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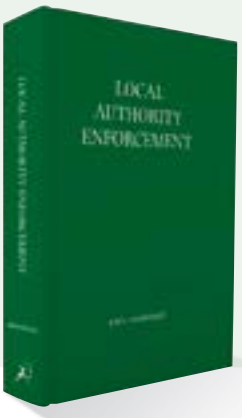

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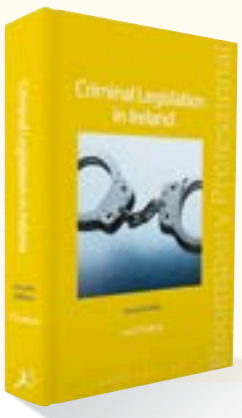

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Kennedy v Gibbons: Straight to the Point(s)

Gary Hayes BL

The recent decision of Hogan J. in the case of *Kennedy v Gibbons*[1] may have brought an end to the practice of 'poor box' donations for fixed charge penalties. The High Court decision appears to expressly disallow a District Court Judge from accepting applications for donations to the poor box *in lieu* of a conviction or penalty points. This is in circumstances where imposition of penalty points is a mandatory requirement pursuant to the Road Traffic Act 2010 and further where section 55 of the Road Traffic Act 2010 has dis-applied the Probation of Offenders Act 1907 to such offences.

The *Kennedy* case arose out of the refusal of an application by the defendant in which the court was invited to accept a donation *in lieu* of a formal conviction. The defendant had pleaded guilty to the offence of speeding, contrary to section 47 of the Road Traffic Act 1961 (as inserted by section 11 of the Road Traffic Act 2004). Under section 103(13) of the 1961 Act (as inserted by section 14(g) of the Road Traffic Act 2006), a person found guilty under that section:

> "[I]s guilty of an offence and is liable on summary conviction to a fine not exceeding €1000"

The defendant, a pensioner with no previous convictions, pleaded guilty in the belief that in doing so he would escape conviction. The appeal to the High Court principally concerned the defendant's complaint that the District Court Judge had convicted him after refusing to consider the possible application of the poor box as a legitimate sentencing option. Hogan J., on appeal, held that the circumstances presented the more fundamental question as to whether that District Court Judge had any other option in the circumstances and in considering the matter initially concluded:

> "For the reasons I will now set out, I find myself obliged to conclude that he had no such option"

Referring to the Law Reform Commission consultation paper *'The Court Poor Box',* Hogan J. referred to the generally accepted sources of origin of the poor box, namely from the Church in feudal times, to Elizabethan statute providing for relief of the poor in 1601. He pointed out that despite there being no statutory basis for the poor box and a paucity of case law on the topic, the system was so widespread and inveterate throughout the State both prior to and after 1922 that it should be regarded as part of the common law which was carried over into the modern legal system by Article 50.1 of the Constitution.

With reference to the case of *Mogul of Ireland Ltd. v Tipperary (N.R) County Council*[2], Hogan J. dealt with the issue of overruling long standing decisions of the courts and the reluctance with which Judges should upset established practice without good reason as held in the judgment of Henchy J. where he stated:

> "Even if the later Court is clearly of the opinion that the earlier decision was wrong, it may decide in the interests of justice not to overrule it if it has become inveterate and if, in a widespread or fundamental way, people have acted on the basis of its correctness to such an extent that greater harm would result from overruling it than from allowing it to stand."

In accepting that the matter was part of the common law, Hogan J. stated that if the poor box was to be accepted as it currently stood, then the only manner in which that acceptance could be abrogated, qualified or even abolished remained entirely a matter for the Oireachtas.

Hogan J. pointed out that the critical point was that the Oireachtas had, in creating the penalty point regime, imposed a statutory scheme of mandatory penalties following conviction for certain road traffic offences which had supplanted the common law and consequently restricted the District Court's sentencing options. The Court referred to the case of *DPP v Maughan*[3] which concerned judicial review proceedings in circumstances whereby a donation to the poor box had been accepted *in lieu* of convicting the accused of the offence of drunk driving. The accused had been roused in the night and informed that his father was seriously ill. While driving to hospital in response to the urgent summons, he had been arrested for drunk driving and it subsequently transpired that his blood alcohol level exceeded the statutory minimum. O'Caoimh J. held that in allowing the accused the option of the poor box, the District Court Judge had acted *ultra vires,* despite the human and perfectly understandable course he had taken. He stated that the District Court Judge was:

> "... obliged at the time to determine the case before him and to proceed in accordance with law to enter a conviction and to impose a penalty as required by law. He was not entitled to strike out the charge, notwithstanding the circumstances outlined to him by the notice party's solicitor at the time. While these indicate that the notice party might not have driven but for the fact that he was requested to visit his father

1 [2014] IEHC 67

2 [1976] IR 260, 273

3 [2003] IEHC 117

> in hospital, it is clear such circumstances do not and cannot afford a defence to the offence as charged against the notice party..."

Hogan J. held that the critical feature of that case is that section 49(7) of the Road Traffic Act 1961 (as inserted by section 10 of the Road Traffic Act 1994) expressly provided that section 1(1) of the Probation of Offenders Act does not apply to such an offence and in the circumstances, it is implicit in the judgment of O'Caoimh J. that in the latter disapplication of the Probation of Offenders Act 1907 to the offence, that the District Court Judge must of necessity proceed to conviction where the facts of the case so warranted. This, he held was a principle indistinguishable from the case before him in circumstances where section 55 of the Road Traffic Act 2010 also provides for the disapplication of the Probation of Offenders Act 1907 to speeding fines and other traffic offences.

Further clarifying the logic for the decision, Hogan J. referred to the decision of Kearns P. in the case of *DPP v Ryan*[4] where the High Court held that the District Court Judge was entitled to accept a poor box donation *in lieu* of a formal conviction for sexual assault. Hogan J. held that the essential difference between the offence of sexual assault, as in *Ryan* has not been the subject of a mandatory provision by the Oireachtas such as those relevant offences under the Road Traffic Acts. Therefore in those circumstances the District Court's common law power to accept a charitable donation from an accused *in lieu* of non-mandatory convictions continues in principle to hold full sway.

Hogan J. considered that the poor box might be thought of by some to be a system which either operated as a salutary and humane check on the possible harshness of the sentencing system, a source of revenue for needy and deserving charities, or that the continued existence of the practice is unsatisfactory in that it provides an escape for the affluent from the proper strictures of the criminal justice system. Hogan J. concluded that in such cases:

> "In the case of those traffic offences where the imposition of penalty points has been made mandatory by the Oireachtas...the District Court's common law poor box jurisdiction must be taken to have been superseded by these statutory provisions. It must accordingly be concluded that the District Court enjoys no jurisdiction to impose an informal sanction short of actual conviction such as accepting a donation to the poor box, as this would amount to an indirect circumvention of these statutory provisions"

The judgment appears to have ruled out in its entirety the use of the poor box *in lieu* of convictions and penalty points for mandatory road traffic offences. While *Kennedy* only deals with circumstances where an individual holds their hands up and states that they are guilty, it remains to be seen on what grounds a District Court Judge may dismiss a claim in other circumstances. If for example a defendant entered a plea of not guilty and made an application to the poor box on condition that the matter would be dismissed, then it appears that a District Court Judge might possibly have discretion to accept the application. It would of course be open to the Director of Public Prosecutions to judicially review the matter.

The recent decision of Judge Michael Coghlan in relation to philanthropist Niall Mellon shows that applications in relation to the poor box may still be accepted. Mr Mellon contended that he did not receive the summons in relation to a speeding offence and despite such a contention not normally being accepted by the Court, it was held that a payment of €250 to the poor box was sufficient to allow him to escape a conviction. The reasoning upon which the decision was based was not elaborated, however as yet the matter has not been subject of judicial review proceedings. ■

4 [2011] IEHC 280

Correction

'*The Right of a Social Welfare Claimant to seek a Revision of Decision*' (Bar Review, Volume 19, Issue 1, February 2014) by Derek Shortall BL

Footnote 20 should read 'Social Welfare Consolidation Act 2005, s 311'.
Footnote 36 Should read 'Social Welfare Consolidation Act 2005, s 311'

Protecting the Reputations of the Deceased: a Step Too Far?

Damian Byrne BL

Introduction

In a November 2013 lecture on "The Limits of the Law,"[1] Lord Sumption, Justice of the Supreme Court, was strongly critical of the jurisprudence of the European Court of Human Rights (hereafter the "ECtHR"). Through expansive interpretation, he argued, the Strasbourg Court had moved way beyond truly fundamental rights and begun to develop Convention rights to "reflect its own view of what rights are required in a modern democracy." A good example of this type of judicial law making was the Court's decision in *Putitstin v Ukraine,* no.16882/03, 21 November 2013, in which the applicant complained of an article which, he said, defamed his dead father. Whilst the case failed on the facts, the Court accepted that the reputation of a deceased member of a person's family may come within the scope of Article 8 of the Convention. In light of this decision, the received wisdom of journalists, historians and biographers that the dead cannot be defamed may no longer hold true in all circumstances.

This article considers the issues of defamation and privacy law as they apply to deceased persons, outlining first the traditional position in Ireland and other jurisdictions, and various suggestions for reform, before moving on to discuss the ECtHR's ruling in *Putitstin*. It shall be argued that the decision in *Putitstin* has potentially troubling implications for freedom of expression, in particular by expanding the protection of "reputation" afforded by Article 8 in a manner not envisaged by the drafters of the Convention. It shall be further argued that any move to extend legal protection to the good names and reputations of deceased persons should be resisted as a disproportionate interference with the right of freedom of expression.

The Irish position

The traditional rule in common law jurisdictions, including Ireland, is that legal proceedings for defamation cannot be taken on behalf of the deceased. There is no right to defend the reputation of the deceased person and hence no such right can be exercised by anyone on behalf of a deceased person. This has been confirmed in several decisions, including *Murray & Gibson v Commission to Inquire into Child Abuse & Ors* [2004] 2 I.R. at 222, where it was stated (at 272) that "because the deceased are neither alive nor citizens, they have no personal rights," and that this was "justified by reference to good policy reasons, presumably relating to the difficulties which will be caused to the writing and recording of a recent history."

As indicated in the *Murray* case, there are three main justifications for this rule:

i) Defamation law protects a person's reputation in the community and is, therefore, a personal tort. A libel or slander on the memory of a deceased person is not deemed to inflict on the deceased person's survivors any legal damage;
ii) A change to the rule would act as a hindrance upon freedom of expression and create major difficulties for journalists and historians writing about and speculating upon past events if they could potentially be sued many years after the death of a defamed person; and
iii) A defendant in a defamation trial may be unable to mount a full and fair defence as they would be denied the opportunity to cross-examine the deceased person who has allegedly been defamed.

Section 39 of the Defamation Act 2009 does provide that a defamation action shall survive the death of the person who is the subject of the alleged defamation, and vest in his or her estate, but only in circumstances where proceedings for defamation had already commenced prior to his or her death. Even in that case, the only remedies available to a court are a declaratory judgment, an injunction or special damages.

Reform proposals

Notwithstanding the arguments noted above, relatives of deceased persons may potentially be exposed to great hurt and distress as a result of false statements made about the deceased, and the common law rule has been called into question in a number of jurisdictions. Of particular controversy in recent years has been the practice of waiting until after the subject has died before publishing celebrity "tell-alls," thus leaving the surviving families with no legal recourse.

The Irish Law Reform Commission, in a 1991 Report on the Civil Law of Defamation[2], recommended that "there should be a new cause of action in respect of defamatory statements made about a person who is dead at the time of publication ... the right to institute such proceedings should be vested solely in the personal representative of the deceased who should, however, be under a statutory obligation to consult the immediate family of the deceased, .i.e. spouse, children, parents, brothers and sisters, before the proceedings are instituted ... the period of limitation within

1 See http://ohrh.law.ox.ac.uk/?p=3643.

2 Paras 12.7-12.13. See http://www.lawreform.ie/_fileupload/Reports/rDefamation.htm.

which proceedings must be instituted should be three years from the date of death of the allegedly defamed person ... the only remedy available should be a declaratory order and, where appropriate, an injunction."

Reforms have at various stages been recommended or even included in draft legislation in other common law countries, including Canada, Australia and New Zealand as well as a number of U.S. States – usually including similar qualifications to the Irish Law Reform Commission recommendation, i.e. that a limitation period of around three years after death be applied; and that the remedies available be limited to corrections, declaratory orders or injunctions. However, it appears thus far that none of these jurisdictions have actually passed a law protecting the dead from defamatory statements.

The Scottish Government published a 2011 consultation paper on whether the law should extend to the relatives of a deceased person the right to sue for defamation on their behalf and, if so, how any new provisions might work in practice.[3] This was prompted in part by a long-running campaign by the parents of Diane Watson. Their daughter was stabbed to death in a school playground row two decades ago. Their 16-year-old son then took his own life after reading a claim in a newspaper that his sister had been a bully.

The paper asked, *inter alia*, whether any proposed remedy should be limited to those whose relatives were victims of murder, culpable homicide, dangerous driving, warfare or suicide and where the defamer has been convicted of causing the death. Respondents were asked to consider whether an action should be compensated by damages or whether in this instance an apology and legal prevention of further publication of the defamatory article would be more suitable.

A further question raised in the Scottish report was whether the issue could be better addressed through a non-legislative approach, i.e. by increasing the awareness and use of existing regulatory codes governing media conduct. It noted that the deceased are already protected by a number of clauses of the Code of Practice overseen by Britain's Press Complaints Commission. Having considered the responses of interested parties, the Minister for Community Safety and Legal Affairs, Roseanna Cunningham, concluded that "...our view is that it is right to support the objective of ensuring that the reputation of a recently deceased person cannot be defamed with impunity, but that an extension of the law may not be the most appropriate way of delivering the requisite protection."

In June 2012, Westminster MPs rejected a proposal to amend the Defamation Act 2013 to enable dead person's spouse or partner, relatives, siblings or offspring to sue a publisher for defamation up to twelve months after the death.[4]

Putitstin v Ukraine

Background

The applicant in *Putitstin* was the son of a former footballer who, on 9 August 1942, took part in a legendary "Death Match" between FC Start – a team made up mostly of professional footballers of Dynamo Kiev who were working in a local bakery at the time – and "Flakfelf" - composed of German military personnel and airport technicians. Four of the victorious home team were subsequently executed at a local concentration camp. On 3 April 2001, the newspaper *Komsomolska Pravda* published an article titled "The Truth About the Death Match". The article contained an interview with D.K., the future director and producer of a film based on the events surrounding the Death Match. In one paragraph of the article, D.K. stated that, according to his sources:

> " ... Actually, there were only four Dynamo players in the Start team created by the director of the local bread factory. And these [were the players who] were executed. And other [football] players worked in the police, collaborated with the Gestapo."[5]

The article was accompanied by a picture of the match poster from 1942 which included the names of all the players. However, the applicant's father was not mentioned in the article, and his name was not legible on the picture of the match poster.

The applicant instituted proceedings against *Komsomolska Pravda* on the grounds, *inter alia*, that the article suggested that his father had collaborated with the occupying police force and with the Gestapo in 1942. Having shown that his father had also been sent to a concentration camp, though not executed, he sought rectification of the article and damages. The first instance court in Kiev rejected his claim, however, on the basis that he was not directly affected by the publication and that the article contained neither the name of the applicant nor his father and made no allegation of the applicant's father having been a collaborator. The ruling was upheld on appeal to two higher domestic courts in Ukraine.

Alleged violation of Article 8

Although invoking Articles 6 and 10 of the European Convention on Human Rights (hereafter "the Convention"), the essence of the applicant's claim before the ECtHR was that the refusal of the domestic courts to order rectification of the allegedly defamatory comments about his father in the *Komsomolska Pravda* article amounted to a breach of the right to protection of his and his family's reputation. The Fifth Section of the Court deemed the complaint to fall for consideration under Article 8, which states:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

3 "Defamation and the Deceased", http://www.scotland.gov.uk/Resource/Doc/337251/0110660.pdf.

4 See http://www.pressgazette.co.uk/node/49522.

5 *Putitstin v Ukraine*, no. 16882/03, 21 November 2013 at [9].

The Court noted that the notion of "private life" within the meaning of Article 8 is a broad concept that includes, *inter alia*, elements relating to a person's identity and physical and psychological integrity; and that, as a person's reputation forms part of his or her personal identity, it thus falls within the scope of his or her "private life".[6] Crucially, the Court then went further in accepting that "... the reputation of the deceased member of a person's family may, in certain circumstances, affect the person's private life and identity, and thus come within the scope of Article 8".[7] Furthermore, the Article goes beyond merely protecting citizens from State interference and imposes a positive obligation on State authorities to take necessary steps to protect an individual's right to a private and family life:

> "... what is in issue is not an act by the State but the alleged inadequacy of the protection afforded by the domestic courts of the applicant's private life. While the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves ... The question of whether an action is brought by the defamed person himself or by his heir may also be relevant for assessing the proportionality of an interference."[8]

The Court then went on to consider the fair balance to be struck between the applicant's right to respect for his private life and the right of the media to freedom of expression pursuant to Article10 of the Convention. On the facts, the applicant's case failed on the grounds that the article in question did not refer to his father or suggest that he had collaborated with the Gestapo; that his father's name was not identifiable from the article; that although the applicant was affected by the article, he was so only in an indirect manner and the level of impact was quite remote; that the article was neither provocative nor sensationalist and informed the public of a proposed film on a historic subject; and that the Ukrainian courts had therefore not failed to strike an appropriate balance between the applicant's rights and those of the newspaper and the journalist: "Against the newspaper's right to freedom of expression, the remoteness of the interference with the applicant's Article 8 rights had to be weighed."[9]

Expansion of right to reputation

Notwithstanding that the applicant in *Putitstin* was ultimately unsuccessful in his case, this is a troubling decision in several respects in terms of its potential implications for freedom of expression. Not only is it clear from the Court's reasoning that there is no obstacle to an heir to a defamed person taking an action, but there is little attempt to set any boundaries to this right. There is no express limitation period on the right to bring an action, nor is it restricted to immediate family or specific categories of relatives. In theory, it is open to any blood relative at any time to bring an action and seek to establish that damage to the reputation of a deceased family member has affected his or her private life and identity. The only real qualifications introduced by the Court is that a rather vague test of "remoteness" will be applied; and that whether an action is brought by the defamed person himself or an heir may be "relevant for assessing the proportionality of an interference."

More significantly, the decision represents a further evolution of a trend whereby by the ECtHR has expanded the right of reputation in the context of Article 8 in a manner which goes well beyond what was intended when the Convention was originally drafted and, arguably, threatens to blur the distinction between defamation and privacy law. As seen above, there is no explicit reference to "reputation" in Article 8 – an omission at the time of the drafting of the Convention which, as Heather Rogers QC has observed, was deliberate.[10] The Convention refers expressly to "reputation" only in the context of Article 10(2), which identifies protection of reputation as one of a number of legitimate aims which may warrant a proportionate restriction upon the exercise of the general right to freedom of expression guaranteed in Article 10(1). Nevertheless, and somewhat controversially, the Court began, in a series of decisions from about 2003, to treat a person's reputation as being capable of protection by Article 8 as part of the right to respect for private life.[11] The new line of reasoning and interpretation was encapsulated in *Pfeifer v Austria* (2009) 48 EHRR 8 at [35]:

> "The Court considers that a person's reputation, even if that person is criticised in the context of a public debate, forms part of his or her personal identity and psychological integrity and therefore also falls within the scope of his or her "private life". Article 8 therefore applies."

The decision in *Putitstin* extends this development even further as it is now no longer only in circumstances of harm to one's own reputation that Article 8 can be invoked - the reputation of the deceased member of a person's family may, in certain circumstances, also affect the person's private life and identity, and thus come within the scope of Article 8. The potential ramifications of this trend have been expressed by Hugh Tomlinson QC thus:

> "The recognition of reputation as a Convention right means that, when it considers defamation cases, the Court needs to balance freedom of expression and reputation from a starting point that neither takes precedence. This is a similar exercise to that carried

6 At [32].
7 At [33].
8 At [34].
9 At [40].

10 See http://inforrm.wordpress.com/2010/10/26/is-there-a-right-to-reputation-part-1-heather-rogers-qc/.
11 See, for example, Cumpana v Romania (2004) 41 EHRR 200 at [91], Chauvy v France (2004) 41 EHRR 610 at [70] and White v Sweden [2007] EMLR 1 at [21].

out in privacy cases and there is a clear risk of the boundary between privacy and defamation becoming blurred."[12]

Conclusion

Journalists and historians could traditionally take comfort in the assumption that the dead could not be defamed. There is no doubt, however, in light of the ECtHR decision in *Putitstin*, that a defamatory allegation against a relatively recently deceased person could now provide a close relative with a very strong basis for bringing an action invoking Article 8 of the Convention, on the grounds of interference with his or her right to a private and family life. This represents a major departure from the traditional view held in Ireland and other common law jurisdictions that no right of action lay in respect of defamation of deceased persons. Indeed, there may now be a positive obligation on State authorities to ensure respect for private or family life by protecting individuals from attacks upon the reputations of deceased family members.

Some may see this as a welcome development. After all, why shouldn't relatives be entitled to seek redress through the legal system where a person's reputation has been destroyed by defamatory falsehoods as soon as they have died? However, the traditional rule that the dead could not be defamed has offered the media and academics some respite from otherwise draconian defamation laws (at least in Ireland and the United Kingdom) and provided a vital space for full scrutiny of public figures and the establishment of historical truths and narratives. One need only think of the recent case of Jimmy Savile to appreciate how this can free the media to play a hugely important public role in revealing stories and conducting investigations in a manner impossible whilst the individual in question was still alive and able to rely upon the shield of defamation law. The grievances of relatives with media coverage of a loved one, however justified in some cases, should not be allowed to get in the way of vital investigative reporting, historical assessment and potential uncovering of unwelcome facts and uncomfortable truths.

Moreover, there are redress mechanisms presently available to relatives of deceased persons, in Ireland at least, in the form of the media Code of Practice overseen by the Press Council and Press Ombudsman. The principles set out in the Code are not confined to media coverage of the living, and increasing awareness and use of existing regulatory codes governing media conduct would be a better way to proceed than altering the current law.

In summary, the decision of the ECtHR in the *Putitstin* case is bad for freedom of expression and a regrettable example of the kind of judicial law making through expansive interpretation which has attracted criticism of the Strasbourg Court from Lord Sumption and others. ■

12 http://inforrm.wordpress.com/2014/01/23/privacy-and-defamation-strasbourg-blurs-the-boundaries-hugh-tomlinson-qc/.

Innocence Project 2013

Introduction

The Bar Council awarded three barristers funding to participate in the Innocence Project in the USA last year.

The Innocence Project is a non-profit legal organization that is committed to exonerating wrongly convicted people through the use of DNA testing, and to reforming the criminal justice system to prevent future injustice. The Innocence Project was founded in 1992 and its work has led to the freeing of 312 wrongfully convicted people, including 18 who spent time on death row.

Sponsored by the Bar Council for the last four years and administered by Susan Lennox BL and Inga Ryan, this project has proven to be a life changing experience for all those who participated. Each of the three barristers who were selected for the 2013 project recount the experience.

Ohio Innocence Project: Lessons Learnt

Aisling Dunne BL

I was lucky to be chosen to join the team at the Ohio Innocence Project (OIP) in Cincinnati. Since its inception in 2003, 17 people have been freed, having served a total of 300 years of incarceration for crimes they did not commit. The Director of the OIP, Professor Godsey is joined in his endeavours by his passionate staff; lawyers Jennifer Paschen Bergeron and Donald Caster, the administrative director, Jodi Shorr and every year, 20 enthusiastic law students.

I arrived in the U.S. with a certain sense of superiority; I believed the failings of the American criminal justice system were in stark contrast to our own. However, what I have learnt from my time in Ohio has caused me to question the safeguards, or lack thereof, available to wrongfully convicted persons here.

The main causes of wrongful convictions include;

- Eye witness misidentification[1],
- Unvalidated[2] or improper forensic science[3],
- False confessions[4],
- Government misconduct,
- Informants[5] and
- Poor legal representation.

The OIP will only represent a person who contends absolute innocence of the crime they've been convicted of; cases claiming lesser degrees of guilt, the use of invalid warrants, a lack of *mens rea*, etc. are not pursued. The most common and often the only way to prove actual innocence is through DNA testing. Every state in the U.S. now has legislation governing an accused person's right to post-conviction DNA testing[6].

While testing had been available in Ohio since 2004, the location of crime-scene samples remained a problem[7]. Following intensive lobbying from the OIP, in 2010 the Ohio legislature, passed legislation[8], which created a requirement for DNA evidence to be retained and properly preserved in all cases of serious crime for the duration of the convicted person's sentence.

My time at the OIP made me acutely aware of the lack of similar protections in Ireland. Whilst there are provisions under Section 2 of the Criminal Procedure Act 1993 for a convicted person, after appeal, to apply for an order quashing their conviction; this can only be done where it is alleged that a new or newly discovered fact shows there has been a miscarriage of justice[9]. It does not provide for post-conviction DNA testing. Furthermore, there are no legislative provisions in Ireland requiring the retention of biological crime-scene evidence beyond the initial conviction and appeal. While the vast tranche of case law relating to evidence retention focuses on the duty on the Garda Siochana leading up to the trial, there has been little discussion of the importance of retention in the aftermath of conviction. The indefinite retention of crime scene samples was recommended by the Law Reform Commission's Report on The Establishment of a DNA Database in 2005[10], however, this recommendation appears to have been ignored in the Criminal Justice (Forensic Evidence and DNA Database System) Bill 2013 which is currently before the Oireachtas.

In light of the fact that 312 exonerations have occurred in the US as a result of DNA testing, the failure by the Irish system to provide a similar mechanism debars a wrongfully convicted person from pursuing the most potentially persuasive and conclusive evidence available.

During my time in Ohio, I came to question more than merely the lack of recourse for wrongfully convicted persons. I also became more aware of the dangers of some

1 Eyewitness misidentification was found to have played a role in 73% of convictions which were later overturned through DNA testing.

2 "Unvalidated", a word frequently used in Innocence Project material referencing forensic disciplines, which have never been subjected to rigorous scientific evaluation.

3 Unvalidated or improper forensic science was found to have contributed to 50% of wrongful convictions, which were later overturned through DNA testing.

4 False incriminating statements were made by approximately 25% of innocent defenders who were later exonerated by DNA testing.

5 False statements were made by informants in 15% of convictions which were later overturned through DNA testing. Incentives for testimony include; payments, early release from prison, avoid prosecution.

6 Oklahoma, under HB 1068, was the last state to adopt such legislation when signed into law on 24th May 2013.

7 A review by the Innocence Project found that between 2004 and 2010, 22% of cases were closed due to the necessary evidence having been lost or destroyed.

8 Senate Bill 77 (The Innocence Protection Act) was drafted primarily by Professor Godsey and his students.

9 Evidence recognised as new or newly discovered by the Court of Criminal Appeal includes guidance counsellor notes describing the perpetrator, *People (D.P.P.) v. Gannon* [1997] 1 I.R. 40, a fingerprint found on the inside of the front passenger seat *People (D.P.P) v. Meleady & Grogan* (20 March 2001, unreported) and a complainant's retraction of her allegation, *People (D.P.P.) v. Hannon* [2009] 2 I.L.R.M. 235.

10 LRC 78-2005, pp. 305

"sciences" which have been debunked in the U.S. yet continue to be used in Ireland. These include blood spatter analysis, bite mark comparisons, GSR (gunshot residue) testing and the study of shoe prints and arson fire patterns. In 2009, the National Academy of Sciences raised serious concerns regarding the extent to which particular forensic disciplines are founded on reliable scientific methodologies and whether the disciplines possess the capacity to accurately analyse evidence and report findings without the threat of bias due to human interpretation.

The infallibility of forensic science was never more apparent than when I met former police captain, Doug Prade, whilst in Ohio. The OIP successfully fought for his exoneration last year, having served 14 years in prison for a murder he did not commit. In 1998, he was convicted of murdering his ex-wife when a forensic dentist wrongly concluded that only his teeth could have caused bite marks found on her arm, having been bitten through her lab coat by her attacker. In 2012, on foot of post-conviction DNA testing of the bite mark area of the lab coat, male D.N.A. was identified but categorically excluded Mr. Prade as the source; his exoneration soon followed. Bite mark analysis, once considered cutting edge, has latterly been widely discredited as unreliable and unscientific. So far, at least 11 American prisoners, who had been convicted of rape or murder based largely on bite mark comparisons, have been exonerated.

With a prison population across America of approximately 1,500,000 people[11], 10% of whom are serving a life sentence, it is clear there is a great need for safeguards against wrongful convictions there. Despite the relatively smaller pool of imprisoned people in Ireland, it remains an important area of our criminal justice system in need of reform. The legislation[12] introduced late last year to establish a new Irish DNA database will hopefully assist in establishing the innocence of those wrongly convicted. However, the legislation, in its current format does not deal specifically with this issue, nor does it deal with the inability of a convicted person to make a post-conviction DNA application.

While Doug Prade's wrongful conviction and incarceration caused immeasurable heartbreak, nonetheless, there was in place a system that eventually reversed the injustice. Sadly the same cannot be said for someone in a similar position in Ireland and it is to be hoped that the necessary legislation will soon be introduced.

The Innocence Project USA – Duke University, Durham, North Carolina

Helen-Louise Caffrey BL

When I first heard about the Innocence Project placement, it immediately appealed to my idealistic notions of what being a lawyer represents; from the Atticus Finch prototype that I admired as a child, to John Grisham's modern heroes, right through to my current addiction, The Good Wife. The dream of the Innocence Project became a reality when I found myself airborne on my way to North Carolina, telling the unfortunate passenger seated beside me on the plane of my excitement. People generally listened with interest when I told them where I was going, however, asking about the project, the university and the scholarship. It's the kind of experience most people will never encounter and an opportunity for which I was very grateful. Falling asleep to James Taylor on my Ipod and chapter three of Brandon Garret's "Convicting the Innocent", I was soon to awake on the northern side of the southern corridor, at Raleigh airport, North Carolina. A different world awaited - a learning curve, a new challenge and the experience of a lifetime.

I was met by glorious sunshine, a stunning university campus and a team of America's finest lawyers, ready for action. I was quickly introduced to all of the team's cases and fully briefed on the most urgent matter, the case of Charles Ray Finch. This motion for post-conviction relief was listed for hearing on the 12th September, 2013. Finch, a black man, had been convicted of the murder of a white shop owner in Wilson County, North Carolina in 1976. When I met him, he had already served 37 years in prison and at every stage had asserted his innocence. Finch alleges that he fell victim to a corrupt police investigation and that the crime had been pinned on him from the very beginning of a blatantly flawed investigation. An unfair trial by jury ensued where little, if any, evidence of Finch's guilt was produced by the prosecution. The ineffective assistance of a young and likely underprepared legal aid lawyer, assigned by the Court at the eleventh hour didn't help matters.

The first task for our team when I arrived was to carry out an in-depth pre-trial investigation. This involved speaking to members of the community who had given evidence at trial, interviewing them in relation to their feelings on the case. Some people would talk, others were notably cagey and nervous about speaking to lawyers. However, one thing was clear; the stories people told supported the theory that there had been widespread corruption in Wilson County, North Carolina at the time and that it had likely affected the investigation into Finch's case. This allegation was supported by the fact that only two years after his conviction, the Sherriff who was in office at the time had been convicted of corruption related offences and the chief investigating police officer had been convicted of fraud offences.

A number of issues with the investigation were obvious from the outset. The only identification evidence was a line-up that had been conducted by the chief investigating police officer on the night of the murder. At trial, the prosecutions case put much weight on the fact that the only eye-witness identified Finch in three line-ups. However, the line-ups were fundamentally flawed; they contained the same five men each time and only one of those men fit the description given by the witness: Charles Ray Finch. Finch was a black man wearing a black three quarter length coat – the exact description given by the witness at the crime scene. Each of the three line-ups were made up of the same five men, dressed in the same clothing, with the exception of the third line-up, in which two of the other men wore hats. By todays standard of double blind line-ups, these were a farce – and they were the mainstay of the prosecutions case. There was no murder weapon produced and the only material evidence linking Finch to the crime was the fact that the shell of a shotgun bullet had been found in his car. That shell was produced before the jury at trial and much was made of the fact that

11 Bureau of Justice Statistics, www.bjs.gov.
12 The Criminal Justice (Forensic evidence and DNA database System) Bill 2013

the shotgun shell was of the same type as that removed from the deceased's body. However, there was no evidence that the shell had been used in the murder weapon itself or that it was the exact shell containing one of the bullets that killed the deceased. There were discrepancies in the medical report too – as to whether the cause of death had been by a shotgun or a pistol. These discrepancies were crucial to Finch's case and went unchallenged at trial.

Our next task was to organise interviews with the former Sheriff and police officers who had been working in the Sherriff's department at the time. I was personally responsible for arranging the interviews. After considerable difficulty in obtaining appointments, haggling with secretaries at every turn, we eventually travelled to Wilson County for a second occasion, this time to interview some of those linked to the Sheriff's office at the time, including the lawyer for the prosecution and the former Sheriff. On this occasion, it was unfortunate that those we interviewed had significantly impaired memory of the events surrounding Finches conviction. However, it did become clear that there had been an in depth FBI investigation into the corruption in Wilson County at the time. The team decided that it would be necessary to get discovery of the FBI's file. Instead of going on with the case on the 12th September, the Court granted an order for discovery. The matter was then listed for hearing in November.

The discovery files obtained unearthed significant details of corruption in Wilson County, North Carolina at the time of Finch's Conviction. In particular, it became clear that the FBI had undertaken significant investigations in relation to the investigating officers in Finch's case. When the matter came to hearing in November, the presiding Judge heard submissions in relation to that corruption. Unfortunately, after one day of hearing, the Judge decided it was necessary to recuse himself on the basis that he had been involved in some cases of corruption at the time, 37 years ago. Finch remains incarcerated in North Carolina and awaits a further date for hearing. At that stage, his team will fight for his release on the basis of his actual innocence.

The Mid-Atlantic Innocence Project, Washington DC

Sorcha Cristin Whelan BL

I am so grateful to the Bar Council for the wonderful opportunity and I can only say it was one of the most enjoyable, fulfilling and rewarding experiences of my life thus far.

I was working in Washington DC, with the Mid-Atlantic Innocence project (MAIP) based there (see www.exonerate.org). The project covers Virginia and Maryland as well as the District of Columbia, with an office based in the centre of DC. I was working with a small team of attorneys, clerks and an investigator. The investigator was a particularly colourful character and could have stepped out of an American crime novel; an ex-policeman and Vietnam veteran, with a propensity for wearing Hawaiian shirts and an insatiable desire to "feed me up". I would occasionally go out "in the field" with him to interview witnesses for the cases etc. As a barrister, it was a novel and invaluable experience to see a case from an investigative point of view.

My primary work involved analysing and examining cold cases, in which persons had been, apparently, wrongfully convicted. I would read and process the case before forming an opinion on whether or not it merited being investigated and pursued with a view to potentially securing an exoneration. These opinions would be presented to the team in written form and discussed and presented at meetings, with my suggestions on what areas in particular need to be investigated, or further explored. Obviously this was an onerous responsibility; if I made a wrong decision, an innocent person could remain languishing in an American prison for the rest of their natural life.

The process of seeing whether a person deserved to have their case re-visited involved reading through the entire transcript, along with the original investigative police work. I found this work particularly insightful in relation to the huge impact trial counsel can have on the determination of the accused's guilt or innocence. This sounds obvious but looking back at a trial in such a clinical and detached way really highlighted how one ill-judged question posed by the defence; one statement too many; or one answer from a witness that was not expected could completely destroy a case and swing the case against a client in the eyes of a jury. Simply ignoring or forgetting instructions, getting confused in respect of certain details, and not noticing a discrepancy in a prosecution witness's account, were also factors that could prove fatal. Like a tiny crack in a dam, one small, seemingly insignificant event in a trial can irrevocably change the whole result of that case. Also, it confirmed just how influential a trial judge can be. It was shocking how clearly it came through on a transcript if a judge clearly favoured, or disliked a particular counsel from comments in the presence or absence of the jury.

Ultimately, the existence of wrongful convictions is due to intermittent systemic failures involving all of the related disciplines of the criminal justice system- the police, the prosecution, the defence bar, judges and even juries. These issues are obviously far-reaching and this article is not intended to be an all-encompassing discussion of those issues, rather a conceptual overview. I have to say that one of the greatest factors that led to wrongful convictions (and there are a number of factors, particularly, *inter alia*, prosecutorial and investigative misconduct) and one that I believe has the greatest resonance for this jurisdiction, is that of identification evidence. Certainly *Casey*[13] has canvassed this issue and along with subsequent case law has attempted to safeguard the intrinsic failings involved in this type of evidence. But in real life, one can actually see how damaging and inherently unsafe it can be.

I was lucky that 2013 was a blockbuster year for the Mid-Atlantic Innocence Project in relation to successful exonerations. Jerry Lee Jenkins was one of these exonerees I was privileged enough to meet. Mr. Jenkins was convicted of a 1986 rape in Maryland, based on eyewitness testimony that he "looked like" the perpetrator and scientific testimony that he fell within the population of people who could have committed the crime. Mr. Jenkins always proclaimed his innocence and began seeking post-conviction DNA testing as soon as he heard it was available – as early as 1989.

13 *The People (Attorney General) v Dominic Casey (No.. 2)* [1962] IR 33

Unfortunately, the physical evidence could not be located to test. In 2004, a serial rapist who had been convicted of crimes in nearby Virginia, was convicted of a rape that was incredibly similar to the rape for which Mr. Jenkins had been convicted – they both involved victims who were real estate agents working in model homes, a tall, stocky, blond perpetrator who wore a plaid shirt and a stocking mask, and eerily similar offences. Based on that evidence, MAIP agreed to take the case as a non-DNA case in 2007, conducting an investigation of the alternative suspect. The attorneys decided to attempt one last search for physical evidence. This time, the State was able to locate a box of evidence that could be tested, and semen located on one of the victim's hairs belonged to the individual that Mr. Jenkins and his lawyers had long believed to be the real perpetrator. In June 2013, Mr. Jenkins was exonerated and is now seeking a pardon from the Maryland governor to fully clear his name.

The Innocence project afforded me an invaluable opportunity to observe the criminal justice system of another jurisdiction and the ability to contrast the failings and successes of that system, as well as an opportunity to observe the Supreme Court in Washington DC in action. I am forever indebted and grateful for such a wonderful and positive experience.

Each of the participants have expressed their sincere thanks to the Bar Council, all the staff and students at the respective Innocence Projects, Inga Ryan and Susan Lennox BL. ■

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VAS is operated by the Bar Council of Ireland and accepts requests for legal assistance from NGOs, civic society organisations and charities acting on behalf of individuals who are having difficulty accessing justice. Please contact us for further details or see the Law Library website under 'Bar Council and You'.

VAS have had a very busy start to 2014 with a number of important cases ongoing. We also have a number of new organisations on board who we look forward to being of assistance to in the future. These include Ana Liffey Drug Project, Merchants Quay Ireland Homeless and Drug Services and Irish Mortgage Holders Association.

Recent cases

Late last year, AdVic (who assist familes who have lost loved ones due to homicide) approached VAS seeking our assistance in advising a family whose daughter had tragically been murdered. In January, Libby Charleton BL met with the family and talked them through what to expect from the forthcoming Central Criminal Court trial and helped them to understand the processes around criminal justice proceedings.

On 13 March, Ronan Lupton BL delivered an informative presentation on data protection to members of charitable organisations in the Carmichael Centre, a support organisation for voluntary and charitable organisations. The Carmichael Centre is an exceptional resource for volunteering groups and VAS are delighted to be associated with them.

We have had a number of requests for assistance from National Advocacy Services providing legal opinions to vulnerable adults at the request of their advocate. David Dodd BL and Mema Byrne BL are acting in two such cases at present.

VAS and Travellers

We have had a number of cases in recent months in relation to travellers and discrimination. The Irish Traveller Movement requested VAS involvement in a case in Kerry. In January, Aoife Lynch BL represented two traveller women who brought proceedings against a Killarney nightclub. The ladies had purchased tickets for an Aware fundraiser, having lost a number of family members to suicide, but were refused entry. They were awarded €1,000 each in compensation.

On 19 February, Eoghan Foley BL and Keith Walsh Solicitors successfully brought discrimination proceedings on behalf of two travellers against a Dublin 7 pub. The men were awarded €500 each.

In November 2010, the Irish Traveller Movement sought assistance from VAS in a case before the Equality Tribunal claiming that the admission procedures of a school in Clonmel were discriminatory. The complaint was upheld, but has since been appealed and has ultimately made its way to the Supreme Court where the appeal was part heard in January. Vivian Meacham BL and Cormac O'Dulachain SC are acting for the claimants, Mary Stokes and her son John. It is hoped there will be a judgment in the matter later this year.

Debt Proceedings

VAS are providing assistance to clients of MABS in numerous cases where proceedings are ongoing in relation to debt and repossession orders. We have also taken on a number of debt related proceedings from Irish Mortgage Holders Organisation, in cases where unique legal issues arise.

Get Involved

VAS are hugely enthused by the numbers of barristers who have made contact to offer their services to VAS in recent months. VAS continue to provide help to NGOs and their clients on an advisory basis. If you would like to get involved, please get in touch with us by contacting either Diane Duggan at dduggan@lawlibrary.ie or Jeanne McDonagh at jmcdonagh@lawlibrary.ie. ■

Legal The Bar Review Update

Journal of the Bar of Ireland. Volume 19, Issue 2, April 2014

A directory of legislation, articles and acquisitions received in the Law Library from the 30th January 2014 up to 25th March 2014
Judgment Information Supplied by The Incorporated Council of Law Reporting

Edited by Deirdre Lambe and Renate Ní Uigín, Law Library, Four Courts.

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Bovine viral diarrhoea (amendment) order 2014
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Award

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Spiller, Pablo
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Oxford : Oxford University Press, 2014
N398.8

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Statutory Instruments

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Building regulations (part J amendment) regulations 2014
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COMPANY LAW

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Application to declare appointment of liquidator invalid – Application for appointment of liquidator – Locus standi – Liquidation of company – Whether company in liquidation – Meeting of creditors – Absence of ordinary resolutions of members – Position of Revenue Commissioners – Whether company being wound up – Process for winding up – Obligation to pass ordinary resolution declaring insolvent status – Obligation to give notice of resolution – Behaviour of directors – Re Duomatic Ltd [1969] 2 Ch 365 and Buchanan Ltd v McVey [1954] IR 89 considered – Companies Act 1963 (No 33), ss 251, 277 and 280– Application refused (2012/570COS – Laffoy J – 18/12/2012) [2012] IEHC 552
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Application for order directing meeting of creditors – Appeals to Supreme Court by companies – Application for order directing meeting to ascertain wishes of creditors – Whether defendants in competition proceedings creditors of companies with entitlement to vote — Whether defendants merely contingent creditors – Summoning of meeting in advance of application – Directions sought by liquidator as to conduct of meeting – Whether creditors of companies could include defendants to competition proceedings – Clear conflict of interest – Inherent jurisdiction of court – Whether vote to be taken at meeting – Comhlucht Páipéar Ríomhaireachta Teo v Údarás na Gaeltachta [1990] 1 IR 320 and Re Genport Limited (Unrep, McCracken J, 21/11/1996) considered – Companies Act 1963 (No 33), s 309 – Rules of the Superior Courts 1986 (SI 15/1986), O 74 – Directions made regarding conduct of meeting (2012/696COS – Laffoy J – 22/1/2013) [2013] IEHC 21
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Receivership

Receiver not appointed by court – Source of authority of receiver – Requirement to adhere to terms of appointing instrument – Consequences of failure to adhere – Whether first respondent authority to appoint receiver – Whether failure to appoint under seal rendered appointment void – Estoppel – Delay in challenging appointment of receiver – Test to be applied – Whether estopped from challenging appointment – Wrights Hardware Pty Ltd v Evans (1988) 13 ACLR 631; R Jaffe Ltd (in liquidation) v Jaffe (No2) [1932] NZLR 195; Windsor Refrigerator Co Ltd v Branch Nominees Ltd [1961] Ch 375 and Bank of Baroda v Panessar [1987] Ch 335 approved – Jennings v Bank of Scotland plc [2012] IEHC 515, (Unrep, McGovern J, 5/12/2012); Lindsay Petroleum Company v Hurd [1874] LR 5 PC 221; R (Mercury Tax Group Ltd) v R & C Comrs [2008] EWHC 2721 (Admin), [2009] STC 743; Archbold v Scully (1861) 9 HLC 360; Byblos Bank SAL v Al-Khudhairy [1987] BCLC 232; Guthrie v Armstrong (1822) 106 ER 1320; Habib Bank Ltd v Habib Bank AG [1981] 1 WLR 1265; Harold Meggitt Ltd v Discount and Finance Ltd (1938) 56 WN (NSW) 23 and Taylors Fashions Ltd v Liverpool Trustees Co [1982] QB 133 considered – Conveyancing and Law of Property Act 1881 (44 & 45 Vict c 41), s 24 – Companies Act 1963 (No 33), s 316 – Land and Conveyancing Law Reform Act 2009 (No 27), s 64 – Declaration appointment void granted (2012/695COS – Gilligan J – 22/3/2013) [2013] IEHC 130; [2013] ILRM 388
The Merrow Limited v Bank of Scotland Plc

Winding up

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Re Connemara Mining Company Plc

Winding up

Petition to wind up company – Alleged

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Statutory interpretation – Whether offence of 'cheating the revenue' part of Irish law – Whether offence of 'possessing false identity documents with intent' made out and part of Irish law – Whether conduct set out in warrant corresponded to offences particularised – Whether minimum gravity threshold met – Whether correspondence required to be demonstrated – Whether correspondence demonstrated – Whether driving licence included in definition of 'instrument' in Criminal Justice (Theft and Fraud Offences) Act 2001 – EMS v Minister for Justice, Equality and Law Reform [2004] IESC 36, [2004] 1 IR 536 applied – Allen v Emmerson [1944] KB 362; Anderson v Anderson [1895] 1 QB 749; Cork County Council v Whillock [1993] 1 IR 231; Hanafin v Minister for the Environment [1996] 2 IR 321; Inspector of Taxes v Arida Limited [1992] 2 IR 155; McGrath v McDermott [1988] IR 258; FMcK v GWD (Proceeds of crime outside State) [2004] IESC 31, [2004] 2 IR 470; M v D [1998] 3 IR 175; Maguire v DPP [2004] IESC 53, [2004] 3 IR 241; Minister for Justice, Equality and Law Reform v Baron [2012] IEHC 180, (Unrep, Edwards J, 4/5/2012); Minister for Justice, Equality and Law Reform v Desjatnikovs [2008] IESC 53, [2009] 1 IR 618; Minister for Justice, Equality and Law Reform v Ferenca [2008] IESC 52, [2008] 4 IR 480; O'Connell v an tÁrd Chláraitheoir [1997] 1 IR 377; O'H v O'H [1990] 2 IR 558; Powys v Powys [1971] 3 WLR 154; Royal Dublin Society v Revenue Commissioners [2000] 1 IR 270; State (Minister for Lands and Fisheries) v Judge Sealy [1939] IR 21 and Wilson v Sheehan [1979] 1 IR 423 considered – Circuit Court Rules 2001 (SI 510/2001), O 58 r 1 – European Arrest Warrant Act 2003 (Designated Member States) (No 4) Order 2004 (SI 400/2004), art 2, sch 2 – Births and Deaths Registration Act (Ireland) 1880 (c 13), s 38 – Proceeds of Crime Act 1996 (No 30), s 9 – Bail Act 1997 (No 16), ss 2, 3 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), ss 24, 29(2) and 30 and Pts 4, 5 – European Arrest Warrant Act 2003 (No 45), ss 11(1A)(f), 13, 16, 16(1), 20(1), 21A, 22, 23, 24, 38(1)(a)(i), 38(1)(b) and 45C – Criminal Justice (Terrorist Offences) Act 2005 (No 2), ss 79, 80, 81 and 82 – Council Framework Decision 2002/584/JHA, art 2(2) – Surrender ordered (2011/252EXT – Edwards J – 26/10/2012) [2012] IEHC 451
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European arrest warrant

Application for surrender for prosecution for offences – Drugs offences – Objections to surrender – Double jeopardy – Judgments issued in issuing State acquitting respondents of offences and convicting respondents of offences – Warrants seeking rendition for prosecution – Absence of jurisdiction to surrender respondents for serving of sentences – Failure of issuing authorities to advise executing judicial authority of trial and judgments – System depending on mutual trust and confidence – Power to direct informing of issuing judicial authority and Eurojust as to reasons for refusal – European Arrest Warrant Act 2003 (No 45), ss 13 and 16 – Surrender refused (2009/25EXT – Edwards J – 30/11/2012) [2012] IEHC 536
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European arrest warrant

Surrender – Mental health of respondent – Availability of treatment in requesting state – Nature of inquiry to be made by court when considering application for surrender – Presumption that courts of requesting member state will respect human rights and fundamental freedoms of respondent – Evidential burden on respondent – Flight – Whether surrender of respondent would be contrary to constitution – Whether surrender of respondent would be contrary to European Convention on Human Rights 1950 – Whether real risk on surrender of breach of right to life or to inhuman or degrading treatment or punishment – Conditions for persons with psychiatric illnesses detained or imprisoned in requesting state – Whether failure by requesting state to make best possible treatment available to respondent amounted to ill-treatment – Whether risk of suicide of respondent could engage of European Convention on Human Rights 1950, arts 2 and 3 – Whether truly exceptional circumstances present such that interference with family life would breach European Convention on Human Rights 1950, art 8 – Whether sufficient evidence of flight risk – Whether warrant defective – Whether minimum gravity threshold met – Whether correspondence demonstrated – Minister for Justice, Equality and Law Reform v Rettinger [2010] IESC 45, [2010] 3 IR 783 and Minister for Justice, Equality and Law Reform v Tobin [2007] IEHC 15, [2008] IESC 3, [2008] 4 IR 42 applied – Miklis v Lithuania [2006] EWHC 1032 (Admin), (Unrep, Latham LJ and Tugendhat J, 11/5/2006); Minister for Justice, Equality and Law Reform v Bednarczyk [2011] IEHC 136, (Unreported, Edwards J, 5/4/2011) and Minister for Justice, Equality and Law Reform v Stapleton [2007] IESC 30, [2008] 1 IR 669 followed – Boudhiba v National Court of Justice, Madrid [2006] EWHC 167 (Admin), [2007] 1 WLR 124; Brand v Netherlands (App No 49902/99), (Unreported, ECHR, 11/5/2005); Farrell v Criminal Courts of Justice, Dublin [2012] EWHC 676 (Admin), (Unrep, Calvert-Smith J, 8/3/2012); Howes v Her Majesty's Advocate [2010] SCL 341; Jansons v Latvia [2009] EWCA 1845 (Admin); Kaprykowski v Poland (App No 23052/05) (Unrep, ECHR, 3/2/2009); Kudla v Poland (App No 30210/96) (2002) 35 EHRR 11; Kumenda v Poland (App No 2369/09), (Unrep, ECHR, 8/6/2010); Kupczak v Poland (App No 2627/09), (Unrep, ECHR, 25/1/2011); Mazurkiewicz v Poland [2011] EWHC 659 (Admin), (Unrep, Jackson LJ and Cranston J, 22/3/2011); Minister for Justice, Equality and Law Reform v Brady, (Unrep, ex tempore, SC, 14/1/2008); Minister for Justice, Equality and Law Reform v Gorman [2010] IEHC 210, [2010] 3 IR 583; Minister for Justice, Equality and Law Reform v Johnson [2008] IESC 11, (Unrep, SC, 12/3/2008), Minister for Justice, Equality and Law Reform v Mazurek [2011] IEHC 204, (Unrep, Edwards J, 13/5/2011); Minister for Justice, Equality and Law Reform v SMR [2007] IESC 54, [2008] 2 IR 242; Minister for Justice, Equality and Law Reform v Tokarski [2012] IEHC 148, (Unrep, Edwards J, 9/3/2012); Morsink v Netherlands (App No 48865/99), (Unrep, ECHR 11/5/2004), Musialek and Baczyński v Poland (App No 32798/02), (Unrep, ECHR, 26/7/2011), MSS v Belgium and Greece (App No 30696/09) (2011) 53 EHRR 2; Nitecki v Poland (App No 65653), (Unrep, ECHR, 21/3/2002), Norris v Government of the United States of America (No 2) [2010] UKSC 9, [2010] 2 AC 487; R (NS) (Afghanistan)) v Home Secretary (Cases 411/10 & 493/10), [2012] 3 WLR 1374; Peers v Greece (App No 28524/95) (2001) 33 EHRR 51; R v Qazi and Hussain [2010] EWCA Crim 2759; R (Prosser) v Secretary of State for the Home Department [2010] EWHC 845 (Admin); R (Tajik) v United States [2008] EWHC 666 (Admin); R (Warren) v Secretary of State for the Home Department [2003] EWHC 1177 (Admin); R (Rot) v District Court of Lublin, Poland [2010] EWHC 1820, (Unrep, HC, Mitting J, 23/6/2010); Ruiz v Central Court of Criminal Proceedings, Madrid [2007] EWHC 2983, [2008] 1 WLR 2798; Saadi v Italy (App No 37201/06) (2009) 49 EHRR 30; S v Court of Bologna [2010] EWHC 1184 (Admin), (Unrep, Foskett J, 25/5/2010); Spanovic v Government of Croatia [2009] EWHC 723 (Admin), (Unrep, Laws LJ and Openshaw J, 15/5/2009), United States v Tollman [2008] EWHC 184 (Admin), [2008] 3 All ER 150; Vilvarajah v United Kingdom (App No 13163/87) (1992) 14 EHRR 248 and Wrobel v Poland [2011] EWHC 374 (Admin) considered – Minister for Justice, Equality and Law Reform v Kasprowicz [2010] IEHC 207, (Unrep, Peart

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European arrest warrant

Application for surrender to serve balance of life sentences – Punitive element of sentence served – Release on licence – Judicial authority in United Kingdom – Points of objection – Imposition of lengthy period of imprisonment for offence committed in jurisdiction since arrival – Inevitable postponement of order for surrender for lengthy period – Contention that impossible to challenge revocation of release on licence upon return – Possibility of challenging revocation order from within jurisdiction – Necessity for court to deal with application on present facts and circumstances – Contention that surrender unconstitutional as only preventative element of life sentence remained – Absence of preventative element to life sentence under Irish law – Whether in breach of constitutional rights to surrender for serving of preventative phase of sentence only – Differences between penal systems of member states – Obligation to give due respect to penal system in United Kingdom – Whether impossible for applicant to have fled since only preventative element of sentence remained – Minister for Justice v Brennan [2007] IESC 21, [2007] 3 IR 732; Minister for Justice v Stapleton [2007] IESC 30, [2008] 1 IR 669; Stafford v United Kingdom [2002] 35 EHRR 32 and The People (Attorney General) v O'Callaghan [1966] IR 501 considered – European Arrest Warrant Act (No 45), ss 13, 18 and 37 – Extradition Act 1965 (No 17), s 27(1) – Surrender ordered (2007/118EXT – Peart J – 22/1/2009) [2009] IEHC 630
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Application for directions as to service and notification of respondents – Judgment of non-return given by Italian court – Decision of father not to proceed with complaint –Attaining of 16 years by child -Whether further steps needed to be taken by central authority – Steps to be taken on receipt of order of non-return – Council Regulation EC_ 2201/2003, article 11 – Rules of the Superior Courts 1986 (SI 15/1986), O 133, r 11 – Direction that no steps needed to be taken; motion struck out (2013/13HLC – Finlay Geoghegan J – 20/3/2013) [2013] IEHC 114
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Child abduction

Application for return of child – US applicant – Whether applicant enjoyed rights of custody – Whether applicant exercising rights of custody at time of removal – Whether applicant acquired legal right to determine where child should live or right to object to change of country – Defences – Whether respondent discharged burden of proof – Discretion of court – Whether views of child to be taken into consideration – Age and maturity of child – Psychological reports – Onus on respondent to show views of child independently formed – Grave risk for respondent – Risk of arrest of respondent on return to US – Re D (Abduction: Rights of Custody) [2007] 1 FLR 961; Re H (A Minor)(Abduction: Rights of Custody) [2000] 2 AC 291; Abbott v Abbott 560 US _ (2010); Nottingham County Council v B(K) [2010] IEHC 9, (Unrep, Finlay Geoghegan J, 26/1/2010); Hunter v Murrow (Abduction: Rights of Custody) [2005] EWCA Civ 976, [2005] 2 FLR 1119; HI v MG [2001] IR 110; Re B (A Minor)(Abduction) [1994] 2 FLR 249; MSH v LH (Child Abduction: Custody) [2003] IR 390; UA v UTN [2011] IESC 39, (Unrep, SC, 13/10/2011); RM (Abduction: Zimbabwe) 1 AC 1288; Re M [2008] 1 AC 1288; G v R [2012] IEHC 16, (Unrep, Peart J, 12/1/2012); TMM v MD [2002] 1 IR 149; P(I) v P(T) [2012] IEHC 31, (Unrep, Finlay Geoghegan J, 7/2/2012); Re D [2007] 1 AC 619; Re E (Child Abduction: Custody Appeals) [2011] UKSC 27 considered – Hague Convention on the Civil Aspects of International Child Abduction 1980, art 3 – Child Abduction and Enforcement of Custody Orders Act 1991 (No 6) – Order refused (2010/27HLC – Dunne J – 15/2/2012) [2012] IEHC 213
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Asylum

Appeal of dismissal of proceedings on grounds that bound to fail – Proceedings seeking to quash decision that no well-founded fear of persecution existed – Application for order dismissing appeal for failure to comply with legislative requirements – Whether certificate to appeal decision required – Whether order dismissing proceedings determination of High Court of application to leave to apply for judicial review – AB v Minister for Justice [2002] 1 IR 296 considered – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5(3)(a) – Motion dismissed (9/2012 – SC – 14/3/2013) [2013] IESC 18
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Asylum

Application for leave to seek judicial review – Certiorari – Congo – Challenge to decision of tribunal – Alleged failure to apply forward-looking assessment of risk – Alleged insufficient consideration of documentary evidence – Negative credibility findings – Material non-disclosure – Failure to disclose prior application for asylum in Belgium – Failure to disclose transit through Italy – Submissions on alleged risk based on sex simpliciter requested but not submitted – Acceptance of gender and nationality of applicant – Country of origin information regarding egregious gender-based persecution – Failure to address claim based on risk of future gender-based persecution – Whether substantial grounds for review established – QFC v Refugee Appeals Tribunal [2012] IEHC 4, (Unrep, Cooke J, 12/1/2012); MAMA v Refugee Appeal Tribunal [2011] IEHC 147, (Unrep, Cooke J, 8/4/2011) and R v Secretary of State ex parte Islam [1999] 2 AC 629 considered – Refugee Act 1996 (No 17), s 13 – Leave granted (2009/788JR – Clark J – 26/6/2012) [2012] IEHC 487
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Asylum

Application for leave to seek judicial review – Submission of Ghanaian nationality in

interview – Subsequent claim of Nigerian nationality on appeal – Preliminary issue – Whether tribunal had jurisdiction to determine claim where all material facts changed – Alleged selective use of country of origin information – Alleged failure to weight information or provide reasons for discarding information – Credibility – Conclusions on demeanour – Explanation of findings – Failure to explain previous misleading of asylum authorities – DVTS v Minister for Justice [2008] IEHC 451, [2008] 3 IR 476; MN v Refugee Appeals Tribunal [2008] IEHC 218, (Unrep, Birmingham J, 2/7/2008); GO v Refugee Appeals Tribunal [2013] IEHC 89, (Unrep, Mac Eochaidh J, 18/6/2013); AAT v Refugee Appeals Tribunal [2009] IEHC 51, (Unrep, Clark J, 11/2/2009); FOO v Refugee Appeals Tribunal [2012] IEHC 46, (Unrep, Hogan J, 2/2/2012) and Camara v Minister for Justice (Unrep, Kelly J, 26/7/2000) considered – Refugee Act 1996 (No 17), ss 11, 16 and 17 – Leave refused (2009/565JR – Mac Eochaidh J – 18/6/2013) [2013] IEHC 350
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Asylum

Application for refugee status – Whether decision-maker considering claim of persecution arising from membership of clan must consider whether applicant belongs to clan – Whether tribunal member considered claim of membership of particular minority in Somalia – Whether sufficient to reject claim of persecution arising from membership of particular clan on basis that account of past events implausible – Whether requirement to consider risk of future persecution where applicant lied about past experiences – CB (DR Congo) v Refugee Appeal Tribunal [2012] IEHC 487, (Unrep, Clark J, 26/6/2012); Da Silveira v Refugee Appeals Tribunal [2004] IEHC 436 , (Unrep, Peart J, 9/7/2004) and MAMA v Refugee Appeals Tribunal [2011] IEHC 147, [2011] 2 IR 729 followed – AFSJ v Refugee Appeals Tribunal [2010] IEHC 144, (Unrep, Clark J, 10/1/2010) and ASO v Refugee Appeals Tribunal [2009] IEHC 607, (Unrep, Cooke J, 9/12/2009) considered – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006) – Refugee Act 1996 (No 17), ss 2, 11 and 13 – Certiorari granted (2011/237JR – Clark J – 1/11/2012) [2012] IEHC 453
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Asylum

Application for leave to seek judicial review – Zimbabwe – Rejection of claim for asylum as being not credible – Enlargement of claim at interview – Differences between claim at interview and that outlined in questionnaire – Claim of acts of persecution commencing with publication of newspaper article about applicant – Adverse credibility findings – Oral appeal – Whether failure to conduct appeal in accordance with natural and constitutional justice – Whether conjecture in relation to finding that applicant not person named in newspaper article – Whether insufficient regard placed on article – Whether insufficient regard placed on medical report outlining injuries – Rationality and reasonableness of assessment of credibility – Inconsistencies in changing claims – Overstating of role of content of article in decision – Whether decision on credibility vitiated by material error – Whether substantial grounds for review established – Pamba v Refugee Appeals Tribunal (Unrep, ex tempore, Cooke J, 19/5/2009) and ME v Refugee Appeals Tribunal [2008] IEHC 192, (Unrep, Birmingham J, 27/6/2008) considered – Refugee Act 1996 (No 17), ss 11B and 13 — European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), reg 5 – Leave refused (2009/574JR – Clark J – 4/10/2012) [2012] IEHC 489
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Asylum

Application for judicial review – Moldova – Challenge to decision of tribunal – Finding that applicant had failed to show that state protection was unavailable – Negative credibility findings at initial stage – Absence of entitlement to oral hearing on appeal – Requirement for high degree of care where appeal being considered on basis of documents alone – Absence of opportunity to review demeanour – Finding that applicant failed to bring complaint to Ombudsman – Whether conclusion regarding Ombudsman fair having regard to prior efforts of applicant and limited information available to tribunal regarding Ombudsman – Absence of obligation to exhaust all possible avenues of redress before seeking international protection – Reasonable steps to seek protection to be taken – Canada (AG) v Ward [1999] 2 SCR 689; DK v Refugee Appeals Tribunal [2006] IEHC 132, [2006] 3 IR 368 and Llanaj v Refugee Appeals Tribunal [2007] IEHC 53, (Unrep, Feeney J, 9/2/2007) considered – Refugee Act 1996 (No 17), ss 11 and 13 – Relevant part of decision quashed and remitted to tribunal member (2008/1202JR – Clark J – 29/6/2012) [2012] IEHC 486
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Asylum

Application for judicial review – Certiorari – Telescoped hearing – Iraq – Claim of persecution based on imputed political opinion or membership of social group – Claim to be minor – Validity of identity card questioned – Age assessment – Finding that applicant over 18 years – Refusal of application for reassessment of age – Negative credibility findings – Adequacy of age assessment – Whether interview unfair and oppressive – Whether core claim considered by decision maker – Correct method of assessing facts and circumstances – Failure to make findings on well-foundedness of fear of persecution based on past of father – Absence of reasons for decision to disregard seemingly reasonable explanation for not apply for asylum elsewhere – Treatment of medical documentation – Whether appeal hearing fair – Whether decision based on peripheral findings rather than assessment of core claim – S v Secretary of State for Home Department [2006] EWCA Civ 1153, [2007] INLR 60 and GK v Minister for Justice, Equality and Law Reform [2002] 1 ILRM 81 considered – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), reg 5 – Decision quashed and fresh appeal before different decision maker directed (2009/139JR – Clark J – 14/3/2013) [2013] IEHC 117
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Asylum

Refusal of application on behalf of son on basis of fear of kidnapping – Prior refusal of application of mother on grounds that basis for application ran counter to country of origin information – Fears of scarification and female genital mutilation – Answer given in interview that claim of son based on same claim as mother – Special position of children in asylum system – Whether tribunal erred in treating failed application of mother as relevant to claim of applicant son – Whether tribunal acted irrationally in considering evidence and country of origin information – Okunade v Minister for Justice, Equality and Law Reform [2012] IESC 49, [2013] 1 ILRM 1 and Tierney v An Post [2000] 1 IR 536 followed – Refugee Act 1996 (No 17), ss 11 and 16(16) – Decision quashed (2011/1102JR – MacEochaidh J – 9/11/2012) [2012] IEHC 455
Reagan Oloo-Omee (A Minor) v Refugee Appeals Tribunal

Asylum

Application for judicial review – Somalia – Challenge to decision of tribunal – Alleged failure to assess whether well-founded fear of persecution on grounds of Bajuni ethnicity – Alleged failure to make specific finding regarding ethnicity – Alleged error of fact in stating documentation not submitted – Rebuttable presumption that applicant not refugee where prior application in another State submitted – Assessment of prior application on basis of Burundian ethnicity – Standard of decision making required – Whether clear finding on ethnicity made – Whether fear of persecution on grounds of ethnicity assessed Meadows v Minister for Justice, Equality and Law Reform [2010] IESC 3, [2010] 2 IR 701 considered – Refugee Act 1996 (No 17), s 11 – Decision quashed (2011/787JR – Mac Eochaidh J – 7/2/2013) [2013] IEHC 44
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Asylum

Application for leave to seek judicial review – Alleged unlawful depriving of oral hearing – Pakistan – Alleged persecution by Taliban – Negative credibility findings – Inconsistency in interviews – Implausibility of claims – Finding that no Convention reason for harm existed – Entitlement to oral hearing – Whether advantage in presenting evidence orally – N(SU) v Refugee Applications Commissioner [2012] IEHC 338, (Unrep, Cooke J, 30/3/2012); VZ v Minister for Justice [2002] 2 IR 135; AD v Refugee Applications Commissioner [2009] IEHC 77, (Unrep, Cooke J, 27/1/2009); XLC v Minister for Justice [2010] IEHC 148 (Unrep, Cooke J, 10/2/2010); S v Refugee Applications Commissioner [2008] IEHC 399, (Unrep, Birmingham J, 8/12/2008) and WMM v Refugee Appeals Tribunal [2009] IEHC 492, (Unrep, Cooke J, 11/11/2009) considered – – Refugee Act 1996 (No 17), s 13 – Leave refused (2012/310JR – Mac Eochaidh J – 19/2/2013) [2013] IEHC 71

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Application for leave to seek judicial review – Challenge to validity of deportation order – Substantive proceedings abandoned as leave to remain granted – Whether certificate of leave to appeal ought be granted against limited costs order – Whether certificate necessary – Whether certificate ought be granted – Applicable test – Whether decision involved point of law – Whether point of law of exceptional public importance – Whether desirable in public interest that appeal be taken – I v Minister for Justice, Equality and Law Reform [2011] IEHC 66, (Unrep, Hogan J, 21/2/2011); L & O v Minister for Justice, Equality and Law Reform [2003] 1 IR 1; Alli v Minister for Justice, Equality and Law Reform [2009] IEHC 595, [2010] 4 IR 45; Gerardo Ruiz Zambrano v Office National de l'Emploi (Case C-34/09) [2012] 2 WLR 886 and Canty v Private Residential Tenancies Board [2008] IESC 24, [2008] 4 IR 592 considered – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5(3)(a) – Certificate refused (2010/548JR – Hogan J– 9/5/2013) [2013] IEHC 501

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Deportation

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

Companies (Amendment) Bill 2014
Bill 5/2014
[pmb] Deputy Stephen S. Donnelly

Seanad Reform Bill 2014
Bill 6/2014
[pmb] Deputy Micheál Martin

Thirty-Fourth Amendment of the Constitution (Members of the Houses of the Oireachtas) Bill 2014
Bill 10/2014
[pmb] Deputy Peter Mathews

Protection of Residential Mortgage Account Holders Bill 2014
Bill 11/2014
[pmb] Deputy Michael McGrath

Garda Síochána (Amendment) Bill 2014
Bill 12/2014
[pmb] Deputy Niall Collins

Equality (Amendment) Bill 2014
Bill 14/2014
[pmb] Deputy Richard Boyd Barrett

Broadcasting (Amendment) Bill 2014
Bill 15/2014
[pmb] Deputy Stephen S. Donnelly

Wind Turbine Regulation Bill 2014
Bill 19/2014
[pmb] Deputy Michael Colreavy, Deputy Martin Ferris, Deputy Brian Stanley

Open Adoption Bill 2014
Bill 18/2014
[pmb] Deputy Anne Ferris

Irish Human Rights and Equality Commission Bill 2014
Bill 20/2014

BILLS INITIATED IN SEANAD ÉIREANN DURING THE PERIOD 29TH JANUARY 2014 TO 25TH MARCH 2014

Planning and Development (Strategic Infrastructure) (Amendment) Bill 2014
Bill 13/2014
[pmb] Senators Rónan Mullen, Feargal Quinn, Mary Ann O'Brien

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Bill 92/2013
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Report Amendments (Dáil)
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ESB (Electronic Communications Networks) Bill 2013
Bill 135/2013
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Report Amendments (Dáil)
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Health Identifiers Bill 2013
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Oireachtas (Ministerial and Parliamentary Offices) (Amendment) Bill 2013
Bill 100/2013
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Road Traffic (No. 2) Bill 2013
Bill 74/2013
Committee Amendments (Seanad)
Report Amendments (Seanad)
Enacted

Upward Only Rent (Clauses and Reviews) Bill 2013
Bill 94/2013
Committee Amendments
Passed by Seanad Éireann

Criminal Justice (forensic evidence and DNA database system) bill 2013
Bill 93/2013
Committee Amendments (Dail)

Open Adoption Bill 2014
Bill 18/2014
First Stage Introduced (Dail)

Wind Turbine Regulation Bill 2014
Bill 19/2014
First Stage Introduced (Dail)

For up to date information please check the following websites:

Bills & Legislation

http://www.oireachtas.ie/parliament/

Government Legislation Programme updated 15th January 2013

http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/

Defrauding the Public Purse; Sentencing for Revenue Fraud

Aaron Desmond BL

Introduction

The onset of the financial crisis has caused the Courts to re-examine their perception and approach towards Revenue fraud. In recent years, three cases have dealt with Revenue fraud in depth: *DPP v. Paul Murray,* [2012] IECCA 60 (2012); *DPP v John Hughes* [2012] IECCA 85 and *Paul Begley v DPP* [2013] IECCA. Although these cases deal with three different types of fraud with different levels of moral culpability; nonetheless all such crimes involve defrauding the public purse. Therefore, these cases should give a clear indication of the attitude of the Irish courts towards sentencing for Revenue fraud.

DPP v. Paul Murray

This case involved the largest unearthed social welfare fraud in the history of the State. The Defendant committed this fraud by claiming social welfare under eight different aliases and was said to have enriched himself by a quarter of a million euros as a result. In the Circuit Court, the Defendant pleaded guilty to having a false passport and twenty five counts of social welfare fraud but was only able to repay €11,000 of the defrauded amount to the State. The Plaintiff was convicted and received a total sentence of twelve and a half years.

The case was appealed to the Court of Criminal Appeal where the applicant submitted that the length of the sentence infringed on the totality principle and that it was excessive for such a crime. The judgment is significant in that it focused on how a court should sentence Revenue frauds in a time of financial crisis. The court acknowledged the sentence imposed by the Circuit Court did infringe on the totality principle. However, it also acknowledged the seriousness of the crime and the current economic reality in the country holding that:

> "… [o]ffences of this kind strike at the heart of the principles of equity, equality of treatment and social solidarity on which the entire edifice of taxation and social security systems lean. This is especially so at a time of emergency so far as the public finances are concerned."

The court reasoned that social solidarity should be upheld: those who earn pay their taxes so those in need can be taken care of. To this end, the court made it clear that these crimes were not victimless or with trivial moral delinquency. While the Court viewed the twelve year sentence as violating the totality principle, it substituted a nine year sentence and emphasised that the culpability was considerable.

What is interesting about this case is that it suggested a more serious deterrent was required. In that regard, the court suggested that those found guilty of Revenue fraud should generally face an "immediate and appreciable custodial sentence". Thus the *Murray* case appeared to, not only, outline the seriousness of Revenue fraud but also to suggest a need for a serious deterrent against such crimes.

DPP v John Hughes

Almost nine months later, the case of *The DPP v John Hughes* was appealed from the Circuit Court to the Court of Criminal Appeal. The facts of this case involved the fraudulent use of a VAT number of a company that was no longer trading. This failure to make VAT payments amounted to €226,000 and took place over a three year period. The Plaintiff successfully made great efforts to settle all matters with Revenue and pleaded guilty to the above matter. In imposing a four year sentence in the Circuit Court, the Judge Stated that in cases of tax evasion/Revenue fraud that a custodial sentence was a viable option for a sentencing Judge in that it would be a significant deterrent for future would be criminals.

In the Court of Criminal Appeal, it was stated that the Circuit Court Judge rightly took a serious view of Revenue fraud and the notion of social solidarity as outlined in the *Murray* case. However, the Court then attempted to ring fence the *Murray* decision to its own unique facts and downplay notions that it created any new sentencing principle in relation to Revenue frauds. Accordingly, the *Hughes* case could appear to be an attempt to contain and/or row back from the *Murray* decision.

The Court of Criminal Appeal also found that the Circuit Court Judge had erred in his suggestion that defaulting taxpayers could "buy themselves away or out of a custodial sentence". The Court stated that this was an error in that it suggested that payments by way of tax, interest and penalties should wholly or largely be discounted which is not the case because if the civil penalties are met it does not mean that criminal punishment will not be administered. Alternatively, it suggested that in administrating a criminal sentence, the extent of financial reparations should be seriously taken into account as a mitigating factor. In the present case it was found that the Circuit Court Judge had erred in focusing too much on deterrence without adequately taking mitigating factors into consideration. The appellant's sentence was reduced from four years to two years on account of his very extensive settlements; cooperation with Revenue; his guilty plea; his rehabilitation and other mitigating factors. Therefore, it would appear that the *Hughes* case demonstrated that *Murray* did not alter or set any new sentencing principles. Furthermore, it is also clear that all other mitigating factors must be weighted

and taken into account in sentencing without placing deterrence above other factors.

DPP v Paul Begley

The *DPP v Paul Begley* is the most controversial and prominent case involving import duty in the State. This case involved the defendant labelling imported garlic from China as apples over a four year period; resulting in an estimated avoidance of payment to the Revenue of €1.6 million. In the Circuit Court, the Defendant pleaded guilty and the court acknowledged that he had fully co-operated with the investigation and adhered to an agreement, through his company, to refund Revenue an agreed amount. In sentencing, the Judge noted that "I'm sentencing Mr.Begley on two principles alone: punishment for Mr Begley and deterrence for others who may attempt to enter upon such a scheme". Begley was subsequently sentenced to six years imprisonment which was the longest sentence handed down for such a crime in the State.

The case was appealed to the Court of Criminal Appeal where the Court reviewed the *Murray* case in both facts and judgement with the objective of giving clarity to the sentencing of Revenue fraud. To achieve this aim, the court first dealt with whether there were sentencing guidelines handed down for Revenue fraud in the *Murray* case. In deciding this point, the court held that the judgement did not intend to, nor did it, in fact, create any substantial departure from existing principles. This was reinforced by the notion that such guidelines would create a blanket approach in tax fraud cases which the court voiced five concerns over:

1. The fact that such crimes were totally dissimilar to more serious crimes;
2. The variation in such cases being so great;
3. The reality that such cases are not frequently prosecuted and are rather dealt with in the civil side, where publicity and/or penalties and interest were more appropriate;
4. Admissions and pleas are crucial in dealing with white collar crimes;
5. Incentivising co-operation must not be lost.

- Furthermore, the court found that such guidelines would also be contrary to the Supreme Court's decision in *The People (Director of Public Prosecutions) v. Tiernan* [1988] I.R. 250 and so the court instead pointed to the *Hughes* case as how to interpret the *Murray* case correctly.

Secondly, the court dealt with the notion of mitigating factors and again highlighted the importance of such factors in considering an appropriate sentence. On this point, the court stated that "Consideration, without effect and without explanation, is of no value". Therefore, a court must not only take such mitigating factors into consideration but it must also do so transparently and expressly when coming to a decision.

The Court of Criminal Appeal then reduced the six year sentence to one of two years.

Conclusion

From the above examination, a number of conclusions can be drawn from the law in this area. Firstly, Revenue fraud, although viewed consistently as very serious, does not attract an automatic custodial sentence. Secondly, it appears that mitigating factors, especially paying back the entire defrauded amount, are given significant weight when sentencing. Moreover, these mitigating factors must not only be considered but must also be seen to be considered.

Two years after the *Murray* case, it is fair to say that the decision has been clarified. It is also clear that the freedom of the courts surrounding Revenue fraud and sentencing has been copper fastened and is unchanged by time, tolerance or financial crisis. ■

Guardianship Reform: An Assessment of the Children and Family Relationships Bill 2014

Lydia Bracken BL*

Introduction

The Children and Family Relationships Bill 2014 seeks to reform and modernise many aspects of Irish family law. Included in the package of reforms are provisions which will allow for guardianship to be extended to civil partners, step-parents, persons co-habiting with a biological or adoptive parent and persons acting in loco parentis for a specified period. The General Scheme of this Bill was published on 30th January 2014 and it has clarified that the appointment of a new guardian will not affect the previous appointment of any other person as a guardian. Initially, the briefing note to the Bill, which was published in November 2013, stated that although the extension of guardianship would be possible, the child would only be permitted to have a maximum of two guardians.[1] This proviso would have meant that despite the fact that a child may have three persons acting in the role of parent, it would not have been possible to extend guardianship to the third person without severing the guardianship rights of one of the parents—something which does not seem to be possible under Irish law. The proposals contained in the General Scheme, however, if ultimately enacted, will mean that guardianship could be extended to a non-parent in a manner which would effectively allow for the child to have three or more guardians.

This paper will assess the suitability of the proposed scheme and it will address the perceived advantages and disadvantages of allowing for the appointment of multiple guardians. The discussion will begin with an analysis of the current legislative framework for guardianship in this country so as to highlight why guardianship reforms are necessary in the first place. The nature of non-parent guardianship will then be discussed and finally the arguments in favour and against the appointment of multiple guardians will be addressed.

Current legislative provisions

Guardianship refers to the rights and duties associated with raising a child. It is concerned with the most significant aspects of the child's life, for example, choosing where the child should be educated, according to which religious belief he or she is to be reared, and whether the child should undergo serious medical treatment.[2] Guardianship is not however a right for the parent. Rather, as Shannon explains, it entails both rights and responsibilities, "in particular the duty to ensure that the child is properly cared for and that decisions relating to the child are made in his or her best interests."[3]

At present in Ireland, where the parents of a child are married to each other, both parents are automatically made joint guardians of the child.[4] Where the child is born outside of marriage, the mother is deemed to be the sole automatic guardian.[5] A non-marital father may obtain guardianship rights in relation to his child, either by agreement with the mother[6] or by court order.[7]

Currently, there is only a limited facility, namely testamentary guardianship, available for a non-genetic spouse or partner to be made a guardian of his or her partner's child. Under section 7 of the Guardianship of Infants Act 1964, a guardian may, by will, make any other person a guardian in the event of his or her death. Should the biological parent fail to make such an appointment, the spouse or partner may apply to the court for guardianship.[8]

Outside of this context, however, the non-biological partner cannot be made a guardian. This partner is also precluded from applying for custody of his or her partner's

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1 *Children and Family Relationships Bill 2013 Briefing Note* http://www.justice.ie/en/JELR/Children%20and%20Family%20Relationships%20Bill%202013%20141113.pdf/Files/Children%20and%20Family%20Relationships%20Bill%202013%20141113.pdf (Accessed: 17/02/2014).

2 Shannon, *Child Law*, 2nd ed. (Dublin: Thomson Reuters, 2010) at p. 724.

3 *Ibid.* It should also be noted that the Law Reform Commission of Ireland has recommended that the term "guardianship" be replaced with that of "parental responsibility". This proposed change in terminology would reflect the fact that guardianship entails both parental rights and duties and would arguably encourage a more child-centred approach to the concept. The General Scheme, however, retains the existing terminology of "guardianship" on the basis that this is the terminology used in Article 42A of the Constitution. Law Reform Commission, LRC 101-2010, *Report on Legal Aspects of Family Relationships* (Dublin: Law Reform Commission, 2010).

4 Guardianship of Infants Act 1964, section 6(1)

5 *Ibid.*, section 6(4)

6 *Ibid.*, section 2(4), as inserted by section 4 of the Children Act 1997

7 *Ibid.*, section 6A(1), as inserted by section 12 of the Status of Children Act 1987. It should be noted though that the General Scheme, does, however, propose to change the allocation of guardianship to an unmarried father in circumstances where he has resided with the mother for certain periods.

8 Guardianship of Infants Act 1964, section 8.

child[9] and is, at present, only permitted to apply for access.[10] Furthermore, it should be noted that these provisions apply not only in the perhaps more obvious "step-parent" scenario but also in circumstances where the child has been born via artificial reproductive technologies using donated genetic material. The 2014 Bill does also propose to deal with the question of parentage where such technologies are used but, at present, there is no Irish legislation governing this area. Therefore, currently, where a child is born using donated genetic material, only the genetic parents will be entitled to apply for guardianship.[11]

The absence of any mechanism to extend guardianship and custody to the non-biological partner poses a major obstacle to that social parent to fully protect his or her partner's child. For example, if the child were to become ill, the non-biological parent would not be permitted to consent to his or her medical treatment. This parent may also be prevented from attending parent-teacher meetings, or from signing a consent form for a class trip.

More pertinent however, is the fact that with no legal relationship, there are much fewer obligations imposed on a non-biological parent to provide for the child, despite the fact that he or she is acting in a parental role. While some such duties are conferred upon step-parents, no equivalent obligations are placed upon civil partner parents. The Civil Partnership and Certain Obligations of Cohabitants Act 2010 makes virtually no reference to children. As such, disparities have been noted between the position of step-children and the children of civil partners in a number of areas including maintenance, family home protection, the dissolution of a civil partnership, the protection of tenancies, and civil liability.[12] Such disparities leave the children of same-sex relationships in a more vulnerable situation than step-children and this weaker legal position stems from the sexual orientation of their parents.

Therefore, the current legislative scheme for guardianship in this country only accommodates genetic parents or, where they have died, testamentary guardians. It is submitted that this scheme leaves the children of non-traditional families in a vulnerable position given that they have no legal relationship with their social parents who care for them on a daily basis. In addition, it could be argued that in failing to provide a mechanism to legally recognise existing de facto family ties, Ireland is acting in breach of its obligations under Article 8 of the European Convention on Human Rights.[13] Consequently, it is submitted that reforms in this area are long overdue.

9 *Ibid.*, section 10(2)(a).

10 Guardianship of Infants Act, section 11B provides that persons "in *loco parentis*" may apply for access.

11 As per the judgment in *M.R. & Anor. v An tArd Chlaraitheoir* [2013] IEHC 91. It should be noted that this decision is, however, currently under appeal to the Supreme Court.

12 For a detailed comparison between the position of step-children and the children of civil partners see: Barrington, *Opinion on the Civil Partnership Bill 2009* (Marriage Equality, 2009); Ryan, *The Civil Partnership Bill: Your Questions Answered. A Comprehensive Analysis of the Civil Partnership Bill* (Dublin: GLEN, 2009); Daly, "Ignoring Reality: Children and the Civil Partnership Bill in Ireland" (2011) 4 I.J.F.L. 82.

13 For a discussion of the ECHR case law in this area see: Bracken, "Is there a case for Same-Sex Adoption in Ireland?" (2013) 3 *Irish Journal of Family Law* 79 pp. 84-85.

Reform: Children and Family Relationships Bill 2014

The General Scheme to the Children and Family Relationships Bill contains proposals which, if enacted, will allow for a person who is not the child's parent to apply for guardianship where certain conditions are met:

1. The intended guardian must be married to or in a civil partnership with a parent of the child or be cohabiting for over 3 years in an intimate and committed relationship with the parent[14] and have shared responsibility for caring for the child with the child's parent for at least two years;[15] or
2. The intended guardian is an adult who has provided for a child's day-to-day care for a continuous period of more than 12 months[16] in circumstances where the child has no existing parent or guardian able and willing to care for him or her.[17]

In applying for the appointment of an additional guardian, the consent of each guardian of the child is required as is the consent of the child if he or she is over 12 years of age and that of the proposed guardian.[18] The court may, however, dispense with the consent of one of the existing guardians or that of the child where "it is satisfied that the consent is unreasonably withheld and that it is in the best interests of the child to do so."[19]

These reforms represent a progressive step forward for Irish family law. In particular, it is encouraging the Government has not included the proviso set out in the briefing note which sought to limit the child to a maximum of two guardians. Head 39(2) of the General Scheme specifically states that the appointment by the court of a guardian "shall not affect the prior appointment of any person as guardian... unless the court otherwise orders." Thus, where a non-parent guardian is appointed, he or she will act alongside the parent guardians and the appointment will not affect the parent's rights.

Furthermore, it should be noted that the appointment of multiple guardians is not a novel concept in Irish law. In the context of testamentary guardianship, the current law does not impose a cap on the number of guardians who may be appointed by will or by deed.[20] Therefore, if the Government had chosen to limit the appointment of guardians in the proposed legislation, it would create an anomaly in the law whereby up to four guardians could be appointed upon the death of the parents but only two guardians could hold office while the parents are alive.

The following sections will discuss the arguments for and against the appointment of multiple guardians. Before

14 General Scheme of the Children and Family Relationships Bill 2014, Head 39(3)(a)(i).

15 *Ibid.*, Head 39(3)(a)(ii).

16 *Ibid.*, Head 39(3)(b)(i).

17 *Ibid.*, Head 39(3)(b)(ii).

18 *Ibid.*, Head 39(3)(4).

19 *Ibid.*, Head 39(3)(5).

20 Section 9(1) of the Guardianship of Infants Act 1964 specifically states that "where two or more persons are appointed to be guardians they shall act jointly and on the death of any of them the survivor or survivors shall continue to act."

turning to these arguments, however, it is necessary to outline the nature of non-parent guardianship.

The nature of non-parent guardianship

Head 34 of the General Scheme provides that the fact of having guardianship in relation to a child means that the guardian has:

> (a) all the duties, powers, rights and responsibilities that a parent of the child has in relation to the upbringing of the child;
> (b) every duty, power, right and responsibility that is vested in the guardian of a child by any enactment; and
> (c) every duty, power, right and responsibility, that immediately before the commencement of this Act was vested in the guardian of a child by any enactment or rule of law.[21]

Guardianship therefore includes *all* of the rights and obligations of a parent (whether or not that parent is a guardian).[22] As such, it would seem that a non-parent guardian, appointed by court order, would consequently enjoy the all of the same rights and obligations as parent guardians. Whether all such rights and obligations are indeed conferred upon non-parent guardians is, however, open to question. In particular, it is notable that section 3(1) of the English Children Act 1989 is broadly similar to Head 34 in that it gives a person with parental responsibility "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child." Notwithstanding this wording, however, it is understood that non-parents who obtain parental responsibility *do not* have all of the same powers and duties as parental guardians. For example, non-parents who obtain parental responsibility do not have the right to object or consent to the making of an adoption order or any right to appoint a different guardian to replace them upon their own death.[23] These are rights which only parents may exercise.

However, the fact that the English scheme limits the powers of non-parents in certain areas does not necessarily mean that the same interpretation will be given to Head 34 in this jurisdiction. As such, it could be argued that a strict reading of Head 34 implies that the appointed guardian's consent would be required before an adoption order could be made. Whether this is indeed the case, however, remains to be seen. The 2014 Bill does specifically state that where an additional guardian is to be appointed, the consent of "each guardian of the child", as opposed to "each parent of the child" is required. Therefore, it would seem that the appointed guardian will nonetheless have the same input in relation to the appointment of another guardian as the parents will have.

In relation to testamentary guardianship, however, the General Scheme only makes provision for "a child's parent who is guardian" to appoint a guardian by will or by deed to replace them upon their death. Furthermore, it should be noted that where a testamentary guardian has been appointed, Head 40(3) of the General Scheme provides that "[t]he testamentary guardian shall act jointly with the surviving parent of the child so long as the surviving parent remains alive, unless the surviving parent objects to his so acting."[24] This Head would seem to establish that only the surviving parent and not the non-parent guardian may object to the appointment of the testamentary guardian. That said though, if Head 34 is to be interpreted in a manner which gives the guardian all of the rights of the parent, it could be argued that a non-parent guardian should also be able to make use of the parental powers in relation to the appointment of, and objection to, a testamentary guardian. This is, however, by no means clear and so it is submitted that this Head will require clarification going forward.

In addition, it is important to note that there are still differences between the nature of guardianship and that of natural parenthood or adoption. For example, guardianship does not create a line of lineage and so the child does not acquire any inheritance rights in respect of the social parent, although, of course, the social parent is at liberty to voluntarily provide for the child in his or her will.[25] Furthermore, guardianship does not create any legal relationship between the child and the appointed guardian's extended family, as would be the case where an adoption order is made. Finally, it should be noted that guardianship effectively "expires" once the child reaches the age of majority. As such, once the child reaches the age of 18 years, the rights and responsibilities of the non-parent will come to an end. By contrast, a natural parent guardian, while also losing his or her specific guardianship rights, will remain a legal parent for life. These points should be borne in mind in considering the arguments for and against the appointment of multiple guardians.

Arguments in favour of three or more guardians

It is submitted that the central argument to be made in favour of a scheme which allows for three or more guardians is that, in many cases, the child will already have three or more persons acting in a parental capacity and so the law should reflect this. This point was made by the Law Reform Commission in its Report on Legal Aspects of Family Relationships. In this Report, the Commission emphasised that the statutory framework for guardianship in this country needed to "reflect the reality that in some circumstances a child may have more than two adults fulfilling parental roles."[26] As such, it recommended that legislation should be enacted so as to facilitate the extension of parental responsibility to civil partners and step-parents in a manner

21 General Scheme of the Children and Family Relationships Bill 2014, Head 34(1).

22 A guardian who is neither a parent nor a person who is in loco parentis of the child does not, however, have any legal duty to support the child from his or her own resources. General Scheme of the Children and Family Relationships Bill 2014, Head 36(8).

23 Hoggett, *Parents and Children*, 4th ed. (London: Sweet & Maxwell, 1993) at p. 110.

24 General Scheme of the Children and Family Relationships Bill 2014.,Head 40(3).

25 Furthermore, it should be noted that where that social parent is a step-parent or civil partner parent, the child will be treated the same as a biological child for the purposes of inheritance tax.

26 Law Reform Commission, LRC 101-2010, *Report on Legal Aspects of Family Relationships* (Dublin: Law Reform Commission, 2010) at p. 39.

which would not remove parental responsibility from the biological parents of the child.[27]

A proviso limiting the number of guardians would therefore run contrary to the recommendations of the LRC. In addition, imposing a cap on the number of guardians would, in effect, mean that one of the existing guardians—a natural parent—would have to give up his or her guardianship rights so as to accommodate a new guardian. This, however, does not seem to be possible under Irish law. Certainly, for the post-divorce child, the briefing note proposals would be inapplicable given that married natural parents (even if they are now divorced) cannot be removed as guardians nor can they voluntarily give up their rights other than in the case of adoption as envisaged by Article 42A.[28] Outside of this context, the rights of natural parents are deemed to be imprescriptible and inalienable. As Henchy J. stated in *G v An Bord Uchtála*,[29] "married parents are not allowed by the Constitution to cast off with impunity their duty to educate their children (the duty being an inalienable one)."[30] Therefore, married parents are not permitted to abdicate their guardianship rights other than where an adoption order is made.

Questions also arise as to whether unmarried parents could voluntarily give up their guardianship rights. In *G v An Bord Uchtála*, Henchy J. did state that the "constitutional inhibition" applying to married parents does not apply to the unmarried mother.[31] That case was, however, concerned with the withdrawal of an unmarried mother's consent to the adoption of her child and so, although it is arguable the statement could be applied in the context of guardianship, this is not altogether clear. The present legislation does specifically provide that an unmarried father who has been appointed as a guardian may be removed as such by court order,[32] but there is no equivalent provision relating to unmarried mothers. Indeed, it is notable that the Department of Justice and Equality website states that guardianship rights cannot be removed from a mother "unless it is the case that the child is placed for adoption."[33] Therefore, it would seem that only an unmarried father may be removed as a guardian but an unmarried mother cannot.

In any case, even if it was possible to remove unmarried mothers as guardians, the potential for their removal would mean that there would be no particular benefit in choosing to extend guardianship to a non-parent rather than applying for an adoption order. The effect of an adoption order is to extinguish all legal ties with the other natural parent and it is seen as an inappropriate method for regulating existing family relationships for this reason. As such, a model of guardianship which allowed for, or indeed required, the termination of a natural parent's guardianship rights could be similarly criticised as being inappropriate for this reason.

Therefore, if guardianship is to be regarded as a viable alternative to adoption, it is submitted that the proposed legislation is correct in allowing for a third person to be appointed as a guardian. After all, given that the intention of the Children and Family Relationships Bill 2014 is to acknowledge contemporary family forms, it would arguably have failed in this objective if the appointment of guardians was to be restricted in the manner proposed by the briefing note.

Arguments against the appointment of multiple guardians

Perhaps the main concern raised against the appointment of multiple guardians relates to the fact that to share guardianship between three, as opposed to two, persons would create a more difficult environment for the adults involved. Each guardian would have an equal say in matters concerning the most important aspects of the child's life which would mean that the parents would then be required to consult with a third or fourth person on such matters, where previously they simply had to consult with one another. However, while this may be regarded as a burden for the parents, it should be borne in mind that guardianship exists for the benefit of the child. As such, if the appointment of the non-parent guardian is deemed to be in the child's best interests, this would clearly be more relevant than consideration of any potential inconvenience which the parents may suffer.

Another perceived difficulty associated with an enhanced status for step-parents, noted by Bainham, is that "it could be seen as shutting out, or at least diluting, the parental contribution of the non-resident parent..."[34] Indeed, he contends that this is precisely what has occurred in some cases in England.[35] As such, he opines that "to share decision-making for a child between three rather than two adults is clearly a weakening of the position of the parent who is not in the household."[36] This issue will not, of course, arise in every case but where it does, it is arguably not so much a problem with the extension of parental responsibility to a non-parent, but rather one which stems simply from the fact that the parents are living apart. The parent with custody will naturally have more control over the day-to-day care of the child. However, in relation to the most important aspects of the child's life, the non-resident parent has an equal input and this will not be diluted where a third guardian is appointed.

This point is specifically addressed by Head 36 of the General Scheme which requires that all of the guardians act jointly with each other and that they "use their best efforts to co-operate with one another".[37] This provision also expressly states that, unless otherwise provided for by the court, a guardian will continue to exercise his or her rights and duties whether or not the child resides with

27 *Ibid.*

28 Article 42A.2.2 provides that provision shall be made by law for the adoption of any child where the parents have failed in their duty towards the child for a specified period, while Article 42A.3 states that provision shall be made by law for the voluntary placement for adoption of any child.

29 *G v An Bord Uchtála* [1980] IR 32.

30 *Ibid.* at p. 91.

31 *Ibid.*

32 Guardianship of Infants Act 1964, section 8(4) as inserted by section 7 of the Children Act 1997.

33 "Guardianship" <http://www.justice.ie/en/JELR/Pages/Guardianship> (Accessed 23/01/2014).

34 Bainham, *Children: The Modern Law*, 3rd ed. (Family Law, 2005) at p. 236.

35 *Ibid.*

36 *Ibid.*

37 General Scheme of the Children and Family Relationships Bill 2014, Head 36(3).

that guardian.[38] Therefore, under the proposed scheme, it would not be possible for the resident parent and his or her partner to shut out or dilute the guardianship rights of the non-resident parent other than where a court order has been made to this effect.

Finally, concern has also been expressed due to the seemingly unlimited nature of the appointment of non-parent guardians. In England and Wales, the parental responsibility of non-parents does not cease by virtue of a divorce or dissolution of a civil partnership alone, although it may be brought to an end by court order.[39] As such, unease has been expressed due to the fact that a child could potentially have a number of guardians during his or her lifetime. Bainham, for example, questions "whether the proliferation of parental responsibility which could occur where children are caught up in serial marriages would be in their best interests, or workable at all, on a practical level."[40]

In terms of the Irish proposals, the guardianship rights of non-parents would not come to an end simply upon divorce or dissolution of a civil partnership and it is submitted that this is the correct approach. After all, the very reason for the initial appointment will have been due to the fact that the appointed guardian was acting as a parent towards the child and that the appointment was deemed to be in the child's best interests. Therefore, it does not follow that the child should lose his or her connection to this guardian simply because the parent may wish to end his or her relationship.

Furthermore, it should be noted that where the appointment is no longer of benefit to the child, the General Scheme does provide a mechanism for the removal of a non-parent guardian. Such guardians may be removed by the court where it is satisfied that this is in the best interests of the child, and the appointed guardian either:

(a) consents to his or her removal,
(b) is unable or unwilling to act,
(c) has failed in his or her duty towards the child such that the safety or welfare of the child is likely to be prejudicially affected if the guardianship is not terminated, or
(d) substantial reasons exist such that the court considers it necessary or desirable to remove this person as a guardian.[41]

This provision would ensure that only those actually caring for the child and acting in his or her best interests would enjoy the status of guardian. Thus, it is submitted that the potential for the appointment of multiple guardians should not be viewed in a negative light. As long as each guardian continues to act in the child's best interests, it is submitted that there is no real reason to bemoan the potential for the proliferation of guardianship.

Conclusion

To conclude, it is submitted that the provisions contained in the General Scheme which allow for guardianship to be extended to non-parents represent appropriate reforms for Irish family law. In particular, it is encouraging that the General Scheme does not propose a cap on the number of guardians. By allowing for three or more guardians to be appointed, the proposals represent a viable alternative to adoption and they acknowledge that, in many cases, the child will already have three or more persons acting in a parental role. The proposals contained in the Children and Family Relationships Bill 2014 would be of great benefit to the increasing number of non-traditional families in this country and so it is hoped that the Government will not delay in debating this Bill and that it will be enacted by the end of this year. ■

38 *Ibid.*, Head 36(2).
39 Section 4A(3) of the Children Act 1989, as inserted by section 112 of the Adoption and Children act 2002.
40 Bainham, *Children: The Modern Law*, 3rd ed. (Family Law 2005) at p. 237.
41 General Scheme of the Children and Family Relationships Bill 2014, Head 44(1).

How Moot is Moot?

Meg McMahon BL

Introduction

Two recent Supreme Court decisions reaffirm the position relating to the doctrine of mootness in this jurisdiction. Following the decisions in *Lofinmakin (a minor) & ors v Minister for Justice*[1]and *W v HSE*[2], it is clear that, in general, a court will not proceed to determine a matter where there is no real dispute between the parties and will not, as a matter of course, issue advisory opinions. This rule is subject to exceptions and "in exceptional circumstances where one or both parties has a material interest in a decision on a point of law of exceptional public importance, the Court may in the interests of the due proper administration of justice determine such a question[3]." This article will examine the general doctrine of mootness in this jurisdiction, as outlined in the above decisions, as well as the circumstances in which exceptions may be made.

Mootness

Legal proceedings are moot when there is no longer a legal dispute between the parties. Hardiman J. explained the doctrine eloquently in *Goold v Collins*[4]:

> "A proceeding may be said to be moot where there is no longer any legal dispute between the parties. The notion of mootness has some similarities to that of absence of locus standi but differs from it in that standing is judged at the start of the proceedings whereas mootness is judged after the commencement of proceedings. Parties may have a real dispute at the time proceedings commence, but time and events may render the issues in proceedings, or some of them, moot. If that occurs, the eventual decision would be of no practical significance to the parties."

Hardiman J. further stated that the rationale for modern mootness rules was well expressed by the Supreme Court of Canada in *Borowski v. Canada*[5] in which it was held that:

> "An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceedings is commenced but also where the Court is called upon to reach a decision. The general policy is enforced in moot cases unless the Court exercises its discretion to depart from it."

It is, generally speaking, not the role of the courts to issue advisory opinions. Article 26 of the Constitution is a notable exception and provides for the situation where Bills of a certain type are referred by the President to the Supreme Court in order for that court to determine their constitutionality. In the normal course of events, however, the courts are not obliged to determine issues that are no longer live or no longer affect the parties to the proceedings.

It was stated by Finlay C.J in *Murphy v. Roche*[6] that:

> "There can be no doubt that this Court has decided on a number of occasions that it must decline, either in constitutional issues or other issues of law, to decide any question which is in the form of a moot and the decision of which is not necessary for the determination of the rights of the parties before it."

He went on to say that "the principle must, of course be subject in any individual case to the overriding consideration of doing justice between the parties."

The Supreme Court decision in *Lofinmakin*

The Supreme Court decision in *Lofinmakin* is one of the most recent judicial pronouncements in the area. In that case, a deportation order was made against one of the appellants. An application was made to the High Court for certain reliefs including leave to seek an order of *certiorari* quashing the deportation order. On 1st February, 2011, Mr. Justice Cooke in the High Court refused leave to seek any relief. He adjourned the application for a certificate for leave to appeal.

On 7th March, 2011 the European Court of Justice (ECJ) delivered judgment in *Zambrano v Belgium*[7]. In that case it was held that the rights of citizen children of the European Union (EU) were held to derive from Article 20 of the Treaty of the EU. Essentially the ECJ in *Zambrano* granted rights of residence and permission to work to the non-EU parents of EU citizens where such children were dependent on their non-EU national parents.

The High Court, in *Lofinmakin*, granted a certificate for leave to appeal to the Supreme Court. On foot of the decision in *Zambrano,* the Minister revoked the deportation order made in respect of the mother and she was granted temporary residence. Thus, there was no longer a deportation order in respect of any of the appellants. The Supreme Court noted that:

> "As the deportation order has been revoked, there is no basis upon which to proceed. Furthermore, any decision by this Court would be based on a hypothesis, and would be an advisory opinion. It

1 [2013] IESC 49
2 [2014] IESC 8
3 [2010] IESC 35
4 [2004] IESC 38
5 [1989] 1 S.C.R. 342
6 [1987] IR 106
7 (Case C-34/09)

> has long been the jurisprudence of this Court that it will not give advisory opinions, except in exceptional circumstances, such as under Article 26 of the Constitution, or as identified in the case law of the Court. Thus, while the parties had a real dispute when the proceedings were commenced, this is no longer the case."

The Supreme Court decision in *Lofinmakin* is a reaffirmation of the law on the doctrine of mootness in this jurisdiction. An issue will be deemed to be moot where there is no longer any legal dispute between the parties, except in exceptional circumstances.

Exceptions to the general rule

The justification for the doctrine of mootness (and for its exceptions) is set out very clearly by Gerry White in *Social Inclusion and the Legal System; Public Interest Law in Ireland*[8]:

> "In the context of the traditional model of litigation, where the impact of the judgment is confined to the parties the rule whereby the courts will not adjudicate on moot points is easily defended as a prudent use of scarce judicial resources. However where the litigation is capable of clarifying the legal rights of many individuals who are not party to the litigation, a prudent use of scarce judicial resources might actually be better served by allowing the court to clarify those rights, even though the point might now be moot in relation to the particular litigants by virtue of an agreed settlement."[9]

The Supreme Court in *Lofinmakin* held that the issues in the case were moot and therefore applying the general rule of court the appeal would not be heard.

The court however was obliged to consider, nothwithstanding the fact that the issue between the parties was moot, whether it should go on to hear and determine the issue.

In some cases, an exception may arise if the issue being determined affects many other cases. Thus, in *O'Brien v. Personal Injuries Assessment Board (No. 2)*[10] Murray C.J. stated:

> "Where, as in this case, a party has a *bona fide* interest in appealing against a declaratory order of the High Court which is not confined to past events peculiar to the particular case which has been resolved in one way or another, the Court should be reluctant to deprive it of its constitutional right to appeal. In this case, the respondent continues to be constrained in the exercise of public powers under statute by virtue of the declaration granted in the High Court at the instance of the applicant."

What constitutes a test case, in the context of mootness, was analysed by Clarke J. in *Okunade v. The Minister for Justice & ors.*[11] In that case the issue was, strictly speaking, moot. It was, however, held to be a test case. Clarke J. stated:

> "This case had, therefore, been, in a sense, designated as an appropriate test case by reference to which the broad issues which are addressed in this judgment were to be determined. That designation occurred at a time prior to the issue becoming moot by virtue of the decision of Cross J. In those unusual circumstances, the Minister was anxious, and the court agreed, that this appeal should be heard notwithstanding the fact that the issue had, by the time the appeal actually came on for hearing, become moot…..the problem which emerged in this case, being that arrangements for an expedited appeal had been set up with a date set but that the issue became moot by virtue of the hearing and determination of the leave application before that date was reached, has a significant risk of occurring in any other case. In those special and unusual circumstances, this court felt that it was appropriate to hear the appeal notwithstanding its mootness."

The Supreme Court, in *Lofinmakin,* said that the fact that a case raises an important point of law is not of itself a reason to bring it within the exceptional category. The foundations of a case that is moot have fallen away and so they are usually not appropriate cases upon which to decide important points of law, unless there are other factors such as arose in *O'Brien v. Personal Injuries Assessment Board* and *Okunade*.

The Supreme Court in *Lofinmakin* noted, in conclusion, that the grounds of appeal related to a deportation order which had been revoked and held that:

> "There is no matter left in issue between the parties. Thus, the appeal is moot and, accordingly, the general rule should apply and the appeal should not be heard. While the Court has a discretion to hear and determine a moot case in exceptional circumstances, no such exception arises in this case."

Public Interest litigation

Public interest litigation is the pursuance, through the courts, of test cases which seek to change the law as well as securing a benefit for the individual involved in the case. Public interest litigation often involves systemic problems; an issue may be settled for an individual and yet be bound to recur leaving a systemic problem unresolved.

The doctrine of mootness may act as a barrier to public interest litigation as it means that a plaintiff may not be able to pursue their claim, if their individual problem, upon which their claim is based, has been resolved. The Supreme Court of the United States in the case of *Honig v Doe*[12] held that an issue may not be moot if "it is capable of repetition yet evading review". As seen above in the case of *O'Brien v PIAB*, where an issue concerns a body exercising statutory functions

8 *Social Inclusion and the Legal System: Public Interest Law in Ireland*, White, Gerry, Institute of Public Administration, 2002
9 *ibid* at101
10 [2007] 1 I.R. 328
11 [2013] 1 I.L.R.M. 1, [2012] IESC 49
12 484 U.S. 305 (1988)

and powers and its determination may impact future cases, the court may proceed to issue a decision.

The case of *Condon & Ors. v Minister for Labour and the Attorney General*[13] concerned a challenge to temporary legislation (which had expired) by bank employees. The Supreme Court heard the matter as it was not satisfied that similar legislation would not be reintroduced. O' Higgins C.J referred to the defendants' arguments as "extremely dangerous to constitutional rights". He observed that if "access to the courts is denied or prevented or obstructed, then such an encroachment, being unchallenged, may become habitual and therefore acceptable". Allowing the legislature to escape judicial scrutiny through temporary legislation would permit that arm of government to exercise a "form of legislative intimidation". Kenny J endorsed U.S jurisprudence, in particular the case of *Southern Pacific Terminal Co. v Interstate Commerce Co*[14]. which applied the test of whether the issue was "capable of repetition, yet evading review" which had been applied in *Honig v. Doe.*

Children and the law

In the case of *M.F v Superintendent Ballymun Garda Station & Ors*[15]*,* the Supreme Court proceeded to hear an appeal of a matter notwithstanding the strict rule against giving a decision on a moot point. The court recognised that cases concerning the care and custody of children and the protection of their rights were in a special and possibly unique category in that the fundamental rights of persons might be in issue in litigation in which they were not represented.

O Flaherty J. indicated that the doctrine of mootness could be modified in relation to cases concerning the protection of childrens' rights so as to enable the courts to give decisions which would be as helpful as possible to all those concerned with the welfare of children. The court held that such cases are special because they concern children and are possibly unique in that the fundamental rights of persons are in issue in litigation in which they are not represented.

The applicant in *M.F* was the mother of five children who were removed from her care by social workers on foot of an order from the District Court. The applicant argued that her children's detention was unlawful as she had not been informed of the basis on which her children were being detained nor as to their whereabouts. The applicant also argued that the relevant legislation had not been followed correctly. The High Court held that the children's detention was unlawful. The notice parties (including a social worker and the Eastern Health Board) appealed that decision to the Supreme Court but indicated that they would not seek the children's return should they be successful.

In the case of *O'Donoghue v Minister for Health & Ors*[16] a mentally handicapped child sought to vindicate his right to primary education notwithstanding that the State had granted him a place on a concessionary basis. The High Court held that a determination of the rights and duties in issue was required. The High Court found that the State had a constitutional obligation to provide for the education of children. The High Court also rejected the rather cruel argument that the child was ineducable. Whilst the respondents had granted a place to the applicant, they had done so on a concessional basis and were therefore free to withdraw it. Accordingly the High Court had to decide whether the issue was moot. The High Court judge held that:

> "I am of the opinion that it is not sufficient for the respondents to grant as a matter of grace and concession, educational benefits which the Applicant is entitled to claim as of right. Were this to foreclose any further action by the Applicant in pursuance of his claim, he would be left in a position where the benefits thus conferred could be withdrawn or varied at any time at the discretion of the Respondents, leaving the Applicant in the position of having to start afresh in seeking to establish his legal entitlement in the matter. I think it is important for all parties to have a determination at this stage of their respective rights and duties."

The Supreme Court in *W v HSE*[17] refused to hear an argument concerning the right of respondent parents to be heard in applications for emergency care orders for their children in circumstances where the issue in question was moot as the child had been returned to his parents.

The child had been taken into care on foot of an emergency care order and the parents, on the child's behalf, had brought a *habeas corpus* application under Article 40 of the Constitution. The High Court had ruled that the child was lawfully detained for the period of the emergency care order. The parents appealed that decision to the Supreme Court. In the meantime the child was returned to his parents after the District Court refused to grant an interim care order.

The legal representatives for the HSE argued that the matter was moot due to the fact that the child had now been returned to the parents. It was submitted that as a matter of logic, you cannot hold an Article 40 inquiry when the person in issue is no longer in custody. The parents' legal representatives argued that there were issues of public importance which are recurring in the District Court which made this an exceptional case which should be considered by the court.

In refusing to consider the case, on the grounds that the issue between the parties was moot, the Supreme Court referred specifically to the fact that the remedy for a successful *habeas corpus* application is the immediate release of the person. The Supreme Court held that "it does not have a wider ambit. It is not a judicial review, nor is it a plenary summons."

It is arguable that if the challenge to the District Court order had been brought some other way, other than under an Article 40 enquiry, the Supreme Court might have decided the case differently. If for example it had been litigated as a test case, challenging the parents' constitutional rights or as a judicial review, the result could arguably have been different.

13 [1981] IR 62
14 (1911) 219 U.S. 498
15 [1991] 1 I.R 189
16 [1993] IEHC 2
17 [2014] IESC 8

Conclusion

The doctrine of mootness is founded upon the notion that judicial resources should not be spent on cases where there is no longer a contentious issue at stake between the parties. The proceedings may have become moot as a result of different occurences; be it through the defendant settling or other circumstances intervening with the effect that the motivation to fight the case has fallen away. This author is of the opinion that in most situations, the courts should not offer advisory opinions where matters have ceased to be contentious (by whatever means) where this results in the crux of the case becoming moot.

However, there are situations when, even though a case or an issue may be technically moot, there serves a wider purpose in hearing the case. For example in *W. v HSE*, referred to above, counsel for the parents argued that there is a systemic trend of not allowing parents be heard in the District Court when the HSE, now the Child and Family Agency (CFA) is seeking to take children into care by means of an emergency care order. A balance must be struck between saving resources on cases that no longer contain live issues between the parties and determining which cases should be designated test cases or should be heard in the public interest. Such test cases can often resolve contentious issues that will inevitably be the source of further litigation in the future. ■

Bar of Ireland Rugby

Pictured are the participants in the recent Bar of Ireland Rugby club's challenge against the giants from the Bar of Northern Ireland. The annual fixture took place on the 29th March last in Old Belvedere RFC and resulted in victory for the Bar of Ireland. A hearty post-match drinks reception and banquet took place in the 17th century Smock Alley theatre where players, supporters and alickadoos enjoyed a wonderful evening with speeches from the respective captains, Lord Justice Coghlin and Niall O'Driscoll B.L.

The next fixture, the final Bar match of the legal year, will take place on 10th May in Manchester. The match will celebrate the 40th anniversary of the fixture between the Bar of Ireland and the Northern Circuit. A post match banquet will be held at the wonderful Midland Hotel in Manchester and owing to the 40th anniversary it is expected that there will be large numbers attending. If you're interested, please get booking. Each tourist makes his/her own arrangements.

Meath Solicitors Bar Association Dinner

The Meath Solicitors' Bar Association is delighted to announce our upcoming black tie Gala Evening to be held in the Knightsbrook Hotel, Trim on Friday the 16th of May next. Drinks Reception at 7.30 pm followed by the dinner. The Evening will mark the recent appointment of Judge Grainne Malone to County Meath, the retirement of Judge Patrick McMahon, the appointment of Judge Mary O'Malley as Specialist Circuit Court Judge. We also hope to welcome County Registrar Mairead Ahern who is covering Louth and Meath currently. For tickets, please contact Declan Brooks of Oliver Shanley & Co, Telephone (046) 9093200, olivershanley@securemail.ie or Mark Dillon of Dillon Geraghty & Co, Telephone (046) 9432583, info@dillongeraghty.ie.

We will be holding our AGM some evening shortly after our Dinner immediately following a CPD Lecture. We are always delighted to welcome our friends in the Bar at our CPD Evenings. If you would be interested in addressing our Members or attending any Lectures, please contact Elaine Byrne, Regan McEntee & Partners, High Street, Trim, Telephone (046) 9431202 for details.

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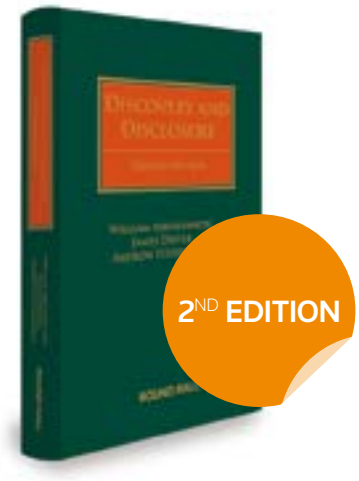

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