extension of time - Decision on first instance and appeal challenged – Mother and infant applicant – Credibility – State protection – Internal relocation – Seven month delay since first instance decision - Whether good and sufficient reason for extending time – Whether extension of time should ever be refused in respect of minor – Whether court's assessment of strength of case a factor in deciding to extend time – Whether failure to specifically and individually address fears of infant applicant - *Ojuade v Refugee Applications Commissioner* (Unrep, Peart J, 2/5/2008) distinguished – Extension time refused (1237 JR/2006 – Hedigan J - 16/10/2008) [2008] IEHC 314
A (K) v Refugee Applications Commissioner

Asylum

Judicial review – Leave - Availability of appeal – Alleged want of fair procedures – Alleged failure to put doubts to applicant – Alleged absence of proper analysis – Finding on credibility – Alleged failure to give reasons – *Certiorari* quashing recommendation of commissioner – Injunction – Citizen of Uganda with right of residence in Nigeria – Claim of well founded fear of persecution in Uganda and Nigeria – Fear of religious persecution in Uganda – Fear of female genital mutilation in Nigeria – Failure to properly identify country of origin information –Whether finding based on 'gut feeling' – Whether failure to employ forward looking test – Alleged failure to have regard to UNCHR handbook – Alleged failure to consult relevant country of origin information – Whether concerns could be best addressed in context of appeals process – *Stefan v Minister for Justice* [2001] 4 IR 2003, *Voke Akpomudjere v Minister for Justice* (Unrep, Feeney J, 1/2/2007), *Akomoj v Minister for Justice* (Unrep, Feeney J, 1/2/2007), Idiakheua *v Minister for Justice* [2005] IEHC 150 (Unrep, Clarke J, 10/5/2005), *Re Haughey* [1971] IR 217, *Zhuchkova v Minister for Justice* (Unrep, Clarke J, 26/11/2004), *Da Silveria v Refugee Appeals Tribunal* (Unrep, Peart J, 9/7/2004) and *Z(V) v Minister for Justice* [2002] 2 IR 135 considered – Refugee Act 1996 (No 17), ss 2 and 13 – Leave refused (2006/1012JR – Edwards J – 30/7/2008) [2008] IEHC 270
O (SMI) (An Infant) v Minister for Justice, Equality and Law Reform

Asylum

Judicial review – Leave - Country of origin material – State protection – Credibility – Time limit - Whether failure to adequately assess if internal relocation available to applicant – Whether respondent's failure to mention document evidenced failure to take into account all material – Whether error of fact - Whether applicant acted with all due expedition - Whether appropriate to extend

time - *Banzuzi v Refugee Appeals Tribunal* [2007] IEHC 2 (Unrep, Feeney J, 18/01/2007), *GK v Minister for Justice [2002] 2 IR 418, A v Refugee Appeals Tribunal* [2007] IEHC 169 (Unrep, Feeney J, 09/02/2007), *DK v Refugee Appeals Tribunal* [2006] IEHC 132 [2006] 3 IR 368 and *E v Refugee Appeals Tribunal* [2008] IEHC 192 (Unrep, Birmingham J, 27/06/2008) applied; *Khazadi v Minister for Justice* (Unrep, Gilligan J. 19/4/2007) distinguished - *European Communities (Eligibility for Protection) Regulations 2006* (SI 518/2006), reg 5(1)(b) – Leave refused (2007/1024JR – Hedigan J – 16/10/08) [2008] IEHC 313
O (K) v Minister for Justice, Equality and Law Reform

Asylum

Judicial review – Leave - Decision of RAT – Delay – Extension of time – Alleged breach of fair procedures – Whether irrelevant material taken into consideration – Whether failure to take all relevant material into consideration - Assessment of credibility – Whether substantial grounds for review – Applicable test – Whether test of anxious scrutiny appropriate – Departing from decision of court of coordinate jurisdiction – Whether errors in assessment of credibility – Whether manifest errors of fact - Whether decision fundamentally flawed – Whether wrongful reliance on matters within personal knowledge – Opportunity to deal with apparent inconsistencies – Failure to address issue during hearing – Whether want of credibility relied upon in decision – Test for persecution – Meaning of persecution – Need to show sustained or systematic risk of harm – Country of origin information – *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39 and *The State (Keegan) v Stardust Compensation Tribunal* [1986] IR 642 applied - *COI v Minister for Justice* (Unrep, McGovern J, 2/3/2007), *R v Home Secretary (ex parte) Boonibyo* [1996] QB 768, *BJN v Minister for Justice* (Unrep, McCarthy J, 18/1/2008), *Gashi v Minister for Justice* (Unrep, Clarke J, 3/12/2004), *Idiakhua v Minister for Justice* (Unrep, McCarthy J, 10/5/2005), *AO v Minister for Justice* [2003] 1 IR 124, *Z v Minister for Justice* [2002] 2 ILRM 215, *Laurentiu v Minister for Justice* [1999] 4 IR 26, *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840, *Irish Trust Bank Limited v Central Bank of Ireland* [1976] ILRM 50, *Imafu v Minister for Justice* (Unrep, Clarke J, 27/5/2005), *Carciu v Refugee Appeals Tribunal* (Unrep, Finlay Geogeghan J, 4/7/2003), *Bisong v Refugee Appeals Tribunal* (Unrep, O'Leary J, 25/4/2005), *Tabi v Refugee Appeals Tribunal* (Unrep, Peart J, 27/7/2007), *Kikumbi v Refugee Applications Commissioner* (Unrep, Herbert J, 7/2/2007), *K v Refugee Appeals Tribunal* [2005] 4 IR 321, *Memshi v Refugee Appeals Tribunal* (Unrep, Peart J, 25/6/2003), *NK v Refugee Appeals Tribunal* [2005] 4 IR 321, R *v Immigration Appellate Authority, ex parte Mohammed* (Unrep, Newman J, 14/10/1999), *Re D* [1995] 4 All ER and *Rostas v Refugee Appeals Tribunal* (Unrep, Gilligan J, 31/7/2003) considered – Leave refused (2006/861JR – McCarthy J – 31/7/2008) [2008] IEHC 294
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Asylum

Judicial review – Leave - Right to full oral hearing on appeal - Adverse credibility finding – *Certiorari* quashing recommendation of commissioner –Libyan national –Application of benefit of doubt where elements of claim not susceptible to proof – Country of origin information – Whether absence of analysis – Possibility of correcting error on appeal – Whether incorrect legal test applied – Whether failure to apply forward looking test – Whether want of fair procedures – Whether failure to consider applicant's explanation for failing to seek asylum in United Kingdom – Whether failure to have regard to specific factors listed in Act – Whether obligation to address each factor specifically - *Da Silveria v Refugee Appeals Tribunal* (Unrep, Peart J, 9/7/2004), *Botan v Refugee Appeals Tribunal* (Unrep, Feeney J, 30/6/2006), *Imafu v Minister for Justice* (Unrep, Peart J, 9/12/2005) and *Chuknuemeka v Minister for Justice* (Unrep, Birmingham J, 7/10/2007) considered – Refugee Act 1996 (No 17), ss 2 and 11 – Leave refused (2006/1015JR – McMahon J – 31/7/2008) [2008] IEHC 273
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Asylum

Refugee Appeals Tribunal – Breach of fair procedures – Duty to give reasons – Whether tribunal erred in failing to allow submissions based on earlier linked case – Whether tribunal ought thereafter to have reopened case to hear witness – Whether tribunal failed to address material factors in reaching decision – Whether tribunal failed to give adequate reasons for decision - *M v Refugee Applications Commissioner* (Unrep, Smyth J, 25/6/2002) distinguished; *F v Refugee Appeals Tribunal* [2005] IEHC 423, (Unrep, O'Leary J, 21/12/2005) followed – Relief granted (2006/636JR – 4/6/2008) [2008] IEHC 214
N (J) v Minister for Justice

Asylum

State protection – Well founded fear of persecution – Whether error of law as to state protection - Whether test of state protection correctly applied - Whether adequate state protection available in country of origin – Whether claimant demonstrated no adequate state protection - Failure to make complaint to police – *Canada (AG) v Ward* [1993] 2 RCS 689 considered, *DK v Refugee Appeals Tribunal* [2006] IEHC 132, [2006] 3 I.R. 368 and *HO v Refugee Appeals Tribunal* [2007] IEHC 299 (Unrep, Hedigan J, 19/7/2007) considered - Fair procedures - Treatment of country of origin information - Alleged error of fact –Failure to specify alleged error in statement of grounds - *Imoh v Refugee Appeals Tribunal* [2005] IEHC 220 (Unrep, Clark J, 24/6/2005) and *Traore v Refugee Appeals Tribunal* [2004] IEHC 606 (Unrep, Finlay Geoghegan J, 14/5/2004) distinguished- Burden of proof - Whether any provision of factual evidence by applicant of incidents of actual anti-semitic persecution of himself - Responsibility of claimant to produce documentation in support of case - *Z v Minister for Justice* [2002] 2 IR 135 considered; *GOB v Minister for Justice* [2008] IEHC 229 (Unrep, Birmingham J, 3/6/2008) followed - Leave refused (2006/ 1243JR – Hedigan J – 15/10/2008) [2008] IEHC 311
O (KO) v Minister for Justice Equality and Law Reform

Deportation

Delay - Judicial review – Leave - Application for extension of time – Minor - Prescribed period of fourteen days – Application out of time by 23 months - Factors to be taken into account –Whether good and sufficient reason for extending time for commencement of proceedings - Whether applicant disadvantaged in relation to the availability of legal advice - Whether distinction in case of adult applicant and minor applicant - Whether court should consider merits of case sought to be made - Whether court should be satisfied that grounds put forward are arguable or have some chance of success - Whether court could refuse to extend time even where grounds are substantial grounds - *Re Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360 and *Imafu v Minister for Justice* [2005] IEHC 416, (Unrep, Peart J, 9/12/2005) considered - Illegal Immigrants (Trafficking) Act 2000 (No 24), s 5 - Deportation - Revocation – Delay – Proportionality – Whether onus on applicant to place all relevant information before Minister - *Botusha v Minister for Justice* (Unrep, Peart J, 29/10/2003) distinguished and *Kouaype v Minister for Justice* [2005] IEHC 380, (Unrep, Clarke J, 9/11/2005) followed - Leave to apply for judicial review refused (2006/651JR Peart J – 2/5/2008) [2008] IEHC 126
F (B) v Minister for Justice

Deportation

Humanitarian leave to remain - Delay – Family settled within State – Entitlement to have duration of residence taken into account — Alleged factual misrepresentations regarding character of father – Alleged failure to consider circumstances of children included in application of mother – Alleged failure to properly consider medical history of mother – Whether lack of fair procedures – *Kouaype v Minister for Justice* [2005] IEHC 380 (Unrep, Clarke J, 9/11/2005), *AA v Minster for Justice*[2005] IEHC 393 [2005] 4 IR 564, *Lupascu v Minister for Justice* [2004] IEHC 400 (Unrep, Peart J, 21/12/2004), *M(K) v Minister*

for Justice [2007] IEHC 234 (Unrep, Edwards J, 17/7/2007), *Agbonlahor v Minister for Justice* [2007] IEHC 166 [2007] 4 IR 309, *L & O v Minister for Justice* [2003] 1 IR 1, *Oguekwe v Minister for Justice* [2008] IESC 25 (Unrep, SC, 1/5/2008), *Cosma v Minister for Justice* [2006] IEHC 36 [2007] 2 IR 133 and *N v Home Secretary* [2005] 2 AC 296 considered – Refugee Act 1996 (No 17), s 5 – Immigration Act 1999 (No 22), s 3 – Claims dismissed (2006/155JR – Edwards J – 29/7/2008) [2008] IEHC 269
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Deportation

Humanitarian leave to remain – Impact of deportation order - Balancing exercise - Fair procedures - Whether due and proper consideration of children's constitutional and convention rights - Proportionality – Welfare of children - Integrity of State immigration laws - Whether proposed deportation interfered with applicant children's rights to reside in State or have society, care and company of parents - Rights of member states to expel and deport foreign nationals – Discretion of Minister - Standard of review – Test of anxious scrutiny - Respect for asylum and immigration system – *Amadasun v Minister for Justice* [2004] IEHC 378, [2007] 3 IR 421, *Baby O v Minister for Justice* [2002] 2 IR 169, *Kouaype v Minister for Justice* [2005] IEHC 380, (Unrep, Clarke J, 9/11/2005), *Nnyanazi v United Kingdom* (Unrep, ECHR, 8/4/2008), R *(Razgar) v Secretary of State for the Home Department* [2004] 1 AC 368, *Bensaid v United Kingdom* (Unrep, ECHR, 6/2/2001), *HI v Minister for Justice* [2007] IEHC 447 (Unrep, Hedigan J, 13/12/2007), *SM v Refugee Applications Commissioner* [2007] IEHC 290 (Unrep, Peart J, 27/7/2007), *GO v Minister for Justice* [2008] IEHC 190, (Unrep, Birmingham J, 19/6/2008), *Dada v Minister for Justice* [2006] IEHC 140 (Unre, O'Neill J, 3/5/2006) and *Dimbo v Minister for Justice* [2006] IEHC 344, (Unrep, Finlay Geoghegan J, 14/11/2006) considered; *Oguekwe v Minister for Justice* [2008] IESC 25 (Unrep, SC, 1/5/2008) distinguished; *Oghosasere v Minister for Justice* [2007] IEHC 453 (Unrep, Hedigan, 13/12/2007), *AO v Minister for Justice* [2003] 1 IR 1, *Pok Sun Shum v Minister for Justice* [1986] ILRM 593 and *IS v Minister for Justice* [2007] IEHC 398, (Unrep, Dunne, 30/11/2007) followed - Constitution of Ireland 1937, art 40.3.1° - Relief refused (2007/1372JR - Hedigan J - 9/10/2008)[2008] IEHC 307
O (OL) (an infant) v Min for Justice

Deportation

Judicial review - Leave – Interlocutory injunction restraining deportation – Turkish national – Fear of persecution – Conscientious objector to military service – Application for revocation – Newspaper articles detailing difficulties endured – Intention to marry Irish citizen – Whether failure to adequately consider newspaper articles – Whether failure to consider right to subsidiary protection – Need to show new circumstances – Whether failure to consider family rights under Constitution – Onus on applicant to present relevant facts - Whether irrational that denial of rights that would be available where wife national of another EU Member State – Obligation to comply with State – Credibility – *Bona fides - G v DPP* [1994] 1 IR 374 and *GO v Minister for Justice, Equality and Law Reform* (Unrep, Clarke J, 19/2/2008) applied - *NH v Minister for Justice* (Unrep, Feeney J, 27/7/2007), *Metock v Minister for Justice* (C-127/08) and *Pok Sun Shum v Minister for Justice* [1986] ILRM 593 considered – Council Directive 2004/83/EC - Immigration Act 1999 (No 22), s 3 - Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Criminal Justice (UN Convention Against Torture) Act 2000, s 4 – European Communities (Eligibility for Protection) Regulations (SI 518/2006) - Leave refused (2008/1013JR – Hedigan J – 9/10/2008) [2008] IEHC 306
Y (AM) v Minister for Justice, Equality and Law Reform

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INJUNCTION

Interlocutory injunction

Principles governing grant - Balance of convenience - Presumption of constitutionality – Whether court should be slow to prevent public body from exercising statutory responsibility - Effect of grant of injunction on electorate – Whether rights of electorate prejudiced – Constitution of Ireland 1937, arts 28(2) and 28(5) - Local Government Act 2001 (No 37), s 19 - Interlocutory relief refused (2008/3377P - Sheehan J - 10/6/2008) [2008] IEHC 172
O'Doherty v Attorney General & Limerick Co Co

Interlocutory injunction

Principles - Common formulations of test - Whether plaintiff established fair issue to be tried - Consideration of strength of case at interlocutory stage - Whether Irish law precluded court from having regard to relative strengths of case after established that fair question raised - Whether plaintiffs' prospects of success remote - *Campus Oil v Minister for Industry* (No. 2) [1983] IR 88 followed; *G & T Crampton Ltd v Building and Allied Trades Union* (Unrep, Laffoy J, 20/11/1997) distinguished; *Quigley v Beirne [1955] IR 62*, *Esso Petroleum Co (Ir) Ltd v Fogarty* [1965] IR 531, *TMG Group Ltd v Al Bahtain Trading* (Unrep, SC, 28/3/1980), *Rex Pet Foods Ltd v Lamb Brothers (Dublin) Ltd* (Unrep, 26/8/1982), *Series 5 Software Ltd v Clark* [1996] 1 All ER 853, *B & S Ltd v Irish Auto Trader Ltd* [1995] 2 IR 142, *Westman Holdings Ltd v McCormack* [1992] 1 I.R. 151, *Symonds Cider v Showerings (Ireland) Ltd* [1997] 1 ILRM 481 and *American Cyanamid v Ethicon Ltd* [1975] AC 396 considered -Industrial Relations Act, 1990 (No 19), s 11(1) - Application for interlocutory injunctive relief refused (2008/3184P – Edwards J - 1/5/2008) [2008] IEHC 147
Chieftan Construction Ltd v Ryan

INSURANCE

Motor Insurance

Motor Insurance Bureau of Ireland - Road traffic accident - Uninsured driver – Duty to indemnify - Whether Motor Insurance Bureau of Ireland as matter of domestic law obliged to compensate – European Union Legislative Framework - Whether Motor Insurance Bureau of Ireland "emanation of the State" - Status of Motor Insurance Bureau of Ireland and relationship with State - Jurisprudence of European Court of Justice - Applicable test – Whether Directive directly enforceable against MIBI - Whether Directive had direct effect against Motor Insurance Bureau of Ireland – Whether MIBI responsible for proper implementation of Directive - *Delargy v Minister for Environment* [2005] IEHC 94, (Unrep, Murphy J, 18/3/2005) distinguished; *Foster v British Gas Plc* [1990] ECR 3313, *Evans v Secretary of State for the Environment* [2003] ECR 4447, *Collino and Chiappero* [2000] ECR 6659, *Rieser Internationale Transporte* [2004] ECR 1477, *Adidas-Salomon and Adidas Benelux* [2003] ECR 12537; *Pfeiffer* [2004] ECR 8834, *Kampelmann v Landschastsverband Westfalen-Lippe* [1997] ECR 4907, *Haim v Kassenzahnrtzliche Vereinigung Nordrhein* [2000] ECR 5123, *Konle v Austrian Republic* [1999] ECR 3099, *Mighell v Reading* [1999] Lloyd's Rep IR 30, *White v White* [1999] 1 CMLR 1251, *Byrne v MIB* [2007] 2 All ER 499, *Dublin Bus v MIBI* (Unrep, CC, McMahon J, 29/10/1999), *Withers v Delaney* (Unreported, CC, McMahon J, 9/3/2001), *NUT v St Mary's Church of England Junior School* [1997] 3 CLMR 630, *Rolls Royce v Doughty* [1992] ICR 538, *Riksskatteverket v Gharehveran* [2001] ECR 7687, *Francovich v Italy* [1991] ECR 5357 and *Wagner Miret v Fondo de Garanatia Salarial* [1993] ECR 6911 considered - Road Traffic Act 1961 (No 24), ss 56 and 65(1) - European Communities (Road Traffic) (Compulsory Insurance) (Amendment) Regulations 1992 (SI 347/1992), art 7 - Council Directive 72/166/EEC - Council Directive 84/5/EEC - Council Directive 90/232/EEC – Motor Insurance Bureau of Ireland Agreement 1988, cl 3(7) and 4(1) - Application granted (1997/10802P - Birmingham J - 31/1/2008) [2008] IEHC 124
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JUDICIAL REVIEW

Abuse of process

Conviction – Summary trial – Cruelty to animals – Lay litigant - Attendance of witness not secured by State – Failure to seek adjournment of trial on this grounds - Applicant banned from keeping all animals – Applicant asserting breach of Convention rights – Alleged breach of constitutional rights already rejected in other proceedings – Rule in *Henderson v Henderson* – District Court Order invalid in part - Whether prosecution in summary case obliged to secure attendance of all witnesses in respect of whom statement served on defendant – Whether proceedings unfair – Whether possible to challenge on basis of Convention right where challenge on basis of Constitutional right already defeated – Whether legislative sanctions proportionate – Whether District Court order severable – Whether appropriate to remit matter - *Bowes v Judge Devally* [1995] 1 IR 315 applied - Control of Dogs Act 1986 (No 32), ss 16 & 18 – Protection of Animals Act 1911 (1911 1 & 2 Geo 5, c 27) – European Convention on Human Rights, art 8 – Constitution of Ireland 1937, art 40 – Relief refused (2008/179JR – O'Neill J - 16/10/2008) [2008] IEHC 318
Sfar v District Judge Brennan

Certiorari

Firearm certificate – Refusal - Whether decision *ultra vires* and without any basis in law - Bases upon which superintendent can make decision to refuse firearm certificate - Application by *bona fide* recreational shooting enthusiast – Reasons given for refusal - Whether good reason for applicant requiring licence – Danger to public safety - Whether any provision which entitled respondent to consider applicant's suitability in relation to particular weapon where certificates were held in respect of others - Whether public safety peace could be endangered by type of firearm - *East Donegal Livestock Mart Ltd v Attorney General* [1970] IR 312, *Dunne v Donohoe* [2002] 2 IR 533 and *Mishra v Minister for Justice* [1996] 1 IR 189 considered - Firearms Act 1925 (No 7), ss 3, 4(a) and 5 – *Certiorari* granted (2006/299JR – Peart J - 2/5/2008) [2008] IEHC 127
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Leave

Application to set aside *ex parte* grant of leave – Failure to inform court of statutory provision – Failure to inform court of notice party's offer – Whether leave would have been granted if matters disclosed to court - *Gordon v DPP* [2003] 1 ILRM 81 applied – Solicitors (Amendment) Act 1960 (No 37), s 7 – Leave set aside (2006/511JR – O'Neill J – 14/10/2008) [2008] IEHC 317
Kelly v Solicitors Disciplinary Tribunal

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LAND LAW

Adverse possession

Boundary dispute – Adjoining landowners - Trespass – Nuisance - Principles applicable in relation to determining boundaries - Rules of construction of a deed – Role of map – Whether any evidence adduced in relation to adverse possession - *Wibberley Building Limited v Insley* [1999] 1 WLR 894, *O'Donnell v Ryan* 4 ICLR 44, *Topliss v Green* [1992] EGCS 20, *Boyd Gibbins Ltd v Hockham* [1966] 199 EG 229, *Kenny v La Barte* [1902] 2 IR 63 and *Cook v JD Wetherspoon plc* [2006] 2 P & CR 18 considered – Plaintiff's claim dismissed (2007/3511P- Hedigan J- 6/10/2008) [2008] IEHC 301
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LANDLORD AND TENANT

Lease

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Negligence

Personal injuries – Damages - Soldier – Post traumatic stress disorder – Noise induced deafness - Vulnerable personality – Immaturity - Stress following deaths of colleagues - Incapacitating states of anxiety – Heavy drinking – Insomnia – Nightmares - Alleged failure to diagnose and treat PTSD – Alleged failure to provide remedial treatment – Duty to take reasonable care for health and safety – Duty to keep abreast with contemporary knowledge - Continuing duties while in service – Correctness of diagnosis of PTSD – Failure to recognise symptoms – Knowledge of PTSD at time of tour – Accuracy of recall for traumatic events – Whether retrospective application of new diagnostic techniques – Repeated sick leave – Previous good work record – Knowledge of plaintiff's condition in the Lebanon – Misdiagnosis by army medical officers – Failure to observe or inquire into symptoms – Failure to follow up and monitor notwithstanding advice – Failure to inform or assist civilian doctors – Delay in acting when issue of PTSD first raised – Failure to acknowledge diagnosis of PTSD – Liability for psychiatric injuries – Nervous shock – Claim of statute bar – Delay – Whether statute bar live issue – Date of knowledge – Constructive knowledge – Knowledge of acts or omissions causing the injury – Failure of plaintiff to give information of problems to army and treating doctors – Reticence and avoidance – Alleged alcoholism – Failure to plead alcoholism – Quantum - *Knowles v Minister for Defence* (Unrep, O'Donovan J, 22/2/2002), *Dalton v Frendo* (Unrep, SC, 15/12/1977), *McHugh v Minister for Defence* [2001] IR 424, *Byrne v Great Southern and Western Railway* (Unrep, Court of Appeal, February 1884), *Bell v Great Northern Railway Company of Ireland (*1890) 26 LR Ir 428, *Dulieu v White & Sons* [1901] 2 KB 669, *McLoughlin v O'Brian* [1983] 1 AC 410, *Jaensch v Coffey* [1984] 155 CLR 549, *Mullally v Bus Eireann* [1982] ILRM 722, *Kelly v Hennessy* [1995] 3 IR 253, *Curran v Cadbury (Ireland) Ltd* [2000] 2 ILRM 343, *White v Chief Constable of South Yorkshire* [1998] 3 WLR 1509, *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310, *Maher v Jabil Global Services Ltd* [2005] 16 ELR 233, *Quigley v Complex Tooling and Moulding* (Unrep, Lavan J, 9/3/2005), *Pickering v Microsoft Ireland Operations Ltd* [2006] 17 ELR 65, *Bradley v An Post* [1998] 2 ILRM 1, *Gough v Neary* [2003] 3 IR 92 and *Spargo v North Essex Health Authority* [1997] 8 Med LR 125 considered - Statute of Limitations Act 1957 (No 6), s 11 - Statute of Limitations (Amendment) Act 1991 (No 18), ss 2 and 3 - Damages awarded (2008/3563P – Budd J – 22/7/2008) [2008] IEHC 292
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SI 528/2008

AT A GLANCE

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Please see S.I as it implements a number of Directives
SI 19/2009

European communities (Burma/Myanmar) (financial sanctions) regulations 2009
REG/194-2008
SI 35/2009

European communities (cat and dog fur) (restriction on trade) regulations 2008
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SI 513/2008

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DIR/2008-109
SI 8/2009

European communities (electro-medical equipment used in human or veterinary medicine) (revocation) regulations 2008
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Road traffic (weight laden of 5 axle articulated vehicles) regulations 2008
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DIR/2006-12, DIR/80-68
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SI 585/2008

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SI 583/2008

Rules of the Superior Courts (amendment to order 118) 2008
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SI 10/2009

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SI 551/2008

Rules of the superior courts (residential institutions redress act 2002) 2008
SI 529/2008

ACTS OF THE OIREACHTAS AS AT 18TH MARCH 2009 (30TH DÁIL & 23RD SEANAD)

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

1/2009 Anglo Irish Bank Corporation Act 2009
Signed 21/01/2009

2/2009 Residential Tenancies (Amendment) Act 2009
Signed 28/01/2009

3/2009 Gas (Amendment) Act 2009
Signed 17/02/2009

5/2009 Financial Emergency Measures in the Public Interest Act 2009
Signed 27/02/2009

6/2009 Charities Act 2009
Signed 28/02/2009

BILLS OF THE OIREACHTAS AS AT 18TH MARCH 2009 (30TH DÁIL & 23RD SEANAD)

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

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

Adoption Bill 2009
Bill 2/2009
Committee Stage – Seanad *(Initiated in Seanad)*

Air Navigation and Transport (Prevention of Extraordinary Rendition) Bill 2008
Bill 59/2008
2nd Stage – Dáil **[pmb]** *Deputy Michael D. Higgins*

Anglo Irish Bank Corporation (No. 2) Bill 2009
Bill 6/2009
Committee Stage – Dáil

Arbitration Bill 2008
Bill 33/2008
Committee Stage - Dáil

Broadband Infrastructure Bill 2008
Bill 8/2008
2nd Stage – Seanad **[pmb]** *Senators Shane Ross, Feargal Quinn, David Norris, Joe O'Toole, Rónán Mullen and Ivana Bacik*

Broadcasting Bill 2008
Bill 29/2008
Committee Stage – Dáil *(Initiated in Seanad)*

Civil Liability (Amendment) Bill 2008
Bill 46/2008
2nd Stage – Dáil **[pmb]** *Deputy Charles Flanagan*

Civil Liability (Amendment) (No. 2) Bill 2008
Bill 50/2008
2nd Stage – Seanad **[pmb]** *Senators Eugene Regan, Frances Fitzgerald and Maurice Cummins*

Civil Partnership Bill 2004
Bill 54/2004
2nd Stage – Seanad **[pmb]** *Senator David Norris*

Civil Unions Bill 2006
Bill 68/2006
Committee Stage – Dáil **[pmb]** *Deputy Brendan Howlin*

Climate Change Bill 2009
Bill 4/2009
2nd Stage – Dáil **[pmb]** *Deputy Eamon Gilmore*

Climate Protection Bill 2007
Bill 42/2007
2nd Stage – Seanad **[pmb]** *Senators Ivana Bacik, Joe O'Toole, Shane Ross, David Norris and Feargal Quinn*

Consumer Protection (Amendment) Bill 2008
Bill 22/2008
2nd Stage – Seanad **[pmb]** *Senators Dominic Hannigan, Alan Kelly, Phil Prendergast, Brendan Ryan and Alex White*

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

Credit Union Savings Protection Bill 2008
Bill 12/2008
2nd Stage – Seanad **[pmb]** *Senators Joe O'Toole, David Norris, Feargal Quinn, Shane Ross and Ivana Bacik*

Criminal Justice (Violent Crime Prevention) Bill 2008
Bill 58/2008
2nd Stage – Dáil **[pmb]** *Deputy Charles Flanagan*

Criminal Law (Admissibility of Evidence) Bill 2008
Bill 39/2008
Order for 2nd Stage – Seanad **[pmb]** *Senators Eugene Regan, Frances Fitzgerald and Maurice Cummins*

Data Protection (Disclosure) (Amendment) Bill 2008
Bill 47/2008
2nd Stage - Dáil **[pmb]** *Deputy Simon Coveney*

Defamation Bill 2006
Bill 43/2006
2nd Stage – Dáil *(Initiated in Seanad)*

Defence of Life and Property Bill 2006
Bill 30/2006
2nd Stage – Seanad **[pmb]** *Senators Tom Morrissey, Michael Brennan and John Minihan*

Electoral (Amendment) Bill 2009
Bill 9/2009
Order for 2nd Stage - Dáil

Electoral (Amendment) Bill 2008
Bill 38/2008
Committee Stage – Seanad *(Initiated in Dáil)*

Electoral Commission Bill 2008
Bill 26/2008
2nd Stage – Dáil **[pmb]** *Deputy Ciarán Lynch*

Electoral (Gender Parity) Bill 2009
Bill 10/2009
2nd Stage - Dáil

Employment Law Compliance Bill 2008
Bill 18/2008
2nd Stage – Dáil

Ethics in Public Office Bill 2008
Bill 10/2008
2nd Stage – Dáil **[pmb]** *Deputy Joan Burton*

Ethics in Public Office (Amendment) Bill 2007
Bill 27/2007
2nd Stage – Dáil *(Initiated in Seanad)*

Fines Bill 2007
Bill 4/2007
Order for 2nd Stage – Dáil

Freedom of Information (Amendment) Bill 2008
Bill 24/2008
2nd Stage – Seanad **[pmb]** *Senators Alex White, Dominic Hannigan, Brendan Ryan, Alan Kelly, Michael McCarthy and Phil Prendergast*

Freedom of Information (Amendment) (No.2) Bill 2008
Bill 27/2008
2nd Stage – Dáil **[pmb]** *Deputy Joan Burton*

Freedom of Information (Amendment) (No. 2) Bill 2003
Bill 12/2003
2nd Stage – Seanad **[pmb]** *Senator Brendan Ryan*

Fuel Poverty and Energy Conservation Bill 2008
Bill 30/2008
2nd Stage – Dáil **[pmb]** *Deputy Liz McManus*

Garda Síochána (Powers of Surveillance) Bill 2007
Bill 53/2007
2nd Stage – Dáil **[pmb]** *Deputy Pat Rabbitte*

Genealogy and Heraldry Bill 2006
Bill 23/2006
1st Stage – Seanad **[pmb]** *Senator Brendan Ryan*

Harbours (Amendment) Bill 2008
Bill 42/2008
Report Stage – Seanad *(Initiated in Seanad)*

Health Insurance (Miscellaneous Provisions) Bill 2008
Bill 67/2008
Order for 2nd Stage - Dáil

Housing (Miscellaneous Provisions) Bill 2008
Bill 41/2008
2nd Stage – Dáil *(Initiated in Seanad)*

Housing (Stage Payments) Bill 2006
Bill 16/2006
2nd Stage – Seanad **[pmb]** *Senator Paul Coughlan*

Human Body Organs and Human Tissue Bill 2008
Bill 43/2008
2nd Stage – Seanad **[pmb]** *Senator Feargal Quinn*

Human Rights Commission (Amendment) Bill 2008
Bill 61/2008
2nd Stage – Dáil **[pmb]** *Deputy Aengus O'Snodaigh*

Immigration, Residence and Protection Bill 2008
Bill 2/2008
Committee Stage – Dáil

Industrial Development Bill 2008
Bill 65/2008
Committee Stage – Seanad *(Initiated in Seanad)*

Industrial Relations (Protection of Employment) (Amendment) Bill 2009
Report and Final Stages – Dáil *(Initiated in Dáil)*

Investment of the National Pensions Reserve Fund and Miscellaneous Provisions Bill 2009
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2nd Stage - Dáil

Irish Nationality and Citizenship (Amendment) (An Garda Síochána) Bill 2006
Bill 42/2006
1st Stage – Seanad **[pmb]** *Senators Brian Hayes, Maurice Cummins and Ulick Burke*

Land and Conveyancing Law Reform Bill 2006
Bill 31/2006
Committee Stage – Dáil *(Initiated in Seanad)*

Legal Practitioners (Qualification) (Amendment) Bill 2007
Bill 46/2007
2nd Stage – Dáil **[pmb]** *Deputy Brian O'Shea*

Legal Services Ombudsman Bill 2008
Bill 20/2008
Report and Final Stages – Dáil

Local Elections Bill 2008
Bill 11/2008
2nd Stage – Dáil **[pmb]** *Deputy Ciarán Lynch*

Mental Capacity and Guardianship Bill 2008
Bill 13/2008
2nd Stage – Seanad **[pmb]** *Senators Joe O'Toole, Shane Ross, Feargal Quinn and Ivana Bacik*

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

National Cultural Institutions (Amendment) Bill 2008
Bill 66/2008
Order for 2nd Stage – Seanad **[pmb]** *Senator Alex White*

National Pensions Reserve Fund (Ethical Investment) (Amendment) Bill 2006
Bill 34/2006
1st Stage – Dáil **[pmb]** *Deputy Dan Boyle*

Nursing Homes Support Scheme Bill 2008
Bill 48/2008
2nd Stage – Dáil

Offences Against the State Acts Repeal Bill 2008
Bill 37/2008
2nd Stage – Dáil **[pmb]** *Deputy Aengus Ó Snodaigh, Martin Ferris, Caomhghin Ó Caoláin and Arthur Morgan*

Offences Against the State (Amendment) Bill 2006
Bill 10/2006
1st Stage – Seanad **[pmb]** *Senators Joe O'Toole, David Norris, Mary Henry and Feargal Quinn*

Official Languages (Amendment) Bill 2005
Bill 24/2005
2nd Stage – Seanad **[pmb]** *Senators Joe O'Toole, Paul Coghlan and David Norris*

Ombudsman (Amendment) Bill 2008
Bill 40/2008
Order for 2nd Stage – Dáil

Planning and Development (Amendment) Bill 2008
Bill 49/2008
2nd Stage – Dáil **[pmb]** *Deputy Joe Costello*

Planning and Development (Enforcement Proceedings) Bill 2008
Bill 63/2008
2nd Stage – Dáil **[pmb]** *Deputy Mary Upton*

Prevention of Corruption (Amendment) Bill 2008
Bill 34/2008
Committee Stage – Dáil

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

Protection of Employees (Agency Workers) Bill 2008
Bill 15/2008
2nd Stage – Dáil **[pmb]** *Deputy Willie Penrose*

Public Appointments Transparency Bill 2008
Bill 44/2008
2nd Stage – Dáil **[pmb]** *Deputy Leo Varadkar*

Registration of Lobbyists Bill 2008
Bill 28/2008
2nd Stage – Dáil **[pmb]** *Deputy Brendan Howlin*

Seanad Electoral (Panel Members) (Amendment) Bill 2008
Bill 7/2008
Order for 2nd Stage – Seanad **[pmb]** *Senator Maurice Cummins*

Spent Convictions Bill 2007
Bill 48/2007
2nd Stage – Dáil **[pmb]** *Deputy Barry Andrews*

Stem-Cell Research (Protection of Human Embyros) Bill 2008
Bill 60/2008
2nd Stage – Seanad **[pmb]** *Senators Rónán Mullen, Jim Walsh and John Hanafin*

Student Support Bill 2008
Bill 6/2008
2nd Stage – Dáil

Tribunals of Inquiry Bill 2005
Bill 33/2005
2nd Stage – Dáil

Twenty-ninth Amendment of the Constitution Bill 2008
Bill 31/2008
2nd Stage – Dáil **[pmb]** *Deputy Arthur Morgan*

Twenty-eighth Amendment of the Constitution Bill 2008
Bill 14/2008
Report and Final Stages – Dáil

Twenty-eighth Amendment of the Constitution Bill 2007 (Rights of Child)
Bill 14/2007
Order for 2nd Stage - Dáil

Victims' Rights Bill 2008
Bill 1/2008
2nd Stage – Dáil **[pmb]** *Deputies Alan Shatter and Charles Flanagan*

Vocational Education (Primary Education) Bill 2008
Bill 51/2008
2nd Stage – Dáil **[pmb]** *Deputy Ruairi Quinn*

Witness Protection Programme (No. 2) Bill 2007
Bill 52/2007
2nd Stage – Dáil **[pmb]** *Deputy Pat Rabitte*

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.

Mediation in Commercial Disputes

By Conor Feeney BL

Introduction

Rule 6(1)(xiii) of Order 63A of the Rules of the Superior Courts 1986[1] provides that the Commercial Judge may, on the application of any of the parties or of his own motion, direct that proceedings be adjourned to allow the parties to consider mediation. The Commercial Court regularly makes these adjournment orders and, as a result, practitioners are now more likely to seriously consider whether they should attempt mediation. But how far can the court go in pushing parties into attempting mediation and can it penalise parties for refusing to give mediation a go?

Costs sanctions

Possibly the single biggest factor in pushing the ADR agenda in commercial disputes in England and Ireland has been the lingering threat that a party that does not at least attempt to mediate the dispute is liable to be penalised at the end of the court proceedings when the issue of costs is determined.

English position

In England, the seminal case of *Dunnett v. Railtrack plc*[2] established the principle that a party might be penalised at the end of a case as regards costs where it unreasonably refused to participate in a mediation. This principle was fleshed out in *Halsey v. Milton Keynes General NHS Trust*[3], the Court of Appeal setting out a non-exhaustive list of factors which were relevant to the question of whether the party had unreasonably refused to mediate:

> (a) the nature of the dispute;
> (b) the merits of the case;
> (c) the extent to which other settlement methods have been attempted;
> (d) whether the costs of the ADR would be disproportionately high;
> (e) whether any delay in setting up and attending the ADR would have been prejudicial; and
> (f) whether the ADR had a reasonable prospect of success."

On the facts of *Halsey,* the court had not itself suggested ADR, and for this reason the refusal of the successful party to enter mediation was not unreasonable. This suggests that the issue of whether or not ADR has been suggested by the court is another factor which can be added to the list above. Indeed, Dyson L.J. stated:

> "The stronger the encouragement, the easier it will be for the unsuccessful party to discharge the burden of showing that the successful party's refusal was unreasonable."

Factor (b) above was at issue in the case of *Hickman v. Blake Lapthorn and Fisher*[4]. In that case, a claimant successfully sued his solicitor and barrister for negligence. The solicitor had been willing to mediate and urged the barrister to do so, but the barrister had refused. The claimant had made an offer of settlement but the barrister refused to negotiate or enter into mediation as he valued the claim at a significantly lower figure that the offer. The claimant recovered less than his offer of settlement. The solicitor submitted that the barrister should pay the whole of the claimant's costs after the date when the solicitor urged the barrister to mediate. The issue was whether the solicitor could demonstrate that the barrister's view of his prospects had been an unreasonable one. The court found that this had not been demonstrated.

An example of factor (c) above coming into play was *Valentine v. Allen*[5]. In that case the court was satisfied that the respondents had not acted unreasonably in refusing mediation and thus granted them their full costs at the conclusion of the appellant's failed appeal. The respondents had put before the court an extensive bundle of correspondence showing that they had made real efforts to settle the dispute, by making generous offers and had sought a round-the-table meeting, all of which were refused by the appellant.

Factor (f) was at issue in *Hurst v. Leeming*[6]. In that case a barrister was found to have acted reasonably in refusing to proceed to mediation in a professional negligence action where the attitude and character of the claimant made it unlikely that the mediation would succeed. The exceptional nature of this case is demonstrated in the judgment of Lightman J., who found that the claimant was "so seriously disturbed" by the course of events, and so "obsessed with the injustice" which he considered he had suffered, that he was "incapable of a balanced evaluation of the facts". In such exceptional circumstances, it was reasonable for the barrister to take the view that the mediation had no real prospect of success.

It should be pointed out that it has been confirmed in the case of *Reed Executive plv v. Reed Business Information Ltd.*[7] that the question of whether or not a party unreasonably refused to mediate does not fall into any of the exceptions

1 Inserted by the Rule of the Superior Courts (Commercial Proceedings) 2004 (S.I. No. 2 of 2004).
2 [2002] 2 All E.R. 850
3 [2004] 4 All E.R. 920.
4 [2006] EWHC 12 (QB).
5 [2003] EWCA Civ 915.
6 [2002] EWHC 1051 (Ch).
7 [2004] 4 All E.R. 942.

to the without prejudice rule. Thus, unless Calderbank letters are used in offering to mediate or both parties consent to the waiver of privilege, privileged correspondence in this regard will not be opened to the court when it comes to assess the reasonableness of a refusal. It will often be impossible for the court to judge reasonableness, as a result. For this reason, open offers or Calderbank letters should be used in offering to mediate.

It should also be noted that, as is clear from the quotation from *Halsey* above, the English courts have placed the burden of proof on the unsuccessful party seeking a costs sanction against the successful litigant to show why there should be a departure from the general rule that costs should follow the event. The court would only depart from this general rule and impose a costs sanction where it was shown that the successful party had acted unreasonably in refusing to mediate. This aspect of *Halsey* is, however, to say the least, on shaky ground, having recently been criticised in speeches by the Lord Chief Justice Phillips[8] and Sir Gavin Lightman[9]. Both favoured a more robust attitude that a successful party who refused to attempt mediation should have to justify his refusal if he is to recover his full costs.

Irish position?

In the context of personal injuries actions, s. 16(3) of the Civil Liability and Courts Act 2004 specifically empowers the court to penalise a party in terms of costs where that party refused to comply with an order by the court to mediate. No such provision exists in O. 63A. However, it is submitted that the Commercial Court would be likely to follow *Dunnett v. Railtrack* if an appropriate case arose. Order 63A, r. 6(2) allows the Commercial Judge, subject to privilege, to direct parties to provide information in respect of any "particulars of any mediation, conciliation or arbitration arrangements which may be available to the parties". This would seem to contemplate the judge being fully aware of efforts made to mediate. Further, an order adjourning the proceedings pursuant to r. 6(1)(xiii) will usually be in the following terms:

> "In the event that the said mediation process has not commenced by the xxxx day of xxxx, the court doth direct that a letter be lodged with the court on the said date without prejudice outlining the steps which have been taken to commence the mediation process and stating the reasons for which the said process was not commenced."

The decision in *Dunnett* was based on the "overriding objective" of "active case management" of the English Civil Procedure Rules, as set out in rule 1.4, including "encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure". Clearly, the Commercial Court shares a very similar overriding objective. Order 63A, r. 5 empowers the Commercial Judge to "give such directions and make such orders… as appears convenient for the determination of the proceedings in a manner which is just, expeditious and which is likely to minimise the costs of those proceedings". Indeed in *Re Norton Healthcare Ltd.*[10] Kelly J. stated:

> "Order 63A of the Rules of the Superior Courts which govern cases in the commercial list seek to achieve precisely the same object as the relevant provisions of the CPR in England; they seek to bring about a just and expeditious trial whilst seeking to minimise cost."

Thus, it is easy to envisage the court following the English approach in penalising parties who unreasonably refuse to mediate. Indeed, Kelly J. gave a strong indication that he might hand out such sanctions in the following passage from *Kay-El (Hong Kong) Ltd. v. Musgrave Ltd.*[11]:

> "The parties not merely considered mediation as a way of solving their problem but actually proceeded to such a mediation within the permitted time. On foot of the order which I made, I was furnished with a report by the mediator who, unfortunately, had to record that although very substantial progress was made in the mediation she was unable to finalise a solution. I should mention that the mediator expressed the view that the parties came to the mediation in good faith and made genuine efforts to reach a compromise. Such being so the lack of success at mediation carries no costs implication for the litigation."

The wording of the above quotation raises an interesting question as to how far the court might go in looking into the mediation and whether a party which entered mediation might nevertheless be penalised where its actions at the mediation led to its failure.

Can the court look at the actions of parties in the mediation?

In the above quotation from *Kay-El*, Kelly J. seems to be suggesting that there may be costs implications where a party's lack of good faith or genuine effort in a mediation leads to the failure of the mediation. If there are to be such costs implications, the court would have to have a power to look behind the failure of the mediation. In England, it has generally been accepted that, once mediation has taken place, the court will not investigate the reasons for the failure of the mediation. In *Halsey* Dyson LJ stated:

> "We make it clear at the outset that it was common ground before us (and we accept) that parties are entitled in an ADR to adopt whatever position they

8 Lord Chief Justice Phillips, *Alternative Dispute Resolution: an English viewpoint* (Made in Delhi on the 29th March, 2008). Summarised in Tony Allen, *Whither Halsey – or will Halsey wither? A passage from India* (Available on www.cedr.com).

9 Gavin Lightman, *Mediation: An approximation to justice* (available at www.cedr.com).

10 Unreported, High Court, Kelly J., 1st December, 2005.

11 Unreported, High Court, Kelly J., 2nd December, 2005.

> wish, and if as a result the dispute is not settled, that is not a matter for the court. As is submitted by the Law Society, if the integrity and confidentiality of the process is to be respected, the court should not know, and therefore should not investigate, why the process did not result in agreement."[12]

That view would appear to confirm that such a situation would not fall within one of the exceptions to the without prejudice rule, and thus the actions of the parties in the mediation could not be assessed by the court, in the absence of waivers of privilege from all parties. Further, in England, the courts have been generally unwilling to impose a duty of good faith in negotiations. In *Walford v. Miles*[13] Lord Ackner stated:

> "[T]he concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations."

However, in the United States, in *Gee Gee Nick v. Morgan's Foods Inc.*[14] a defendant who refused to make a written submission and send a representative with authority to settle was held to have acted in bad faith in the mediation and received monetary sanctions as a result. A different approach is often taken at state level. In *Foxgate Homeowners' Association Inc. v. Bramalea California Inc.*[15] a lawyer for one of the parties attended the mediation without his client and without experts. The California Supreme Court held that, save in exceptional circumstances, conduct in the mediation could not be disclosed by the mediator to the court.

In Australia, as discussed below, the courts, under various statutory provisions, have a jurisdiction to compel parties to attend mediation. Along with this power, the parties are also obliged to participate in good faith.[16]

Many states in the U.S. require a neutral statement in relation to a failed mediation to be made. For instance, in Ohio the parties must file a report with the court giving details of any agreement reached, but not disclosing what was discussed during the mediation. In California, the mediator has to complete a Statement of Agreement or Non-Agreement, which identifies the mediator, the date(s) of the mediation, the time spent in mediation and whether it ended in settlement. Where a mediation did not take place, the mediator can tick a box stating that a party who was ordered to appear at the mediation did not appear, or a box marked "other reason". Such standard forms limit the extent of the information a mediator could be forced to provide and protect the all-important trust that must exist between mediator and party, as well as the confidentiality of the process. The neutral summary never extends to evaluative feedback.

Leading commentator, Arthur Marriott, has expressed concern that analysing the conduct of the parties in a mediation might be a step too far for the court:

> "The problems are obvious: how can a court properly assess who was unco-operative in an ADR process? Are parties, who stand firm in a principled way and do not change their position significantly, to be regarded as recalcitrant? Who is to tell the judge? Do cost sanctions, where imposed by the mediator or by a court following the mediator's report, damage the integrity of the process? I am coming increasingly to the view… that this is an area in which it may be too dangerous for the courts to trespass."[17]

This concern is echoed by the Law Reform Commission in its Consultation Paper on Alternative Dispute Resolution.[18] In addition, the Commission expresses concern that such examination of conduct at mediations may only lead to further costly "satellite litigation".[19]

These are valid concerns. If a report from the mediator is to be required, perhaps the U.S.-style neutral statement is as much as the courts should require.[20] A similar system has been adopted in the context of personal injuries actions, in the Civil Liability and Courts Act 2004. In s. 16(1) of that Act the mediator is required to submit a report to the court setting out "a statement of the reasons as to why [the mediation] did not take place". Such a report limits the knowledge of the court to the issue of why the mediation did not take place. However, it may leave a little too much room for evaluation on the part of the mediator. For instance, if a mediator cancelled a mediation because, as in the *Foxgate* case above, a lawyer turned up to the mediation without his client or experts, the s. 16(1) report might leave it open to the mediator to put this down as the reason the mediation did not take place.

In terms of the Commercial Court, the passage from *Kay-El* above should be put into context. Kelly J. at that time tended to require a report from the mediator on the mediation. Kelly J. appears to have moved away from this practice. He is generally now satisfied with the letters that will be lodged by the parties with the court updating the court on progress in the dispute.

Compulsory mediation

It is clear from the provisions of order 63A and from the discussion of the caselaw above that the Commercial Court has a role in encouraging resolution of disputes through mediation. However, does the court have a further jurisdiction to compel unwilling parties to enter mediation?

English position

In *Halsey* the Court of Appeal held that parties could

12 *Ibid.*, at para. 14.
13 [1992] 1 All E.R. 453.
14 270 F.3d 590 (8th Cir. 2001).
15 26 Cal. 4th, 1 (2001).
16 See, for example, *Idoport Pty Ltd. v. National Australia Bank Ltd.* [2001] N.S.W.S.C. 427.
17 Arthur Marriott, *Mandatory ADR and Access to Justice* (2005) 71 Arbitration 4, at p. 313.
18 (LRC CP 50 - 2008), at paras. 11.29 to 11.32.
19 *Ibid.*, at para. 11.27
20 Indeed the Law Reform Commission, in its Consultation Paper, provisionally recommends that mediators' reports be restricted to neutral summaries of the outcome. See para. 11.78.

not be compelled to mediate. The court was of the view that the essence of ADR procedures, and in some cases the key to their effectiveness, was the fact that they were voluntarily entered into by the parties. The court also found that mandatory references would infringe Article 6 of the European Convention on Human Rights, as they would be "an unacceptable obstruction on [the parties'] rights of access to the courts".

That aspect of the decision in *Halsey* has been the subject of vigorous criticism from commentators, and even members of the judiciary[21], in England. One leading commentator made the following comments on the first ground for that decision:

> "[T]hat conclusion is wholly inconsistent with the experience in the United States, Canada and Australia, where the key to effectiveness of ADR is precisely that references are mandatory and where experience shows the same level of satisfaction with the result of the process by litigants, whether they voluntarily agreed, or were compelled to go to it."[22]

On the second ground, that compulsory mediation would infringe article 6, that commentator stated:

> "[I]t is a nonsense to say that a requirement that a party must go to mediation, not in lieu of a formal adjudication, but before a formal adjudication by a judge, is a contravention of the right of access. If it is in the public interest to promote the settlement of cases, if the right of access is preserved and if there is a crisis in the civil justice system, which means that access to justice is being effectively denied, then it cannot be unjust to require parties to mediate before they can get a formal and binding adjudication by a judge. Human rights and access to justice are not concepts peculiar to England and Wales. The American, the Canadians and the Australians do not feel that human rights are being breached by mandatory references. They all have a right of access to the courts. But to the contrary, they feel that access to justice is being improved by mandatory mediation."

It is difficult to argue against this viewpoint. Mediation is not a stand-alone alternative to litigation which prevents access to the court. A party, even where compelled to enter mediation, is always free to quit the process if it feels it is going nowhere and continue on with the litigation safe in the knowledge that its decision to withdraw will be kept from the court unless both parties waive confidentiality in that regard. The right of access to court remains in place and the only real effect on the proceedings might be a short delay. Compelling a party to go to a mediation is not the same as requiring them to continue attending a mediation or, indeed, requiring them to resolve the dispute through mediation.

It would appear likely that this aspect of *Halsey* will be overruled in the near future. It has been pointed out by numerous commentators that the main authority cited by the court in *Halsey* on the article 6 point, *Deweer v. Belgium*[23], is not applicable to mediation. Furthermore, it has been suggested that the Court of Appeal's views on compulsory mediation in *Halsey* were, in any event, *obiter dicta* and English judges would thus be free to make 'ADR orders'.

A strong indication of the route the English courts might take on this issue was given by Lord Phillips, the Lord Chief Justice, in a recent speech.[24] Having analysed *Halsey*, and agreed with the criticisms set out above, he reached the conclusion that to order ADR on pain of contempt of court, or having an action or defence struck out as[25] a sanction, would probably offend article 6, but that facing a mere costs sanction for refusal would not constitute a breach of article 6. Lord Phillips summed up his view as follows:

> "Litigation has a cost, not only for the litigants but for society, because judicial resources are limited and their cost is borne – at least in part – by the State. Parties should be given strong encouragement to attempt mediation before resorting to litigation. And if they commence litigation, there should be built into the process a stage at which the court can require them to attempt mediation – perhaps with the assistance of a mediator supplied by a court."

Thus it is highly possible that the English courts will move in the direction of jurisdictions such as Australia in ordering mediation against the wishes of one or more of the parties. The Australian courts have such a power under various statutory provisions, for instance the New South Wales Civil Procedure Act 2005. However, referral to mediation only follows a screening process by the court where the circumstances of the case are considered.

Irish position?

Again, the Civil Liability and Courts Act 2004 goes further than O. 63A in this regard. It provides for a form of compulsory mediation in the context of personal injuries actions. Section 15(1) empowers the court, "upon the request of any party", to "direct" that the parties attend a mediation conference. Clearly then, the issue will not arise if neither party wishes to mediate, but if one party does wish to mediate and the other does not, the court may compel the unwilling party to attend a mediation.[26] Order 63A contains

21 For example, Sir Gavin Lightman, *Mediation: An approximation to justice* and Sir Anthony Clarke, *The Future of Civil Mediation* (both available at www.cedr.com).

22 Arthur Marriott, *Mandatory ADR and Access to Justice* (2005) 71 Arbitration 4, at p. 314.

23 [1980] 2 E.H.R.R. 439.

24 Lord Chief Justice Phillips, *Alternative Dispute Resolution: an English viewpoint* (Made in Delhi on the 29th March, 2008). Summarised in Tony Allen, *Whither Halsey – or will Halsey wither? A passage from India* (Available on www.cedr.com).

25 For an excellent analysis of various compulsory or quasi-compulsory mediation schemes in other jurisdictions, see Chapter 3, Part B of the Law Reform Commission's recent Consultation Paper on Alternative Dispute Resolution (LRC CP 50 - 2008).

26 See Nolan, *Mediation and the Civil Liability and Courts Act 2004* (Bar Review, 2008, Vol. 6, p. 132) for a discussion of the test applied

no such provision and the question of whether or not the Commercial Court has a jurisdiction to compel a party to go to mediation has not yet been given judicial consideration. Any such consideration will undoubtedly focus on the terms of O. 63A.

If the English courts find that they have a jurisdiction to compel parties to mediate under the CPR, it is easy to see O. 63A, informed as it is by similar intentions and objectives, being interpreted in a similar manner. While r. 6 of that order states that the judge "may" adjourn the proceedings to allow the parties time to consider mediation, it is expressly stated to be "without prejudice to the generality of rule 5". In an appropriate case, the Commercial Judge might consider an order compelling the parties to attempt mediation as being, under the terms of r. 5, "convenient for the determination of the proceedings in a manner which is just, expeditious and likely to minimise the costs of [the] proceedings". Kelly J. has in the past interpreted r. 5 as giving him a broad range of powers.

However, given the seriousness with which directions in the Commercial Court are generally taken, it may be that this is not an issue which will arise in the near future. It would be a brave litigant that would outright refuse to at least attempt a mediation following a suggestion to that effect by Kelly J, particularly given the potential costs implications.

Can mediation be compelled on foot of an agreement to mediate?

In *Cable & Wireless plc v. IBM UK Ltd.*[27] the contract the subject of the dispute between the parties contained a clause that specifically referred disputes to mediation. Despite the fact that the clause was vague in terms of the nature of the procedure that should be used (other than referring broadly to CEDR rules), it was nevertheless found to be contractually enforceable. The court ordered a stay of the proceedings on the following basis:

> "…where there is an unqualified reference to ADR, a sufficiently certain and definable minimum duty of participation should not be hard to find… The reference to ADR is analogous to an agreement to arbitrate. As such, it represents a free-standing agreement ancillary to the main contract and capable of being enforced by a stay of the proceedings or by injunction absent any pending proceedings."

Cable & Wireless appears to have distinguished the case of mediation clauses from general agreements to negotiate, which are not enforceable under English law (a principle set down by the House of Lords in *Walford v. Miles*[28] and followed by Laffoy J. in *Triatic Ltd. v. Cork County Council*[29]). The judgment fits neatly with the role of the court under the CPR, and in this jurisdiction under O. 63A, to encourage mediation. It must be likely that if Irish companies include clearly worded dispute resolution clauses in their commercial agreements the court will facilitate their enforcement. Indeed, Keane C.J. has already hinted at this in *obiter* comments made in *Re Via Net Works (Ireland) Ltd.*[30]

Clearly, as mediation is a non-binding procedure, all such a clause can do is to require the parties to *attempt* to resolve any dispute through mediation. In contrast, an arbitration clause can require parties to abide by any award made and thus may exclude or at least delay the involvement of the courts in determining a dispute. An agreement to mediate may be part of a "tiered" or "escalator" ADR clause setting out a series of steps forming a dispute resolution process. In such structures the resolution processes normally increase in formality as each step fails – thus, for instance, mediation might follow a negotiation stage. If no resolution is reached, the only recourse may be litigation. Such ADR clauses are effective as the issue of proceedings too early in a dispute may drive out certain settlement possibilities which were not achievable in informal negotiations but may have been achieved in mediation.

Conclusion

It is far from clear where the limit lies in the role of the courts in encouraging the resolution of commercial disputes through mediation. The courts are rightly protective of the integrity of the mediation process and the principles on which it is based. If these are sacrificed in the pursuit of the ADR agenda then the promising development of the use of mediation may be stifled. This important consideration must be balanced against the reality that this form of dispute resolution remains underused and requires to be strongly promoted when suitable. ■

by the High Court in *McManus v. Duffy* (Unreported, High Court, Feeney J., 4th December, 2006) when ordering mediation under s. 15(1).

27 [2002] 2 All E.R. 1041 (Comm.)

28 [1992] 1 All E.R. 453.

29 [2006] IEHC 111.

30 [2002] 2 I.R. 47, at p. 58.

Case Law on the Mental Health Act 2001
Part 2

Niall Nolan BL

This article is the second installment of a two part article discussing case law pertaining to mental health tribunals.

Introduction

Considerable assistance and guidance has been provided by the High and Supreme Court as to both how particular provisions of the Mental Health Act 2001 Act should operate and in relation to what is expected professionally of the various persons, be they lawyers, doctors, tribunal members or personnel working in the Mental Health Commission, in the context of the discharge of their statutory responsibilities. Some of the judgments have highlighted problems with the processes resorted to, which consequentially –and in the absence of an available, dedicated and expeditious alternative- have had the significant and practical effect of bringing about changes to some of the documentation required to be completed by consultant psychiatrists and others, in order to make the commencement and management of involuntary detentions conform with the intent and import of the Act.

Duration of Involuntary Admission and Renewal Orders

Recent decisions which dealt with issues such as when orders have effect and for how long include *M.D. v. The Clinical Director of St. Brendan's Hospital & Ors* (Unreported Supreme Court, 27th of July 2007), *J.B. v. Director of the Central Mental Hospital & Ors* (Unreported High Court, 15th of August 2008) and *AMC v. St, Lukes Hospital, Clonmel* (Unreported High Court, 28th of February 2008).

In considering the issue of when a renewal order came into effect, the Supreme Court (*per* Hardiman J. delivering the unanimous judgment) in dismissing the applicant's appeal, endorsed the following finding of the High Court (*per* Peart J.):

> "It seems to me that there is a clear sequencing of events contemplated by the terms of Sections 14, 15, 17 and 18 of the Act. Various periods of detention and extensions of detention are provided for, and none of these periods can be seen as overlapping. Each new period of detention commences upon the expiry of the previous period. Each period of detention is required to receive a review also, and it does not seem to me to be contrary to anything stated in the sections under scrutiny, or the plain meaning intended by the Oireachtas, to conclude that an order renewing an admission order may for any reason be made a day or some days or at anytime in fact before the review of that admission order has been completed, since the renewal order would take effect only at the conclusion of the specified twenty-one day period following the making of the admission order"

The proceedings in *J.B. v. Director of the Central Mental Hospital & Anor* constituted the third occasion that the applicant challenged the basis for his detention before a High Court and was the occasion on which he was successful. The issue before Mr. Justice Sheehan was whether or not the terms of Section 18(4) of the 2001 Act effectively enabled a Mental Health Tribunal to extend the time for which a renewal order remained effective. In this regard, the Court determined the issue in the following terms:

> "When a renewal order is made, the Mental Health Tribunal is obliged to review same and make a decision as soon as may be but not later than 21 days after the making of the renewal order. The period of 21 days may be extended by 14 days either of it's own motion or at the request of the patient concerned and by a further 14 days on the application of the patient if the tribunal is satisfied it is in the interest of the patient.
>
> In this case the hearing was adjourned on two occasions. Mr. McDermott B.L. for the first named Respondent has urged the Court to take a wide view when it comes to interpreting the Mental Health Act 2001 and has urged the Court to hold that when a renewal order is made within an extended time period, the detention period is implicitly extended by that amount of time.
>
> Having considered s.18(4,) the Court holds that the purpose of this section is to assist the Mental Health Tribunal in doing it's work in a meaningful and fair way, and that the purpose of allowing a hearing to be adjourned is essentially to give to the Mental Health Tribunal further time when such is required to enable it to do it's work properly.
>
> In this particular case, there is a clear example of that where the matter was listed for hearing within the 21-day period, a crucial witness was absolutely

understandably unavailable and the matter had to be adjourned. That is the purpose of Section 18(4). The Court takes the view that it would be going too far if it were to import into that section the implication that the adjournment, or further adjournment, allows the Court to take the view that the order for renewal is extended in that way."

The decision in *AMC* put beyond doubt that a Mental Health Tribunal must review a renewal order within 21 days of the making of such an order, that is to say, the date the Form 7 is signed by the responsible consultant psychiatrist.

In *S.M v. The Mental Health Commissioner & Ors*,(Unreported High Court, 31st October 2008) the question that troubled the Court was whether or not, when the consultant psychiatrist was authorized to make renewal orders pursuant to Section 15 of the Act for periods not exceeding 3 months, 6 months or 12 months, did he or she have the power to make a renewal order stated to be for periods not exceeding 3 or 6 or 12 months without fixing more definite periods. The respondents argued that in the case that a period "not exceeding twelve months" when signed off on by a responsible consultant psychiatrist means that the renewal order is for a definitive period of 12 months. Mr. Justice McMahon did not accept this proposition holding, "This is an extraordinary proposition and would clearly not be in the interests of the patient where for example a consultant psychiatrist who was of the opinion that detention for a shorter period (e.g. three weeks to complete a course of medication or therapy) was appropriate would not be permitted to make a renewal order for less than twelve months". His ultimate conclusion was put in the following terms, "I am of the view that a renewal order made under subs. (2) and (3) of s.15 and which does not specify a particular period of time, but merely provides that it is in order for a period "not exceeding 12 months" is not an order permitted under the legislation and is void for uncertainty". It followed as a consequence that there was no legal basis for the detention of the patient.

This decision is noteworthy in a number of respects, not least because of the manner in which the Oireachtas, on notice of the predicted outcome, guillotined through the Mental Health Act 2008 in order to regularize the position of patients who at the time were involuntarily detained. It is also noteworthy with what it had to say regarding the limitations of any purposive paternalistic approach to interpretation. The following statements refer, "The legislative discretion left to the consultant translates into uncertainty for the patient", "It must be remembered that what is at stake here is the liberty of the individual and while it is true that no constitutional right is absolute, and a person may be deprived of his/her liberty "in accordance with law", such statutory provisions which attempt to detain a person or restrict his/her liberty must be narrowly construed". "The approach to an interpretation of the section should be that which is most favourable to the patient while yet achieving the object of the Act."

This case is of further significance from the point of view of the limitations it places on the ability of Respondents to plead acquiescence/issue estoppel type arguments against Applicants moving pursuant to judicial review and Article 40 of the Constitution. A belief had arisen that further to certain *dicta* in the aforementioned *WQ* case, failure to raise certain points before Mental Health Tribunals, somehow foreclosed the opportunity to litigate points before the High Court. Although the exceptional and particular circumstances of *WQ* did result in the view of Mr. Justice O'Neill that the application for release should be dismissed, the judgment (certain *dicta* therein expressly making the point) and further cases make it quite clear that each case turns on it's own facts and that the constitutional jurisprudence is well settled against a practice that precludes, on something akin to a *fixed rule* approach, access to the High Court in order to make complaint in relation to something as fundamental as an individual's right to liberty. It is in this context that the *SM* decision is of further significance as it traces and analyses how the acquiescence doctrine should be properly applied, in the process making reference to the decision of the Supreme Court in *A. v. Arbour Hill Prison*, with particular reference to litigation under the Mental Health Acts.

Criteria for Involuntary Admission ("Mental Disorder")

The substantive conditions precedent to involuntary detention are findings that individuals are suffering from mental disorders within the meaning of the Act. In the aforementioned *MR* case and in *T O'D v. Harry Kennedy & Ors* (Unreported High Court, 25th of April 2007, Mr. Justice Charleton), the requirements of Section 3, in which the definition of mental disorder appears, were discussed in detail. In *T O'D* Mr. Justice Charleton stated as follows:

> "It is when a person suffers from a mental disorder that the rest of the Act may be operated. As O'Neill J. stated in *M.R. v. Byrne* (High Court, Unreported, 2nd March, 2007), this section is of critical importance as it establishes the benchmark against which all forms of mental illness must be assessed before an admission order or a renewal order can be made. These orders have the result of detaining persons against their will."

Charleton J. then adopted the analysis of O'Neill J. at pages 15 to 18 of his judgment in *Byrne*:

> "As is clear from this section there are two separate bases upon which "mental disorder" can be established. The first of these is as set out in s. 3(1)(a) and it is where the Mental Illness, severe dementia or significant intellectual disability is such that there is a serious likelihood of the person causing immediate and serious harm to himself or herself or to other persons. The second basis is where the severity of the mental illness, dementia or disability is such that the judgment of the person concerned is so impaired that a failure to admit the person would be likely to lead to a serious deterioration in his or her condition or would prevent the administration of appropriate treatment that could be given only by such admission and that the reception, detention and treatment of the person concerned in an approved centre would likely to benefit or alleviate the condition to a material extent.

> I am quite satisfied that these two bases are not alternative to each other and indeed it would be probable in my view that in a great many cases of severe mental illness there would be a substantial overlap between the two. Thus it would be very likely in my opinion that in a great many cases in which a person could be considered to fall within the categorisation in s. 3(1)(a) that they would also be likely to fall within s. 3(1)(b). To a much lesser extent, it is probable that persons who are primarily to be considered as falling within s. 3(1)(b), would also be likely to have s. 3(1)(a) applied to them."

The passage referred to in the judgement of O'Neill J. also stressed that the threshold for detention in an approved centre by way of either an Admission Order or a Renewal Order is set high. There must be a serious likelihood of the person concerned causing immediate and serious harm to himself or herself or to other persons and the critical factor which must be given dominant weight is the propensity or tendency of the person concerned to do harm to themselves or others.

Referring to s. 3(1)(b), O'Neill J. said

> "These elements in s. 3(1)(b)(I) and (II) are in my view clear and self explanatory. It is perhaps worth drawing attention to the fact that in 3(1)(b)(I) there are alternative provisions, namely that the failure to admit to an approved centre be likely to lead to a serious deterioration in the condition of the person or that the failure to admit into an approved centre would prevent the administration of appropriate treatment that could be given only by such admission. It should be stressed that the foregoing analysis or description of these provisions merely seeks to set out the legal framework of the operation of the statutory provisions. It cannot be over emphasised however that on a daily basis these provisions will have to be operated by clinical experts who within the broad framework set out above have to make clinical judgments, and I would like to stress that it is not intended in this judgment to interfere in the proper realm of clinical judgment or to cut down or limit the proper scope of clinical judgment.""

Later in his judgement, the role of the Mental Health Commission was summarised in the following terms, "When these orders are made, they are sent to the Mental Health Commission. Their job, in essence, is to monitor such detentions and ensure that the rights of the patient were upheld."

Responsible Consultant Psychiatrist

Somewhat surprisingly, considering the range of responsibilities devolving upon such persons under the Act, this term is not ascribed a particular definition by Section 2, the interpretation section. Of some assistance in the context of detentions pursuant to the operation of Sections 23 and 24 is sub-section 6 of the latter section wherein is stated, "References in this section to the consultant psychiatrist responsible for the care and treatment of the person includes references to a consultant psychiatrist acting on behalf of the first-mentioned consultant psychiatrist".

Instead it has been left up to the Superior Courts to establish the essence and import of the term.

The starting point is *W.Q. v. The Mental Health Commission & Ors* (Unreported High Court, 15th of May 2007), where the Applicant complained on a number of grounds that his detention in the Central Mental Hospital was unlawful. A discreet complaint was that the psychiatrist who signed a renewal order did not have the requisite authority to do so as she was attached to a regional catchment area. The Renewal Order, in this case, which purported to renew the detention of the applicant pursuant to s. 15(2) of the Act of 2001, was made by one Dr. O'Leary. It was submitted on behalf of the applicant that Dr. O'Leary had no power to make this order because the power to make a Renewal Order under s. 15(2) is restricted to the "Consultant Psychiatrist responsible for the care and treatment of the patient concerned" and it was submitted that Dr. O'Leary was not the Consultant Psychiatrist responsible for the care of the applicant. In this case, the evidence established that at all material times the applicant was in the Central Mental Hospital and under the care of one Dr. Mohan. O'Neill J. held the detention was invalid, stating:

> The restriction of this power to the "Consultant Psychiatrist responsible for the care and treatment of the patient" is one of the significant safeguards provided by the Oireachtas in this legislation for the benefit of persons suffering from mental disorder within the meaning of s. 3 of the Act of 2001 and in my opinion a failure to comply with this provision vitiates the lawfulness of a detention based upon a Renewal Order signed by someone who lacked the power to make that order."

Recently however our Supreme Court has had occasion to consider this particular issue and phrase in the case of *M.M. v. Director of the Central Mental Hospital* (Unreported Supreme Court, 7th of May 2008).

The case concerned a patient transferred from Cork to the Central Mental Hospital in late 1998, where he has remained since that time. A Dr. Cooney authorised his transfer and indeed signed various orders extending the applicant's period of detention under the old regime and it was he who was primarily responsible for the management of the patient's treatment while he was in Cork. It was however incontrovertible that Dr. Cooney was not on the staff of the Respondent Hospital, yet it was he who signed a series of renewal orders under the 2001 Act which gave rise to the complaint before the High Court. Affidavits were sworn by the relevant doctors in the case and cross-examination before the High Court was conducted. It was also the case that both the applicant and the applicant's family considered Dr. Cooney the psychiatrist most familiar with the case history. Dr. Cooney gave evidence of his belief that he was "overall responsible", although not responsible on a "day to day" basis. Notwithstanding this, the Consultant who compiled the independent Section 17 report referred to a Dr. Duffy rather

than Dr. Cooney as the responsible consultant psychiatrist. In the Article 40 application however, Dr. Duffy gave evidence in the case supportive of Dr. Cooney's position.

In a unanimous judgment, the Supreme Court decided that through deploying on this occasion an "unorthodox though purposive" interpretation to the word "the" as it appeared in Section 15(2) of the 2001 Act – which it further described as "a somewhat ambiguous piece of legislation"- the phrase "the consultant psychiatrist responsible for the care and treatment of the patient concerned" could cover Doctors Duffy and Dr. Cooney. The judgment also confirmed the position, intimated in earlier cases, that temporary replacement consultants for responsible consultant psychiatrists of particular approved centres, be the latter unavailable through illness or holidays for example, could also come within the definition posited.

In it's review report, the Commission has committed itself to exploring how greater clarity can be provided to the term but from the cases however it can be gleaned that applications before the Superior Courts will turn on the facts particular to the case. Necessarily consultants purporting to claim the title of the responsible consultant psychiatrist must still satisfy a qualification requirement and a threshold for involvement and familiarity with issues surrounding a patient's involuntary detention.

Other litigation

Currently before the Superior Courts are a number of cases awaiting resolution. They concern such diverse issues as what party in proceedings should lawfully bear the burden of establishing whether a patient is suffering from a mental disorder on an appeal before the Circuit Court and the lawfulness of engaging a private contractor to remove persons to approved centres purportedly pursuant to Section 13(2) of the 2001 Act after recommendations for an involuntary admission has been made.

On this last point, mention might be made of *R.L. v. Clinical Director of St. Brendans & Ors* (Unreported High Court, 17th of January 2008, Feeney J. and Unreported *Ex-tempore* Supreme Court 15th of February 2008) and *E.F. v. Clinical Director of St. Ita's Hospital & Ors* (judgment currently reserved, O'Keefe J.). Both cases involved challenges to the activities of a private contractor, engaged by the HSE to remove persons from the community to hospitals (an "assisted admissions service"), purportedly pursuant to Section 13 of the 2001 Act.

It appears resort was had to private operators by Hospital managers in order to overcome the *impasse* constituted by the lengthy industrial relations dispute involving HSE management and psychiatric nurses. In *L,* the argument canvassed was that as the private operator could not be deemed a member of staff, therefore the removal of the patient by such undertaking was unlawful. The patient brought an Article 40 application seeking her release, however the Superior Courts never embarked on an examination of the substance of the complaint as they determined that the appropriate remedies were achievable through a Judicial Review application and/or a claim for compensation.

The *L* litigation was therefore disposed of on procedural grounds, however the substantive issues were however recently litigated in *E.F.* along with a plethora of other issues, both substantive and procedural, and judgment is awaited.

Of further note in this regard and a fact that highlights concerns and misgivings expressed over the manners in which such removals are currently occurring is firstly the fact that the Mental Health Commission has established a committee to examine issues connected with the implementation of Section 13 and is recommending as a priority further consultation with relevant parties "to ensure patients' rights are safeguarded throughout the involuntary admission".

Two further Article 40 cases of note in the particular area of the transferring of patients between approved centres are *J.B. (No.2) v. The Director of the Central Mental Hospital & Ors* (Unreported High Court, 15th of June 2007) and *B v. The Clinical Director of Our Lady's Hospital Navan & Ors* (Ex tempore judgment of Sheehan J., 5th of November 2007). In *B*, Mr. Justice Sheehan accepted as lawful a renewal order signed by a consultant psychiatrist in the approved centre to which the patient had been transferred despite Section 21(4) stating that, "the detention of a patient in another approved centre under this section shall be deemed for the purposes of the Act to be detention in the centre from which he or she was transferred.

In *D.H. v. The President of the Circuit Court & Ors* (Unreported High Court, 30th of May 2008), the subject matter case involved appeals lodged to the Circuit Court from determinations of Mental Health Tribunal affirming admission and renewal orders and the operation of Section 19 of the 2001 Act. By the time the appeals came on for hearing, the applicant/appellant had improved and was no longer involuntarily detained in an approved centre. Nonetheless, he still wished to pursue his appeal. Any such appeal centres exclusively on whether at the time of the hearing, the patient is or is not suffering from a mental disorder. In circumstances where the detaining orders were discharged however, the President of the Circuit Court considered matters moot. A judicial review application was moved. Mr. Justice Charleton, while deploring the time it took to have appeals heard before the Circuit Court stating that they should be with as promptly as possible, nevertheless determined that the "Circuit Court has no jurisdiction to decide any such appeal unless the person is then the subject of an admission order or a renewal order, and is thus detained in a hospital".

While the aforementioned Commission's report on the operation of the Act makes no recommendation on expediting the appeal process, it is to be hoped that it will reconsider this issue in light of the express entreaties of the High Court.

In *Z v. Khattak & Anor*,(Unreported, 28th of July 2008), Mr. Justice Peart refused to direct the release of the applicant. His core findings were to the effect firstly, that he was not satisfied that the fact that a process to detain had been initiated further to the provisions of Section 12 precluded matters from ultimately proceeding further under Section.9. He held that alternative procedures were available. Secondly, while expressing disquiet and concern about the appropriateness of an examination of the applicant - conducted by a retired doctor (who after his retirement had continued to act for Gardai) and which led to him making a recommendation for the detention of Z – which was conducted by having a "chat" for two minutes with the Applicant at the rear

of a Garda station while smoking cigarettes and where following evidence, it appeared the doctor did not have any knowledge of the precise requirements specified in the Act for such an examination, the Learned Trial Judge concluded that, "..nevertheless one cannot discount completely the probability that Dr. W's thirty years experience as a general practitioner and his later experience of examining patients in a Garda Station, enables him to reach the necessary conclusions, for the purpose of making this recommendation, quite rapidly both from observation and conversation with the person, armed as he was, and was entitled to be, with necessary background information provided to him by the applicant's brother and Sgt. Reynolds at the time." Two final findings were that a delay of some seven and a half hours between the applicant's arrival at the hospital and his examination by a consultant psychiatrist for the purpose of making an admission order complied with the requirement in Section.14 that such an examination be carried out "as soon as may be" and finally that a breach of the requirement in Section.16 to send a copy of the admission order to the Commission within 24 hours did not affect any right of the applicant in any fundamental way or at all.

Conclusion

It is clear from the above case-law that considerable assistance and guidance has been provided by the High and Supreme Court as to both how particular provisions of the Mental Health Act 2001 Act should operate and in relation to what is expected professionally of the various persons, be they lawyers, doctors, tribunal members or personnel working in the Mental Health Commission, in the context of the discharge of their statutory responsibilities. Indeed some of the judgments have had the practical effect of resulting in changes to some of the forms which require completion by consultant psychiatrists in order to lawfully implement the Act, and this is but one of a number of tangible benefits brought about by the litigation.

Finally, the judgments also acknowledge the real challenges, ethical, professional and otherwise faced by all those called upon to discharge statutory duties under the Act. Putting this in context however, Mr. Justice Charleton commented in *T O'D*:

> "These provisions are exacting and complex. They were designed, however, by the Oireachtas in order to replace the situation whereby it was potentially possible for a person to be certified and detained in a mental hospital and then forgotten. The need for periodic review and renewal, and the independent examination of these conditions is not a mere bureaucratic layer grafted on to the previous law for the treatment of those who are seriously ill and a danger to themselves and others: it is an essential component of the duty of society to maintain the balance between the protection of its interests and the rights of those who are apparently mentally ill"

In total, the Mental Health Commission makes 28 recommendations in relation to the operation of the 2001 Act at the conclusion of it's review report, a report which any person working in the area would derive considerable benefit from reading. Far-reaching recommendations are made, dedicated to the aim, as the Commission Chairman puts it, of "respecting and promoting the human rights of the service user" which he concludes, "must continue to be the principle underpinning future actions and developments". ■

Launch of "Legal Offaly"

The book "Legal Offaly", by Michael Byrne Solicitor, was launched recently at the Tullamore Courthouse. The work provides a detailed background to the development of the legal profession in County Offaly including the old Home Circuit and the present day Midland Circuit. Pictured at the launch are: Michael Byrne of Hoey and Denning Solicitors, Tullamore; P. J. Fitzpatrick, the then CEO of the Courts Service; Pat Gallagher Offaly County Manager; Mrs Mary O'Gorman (widow of the late Patrick O'Gorman, county registrar Offaly 1971-2001), His Honour Judge Anthony Kennedy, Judge of the Circuit Court; Verona Lambe, Offaly County Registrar.

Pupil Exchange in Paris

Ann Campbell BL

When I first applied for the pupil exchange programme in Paris and learned that it entailed two months participation in the 'Stage International' conducted by the Paris Bar I was excited about the opportunity of immersing myself in a completely different legal system. Two months is of course only long enough to glean something of an overview of an entire legal system but seeing the French system in action undermined many of my assumptions concerning the universality of certain of our legal practices and principles.

The firm I worked in practised almost exclusively criminal law and therefore one of the most striking differences that I encountered was in that domain. French law permits an accused to be charged and convicted of a crime in absentia. Together with the ordinary limitation periods within which a crime must be prosecuted, French law contains a second set of limitation periods governing the time limit within which a sentence which has already been imposed must be carried out. In this way a suspect who cannot be located can nonetheless be convicted and sentenced. If he is later found, that sentence can be executed at any stage within the period set out in legislation. For the most serious crimes such as murder or rape, a sentence can be executed up to 20 years after it is imposed.

Since the trial can therefore be carried out without the accused's participation or even knowledge, my immediate thought was the question of audi alteram partem and the rights of an accused, including to speak in his own defence. The French approach is to allow an individual who has been convicted in this manner and is later apprehended to have his case re-tried in a completely *de novo* hearing. The parties and judges (there are three judges in the higher criminal courts) do however have full access to the original proceedings and judgment.

One of the main purposes of limitation periods of course is to ensure that a case is tried while the evidence is relatively fresh. Surely then a re-trial, potentially held up to 20 years after the original, is automatically held on a weaker basis. The lawyers I spoke to from France and other civil law jurisdictions did not seem to find this concept as shocking as I. However, I was informed that there has been some debate in France concerning the legitimacy of such extensive limitation periods.

There is also the question of the efficacy of conducting an entire hearing for a second time, including witness examinations and arguments from counsel not just for the prosecution and defence but also for each victim (victims are represented in French criminal trials and can apply during the same proceedings for monetary compensation - a practice which, in my opinion, deserves serious consideration in this jurisdiction). Perhaps this idea makes more sense in the French system where criminal cases are almost never brought to court unless a conviction is practically a certainty. Also, the trial itself tends to focus more on the accused's motives (based on his personality, background etc.) and on establishing the details of how the crime was carried out in fact rather than on technical legal argument or how the case was processed? In practice, the three criminal trials I witnessed more closely resembled sentencing hearings than the trials with which we are familiar here.

The Stage included lectures on and a visit to the Conseil d'Etat which is known as the chief watchdog of the validity of French laws. I was particularly interested to learn of a new reform that was passed in July 2008 which allows individuals to challenge the validity of a law before that court on the grounds, *inter alia*, that it is unconstitutional or infringes their fundamental human rights. This Conseil d'Etat, under certain conditions, previously had the power to pronounce a Bill as constitutional or unconstitutional *before* its enactment into law. But, prior to this reform, once a law was published, there was no domestic legal recourse to challenge its validity. Until last July, this was not considered to be a judicial function. Unfortunately, at the time I was in Paris, the necessary secondary legislation had not yet been put in place to clarify how the Conseil d'Etat was expected to function in practice. All of my inquiries in this regard were met with shaking heads and shrugging shoulders. Apparently this reform, which appears to represent a substantial shift in the balance of powers between State organs and has the potential to resemble to some extent our long-established judicial review system, is so novel in France that practitioners remain somewhat 'bouleversé' and at a loss.

Increased understanding of alternative methods to address the common aim of developing a legal system which adequately serves the needs of modern society is an essential element in the continuing evolution of our own system. While the pupil exchange programme merely provides a glimpse into the French approach, it is enough to ignite an interest and dialogue on matters which would otherwise go unnoticed. It has also been an invaluable experience to me personally and I wish to strongly encourage anyone with any curiosity about the wider legal world to consider participating. Many thanks are due to Turlough O'Donnell SC, the Bar Council, the Barreau de Paris and, in particular, Inga Ryan and Madame Katrine Lizfranc for their extensive work in ensuring the success of the exchange. ■

Handling Stolen property

JOHN MAHER BL

Gardai who mount surveillance of stolen property may inadvertently change the character of the property, so that it is no longer considered "stolen" within the meaning of the Criminal Justice (Theft and Fraud Offences) Act 2001. In the recent case of *The People (DPP) v Caroline Burke* in the Dublin Circuit Court, Judge McCartan directed an acquittal, after he ruled that property which had been stolen, but which then came under Garda surveillance, was within the officers' custody and control at the time of the alleged offence.

The accused had pleaded not guilty to handling stolen property, contrary to Section 17 of the 2001 Act. The prosecution evidence was that on the morning of August 16th 2006, one of the owners of a beauty products company arrived at its warehouse at Donabate, Co. Dublin and found that there had been a break-in overnight. Noticing mud in the doorway, he and a garda searched nearby and found the missing property lying in an adjacent field, hidden under a large metal sheet. Neither touched the goods – some €10,000 worth of beauty products. The garda suggested leaving the products where they were and mounting a surveillance operation, and the owner agreed. As darkness fell, a surveillance team moved into place. Before long, a jeep was seen to stop near a gap in the hedge that led into the field and two men and the accused emerged from the vehicle. The men approached the metal sheet. As soon as they lifted it, the gardaí switched on a powerful beam and moved in. They arrested one man and the second escaped. The accused ran to her jeep but was arrested as she tried to start it.

The defence applied for a direction to acquit on two grounds. Counsel said that taken at its highest, the Garda evidence against the accused placed her in the field but some eight yards from the property. There was no evidence that she had any knowledge that the property was in the field, nor that she was part of any plan to retrieve it. The second ground was that by the time of the alleged offence, the property had lost the character of stolen property. When the garda officer and the owner of the property had discovered it in the field, the property had been restored to the owner at that stage, and it had also come into the lawful possession and custody of the gardaí.

Section 17 (1) of the 2001 Act states that a person is guilty of handling stolen property if (otherwise than in the course of the stealing) he or she, knowing that the property was stolen or being reckless as to whether it was stolen, dishonestly – (a) receives or arranges to receive it, or (b) undertakes, or assists in, is retention, removal, disposal or realisation by or for the benefit of another person, or arranges to do so. Conviction of the offence requires as an essential proof that the property is stolen property at the time the offence is committed.

The court considered a number of authorities and in particular *Haughton v Smith*[1], *Attorney General's reference (No. 1 of 1974)*[2], *R v Schmidt* [3], *R v Villensky*[4] and *Metropolitan Police Commissioner v Streeter*.[5] Judge McCartan ruled that at the time of the alleged offence, the property was not stolen. He said the question of what property is capable of being "handled" in the Criminal Justice (Theft and Fraud Offences) Act 2001 was dealt with by Section 20 (3) of the Act which states *inter alia* that "property shall not be regarded as having continued to be stolen property after it has been restored to the person from whom it was stolen or to other lawful possession or custody." The learned judge said the operative word was "restoration" and the authorities indicated that what amounted to "restoration" depended on the facts of each case. In this case, the owner and the garda had found the property in the field and agreed to leave the property where it was. At that point the property had come under the control of the owner, who passed it on to the gardaí.

There was no processing of the property by the accused. Had gardaí delayed their move to apprehend the suspects, he said, the goods might have been moved outside the care and control of the officers.

The learned Judge said that if he was wrong about the character of the property, he still had concerns about the evidence that placed the accused in the field; he said her actions generally were open to differing conclusions and she was entitled to the better interpretation. He added that he recognised it was easy for a judge to say the gardaí had acted too precipitously, but clearly the situation would have been different had the gardaí waited and the property had been taken to the accused's car. Judge McCartan withdrew the case from the jury and directed them to acquit.

This reasoning might also be seen to apply to possession offences under the Act. One point to note is that had the prosecution proven greater involvement by the accused with the property, it would have been open to the jury to consider a verdict of attempted theft, under the "alternative verdict" provisions of Section 55 of the 2001 Act . In general terms, however, the ruling suggests that in a surveillance operation of this type, officers should either delay making their final move, or devise ways to monitor stolen property without having it within their custody and control. ■

1 [1975] AC 476.
2 [1974] 1 QB (744)
3 [1866] LR 1 CCR 15
4 [1892] 2 QB 597
5 71 Cr.App.R. 113