The Bar Review

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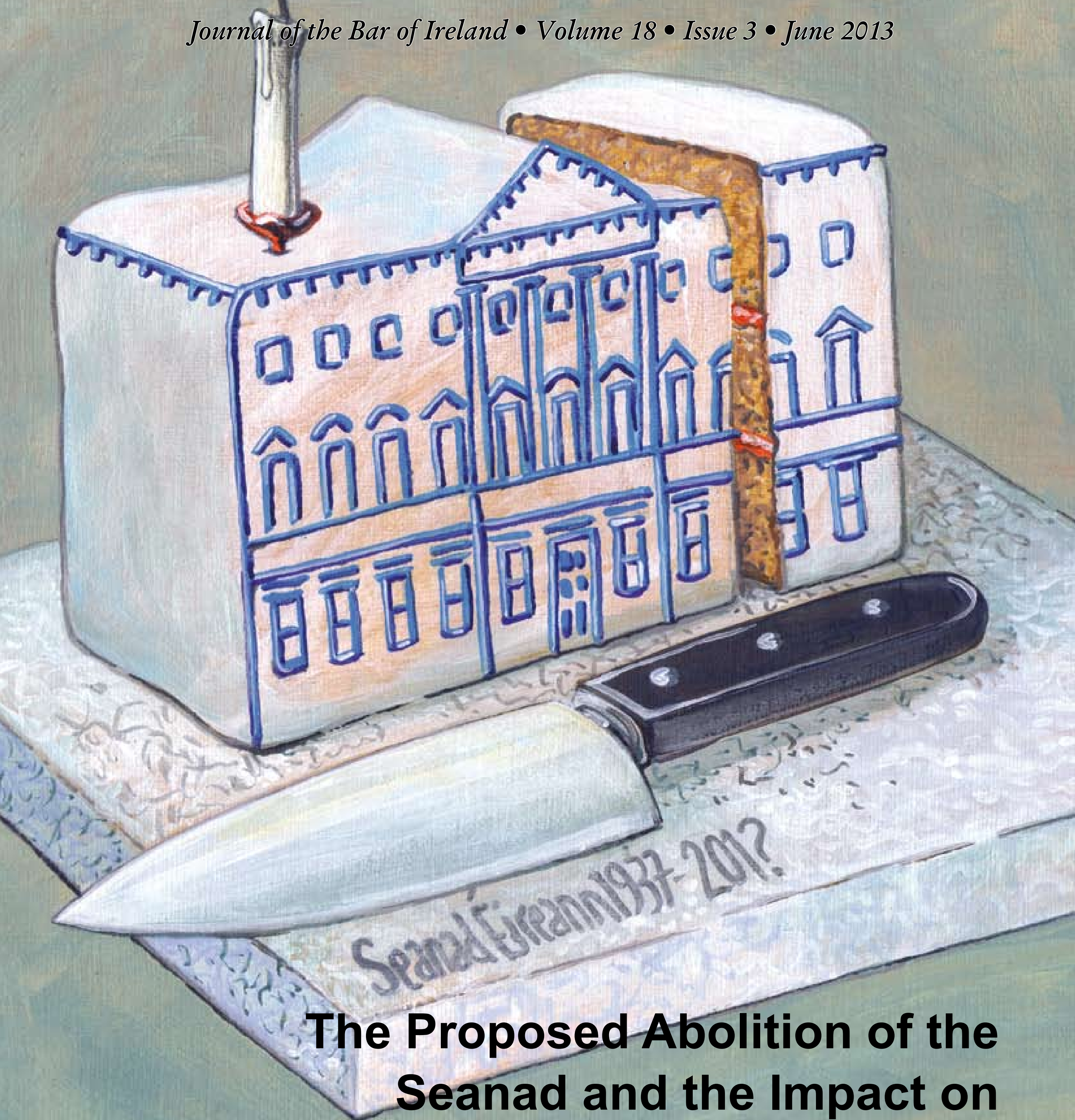

The Proposed Abolition of the Seanad and the Impact on Judicial Independence

ROUND HALL

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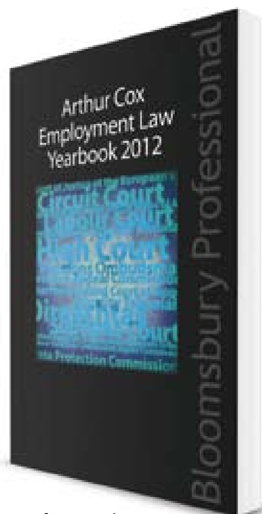

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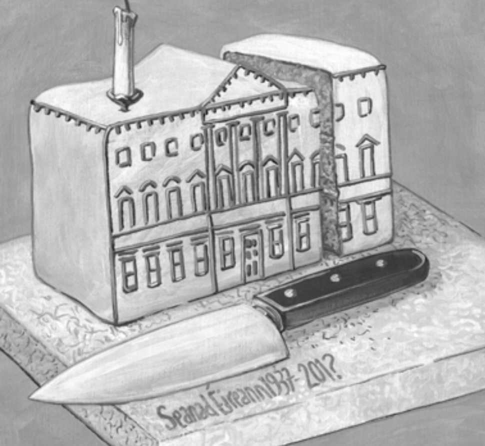

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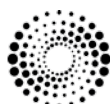

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Proposed Abolition of the Seanad and the Implications for Judicial Independence

Bláthna Ruane SC

The Government has indicated that it proposes to hold a referendum in the Autumn, dealing with the abolition of Seanad Éireann. The abolition of the Seanad could potentially have very significant implications for the courts, in regard to the protection of judicial independence.

The Seanad has many constitutional roles, one of which concerns the procedure for the removal of a superior court judge from office. Abolition of the Seanad would thus impact upon how judges can be removed from office. Article 35,4.1 of the 1937 Constitution provides that a judge of the Supreme or the High Court shall not be removed from office except for stated misbehaviour or incapacity, and then only upon resolutions passed by Dáil Éireann and by Seanad Éireann, calling for the judge's removal[1]. In other words, as matters stand, the approval of each of the two Houses of the Oireachtas is necessary before a judge can be removed from office. Leaving aside entirely the more general question of whether it is desirable that the Seanad should be abolished or not, *if* the Seanad is abolished, then depending upon what alternative arrangement is made, this carries the risk that it will become easier to remove a judge from office.

The proposal to abolish the Seanad comes in the context of difficulties in the relationship between the Government and the Judiciary. The 2011 debate on the referendum to allow reductions to be made to judicial remuneration produced a rather fractious debate on the question of whether the wording of the proposal actually diminished the Judiciary's independence. There have also been unprecedented public indications of tensions between the Government and the Judiciary in recent times regarding the protection of the independence of the Judiciary. The proposed abolition of the Seanad represents a potentially serious threat to judicial independence.

Consequently the Minister for Justice and Equality, Mr Alan Shatter's recent brief indication (as outlined in a newspaper report of a speech given in Killarney)[2] of the Government's proposal for dealing with this issue, is of particular interest. At the time of writing, it appears that the Government proposes that it would require a two-thirds majority of the Dáil before a judge could be removed from office, in lieu of the current requirement of a majority vote of each of the two Houses of the Oireachtas. The Minister was recorded as having indicated that 'the Cabinet had agreed that a requirement should be added to the Constitution for a two-thirds majority vote in the Dáil to remove a judge "so as to maintain a balanced approach" to the impeachment process'.

While the detail of the proposal is not yet clear, the big issue from the perspective of judicial independence, was always going to be the size of the Dáil majority that would be required for the removal of a judge from office and this critical point appears to have been determined by the Government at the level of a two-thirds majority vote in the Dáil. The effect of the Government's proposal is to set a high threshold for removal of a judge and as will be seen, it provides a level of protection against removal that is on a par with other comparable jurisdictions, such as the United States and South Africa. The effect of this proposal is that the issue of judicial independence is less likely to feature as a significant factor in the referendum debate.

Placing that proposal in a historical and comparative perspective throws some light on its overall significance in a number of respects and gives some indication of whether or how the issue of judicial independence is likely to arise in the referendum campaign. There is an interesting contrast between the way that the issue is being handled by the Government now and how the equivalent issue was handled by de Valera in 1934 when he sought to abolish the Seanad by means of legislation, as no referendum was required at that stage. It appears that various arguments that were used in 1934 to justify the lower threshold are *not* being raised now. Consequently the effect of the Government's proposal on this occasion, is that it is likely to avoid a major ground of opposition to the proposal for abolition, which de Valera faced.

Abolition of the Seanad Debates 1934

De Valera's proposal gave rise to bitter allegations regarding Fianna Fáil's and Cumann na nGaedheal's respective attitudes to judicial independence. De Valera had long opposed the role of the Seanad, which had provided southern loyalists with a role in public affairs disproportionate to their relative population and electoral strength, and he had also experienced opposition from the Seanad to his constitutional reforms.[3] He therefore put forward the Constitution (Amendment No. 24) Bill 1934, to abolish the Seanad. The proposed abolition was strongly opposed by Fine Gael for a variety of reasons,

1 Removal of Circuit Court Judges and District Justices is regulated by statute.

2 *Irish Times* 13 May 2013 Ruadhán Mac Cormaic "Judicial holidays under scrutiny from Shatter"

3 The Seanad had delayed the passage of the Constitution (Removal of Oath) Act 1933.

but among their concerns was the potential impact of the abolition on the independence of the Judiciary. Article 68 of the 1922 Constitution provided that removal of judges of the Supreme and the High Courts could only be effected "by resolutions passed by both Dáil Éireann and Seanad Éireann". The abolition of the Seanad as originally proposed by de Valera exposed judges to removal by a simple resolution of the Dáil only. That diminution in the protection of judicial independence sparked bitter and lengthy Dáil debates in April and May 1934 on judicial independence.

The issue of the level of procedural protection to be afforded to the senior Judiciary in regard to the removal of a judge already had a strong historical resonance, as Fine Gael Deputy and former Cumann na nGaedheal Minister, Desmond FitzGerald, pointed out during the 1934 debates. Section III of the British Act of Settlement 1701[4] had provided that judges in England would hold office for "good behaviour" but could be dismissed by a motion of both Houses of Parliament. That protection did not however initially apply in Ireland. FitzGerald commented:

> "The principle of the independence of the judges was long fought for. It is recorded in many books dealing with the Irish Parliament that one of the things Irish Parliaments fought for – and fought for many years unsuccessfully – was that the judges shall be removable only by resolution of the two Houses of the Irish Assembly. Year after year, when bills were sent over to England containing that phrase, they were returned. The English Government of those days thought that, while it was desirable that judges in England should be independent in the exercise of their judicial functions, the judges appointed by these Englishmen to preside over legal matters in this country should be dependent for their judicial lives upon the English Government."[5]

He went on to observe that before 1800 the same principle had at last been established for the Judiciary in Ireland and that a resolution of the two Houses was necessary to remove a judge from office and that arrangement

> "has lasted until now. There is now made for the first time the proposal to put the judges on the bench at the mercy of a political party in one House and the proposal that that political majority alone is to have any say."[6]

During the debates there were some strong comments from Fianna Fáil indicating that they might remove some judges from office if it became necessary. The then Minister for Industry and Commerce, Seán Lemass, made what proved to be a rather inflammatory statement, which his opponents characterised as indicating a lack of respect for judicial independence. Lemass commented

> "Power to remove Judges is provided by the Constitution. If it becomes necessary in the mind of the Government to exercise that power it will be exercised."[7]

This was compounded when de Valera later memorably stated

> "The best safeguard for the judiciary is for it to establish itself soundly in the good repute of the people. There is no other way."[8]

De Valera had just before that expressed scepticism about whether the requirement for a separate vote of the Seanad actually afforded any additional protection for the Judiciary where its majority was the same type as the majority in the Dáil. [9]

Fine Gael Deputy, and also a former Cumann na nGaedheal Minister, Patrick McGilligan, asked Lemass

> "…to consider the matter this way - let him parade before himself six or seven worthy aspirants for judicial office and let him ask them would they rather take office under the system which holds at the moment or under the system which would obtain when this Bill becomes law.[10]

Another Fine Gael Deputy (and future party leader) James Dillon, warned that de Valera's proposal would allow him to destroy judicial independence[11]. Dillon challenged the then Attorney General and future Chief Justice, Conor Maguire, as to whether he supported the proposal

> "I doubt very much if the Attorney-General is prepared to defend the general proposition that the High Court judges should be dismissable by a bare majority of this House."[12]

Maguire's response to this was couched in terms of political expedience rather than principle. He argued that the Government was very unlikely to use the power to remove judges for party political reasons and that any government or party would hesitate to bring in a motion for dismissal of a judge for purely party reasons because it would damage them electorally. He opined

> "I do not believe, even if a judge did give a judgment which annoyed an Executive exceedingly, that that Executive would rush post haste to the Assembly and seek to have that judge discharged for that offence. I have sufficient belief in the people to believe that Governments constituted by a democracy here will contain men of sufficient sanity, sufficient balance, sufficient judgment, and sufficient interest in the future of their country, that they will not hotheadedly, and without real justification attempt to remove from office men who have been placed there and who are expected by all the rules and traditions of the office

4 Act of Settlement 1701 12 & 13 William III c.2
5 51 *Dáil Debates* 19 April 1934 col.1987
6 51 *Dáil Debates* 19 April 1934 col.1987
7 51 *Dáil Debates* 18 April 1934 col.1871.
8 51 *Dáil Debates* 20 April 1934 col.2138.
9 51 *Dáil Debates* 20 April 1934 col.2138.
10 51 *Dáil Debates* 19 April 1934 col. 1996
11 51 *Dáil Debates* 18 April 1934 col. 1864.
12 52 *Dáil Debates* 1 May 1934 col. 40.

they hold – in addition to the written letter of the Constitution – to act in an independent manner.

Furthermore, I have this belief, that any Executive which was on the verge of taking such a step would pause, for this reason, that they would realise that to take such a step in hot haste, and without real basis and justification, would jeopardise their own position in the country."[13]

It may be wondered whether Maguire as Chief Justice, would have felt quite so confident of those views.

De Valera was quick to deny the suggestion that Fianna Fáil would treat the courts with any greater disrespect than the Cumann na nGaedheal Executive Council, whom he accused of having shown lack of respect for the courts. He referred to their "suppression" of the Supreme Court of the Dáil Courts and the execution of Erskine Childers while his appeal was pending, as examples.[14] He rejected the suggestion that the Bill was a real danger to judicial independence, and maintained that there was no fundamental difference of opinion between the two sides on the desirability of judicial independence but that the issue was what security was it reasonable to give.[15]

Fine Gael proposed an amendment to increase the size of the Dáil majority required to remove a judge from office. It proposed that a majority of three-fifths should be required. Fianna Fáil however countered with a proposal requiring a majority of five-ninths.[16] In justifying his figure, de Valera adverted to the role of the proportional representation, (PR), voting system,[17] and he had also previously argued, fairly, that it was important not to make removal impossible.[18] Ultimately the requirement for a majority of four-sevenths of the full membership of the Dáil (excluding the Chairman or presiding member) was provided for under the Act.[19] The Bill was, unsurprisingly, bitterly opposed in the Seanad and in consequence did not pass until 29 May 1936.

Under the 1937 Constitution, with the return to the Seanad and the re-adoption of the bi-cameral form of Legislature, the arrangement whereby the removal of a judge was solely a decision for the Dáil was not continued. The level of protection reverted to the original level it had previously under the 1922 Constitution, requiring a vote of each House of the Oireachtas. This had been recommended by the Majority Report of the Second House of the Oireachtas Commission in September 1936.[20]

13 52 *Dáil Debates* 1 May 1934 col. 66.

14 51 *Dáil Debates* 20 April 1934 Col. 2137-2138. Fianna Fáil Deputy Frank Aiken also referred to the removal by the Provisional Government of Judge Crowley, a Dáil Court judge, in 1922. See 51 *Dáil Debates* 19 April 1934 Col. 2090. Fianna Fáil Deputy Hugo Flinn referred to the manner in which Cumann na nGaedheal had legislated to undo the effect of an appeal to the Judicial Committee of the Privy Council. See 51 *Dáil Debates* 18 April 1934 col. 1908. See also comments of de Valera in 51 *Dáil Debates* 19 April 1934 Col. 2121.

15 52 *Dáil Debates* 1 May 1934 Col. 46

16 52 *Dáil Debates* 1 May 1934 col. 47

17 52 *Dáil Debates* 1 May 1934 col. 46

18 51 *Dáil Debates* 26 April 1934 cols. 2486-2487

19 See s.2(1) and Part II of the Schedule to the Constitution (Amendment No. 24) Act 1936, providing for an amendment to Article 68 of the 1922 Constitution.

20 NAI D/T S 8642/8 in Gerard Hogan *The Origins of the Constitution* (Royal Irish Academy, Dublin, 2012) p.203.

Parliamentary Votes Elsewhere

An examination of the procedures for removal of judges, which vary across different jurisdictions, also provides a useful perspective on the Government's proposal. Very briefly, among major comparable jurisdictions, a vital procedural element is that the removal of the most senior judges from office requires parliamentary approval, although the size of parliamentary majority and the number of Houses of Parliament whose support is required, vary.

In the United Kingdom, under Section 33 of the Constitutional Reform Act 2005,[21] judges of the Supreme Court hold office during good behaviour, but may be removed from it on the address of both Houses of Parliament. In Australia the removal of a federal judge for "proved misbehaviour or incapacity" is by the Governor-General who acts in response to an address from both Houses of the Parliament in the same session praying for such removal.[22] In Canada, Section 9(1) Supreme Court Act R.S.C. 1985 c.S 26 provides that the judges of the Supreme Court hold office during good behaviour but are removable in certain circumstances by the Governor General on address of the Senate and the House of Commons[23].

Judges of the American Supreme Court also hold office during good behaviour. They can be removed only by impeachment which must be initiated by charges brought pursuant to a simple majority vote in the House of Representatives. Impeachment then requires a two-thirds majority of the members present in the Senate.[24] Under the South African Constitution, the removal of a judge requires the support of at least a two-thirds majority of the National Assembly calling for the removal of such a judge and the removal of the judge is made by the President.[25]

21 2005 c.4

22 Section 72 Commonwealth of Australia Constitution Act, 1900 63 & 64 Victoria c.12

23 See also S. 99 Constitution Act 1867 in respect of superior provincial courts.

24 Under Article III Section 1 of the United States Constitution, the judges of the Supreme Court hold their office "during good behavior". Article II Section 4, provides that "The President, Vice-President and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors".

Article I, Section 3 [6] provides: "The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present."

25 Section 177 of the Constitution of the Republic of South Africa Act 1996 provides:

"1. A judge may be removed from office only if -

(a) the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct;

(b) the National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two-third of its members.

2. The President must remove a judge from office upon the adoption of a resolution calling for that judge to be removed.

3. The President, on the advice of the Judicial Service Commission, may suspend a judge who is the subject of a procedure in terms of subsection (1).

While detailed elements of the removal procedure vary among those comparators, in all of them a parliamentary vote is a critical element in the procedure for removing a judge. It is instructive that these comparators require considerably more than a mere bare majority of one House of Parliament before a judge can be removed, and they demand either the approval of two Houses of Parliament or a two-thirds majority of one House, before a senior judge can be removed.

Conclusion

Given the previous experience of abolition of the Seanad, it is interesting to note that as a result of the Government's approach, one of the most troublesome issues that proved so divisive in 1934 is less likely to play a significant part in the Seanad abolition referendum debate. Approaches used in 1934, which could have been deployed now by the Government to justify a lower majority threshold for removal of a judge, have notably not been favoured. Thus the Government has not proposed that a judge could be removed from office solely on a bare majority of the Dáil. Instead the Government's proposal requires far more than a bare majority of the Dáil before a judge can be removed. The fact that it proposes an increase in the majority required in the Dáil is an implicit rejection of de Valera's argument in 1934, that requiring a majority of the Seanad to vote in favour of the removal of a judge, has not in reality been a significant extra safeguard for a judge, above and beyond the requirement of a Dáil majority.

Likewise, the Government might have tried to follow de Valera's precedent of a majority of four-sevenths. That choice might have been supported by a claim that the PR system has a significant impact on the likelihood of individual parties commanding a parliamentary majority, rendering the removal of a judge inherently more difficult, such that a four-sevenths (or even a bare) majority, would be an adequate safeguard. The Government has not sought to argue that a figure as high as two-thirds would render removal impossible in practice.

Those arguments would of course be hotly contested if they were made and would inevitably have resulted in a vigorous debate on what level of protection is desirable. For example, it would be argued that a requirement for only a bare majority would put a judge at serious risk of removal for purely political reasons. It would also be argued that the loss of the requirement for Seanad approval is a meaningful factor because there is a greater likelihood of a more independent attitude being taken by members of the Seanad, since its membership usually includes some less politically partisan figures, whose attitudes are less predictable. Taoisigh have often included in their eleven personally selected appointees, persons deliberately selected on a non-party political basis. The presence of Senators elected by the universities has also resulted in a somewhat more independent line being taken on various issues.

Similarly as far as the impact of PR is concerned, whilst in more recent times, the largest party has frequently been unable to command a majority on its own, it is not that long since a single party was able to govern for extended periods. Moreover, the risk of politically motivated removal does not stem simply from single party government but could also emanate from a coalition government, where two or more combined parties could constitute a sizable majority in the Dáil. The removal of a judge from office should only be for grave reasons of a kind that command very widespread parliamentary support, and not just that of a single party or even a coalition government. Accordingly, the PR system does not provide a justification for lowering the size of the majority vote required and nor does the figure of two-thirds render the removal unreasonably difficult.

Given the recent tensions in the relationship between the Government and the Judiciary, a debate on those issues could have proved even more controversial than in 1934. The Government's alternative will almost certainly mean that argument over relative degrees of protection will probably not be significant. Its requirement of a two-thirds majority offers a very significant level of alternative protection of judicial independence. While some may argue that it sets the limit at too high a level and makes it too difficult to remove a judge, the fact that it is in line with the major comparable jurisdictions referred to above, where only one House votes on the removal, means that such an argument is unlikely to be a major issue. The result is that, unlike the bitter controversy that de Valera's approach stirred up during the 1934 debates, it is far less likely that the forthcoming debate on the abolition of the Seanad will become pre-occupied by a divisive dispute on judicial independence. ■

Section 42 provides
"1. Parliament consists of -
(a) the National Assembly; and
(b) the National Council of Provinces ……….
2. The National Assembly and the National Council of Provinces participate in the legislative process in the manner set out in the Constitution.

Launch of Book on Capital Punishment; Proceeds to go to DeafHear

The launch of "The Last Sting of a Dying Wasp", an account of capital punishment, by Solicitor Gerard O'Keeffe, will take place in the Solicitors Building at Blackhall Place, Dublin, on Friday 26th July, 2013 between 4pm and 6pm. The book can be ordered personally from Gerard O'Keeffe, Park House, Kanturk, Co Cork for €35 euros (including postage) and for €30 at the launch itself. The book comes with a recording of some verses of The Ballad of Reading Gaol read by the late Supreme Court Judge, the Honourable Mr Justice Niall McCarthy.

All of the profits from the book (and CD and DVD) will go to DeafHear (formerly the National Association for Deaf People) who provide a range of services annually to over 32,500 persons with hearing difficulties and their families. DeafHear was the brainchild of the late Mr Justice Niall McCarthy and retired Supreme Court Judge, the Honourable Mr Justice Anthony Hederman.

The Structure of the Legal Professions in France

Conor Nelson BL

Introduction

I traveled to Paris in late September 2012 to participate in the two month '*stage international*' hosted by the *Barreau de Paris*. Beneath is a brief outline account of the structure of the French system that may be of interest to members of the Bar in the context of the Legal Services Bill.

Varieties of Lawyer

There remain a number of different varieties of legal professionals in France despite a legislative merging of certain of the separate professions in 1971 and 1992.

- *Notaries Public*: enjoy legal monopolies in conveyancing and authenticating all papers filed by or with them. They deal in conveyancing, wills and estates and succession planning.
- *Hussiers:* bailiffs appointed by the Minister for Justice for the service of writs and effecting attachments, garnishments and other seizures. They can technically advise in all legal matters but generally stick to debt collection and enforcement. A further sub-category 'hussiers audienciers' are officers of the court.
- *Administrateurs Judiciaries*: court appointed insolvency practitioners who act for the court or as 'Representant des Creanciers' for creditors. As 'Mandataires Liquidateurs' they act under the supervision of a court in the winding up of a company.
- *Commissaires Prisseurs*: enjoy a monopoly on the running of auctions and can be involved as valuers in insolvency proceedings.
- *Conseils en Propriété Industrielle*: the traditional designation of patent and trademark agents. Since 1992, Avocats may also engage in this work.
- *Experts Comptables*: Since 1945, accountants in France can advise existing clients on certain legal matters and can act as company secretaries in certain cases.
- *Juriste d'Enterprise*: Corporate or 'in-house' lawyers provide advice but can only appear in courts where a right of audience is reserved for avocats.

All of the above professions have both regional and national representative organisations save *Juristes d'Enterprise*.

Legislative changes in 1971 saw the merging of *'Agréés'* (lawyers acting as solicitors before the commercial courts[1]), '*Avouès pres le Tribunal de Grande Instance*' (lawyers acting as solicitors before the High Court) and '*Avocats a la Cour*' (lawyers arguing cases before the superior courts) into '*Avocats a la Cour*'. Separately, a new branch of the legal profession '*Conseils Juridique*' was created to act as legal advisors but without rights of advocacy [2].

A 1990 law (effective from January 1, 1992) merged '*Avocats a la Cour*' and '*Conseil Juridique*' into the single profession of *Avocat*. Since 1992, Avocats are called to the bar in a court of appeal and must have their legal domicile within territorial reach of that court. They can advise on all matters and may appear before any jurisdiction or administrative agency having 'quasi jurisdictional' authority without restriction.

Avocats

By far and away the largest grouping of legal professionals are '*avocats*' (approximately 45,000 of whom are enrolled). Though sometimes portrayed as equivalent to barristers, much of their work would be performed in Ireland by a solicitor (including notably the holding of funds on behalf of clients which is done through a scheme known as CARPA, comprising special bank accounts located at the BNP Paribas branch behind the *Palais de Justice*). *Avocats* were banned by the revolutionaries but reinstated by the consulate (1799 -1804) and practiced without any state regulation until 1971. They operate within a regional rather than a national framework.

There are 161 regional bars (*Barreaux*) of which the *Barreau de Paris* is emphatically the biggest being composed of 25,000 members. The regional bars collectively comprise the *Conseil Nationale des Barreaux* (CNB). Since 1971, the CNB has set about harmonizing the regional codes of practice. Each regional bar is run by an '*Ordre*' composed of members elected by their colleagues. Each *Ordre* is responsible for callings to the bar, finance and discipline. The *Ordre* of the Paris Bar is headed by the '*batonnier*', who also has an automatic seat on the CNB. The Paris *Ordre* meet in a purpose built (and very grand) room within the Palais de Justice building on the Île de la Cite.

There is a small specialist bar of *avocats* composed of approximately 400 members who practice exclusively before the *cour de casation* (the Supreme Court) and the *Council d'Etat*

1 France has long had a separate system of commercial courts composed of industry elected lay judges with commercial experience. The system often operates informally notably where enterprises are in difficulty and seeking with the aid of the commercial court to avoid insolvency. Unlike the Tribunal de Grande Instance (the French equivalent to the civil High Court) parties are not obliged to be legally represented before the commercial courts.

2 They could appear before the commercial courts for which no such rights were required.

(the supreme court for administrative matters) respectively. In addition, a small number of *avoues* continue to practice at the court of appeal. They are employed by *avocats* to file pleadings and documentation.

Discipline

When exercising its disciplinary function in respect of serious matters, *avocats* are brought before the entire council (42 members) who decide upon what sanction to take. Sanctions available to the *Ordre* include warnings, reprimands, temporary suspension and disbarment (art. P. 72.2 *Dispositions propres du Barreau de Paris*).

Practice Models

Since the merger of the professions in 1992, *avocats* can operate within a wide variety of structures:

- Sole Practitioner. Many operate as sole traders, in particular outside Paris. Sole practitioners can use the services of legal assistants called ' avocats collaborateurs'.
- Office Sharing. '*Groupés*' and "*Société civile de moyens*" (SCM) merely share office expenses without profit or client sharing. The distinction between the two is tax based. In a groupé, one of the avocats is a tenant or the owner of the premises and the others are sub-lessees. The SCM is often itself the tenant or owner.
- Professional Companies
  There are various forms of professional companies and each have different rules with regard to capital and voting rights etc. Such companies can comprise exercising and non exercising members, both of which are lawyers though the former can practice only on behalf of the company. The latter can hold a majority interest in the company but the exercising members must hold a majority of the voting rights. The *ordres* exercise a supervisory function in relation to capital requirements, changing of registered offices and company formations. Arising out a government commission headed by Maitre Jean–Michel Darrois, a law of March 28, 2011 and a decree of March 25, 2012, it is now possible to form 'inter-professional' companies comprised of *avocats*, notaires, accountants, insolvency experts (*priseurs*), baliffs (*hussiers*), and IP specialists (*conseil en propriete industrielle*). The justice ministry has said that these laws are designed to allow firms offer ' *a more complete service to their clients*'[3].
- Unincorporated partnerships based on contract known as '*associations*' can also be adopted where profits are shared based on a percentage scale. These structures can combine with certain of the structures above.
- In 2009, there were 29 Partnerships under a law of Dec 31, 1971 and 22 entities of foreign origin based in Paris on foot of a European Directive.
- *Groupement d'interet economique* (GIEs) which is an economic interest grouping formed to maximize competitive advantage not entitled to practice law but capable of rendering services to its clients and facilitating practices. Pan European *groupements* are also possible where there are members in more than one member state. *Groupements* may be formed under laws other than French law.

Functions

Avocats provide advice generally as well as advocacy services before all courts. They can act as agent for a client provided that they operate under specific instructions and are not permitted to become *de facto* principals or managers of client businesses though certain exceptions are provided for family businesses.

They can hold client funds and documents in trust or escrow. They can also act as lobbyists and trustees. An *avocat* who is also a member of parliament may not act against the state or any emanation thereof including state run companies.

Qualification

Generally speaking a law degree from a recognized university as well as completion of an 18 month course at the '*ecole de formation'* is required prior to being called to the Paris Bar though there are certain other unusual routes for individuals such as senior civil servants or diplomats whose extant professional experience can be considered in lieu of formal training. When I was in Paris, controversial plans were afoot in the wake of the formation of a new national assembly to allow former MPs automatically qualify as *avocats*.

Duties and Responsibilities

Avocats are required to act with dignity, conscientiously, independently and with humanity. They are bound both by statute and the codes of practice of the CNB and the regional bar to which they belong. There is a duty to protect 'professional secrets', a broader concept than privilege as we know it. Indeed, failure to do so is a crime punishable with imprisonment for a year. There is a longstanding right in France to sue *avocats* for negligence. The standard expected of a lawyer is that of a competent lawyer in similar circumstances.

In some of the practice models set out above, *avocats* can be vicariously liable for harm caused by associates or staff. Partners as here are normally jointly and severally liable.

Exclusions

Generally, *avocats* cannot be chairman or chief executive of companies (save with the permission of the regional bar in the case of certain public companies). Furthermore, *avocats* cannot become a partner in a business deal with a client as it would encroach on their independence.

Insurance

Insurance has been mandatory since 1971 and is provided through the regional bars with additional cover available for the larger firms. ■

3 Press release issued by the Justice Ministry.

Mock Trial with Pupils from St Audeons

Members of the Law Library carried out a mock trial at the Four Courts on 24th April last, with the assistance of the 6th class pupils of St Audeon's National School, Cook Street. Judge Mary Ellen Ring presided over the trial where she sentenced a 14 year old schoolboy John O'Donnell (otherwise Craig Johnson) to attend school, after he was found guilty by majority jury verdict of the theft of a box of Lindt chocolates from a sweet shop at Donegal Street.

The pupils from the school performed the various roles of witnesses and jurors. Simon Donagh BL drafted the book of evidence and along with Grainne Quinn BL appeared forcefully for the prosecution. James Nerney BL and David Perry BL represented the accused and were unlucky that the jury convicted on entirely circumstantial evidence. An appeal is being considered.

During the trial, Judge Ring heard evidence that the accused was mitching from school (although she did admonish prosecuting counsel for using such a colloquial phrase). Accordingly when it came to sentencing the accused, she decided that if he were to undertake to attend school, that would be the end of the matter. However, should he fail to attend school, a custodial sentence might be warranted.

The organisers would like to express our sincere thanks to Judge Ring who presided so fairly over the trial.

Volunteers are always welcome in the Breakfast Club and Reading Club in St Audeon's which are both staffed on a voluntary basis by members of the Law Library. If you are interested, please contact John McBratney SC or Sunniva McDonagh SC or any other barrister involved in either. ■

An tAcht um Fháltais ó Choireacht agus Áras an Teaghlaigh (The Proceeds of Crime Act and the Family Home)

Niamh Cassidy

Déanann an t-alt seo cuir síos ar imoibriú an tAcht um Fháltais ón gCóireacht, 1996 le áras an teaghlaigh (coinceap a shonraítear san Acht um Chaomhnú Áras an Teaghlaigh, 1976) agus cearta doshannta an teaghlaigh a aithnítear sa Bhunreacht.

Cúlra Bunreachtúil

Aithníonn Bunreacht na hÉireann an tabhacht a bhaineann le réadmhaoin phríobhaideach agus leis an teaghlaigh. In Airteagal 41, foráiltear mar seo a leanas:

> 1° Admhaíonn an Stát gurb é an Teaghlach is buíon-aonad príomha bunaidh don chomhdhaonnacht de réir nádúir, agus gur foras morálta é ag a bhfuil cearta doshannta dochloíte is ársa agus is airde ná aon reacht daonna.
>
> 2° Ós é an Teaghlach is fotha riachtanach don ord chomhdhaonnach agus ós éigeantach é do leas an Náisiúin agus an Stáit, ráthaíonn an Stát comhshuíomh agus údarás an Teaghlaigh a chaomhnú.

In Airteagal 43, ag eascrú as bua an réasúin a bheith ag an duine :

1. 1° Admhaíonn an Stát … go bhfuil sé de cheart nádúrtha aige maoin shaolta a bheith aige dá chuid féin go príobháideach, ceart is ársa ná reacht daonna.

   2° Uime sin, ráthaíonn an Stát gan aon dlí a achtú d'iarraidh an ceart sin, ná gnáthcheart an duine chun maoin a shannadh agus a thiomnú agus a ghlacadh ina hoidhreacht, a chur ar ceal.
2. 1°Ach admhaíonn an Stát gur cuí, sa chomhdhaonnacht shibhialta, oibriú na gceart atá luaite sna forálacha sin romhainn den Airteagal seo a rialú de réir bunrialacha an chirt chomhdhaonnaigh.

   2° Uime sin, tig leis an Stát, de réir mar a bheas riachtanach, teorainn a chur le hoibriú na gceart réamhráite d'fhonn an t-oibriú sin agus leas an phobail a thabhairt dá chéile.

agus arís, in Airteagal 40.5, foráiltear :

> "Is slán do gach saoránach a ionad cónaithe, agus ní cead dul isteach ann go foréigneach ach de réir dlí"

Reachtaíocht Cosanta vs Reachtaíocht a déanann Ionsaí

Cuireann reachtaíocht feoil ar na cnámha bunreachtúla seo, leis an Acht um Chaomhnú Áras an Teaghlaigh, 1976 ("an tAcht") ach go háirithe. Mar a luaitear san Acht, nuair a beartaíonn céile,

> "gan toiliú a fháil roimh ré i scríbhinn ón gcéile eile, aon leas in áras an teaghlaigh a thíolacadh chuig duine ar bith seachas an céile eile, ansin, faoi réir eisceachtaí, beidh an tíolacas airbheartaithe ar neamhní"

Faoi alt 2, ciallaíonn "áras teaghlaigh" teaghais ina bhfuil gnáthchónaí ar lánúin phósta agus ciallaíonn "'teaghais' aon fhoirgneamh nó cuid d'fhoirgneamh a áitiú mar theaghais ar leithligh agus folaíonn sé aon ghairdín nó talamh eile áitíocht de ghnáth leis an teaghais [...]"

Tháinig an tAcht um Fháltais ó Choireacht*, 1996* i bhfeidhm ar an 4ú Lúnasa 1996. Leasaíodh an reachtaíocht seo i 2005[1] agus is iad I.R. 242/2006 — Rules of the Superior Courts (Proceeds of Crime and Financing of Terrorism) 2006 na rialacha a ghabhann le nós imeachtaí na reachtaíochta san Ard Chúirt. B' í aidhm na reachtaíochta seo ("PoCA") ná "chumasú don Ard Chúirt, maidir leis na fáltais ó choireacht, orduithe a dhéanamh chun an mhaoin lena mbaineann a chaomhnú agus, más cuí, a dhiúscairt..." agus nuair atá gach freagróir foriarratais ciontach i mí-iompar, ní bhíonn fadhbanna ann. Ach céard faoi céilí nó paistí nach bhfuil smal coireachta orthu ar chor ar bith?

Ag tabhairt faoin saincheist seo, dúirt Feeney B., in *F.J. McK. v. T.H. & Ors,* 17 Deireadh Fomhair, 2008 :-

> "The fact that the notice party and her family need a home cannot of itself operate to defeat the public interest ... of depriving a person of property representing the proceeds of crime. There is no basis for treating a person in a position such as the notice party and her family on a more favourable basis than a family who lose their home as a result of a possession order following an inability to discharge mortgage repayments or as a result of an inability to pay rent. The notice party and her family have no entitlement to the use of a particular premises. If it were not for the use of the premises obtained from the proceeds of crime the notice party would have

1 *Acht um Fháltais ó Choireacht (Leasú) 2005*

had to have provided for herself or have provided for her alternative accommodation. The fact that the notice party and her family would be placed in the position ... where she would have to seek alternative accommodation is, of itself, not a basis for discharging the Section 3 ... Orders."

Bhí an Breitheamh léannta an-shoiléir ar an bpointe, ag dearbhú : "(a) person in possession of premises representing the proceeds of crime has no constitutional grievance if deprived of their use."

Sa chúis sin, rinne an freagróir achomharc ar an gcinneadh ach chin an Chúirt Uachtarach nach raibh aon "error in law in th(is) reasoning" agus í ag tabhairt bhreithiúnais gonta *ex tempore* ar an 25 Márta, 2011.

I *Criminal Assets Bureau v O'B & O'B* [2010] IEHC 12, bhí iarratais faoi alt 3 agus 7 den PoCA i gceist arís. Cheap an breitheamh léannta na hArd-Chúirte (Feeney B.) :

> "to allow the second named respondent to remain on indefinitely, as argued for on her behalf, would … as in the *CAB v. J. K. & T.T.* case, perpetuate a position where she continued to benefit from an asset obtained from the proceeds of crime.
>
> …The fact that the second named respondent contributed the bulk of her social welfare payments to the upkeep of the family cannot be said to attach to the property or to give her a right to the property or to remain therein. The purpose of the social welfare payments was to assist in the upkeep of the second named respondent and her family and they were used for that purpose …
>
> The fact that such upkeep occurred in a particular house does not result in a situation arising where it would be unjust to make a s. 3 order covering such house or home."

Leag an breitheamh léannta béim ar leith arís ar an méid a duradh Keane J. *i Murphy v. G.M. & Ors*: "a person in possession of premises representing the proceeds of crime can have no constitutional grievance if deprived of their use."

Agus achomharc fós ar feitheamh i gcoinne an chinneadh seo, beidh sé le feiceáil a bhfuil aon thionchur ag an g*Coinbhinsiún Eorpach um Chearta an Duine*. Thug feidhm leis an gCoinbhinsiún i *2003* agus foráiltear in airteagal 8 go bhfuil ceart ag gach duine chun sealúchais a shealbhú agus nach féidir a shealúchais a bhaint de dhuine ach amháin ar mhaithe leis an leas poiblí agus sna cásanna agus faoi na coinníollacha dá bhforáiltear le dlí, sna téarmaí seo a leanas :-

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 freedom of others

Sa comhthéacs seo go bhfuil na cearta seo teoranta leis an gcoinníoll "except such as is ... necessary ... for the prevention of disorder or crime", is fiú aird a thabhairt don méid a dúirt Lord Hope of Craighead (a ghlacadh leis ag an gCúirt Úachtarach i *Murphy –v- G.M.)*:

> "People engage in [drug trafficking] to make money and it is notorious that they hide what they are doing. Direct proof of the proceeds is often difficult if not impossible. The nature of the activity and the harm it does to the community provide a sufficient basis for the making of these assumptions (i.e. assumptions that property held by the accused could in certain circumstances be assumed to have been received in connection with drug trafficking). They serve the legitimate aim in the public interest of combating that activity. They do so in a way that is proportionate. They relate to matters that ought to be within the accused's knowledge, and they are rebuttable by him at a hearing before a judge on the balance of probabilities. In my opinion a fair balance is struck between the legitimate aim and the rights of the accused."

Is léir go n-aontaíonn Feeney B. leis an sliocht seo thuas, ón méid a dúirt sé i *O'B* faoi:

> "the legislative intent of the Proceeds of Crime Act 1996 is the taking of property which has been proved, on the balance of probabilities, to represent the proceeds of crime, there is no issue but that such intent is a legitimate aim and can be said to be within the provisions of Article 8(2) of the European Convention on Human Rights as being necessary in a democratic society."

Is léir freisin go réitíonn an ráiteas seo le breithiúnas i *Gilligan v. Criminal Assets Bureau* [2001] 4 I.R 113:

> "While the provisions of the Act may, indeed affect the property rights of a respondent it does not appear to this court that they constitute an unjust attack … The right to private ownership cannot hold a place so in the hierarchy of rights that it protects the position of assets illegally acquired and held."

agus tá Feeney B. tar éis an pointe céanna a dhéanamh sa chúis is déanaí de chuid John Gilligan.[2]

Conclúid

Is beag faoiseamh a thug an Chúirt Uachtarach leis an achomharcóir i *McK v. T.H.* - agus níos lú réasúnaíochta. Beidh sé le feiceáil an ndéanfar athbhreithniú i cásanna ina bhfuil aighneachtaí níos iomláine os comhair na cúirte nó impleachtaí níos tromchúisí do chéile nó páistí ag eascrú as na fíricí. Agus an dlí ag seasamh mar a seasann sé, áfach, claoífidh Feeney B., nó aon breitheamh eile atá an líosta um fháltas ó choireacht mar curam aige nó aici, leis na tuairimí a nochtaíodh le blianta beaga anuas agus beidh an teach a cheannaítear le fáltais ó choireacht fuar do gach éinne a chónaíonn ann. ■

2 *Criminal Assets Bureau v. Gilligan*, High Court, 27th January, 2011.

Legal

The Bar Review

Journal of the Bar of Ireland. Volume 18, Issue 3, June 2013

Update

A directory of legislation, articles and acquisitions received in the Law Library from the 29th March 2013 up to 15th May 2013
Judgment Information Supplied by The Incorporated Council of Law Reporting

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

ADMINISTRATIVE LAW

Statutory Instrument

Arts, Heritage and the Gaeltacht (Delegation of ministerial functions) order 2013
SI 94/2013

AGRICULTURE

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An Bord Bia act 1994 (levy on slaughtered or exported livestock) order 2013
SI 98/2013

Bovine viral diarrhoea (amendment) order 2013
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European Communities (swine vesicular disease) regulations 2013
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Article

Haynes, Shannon Michael
The prevalence of judicial review in the asylum arena
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BANKING

Article

Murphy, Trevor
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In re Mullee (a bankrupt)

COMMERCIAL LAW

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European Communities (late payment in commercial transactions) (amendment) regulations 2013
(DIR/2011-7)
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Wireless telegraphy act 1926 (section 3) (exemption of ground probing and wall probing radars) order 2013
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Wireless telegraphy act 1926 (section 3) (exemption of level probing radars) order 2013
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Pyne v Van Deventer

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CONSTITUTIONAL LAW

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McCrystal v Minister for Children and Youth Affairs

Amendment

Referendum – Role of Government – Democratic and constitutional process for amendment of Constitution – Equality – Fair procedures – Freedom of expression – Use of public funds for Government information campaign – Test applicable – Whether clear disregard of constitutional powers and duties – Whether impartial, equal and fair – Whether neutral when viewed broadly – Whether promoted one side in referendum – *Boland v An Taoiseach* [1974] IR 338, *Crotty v An Taoiseach* [1987] IR 713, *McKenna v An Taoiseach (No 2)* [1995] 2 IR 10, *TD v Minister for Education* [2001] 4 IR 259 and *Curtin v Dáil Éireann* [2006] IESC 14, [2006]

2 IR 556 followed; *Associated Provincial Picture Houses, Ld v Wednesbury Corporation* [1948] 1 KB 223, *The State (Keegan) v Stardust Compensation Tribunal* [1986] IR 642, *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39 and *Hanafin v Minister for the Environment* [1996] 2 IR 321 distinguished – Referendum Act 1994 (No 12), s 43 – Constitution of Ireland 1937, Articles 5, 6.1, 11, 16, 28.2, 40, 41, 42, 42A.1, 46 and 47 – Plaintiff's appeal allowed (486/2012 – SC – 11/12/2012) [2012] IESC 53
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SI 82/2013

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SI 91/2013

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SI 123/2013

TORT

Medical negligence

Duty of care – Hip replacement surgery – Plaintiff alleging personal injury – Expert witnesses – Whether defendant negligent – *Dunne (an infant) v National Maternity Hospital* [1989] IR 91 applied – Claim dismissed (2006/3200P – Quirke J – 23/2/2012) [2012] IEHC 266
McGowan v O'Rourke

TRANSPORT

Statutory Instrument

Railway safety act 2005 (section 26) levy order 2013
SI 68/2013

BILLS INITIATED IN DÁIL ÉIREANN DURING THE PERIOD 29TH MARCH 2013 – 15TH MAY 2013

[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.

Land and Conveyancing Law Reform Bill 2013
Bill No. 34 of 2013

Non-use of Motor Vehicles Bill 2013
Bill No. 37 of 2013

Forestry Bill 2013
Bill No. 43 of 2013

Housing (Amendment) Bill 2013
Bill No. 44 of 2013

In Camera Rule in Childcare and Family Law Proceedings Bill 2013
Bill No. 35 of 2013
[pmb] *Deputy Robert Troy*

Statute of Limitations (Amendment) Bill 2013
Bill No. 38 of 2013
[pmb] *Deputy Caoimhghín Ó Caoláin*

Mortgage Resolution Bill 2013
Bill No. 40 of 2013
[pmb] Deputy Michael McGrath

Finance (Local Property Tax Repeal) Bill 2013
Bill No. 42 of 2013
[pmb] Deputy Pearse Doherty

Health (Fluoridation of Water Supplies) (Repeal) Bill 2013
Bill No. 47 of 2013
[pmb] *Deputy Brian Stanley*

Statistics (1926 Census) Bill 2013
Bill No. 50 of 2013
[pmb]*Deputy Seán Ó Fearghaíl*

Housing (Purchase of Voluntary and Co-operative Housing) Bill 2013
Bill No. 51 of 2013
[pmb]*Deputy Seán Ó Fearghaíl*

Petroleum and other Minerals Development (Amendment) Bill 2013
Bill no. 52 of 2013
[pmb] *Deputy Michael Colreavy*

BILLS INITIATED IN SEANAD ÉIREANN DURING THE PERIOD 29TH MARCH 2013 -15TH MAY 2013

Criminal Law (Human Trafficking) (Amendment) Bill 2013
Bill No. 39 of 2013

Criminal Justice (Unlicenced Money-Lending) Bill 2013
Bill No. 36 of 2013
[pmb] *Senator Marc MacSharry*

Financial Stability and Reform Bill 2013
Bill No. 41 of 2013
[pmb] *Senator Sean D. Barrett*

Corporate Manslaughter Bill 2013
Bill No. 45 of 2013
[pmb] *Senators David Cullinane, Trevor Ó Clochartaigh and Kathryn Reilly*

Sea Fisheries and Maritime Jurisdiction (Fixed Penalty Notice) Bill 2013
Bill No. 46 of 2013
[pmb] *Senators Paschal Mooney, Denis O'Donovan, Brian Ó Domhnall*

Public Health (Availability of Defibrillators) Bill 2013
Bill No. 48 of 2013
[pmb] *Senators Fergal Quinn, John Crown, Sean D. Barrett, Rónán Mullen and David Norris*

Seanad Bill 2013
Bill No. 49 of 2013
[pmb] *Senators Katherine Zappone, Feargal Quinn and Mary Ann O'Brien*

PROGRESS OF BILL AND BILLS AMENDED DURING THE PERIOD 29TH MARCH 2013 – 15TH MAY 2013

[Seanad] – initiated in Seanad

Animal Health and Welfare Bill 2012 [Seanad]
Bill No. 31 of 2012

Amendments made by the Dáil

Central Bank (Supervision and Enforcement) Bill 2011
Bill No. 43 of 2011

Committee Amendments

Companies Bill 2012
Bill No. 116 of 2012

Second stage completed, referred to Committee

Construction Contracts Bill 2012
Bill No. 21 of 2010

Committee Amendments

Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Bill 2013
Bill No. 7 of 2013

As amended in the Select Committee on Justice, Defence and Equality

Education and Training Boards Bill 2012
Bill No. 83 of 2012

Amendments made by the Seanad

Enacted

Further Education and Training Bill 2013
Bill No. 5 of 2013

Committee Amendments

Health (Alteration of Criteria for Eligibility) Bill 2013
Bill No. 27 of 2013

Committee Amendments

Enacted

Health (Pricing and Supply of Medical Goods) Bill 2012 [Seanad]
Bill No. 63 of 2012

Report Amendments

Health Service Executive (Governance) Bill 2012 [Seanad]
Bill No. 65 of 2012

Committee Amendments

National Lottery Bill 2012
Bill No. 117 of 2012

Report Amendments

Taxi Regulation Bill 2012 [Seanad]
Bill No. 107 of 2012
As passed by Seanad Éirann

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The Right to Legal Aid at a Coroner's Inquest

CHRISTIAN KEELING BL

Introduction

The recent tragic death of Mrs. Savita Halappanavar has drawn attention to the system that the State has in place for investigating the deaths of persons who die while they are in the care or custody of the State. At the time of writing, the circumstances surrounding Mrs. Halappanavar's death have recently being the subject of a coroner's inquest before the Galway West coroner, Dr Ciarán McLoughlin, and a verdict of death by medical misadventure has been returned. Prior to the conclusion of the inquest, national newspapers reported comments by Dr. McLoughlin to the effect that 67 persons gave statements to the inquest and it appears that a not insubstantial proportion of these persons were called as witnesses.

While there are broad questions as to whether and when a coroner's court is a suitable forum within which to carry out this type of inquiry, this article is principally concerned with the question as to whether a victim's next-of-kin enjoys a right to legal aid at a coroner's inquest. As the case of Ms. Halappanavar demonstrates, it is arguable that in some instances a failure to grant legal aid to a deceased's next of kin may operate in a manner that is oppressive and may have the potential to add to an injustice that a deceased and his family have suffered at the hands of the State.[1]

The Supreme Court, in *Magee v Farrell*,[2] ("*Magee*"), has recently held that a next-of-kin does not enjoy a constitutional right to legal aid before a Coroner's Court even where the inquest relates to a death that occurred while the deceased was in the care or custody of the State. The Court also briefly considered and rejected similar arguments based on the European Convention on Human Rights, ("ECHR"). This article considers this decision and argues that it is inconsistent with the jurisprudence of the European Court of Human Rights, ("ECtHR"). The article also considers the potential scope of the ECHR right to legal aid as it has been interpreted and applied in England & Wales.

Civil Legal Aid

A person's right to apply for legal aid in civil matters is governed by the Civil Legal Aid Act, 1995, (as amended), ("the Act of 1995"). Pursuant to section 27(2)(b) of the Act of 1995, before an application for legal aid at a coroner's inquest can be considered by the Legal Aid Board, the Minister for Justice must prescribe by Order that such a court or tribunal falls within the remit of the Act and, to date, no such Order has been made. It follows that a next-of-kin enjoys neither a statutory right to legal aid itself nor a statutory right to apply to a properly administered legal aid scheme.

Magee v Farrell – High Court

In *Magee,* the plaintiff's son was arrested for public order offences at the home of a friend where he was displaying signs suggestive of paranoid delusions. He was taken to Kilmainham garda station where he was handcuffed and placed in a cell. Shortly afterwards he was found to be in an unconscious state. He was taken by ambulance to St. James's hospital where following attempts to resuscitate him, he was pronounced dead. A post-mortem was carried out and toxicological examination showed recent use of cocaine. The state pathologist's ultimate conclusion was that the death was consistent with cocaine related collapse. The deceased had previous convictions which included convictions for assaulting Gardai. In addition, the post mortem examination revealed minor injuries which could have occurred as a result of a minor scuffle. The injuries were not of a nature that would normally be expected to contribute to death. The plaintiff had concerns in relation to her son's treatment in custody and the speed with which medical treatment was sought. She felt that that she had not been adequately informed of the circumstances surrounding her son's death and was concerned that the full facts had yet to emerge.

The plaintiff sought legal representation at the inquest into the death but was advised that there was no publicly funded provision for legal aid at inquests. The Plaintiff sought judicial review of the decision to refuse the grant of legal aid and was successful before the High Court.[3] Gilligan J based his decision on an expansive interpretation of the Supreme Court's seminal decision in *The State (Healy) v Donoghue*[4], ("*Healy*"), and the consequential High Court jurisprudence thereunder.

As well as relief under the constitution, the Plaintiff had sought damages pursuant to section 3 of the ECHR Act, 2003 and a declaration that Article 2 of the ECHR required the defendants to take appropriate steps to safeguard the lives of those within the jurisdiction by ensuring the provision of an effective and independent judicial system so that the cause of death of individuals who die in state care and/or custody can be determined. However, the Plaintiff's claim under the ECHR failed *in limine* in the High Court on the basis that

1 In some instances, the dependants of a deceased may be entitled to recover the costs of representation at an inquest as a head of special damage in a fatal injuries action, see *Courtney v Our Lady's Hospital Ltd* [2011] IEHC 226. I would like to thank Shane Geraghty BL for drawing my attention to this decision.

2 [2009] 4 IR 703

3 [2005] IEHC 388

4 [1976] IR 325

the death took place prior to the coming into effect of the ECHR Act 2003.[5]

Magee v Farrell – Supreme Court

The Supreme Court allowed the respondents' appeal. Having considered the relevant jurisprudence, Finnegan J accepted that where a legal aid scheme is in place an applicant has a constitutional right to have an application determined in accordance with fair procedures.[6] However, a substantive constitutional right to legal aid would only arise where an applicant was facing a criminal charge conviction for which carried serious consequences for the accused. The principle set out in *Healy* was held not to be applicable to proceedings before a Coroner's Court:

> "[38] The jurisprudence of this court in *The State (Healy) v. Donoghue* [1976] I.R. 325 is clear. A right to legal representation does not carry with it a right to State funded legal aid. Where, however, the liberty of the individual is in issue before the criminal courts there is an entitlement to State funded legal aid. The three decisions of the High Court relied upon by the plaintiff and by the trial judge in giving judgment for the plaintiff do not support a broad extension of the constitutional right recognised in *The State (Healy) v Donoghue* to every case in which fundamental personal rights under the Constitution are involved. *There are very considerable differences between proceedings before a coroner and criminal proceedings***.** An inquest is an inquisitorial process. It is a fact finding exercise and not a method of apportioning guilt or establishing civil liability. At an inquest there are no parties, there is no indictment, there is no prosecution, there is no defence, there is no trial; it is a process of investigation which attempts to establish facts surrounding a death. Questions of civil or criminal liability may not be considered nor investigated. It is not a forum for gathering evidence for pending or impending criminal or civil proceedings. This being so I am satisfied that there is no constitutional right in a person entitled to attend before and be represented at an inquest to State funded legal representation. I would not extend the constitutional entitlement recognised in *The State (Healy) v Donoghue* in the manner sought by the plaintiff." [Emphasis added]

Although the above passage may appear to rely on a right to liberty as the primary source of a right to legal aid, it is clear from both other passages of the judgment,[7] and from the decision of O'Donnell J in *Joyce v Judge Brady*[8], ("*Joyce*") that the primary source of a right to legal aid is the right to a trial in due course of law provided for by Article 38.1 of the Constitution; and the express wording of this provision may form part of the basis for the Supreme Court's reluctance to extend the right to legal aid outside the context of a criminal trial.[9] In any event, it must now be considered settled law that a next-of-kin has no constitutional right to legal aid at a coroner's inquest.

Magee v Farrell – the ECHR point

In *Magee,* the Court briefly considered arguments in relation to Article 2 of the Convention;

> "[37] While the issue relating to the European Convention on Human Rights was not argued before the High Court, before this court the plaintiff in written submissions submitted that the jurisprudence of the European Court of Human Rights could inform the approach of this court to the issue of the entitlement of the plaintiff to legal representation funded by the State before the coroner. Reliance was placed on *McCann v. United Kingdom* (1995) 21 E.H.R.R. 97. That case concerned the killing of a number of I.R.A. members by security forces in Gibraltar. The applicants relied on article 2.1. of the Convention and, inter alia , complained that the Gibraltar inquest did not provide an effective ex post facto procedure for establishing the facts surrounding the killing and among the shortcomings identified was the absence of legal aid… The European Court of Human Rights did not determine whether such civil proceedings, had they been permitted, would constitute an effective compliance with article 2.1 of the Convention. *In the present case it is open to the plaintiff to institute such proceedings and apply for legal aid in respect of the same. It is not suggested that such civil proceedings would be ineffective and it would be difficult to do so having regard to the availability of discovery, third party discovery and interrogatories and the availability of means to compel the attendance of witnesses.* I do not find any assistance

5 On this point, see, *Dublin City Council v. Fennell* [2005] 1 IR 604 *&* *Byrne v An Taoiseach* [2010] IEHC 353 at page 37. This specific question was the subject of substantial appellate judicial disagreement in England and Wales. See *R (Khan) v Sec. of State for Health* [2004] 1 WLR 971; *In Re McKerr* [2004] 1 WLR 807; *Silih v Slovenia* (2009) 49 EHRR 37 & *Re McCaughey* [2011] 2 WLR 1279. As a matter of ECHR law, the procedural obligation to investigate can be detached and continues to bind "*the state throughout the period in which the authorities can reasonably be expected to take measures with an aim to elucidate the circumstances of death and establish responsibility for it*", *Silih v Slovenia* (2009) 49 EHRR 37 at para 157, and as such the better view may now be that the obligation was in fact binding on the State.

6 Murray CJ & Fennelly J concurred

7 See para 27

8 [2011] IESC 36

9 Article 38.1 the Constitution provides, "*No person shall be tried on any criminal charge save in due course of law*".

Finnegan J also considered, and failed to take the opportunity to expressly disapprove of, *Kirwan v. Minister for Justice* [1994] 2 IR 417 wherein it was held that the applicant was entitled to legal aid before a non-judicial body that determined whether the applicant was to be released from the Central Mental Hospital. The applicant was not facing a criminal charge and as such this finding appears *prima facie* inconsistent with the ratio of *Magee* and *Joyce.* Perhaps this decision can be justified on the basis of the express wording of Article 40.4.1° of the Constitution which provides, in a manner analogous to Article 38.1, *"No citizen shall be deprived of his personal liberty save in accordance with law"*. *Kirwan* now appears to be the only decision that has not been disapproved of by the Supreme Court where an applicant has been held to enjoy a constitutional right to legal aid outside the context of a criminal trial.

in this decision in determining the issue before the court." [Emphasis added]

While the issue may not have been fully argued, (perhaps as a result of the threshold issue raised in the High Court), it is submitted that this aspect of the decision in *Magee* may be inconsistent with the scope of a next-of-kin's rights under Article 2 of the ECHR as set out in the jurisprudence of the ECtHR.

Article 2 and the ECtHR

The ECtHR has consistently held that a State's obligations under Article 2 extend beyond the mere prevention of unlawful death and include an obligation to provide an effective judicial system in which potentially wrongful deaths may be investigated and liability determined. Moreover, where a person dies while in the care or custody of the State, or where a state agent is implicated in a potentially wrongful death, a more onerous duty, to proactively and publicly investigate the circumstances surrounding the death, may be imposed.[10]

In *Jordan v United Kingdom*[11], ("*Jordan*"), the applicant alleged that his son had been unjustifiably shot and killed by a police officer and that there had been no effective investigation into, or redress for, his death. In November 1992, the deceased, Pearse Jordan, was shot multiple times and killed while he was unarmed by the Royal Ulster Constabulary in circumstances that, it was alleged, required investigation and explanation. The DPP determined that there was insufficient evidence to prosecute the officers involved and the Independent Commission for Police Complaints determined that there was insufficient evidence for the preferment of disciplinary charges. The applicant applied and was granted legal aid in respect of a fatal injuries action which was commenced in December 1992 but the prosecution thereof was in large part kept in abeyance pending the outcome of, initially, the police investigation and, subsequently, the coroner's inquest.

A coroner's inquest was commenced in January 1995 and was the subject of a variety of legal challenges, which challenges included an ultimately unsuccessful application for judicial review of a decision to refuse the applicant legal aid for representation at the inquest.[12] The applicant was represented at the inquest notwithstanding the failure to provide legal aid. In July 2000, the Lord Chancellor announced the establishment of an extra-statutory *ex gratia* scheme to make public funding available for representation for proceedings before Coroners in exceptional inquests in Northern Ireland.

The ECtHR was asked to consider whether the legal processes employed in relation to the death were consistent with obligations imposed by Article 2 of the ECHR. The ECtHR stated:

"103. In the light of the importance of the protection afforded by Article 2, the Court must subject deprivations of life to the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances. *Where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as for example in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries and death which occur. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation. ...*

105 The obligation to protect the right to life under Art.2 of the Convention, read in conjunction with the State's general duty under Art.1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force... What form of investigation will achieve those purposes may vary in different circumstances. *However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures. ...*

109. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. *In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests."* [Emphasis added]

While applying the general principles to the facts the Court stated:

"131 The public nature of the inquest proceedings is not in dispute... The applicant complained however that his ability to participate in the proceedings as the next-of-kin to the deceased was significantly prejudiced as legal aid was not available in inquests and documents were not disclosed in advance of the proceedings.

132 The Court notes however that, as with the next-of-kin in the McCann case, the applicant has been represented by a solicitor and counsel throughout at the inquest, even though legal aid only became available for inquests in Northern Ireland from July 25, 2000. ... *While it cannot therefore be said that the applicant has been prevented, by the lack of legal aid, from obtaining any necessary legal assistance at the inquest,* this has contributed significantly to prolongation of the proceedings. The Court considers this further below in the context of the delay. ...

141 As found above, civil proceedings would provide a judicial fact-finding forum, with the attendant safeguards and the ability to reach findings of unlawfulness, with the possibility of

10 Article 2 of the ECHR provides, in relevant part, "*2(1). Everyone's right to life shall be protected by law".*

11 (2003) 37 EHRR 2

12 Legal Aid, Advice and Assistance (Northern Ireland) Order 1981, Sch.1, para.5. See *In re Lavery (Application for Judicial Review) (No 1) & (No 2)*, unreported, Queens Bench Division, 16 March 1999, Kerr J

damages. *It is however a procedure undertaken on the initiative of the applicant, not the authorities*, and it does not involve the identification or punishment of any alleged perpetrator. As such, it cannot be taken into account in the assessment of the State's compliance with its procedural obligations under Art.2 of the Convention."[13] [Emphasis added]

It is submitted that it is clear from the Courts' reasoning that if a failure to provide legal aid at the inquest had resulted in the applicant being denied necessary legal representation the State would have been in breach of its obligations under Article 2. In addition, it is submitted that, contrary to the view of the Supreme Court in *Magee*, the ECtHR held that the opportunity to bring civil proceedings, for which legal aid may be available, will not always be sufficient to meet the State's obligations. The State must cause an effective investigation and not merely facilitate one.

English ECHR jurisprudence

In England & Wales, there is considerable body of law that considers the scope and implications of a State's Article 2 obligations. The extent to which English authority can be relied upon by an Irish Court when interpreting the scope of ECHR rights is an issue that, it is submitted, has yet to be fully considered by an Irish Court.[14] Consideration of the issues that arise is beyond the scope of this article but for present purposes it may suffice that the authority be of persuasive value.

In *Legal Services Commission v R (Humberstone)*[15], ("*Humberstone*"), the claimant's son suffered an asthma attack and an ambulance was called. At first, a single paramedic arrived and checked the child's oxygen level which was low. Oxygen was given through a mask but the child collapsed. The paramedic then called ambulance control and an ambulance eventually arrived and took the child to hospital. Attempts to resuscitate the child failed and he was declared dead shortly after arriving at hospital. The claimant was later arrested on suspicion of manslaughter by gross negligence, the police apparently acting on suggestions by medical practitioners that she had not cared for the child properly, but the police decided not to charge her. The claimant asked the Legal Services Commission to request the Lord Chancellor to exercise his discretion to provide funding for her to be represented at the inquest into her son's death.

The Lord Chancellor's Funding Guidance in respect of inquests stated that funding would only be granted where there is a significant public interest in the applicant being legally represented or where funded representation "*is likely to be necessary to enable the coroner to carry out an effective investigation into the death as required by article 2 of [the Convention for the Protection of Human Rights and Fundamental Freedoms]*". The Funding Guidance further stated that such necessity would only arise in exceptional cases. The Legal Services Commission refused to request funding for the claimant, finding that even if Article 2 was engaged, which was not accepted, the circumstances were not exceptional. It was accepted by the claimant that the significant public interest exception was not applicable. At first instance the claimant's claim for judicial review was allowed. The Court of Appeal, agreeing with the finding, but not the reasoning, of the High Court dismissed the State's appeal.

Smith LJ took the opportunity to summarize some of the principles applicable to Article 2:

> "20 It is convenient at this stage to interpose what I hope will be a brief uncontroversial explanation of the state's obligations under article 2 of ECHR, as much of what follows in this judgment relates to the existence and extent of those obligations.
>
> 21 The ECHR was imported into domestic law by the Human Rights Act 1998. Article 2(1) provides that: "Everyone's right to life shall be protected by law". That primary duty imposes on the state a duty not to take life and also a duty to take appropriate legislative and administrative steps to protect life, for example by the provision of a police force and criminal justice system. It imposes on state authorities such as the police and prison authorities the duty to protect those in their immediate care from violence either at the hands of others or at their own hands.... The duty also extends to organs of the state, such as hospital authorities, to make appropriate provision and to adopt systems of work to protect the lives of patients in their care...
>
> 22... In addition to these substantive duties, there is an obligation on the state in respect of the investigation of deaths and it is the scope of this duty which falls to be considered in this appeal. That duty has been described in *Jordan v United Kingdom*... as requiring the initiation of an effective public investigation by an independent official body into any death where it appears that any of the state's substantive obligations has been or may have been violated and it appears that agents of the state are or may be in some way implicated.
>
> 23 This duty may be fulfilled in England and Wales by the conduct of a coroner's inquest although, in *R (Middleton) v West Somerset Coroner*... , the House of Lords held that, in a case where the state's duty under article 2 was at least arguably engaged, the inquest had to range more widely than was usual pursuant to the Coroners Rules 1984 and had to include consideration of 'by what means and in what circumstances' the deceased had died.[16] This type of inquest, where article 2 is potentially engaged, is now often known as a 'Middleton' inquest.
>
> 24 *Where such an inquest is necessary, the state may bear a further responsibility, namely to provide representation for the close family members so as to enable them to play an effective part in the inquest.* In *R (Khan) v Secretary of State for Health*... the Court said that the inquest could only be

13 See also paragraph 142

14 However, see *JMcD v PL* [2010] 1 ILRM 461

15 [2010] EWCA Civ 1479; [2011] 1 WLR 1460

16 Cf. Section 30 of the Coroner's Act, 1961:
"*30.—Questions of civil or criminal liability shall not be considered or investigated at an inquest and accordingly every inquest shall be confined to ascertaining the identity of the person in relation to whose death the inquest is being held <u>and how, when, and where the death occurred</u>*."

an effective investigation if the close family members could play an effective part in it. Such representation would not be necessary in the great majority of cases but, in what were there described as 'exceptional' cases, it would be.

> 25 The main issue in the present case is whether the state's obligation to conduct an effective investigation into a death (with the associated possible necessity to provide representation) arises in all cases where a death occurs while the deceased was in the care of the state or whether it arises only in a much narrower range of cases where it is arguable that the state has breached its substantive article 2 obligations. ...
>
> 58 I would summarise [Richard J's] conclusions by saying that article 2 imposes an obligation on the state to set up a judicial system which enables any allegation of possible involvement by a state agent to be investigated. That obligation may be satisfied in this country by criminal or civil proceedings, an inquest and even disciplinary proceedings or any combination of those procedures. This obligation envisages the provision of a facility available to citizens and not an obligation proactively to instigate an investigation. Only in limited circumstances (I depart from Richards J only so far as to decline to call them exceptional) will there be a specific obligation proactively to conduct an investigation. *Those limited circumstances arise where the death occurs while the deceased is in the custody of the state or, in the context of allegations against hospital authorities, where the allegations are of a systemic nature such as the failure to provide suitable facilities or adequate staff or appropriate systems of operation. They do not include cases where the only allegations are of "ordinary" medical negligence."* [Emphasis added]

Smith LJ later took the opportunity to criticise the Funding Guidance in several respects.[17] These criticisms may shed light on the Court's view as to the appropriate scope of the State's duty to provide legal aid at an inquest.

First, the Court observed that the focus in the Guidance on the needs of the Coroner was inappropriate and instead "*the decision must focus on the effective participation of the family*".[18] Further, Smith LJ considered that a statement in the Funding Guidance that funding would only be required in "*exceptional*" cases was inappropriate:

> "77 It is however, important to remember the test which must be applied when deciding whether the state should fund representation. The duty to provide representation is derived from the fifth criterion which must be satisfied in an enhanced investigation as described in *Jordan*... The requirement is that the next of kin must be involved in the procedure to the extent necessary to safeguard their legitimate interests... From that requirement flows the duty to provide representation where it is likely to be necessary to enable the next of kin to play an effective part in the proceedings.
>
> 78 Whether such representation is likely to be necessary in a particular case is a matter of judgment dependent on the facts of the individual case and, as the Lord Chancellor's guidance correctly states, on all the circumstances of the case. However, I do not think that it should be necessary or appropriate to classify a case as 'exceptional' before it can be adjudged to give rise to a need for representation... Without a statistical analysis, I do not think anyone could say in what proportion of cases representation will be likely to be necessary."

In addition, Smith LJ expressed concerns with respect to guidance to the effect that a family will typically be able to participate without legal representation:

> "79 A further concern arises from the statement at paragraph 27.4.9 [of the Funding Guidance] that the starting point for consideration of whether funded representation will be necessary is that in the majority of cases the family will be able to participate effectively without the need for advocacy services. It is said that in general the ability to attend and understand the proceedings together with an opportunity to raise any particular matter of concern with the coroner will be sufficient. First, this passage seems to create a presumption against the grant of representation which I do not think is consistent with the application of the test. But, in addition, the passage seems to overlook the right of a close family member, pursuant to rule 20 of the Coroners' Rules to question witnesses. Of course some family members will be able to exercise that right competently, although I think it will often be difficult for them to do so. But to suggest that in general it will be enough for them to be able to tell the coroner of their concerns seems to me to contemplate that they can properly be deprived of their right to question witnesses." [Emphasis added]

Conclusion

It is submitted that it follows from the foregoing that, on appropriate facts, an applicant denied legal aid for representation at a coroner's inquest may have a good claim for damages under Section 3 of the ECHR Act, 2003. More directly, it is submitted that the better view is that the ECHR aspect of the decision in *Magee* was wrongly decided.[19] In addition, broader questions, such as the compatibility of the scope of a standard coroner's inquest with the State's obligations under the ECHR, also arise.

It may also be worth commenting on the constitutional aspect of the decision in *Magee* in light of the ECtHR jurisprudence. It is submitted that while the judgement amounts to a forensic rebuttal of the proposition that the pre-existing jurisprudence, taken as a whole, supported the proposition that a constitutional right to legal aid existed outside of a criminal trial, the judgment is less persuasive,

17 The guidance has since been amended.

18 At paragraph 75

19 An issue may arise as to whether the decision was reached *per incuriam*.

or at least less thorough, when it justifies a refusal to extend the right to legal aid.

In particular, the Court did not address whether the State's constitutional obligation not only to protect, but also to vindicate in case of injustice done, as best it may, the right to life of every citizen, ought to be considered as imposing wider duties on the State, at very least where the State itself is implicated in a death. Whether a right to legal aid arises at an inquest can, it is submitted, only be properly considered in the context of a broader consideration as to the scope of the State's duty to provide mechanisms and processes to explain deaths.

While the principles that are, and ought, to be at play when the Court discovers or extends the scope of a constitutional right are controversial, it is submitted that the Court ought to be entitled to develop this law in a manner that takes cognisance of the lessons that manifestly flow from a consideration of the history of the State's legal system and the issues with which that system has been confronted. Our law should in part reflect our own traditions and values as have developed through our own experience. And if that is correct, it may be worth remembering in this context the lessons that ought to flow from the industrial schools scandals. While many State institutions must take some share of responsibility for the failures at issue, there can be no doubt but that the failure to bring contemporaneous prosecutions, or civil proceedings, reflects poorly, not only on the criminal justice system, but on all arms of the State, and indeed professions, that are associated therewith. Our constitutional law ought to reflect lessons learned from these failures.

One cause of these failures may have been the powerlessness of the victims and an associated inability to effectively engage with the variety of legal processes by which the State could have been contemporaneously held to account. It is submitted, therefore, that a lesson that manifestly flows from our legal history is that the mere provision of a legal system that facilitates or enables the possibility of the State being held to account will not act as a sufficient check against abuse of State power, so as to meet the State's constitutional obligations, where that system is dependent on individual victims of State abuse engaging with it. Such engagement presupposes an amount of power that the victims of abuse of State power, for social, political, educational, or economic reasons, will often not posses. What may therefore be required, in the context of a Coroner's inquest, is the empowerment of both the victim's next-of-kin and the Coroner's Court itself. ■

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Single Euro Payments Area initiative (SEPA)

Caroline Bergin-Cross BL*

This Article shall provide a detailed anaylsis of the Single Euro Payments Area initiative (SEPA) which aims to overcome the legal and market barriers that have remained in place since the period before the introduction of the euro. This has resulted in a fragmented market, however, SEPA aims to create a single market for euro-denominated retail payments. SEPA will allow payment systems users to make cashless, euro-denominated payments to payees located anywhere in the EU and EEA, using a single payment account and a single set of payment instruments.

SEPA Credit Transfers and direct debits SCT and SDD

The European Payments Council ('EPC') has developed standards and rules for credits and debits in Euros (known as SCT and SDD) payments.[1] The central idea is that it should be easy to send electronic payment to a recipient in any SEPA State as to a payee in the same State, and for the same cost. The SEPA area encompasses all EU Member States and Iceland , Liechtenstein, Norway, Switzerland and Monaco.[2]

The SEPA credit scheme was launched on January 28th, 2008. By May 2010, SEPA credit transfers accounted for some 8% of the total cross-border Euro payments. The SEPA direct debits scheme was launched on November 2nd, 2009.

(a) The infrastructure

Essentially the EPC has developed uniform rules and standards for credit transfers and direct debits, to which participants adhere, the Scheme Layer. The infrastructure is a matter which is left to the participants, the Infrastructure Layer. It is envisaged there may be a number of different providers of a clearing and settlement mechanism, CSM, and competition between such CSM providers. However, the EPC has set out a framework of principles with which providers of CSM services must apply.[3] The main requirements include a requirement that it must be possible for a payment to reach any account which complies with the SEPA requirements in any SEPA State, known as reachability, and that systems used in the clearing and settlement of SEPA payments must be interoperable. This model of infrastructure is called a Pan European Automated Clearing House, as known as PEACH. The framework principles are called the PE-ACH CSM framework.[4]

(b) SEPA credit transfer

The rule book for SEPA credit transfers is:

> "a set of rules practices and standards to achieve interoperability for the provision and operation of a SEPA payment instrument agreed at interbank level."

Participants in the scheme adhere by way of an agreement. The rulebook is governed by Belgian law, as is the adherence agreement. SEPA credit transfers may only be made in Euros.[5] The rulebook does not impose any limit on the amount of a transfer though banks may impose them.[6] The full sum transferred must be received into the payee account,[7] although charges may be levied on the payer and the payee.[8] Messages between banks comply with ISO20022. The remittance data field is limited to 140 characters. There is a single standard for identifying a bank account. It is intended that the scheme may be applied to internal as well as cross-border payments, and to bulk as well as individual payments. Transfers must be received within two business days of the payment instruction being accepted. From January 1, 2012, the payment must be received within one business day.[9]

A transfer can be returned within three business days of the settlement date if it cannot be credited on the basis of the information given on the payer's instructions.[10] A transfer can be recalled within ten business days after the execution date by the paying bank on behalf of a customer for these reasons only: 'duplicate sending', and technical problems resulting in erroneous 'transfer,' and 'fraudulent originated Credit Transfer'.[11]

The paying bank should ensure the 'authenticity and

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1 European Payments Council, Framework for the Clearing and Settlement of Payments in SEPA (January, 2007).
2 European Payments Council, Framework for the Clearing and Settlement of Payments in SEPA (January, 2007).
3 See Committee on Payment and Settlement, Core Principles for Systematically Important Payment Systems (Bank for International Settlements, Basle, 2001).
4 European Payments Council, Framework for the Clearing and Settlement of Payments in SEPA (January, 2007). See Committee on Payment and Settlement, Core Principles for Systematically Important Payment Systems (Bank for International Settlements, Basle, 2001).
5 Regulation 2.5.
6 European Payments Council, Framework for the Clearing and Settlement of Payments in SEPA (January, 2007).
7 Regulation 4.2.4.
8 Regulation 4.2.3.
9 Regulation 4.4.
10 Regulation 4.4.
11 European Payments Council, Framework for the Clearing and Settlement of Payments in SEPA (January, 2007).

validity' of the transfer instructions and check the destination details. A paying or receiving bank may be liable to compensate the other. However, liability is limited to the amount of the transfer except in cases of 'wilful intent.'[12]

SEPA direct debit

The SEPA rulebook for direct debits applies to the collection of funds from a payer's account which is initiated by a payee based on the authorisation or mandate given by the payer to the payee.[13] Participants in the scheme adhere by way of an agreement.[14] The rulebook is governed by Belgian law, as is the adherence agreement. The mandate must be governed by the law of a State in the SEPA area.[15]

Direct debits can be recurrent or one off. The scheme only applies to debits in Euros. There is no limit on the value of a debit transfer the scheme, though banks may impose limits on customers.[16] There is a strict timetable for the submission of direct debit instructions. In general, the debit should be settled and paid on the same day as due.[17] The paying bank may reject a direct debit for technical reasons, or when unable to process it. The payer may for any reason request that a paying bank not pay a direct debit. A payee may request a reversal of a payment although the receiving bank is not obliged to re credit the payer.[18]

A paying or receiving bank may be liable to compensate the other for breach of the rulebook, negligence or operational failure. However, liability is limited to the amount of the transfer in cases of 'wilful intent'. There is an optional scheme for electronic direct debit mandates, and a separate scheme for business to business direct debits.[19] ■

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12 Regulation 2.2. See Committee on Payment and Settlement, Core Principles for Systematically Important Payment Systems (Bank for International Settlements, Basle, 2001).

13 Regulation 1.4.

14 Regulation 1.4.

15 European Payments Council, Framework for the Clearing and Settlement of Payments in SEPA (January, 2007). See Procotor, Goode on Payment Obligations in Commercial and Financial Transactions, 2nd edn (London: Sweet & Maxwell, 2009), para 1-09 et seq. See generally, Procotor, Mann on The Legal Aspect of Money, 6th edn (Oxford Clarendon Press, 2005) CH VII.

16 Norton J, Reed C and Walder I. (eds), Cross Border Electronic Banking (1st edn, London, 1995), ch. 9.

17 Regulation 4.3.1.

18 Regulation 4.4.

19 See Benjamin Geva, 'Payment Transaction under the EU Payment Services Directive: A U.S. Comparative Perspective' (2009) 27 Penn State International Law Review 713.

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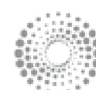
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Barristers as lecturers in law: why, how and where?

By Arran Dowling-Hussey Barrister-at-Law*

Many a young, and not so young barrister, has tutored or lectured in law.[1] Some, but not many barristers, combine full time membership of a Faculty or School of Law with an extensive legal practice. However this is rare and as time has gone by, institutions increasingly ask that the Barrister/Lecturer devote themselves solely to the latter role if they want the benefits that come with a full time position at a third level institution. Moreover such full time roles in 2013 are increasingly hard to come by without a doctorate in law- a project not easily entered into once full time studies have concluded and practice in the Law Library has been commenced. Therefore, realistically, many of the 2,300 or so members of the Law Library who tutor or lecture, are doing so on a part time basis.

It should of course be noted that opportunities of this type, whilst popular, are not of universal appeal and there are many successful Barristers who will never have tutored or lectured in law. The remarks that follow are intended to be of some help to those Barristers who might like to look at doing some teaching. It should be noted that whilst a very strong academic record is certainly no barrier to getting such work, there is such a breadth of courses available to teach that many institutions are more interested in getting input from a practitioner. Morever, developing a reputation for turning up on time and being ready and prepared to teach a class is something of more interest to most third level providers than what place you came in your graduating class.

There are less part time tutoring or lecturing positions than Barristers who might like to carry out work of this type. But before looking at how to get a position as a tutor or lecturer it's helpful to examine why such work is of assistance to young counsel. Often in the early years, the time spent by junior barristers in court will not be very long. Therefore besides the financial benefits of part time legal teaching, there is a professional benefit. The Barrister/Lecturer will be speaking in an ordered, coherent manner for an hour or more in front of a critical audience whose interest needs to be maintained. The audience for a class or tutorial in an university is not the same as in a court room but nonetheless some of the skills that can be practised and improved on a campus transfer between the two roles.

With a little luck and some persistence, it can be possible to get lecturing hours. For reasons of space, it is not possible to list all the third level institutions where part time legal teaching can be obtained. It is not too hard to compile a list if a short amount of time and consideration is given to researching the issue. Likewise it is normally easy enough to work out where the application should be directed. Normally, within the Faculty or School of Law's section of the institution's web page there will be a page that explains when such applications should be submitted by, whom they should go to and the form that they should take. Some applications will need to be made on a specialised form whereas others will merely be by CV and covering letter. In one or two cases, provision of a photograph or some other additional requirement will be asked of applicants.

In some instances, tutoring or lecturing can be obtained other than by general application. Often those full time members of staff responsible for administering courses are under time constraints. Therefore, when one Barrister departs a course that they have taught as a part time tutor or lecturer, the staff member responsible for administering the course will be more than happy to accept a suggestion that another Barrister assumes responsibility for the part time course. This process is not one that will arise for all Barristers- it is by and large out of your hands as to whether such an offer will be made to you by a colleague. However, a couple of steps can increase the chance of 'lightning striking'. Many sub-areas of law have associations which Barristers and/or Solicitors belong to such as *inter alia* the Employment Bar Association of Ireland. Membership of such an organisation increases the chance that you will become known as someone interested and qualified in an area and it marks you out from the ranks of the wider Bar.

If a decision to give up a part time teaching position has been made, it is easier to make an offer to the one or two colleagues who are an active member of the organisation just mentioned or others such as, say the Irish Society for European Law then to think about all the colleagues who were called to the Bar around the same time as you who could teach such a course. Likewise, in a minor way, writing journal articles helps develop a practitioners profile in a particular area of law. Whilst the foregoing 'lightning striking' is unlikely, it can and does happen in some cases. A more manageable goal in the short term, if waiting for part time teaching opportunities, may be to pitch one a one off legal lecture to private Continuing Professional Development ("CPD") providers.

Work of this type, as is the case with teaching in a VEC may

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* Arran Dowling-Hussey has tutored, lectured or acted as a guest lecturer at or for Brunel University, Central Law Training, Chartered Institute of Arbitrators (Irish Branch), Dublin City University, Dublin Institute of Technology, Griffith College Dublin, University of Limerick and the Law Society of Ireland.

1 Mr. Justice John Murray the former Chief Justice of Ireland and Mr. Justice Daniel O'Keeffe are but some of the many members of the Inner Bar or Superior Courts who tutored or taught at universities in Dublin such as in Judge Murray and Judge O'Keeffe's case University College, Dublin.

be an entry level step that facilitates subsequent lecturing or tutoring at the Law Society of Ireland or a University. Like third level providers, there is less private provision of CPD than there used to be, but it does go on. It might be that a lecture to the Midlands or South Eastern Circuit CPD evening allows some practitioners their first chance to dip a toe into such waters and extend the talk given to colleagues into a lecture for a private CPD company. As has been set out, it can be hard to get part time teaching work. Anyone looking for work like this is not just competing with fellow Barristers. Young solicitors tutor and lecture on a part time basis so as to raise their profiles as well. Moreover, in recent years, with pressure on university budgets, many institutions are not able to have as many part timers as they once did. However, work of this type has not disappeared and it is hoped that as the economy improves that there may be more of it to go around. ■

Irish Rule of Law International

A delegation of four are traveling to Malawi in May: Judge Roderick Murphy, Eithne Casey BL, Caroline O'Connor BL and Anne-Marie Blaney. They will first visit the project in Lilongwe and then travel to Blantyre for a three day workshop in partnership with the EU Democratic Governance Programme. The training is for 40 Judicial Officers and Magistrates in restorative justice and human rights based approach to criminal justice, along with an introduction to alternative dispute resolution procedures.

This follows on the success of the two legal volunteers in Malawi; Ruth Dowling and Eithne Lynch, who were awarded the inaugural Bar Council Human Rights Award, at the Danske Law Awards 2013, last week. They have dedicated the past two years to working with some of the most vulnerable people in Africa.

They were sent to Malawi with the development NGO, Irish Rule of Law International, to set up a pioneering project tackling severe overcrowding in prisons. They were given a blank canvass and limited resources to lay foundations for the project and forge a way for the organisation within the criminal justice system in Malawi.

Ruth and Eithne initially focused on providing access to justice for the "forgotten" prisoners; those held for years on end in pre-trial detention without access to a lawyer. Through sheer perseverance these two lawyers have overcome numerous hurdles to drive this project to great heights. Apart from free legal assistance for prisoners, they have now also established a diversion system within police stations in their locality, a behavioural change programme for juveniles in conflict with the law, basic legal skills training for prisoners and human rights workshops for the police and judiciary. ■

For further information, please contact Rachel Power, tel: (01) 817 5331

Mr. Michael Irvine Director Irish Rule of Law International and Ruth Dowling BL Programme lawyer with IRLI at Kachere juvenile prison

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