Bar Review

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- Developments in the Employment Injunction
- The Personal Injuries Assessment Board
- Judicial Review of Asylum Applications

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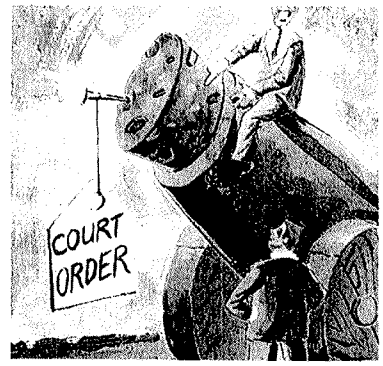

Contents

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The Personal Injuries Assessment Board

The government has finally unveiled a battery of measures to tackle the soaring cost of insurance. The centre-piece of this action plan is the long mooted establishment of a Personal Injuries Assessment Board (PIAB), which will initially deal with claims where liability is not in issue. Of course, the government is to be lauded for attempting to address a problem that burdens consumers and business alike. But, it has long been our view that PIAB is no panacea to the ills that push up premia.

PIAB is a sticking plaster, an extra layer of bureaucracy grafted on to the existing system, without any reasoned analysis as to how it will operate in practice. Indeed, the report of the Implementation Group 2002 launched by the government specifically recognises that this extra layer is one of the "perceived risks" attached to the scheme.

It seems that PIAB is based on the false premise that claimants will accept less compensation if their claims can be processed more quickly. However, Dr. Peter Bacon, in his report on the proposed Personal Injuries Compensation Scheme, came to the opposite conclusion. His view is that in order for PIAB to work, it will have to offer some added benefit to claimants over the existing system. Indeed, this accords with the experience of legal practitioners who find that the over-riding consideration of any plaintiff at settlement talks is whether he can secure a higher amount in court.

Since our constitution requires that citizens cannot be denied access to the courts, PIAB awards will be subject to judicial scrutiny, through appeal or judicial review. This will complicate rather than simplify the handling of claims. If PIAB is perceived as a cut-price compensation board, then claimants will exercise their right of appeal to the courts. This in turn will add to the cost and length of proceedings, the very problems which the government seeks to address. It is our view that PIAB will not sit easily within the current court system, and we fear that the government has not fully analysed the manner in which it will be integrated within the existing court structure.

Our view, which is supported by the lengthy analysis conducted by Dr Bacon, is that the most cost-efficient manner of tackling legal costs is to address the inefficiencies in the current court system. We believe that a radical reform can be carried out with little or no additional cost to the taxpayer. As practitioners, we are uniquely placed to spearhead the necessary reforms and to anticipate the pit-falls . It seems the government sees fit to ignore that expertise and, we regret that no practising barrister has been included in the eleven-member Interim Board set up to monitor the establishment of PIAB. We would point out that the establishment of PIAB involves complicated issues of law and procedure - it is not merely an administrative exercise. The views of those who practise in the courts and who are uniquely familiar with their operation should not be ignored.

The reforms that we support, are detailed in the Dr Bacon report. These reforms focus on cutting down the costs of delivering a fair compensation award without reducing the actual award. These measures aim to tackle the procedural inefficiencies in the system, while preserving the legal rights of bona fide victims. These proposals include mandatory pre-trial settlement meetings in cases where liability is not in issue, automatic discovery of certain documents on request, an amendment to the Statute of Limitations requiring personal injury claims to be brought within a two-year period and provisions speeding up the exchange of pleadings through stricter enforcement of the rules and through greater use of electronic pleadings. The Bacon report also suggests that the mutual exchange of evidence at an earlier stage would facilitate earlier resolution and, to this end, he recommends that existing High Court rules on pre-trial disclosure should be extended to the Circuit Court.

Indeed, one of the key proposals from the Bar Council which has now gained common currency is our recommendation that more stringent measures must be introduced to combat fraud. We have suggested that those who fabricate or exaggerate claims should be heavily penalised and we back the introduction of a new offence of "insurance fraud." In terms of case management, it is clear that the appointment of a court official to manage personal injuries cases and to enforce rules relating to discovery and the time-limits for pleadings, would facilitate a more effective use of court time and would allow judges to focus on the more important task of determining liability.

We note that the impetus for PIAB is driven by the insurance industry and those who subscribe to the economic argument that it will automatically lead to lower insurance costs. However, there is no economic analysis, which supports this conclusion. The only report that has addressed and examined the issues is that prepared by Dr. Bacon, who has reached the opposite conclusion. Indeed, the Tanaiste, Mary Harney has admitted that no cost-benefit analysis was carried out by the government to estimate the cost of PIAB, and she has committed to such an analysis in the coming months. In our view, it is extraordinary that in its eagerness to quell dissent from disgruntled consumers and a vocal insurance industry, the government has seized on PIAB without having first examined the cost to the taxpayer. It is also extraordinary that the Tanaiste has not secured any binding commitment from the insurance industry that it will substantially cut premia.

We believe that PIAB is a flawed premise and will not lead to any real, long-term reduction in the cost of insurance. In our view, PIAB has become the political equivalent of a runaway train. ●

Developments in the Employment Injunction

Donal O'Sullivan BL

Introduction

The traditional view of the courts of equity was that the remedy of injunction would not be granted to restrain breaches of contracts of employment. However, this view has been significantly undermined by decisions of the courts in this jurisdiction in the last 10 years. Equity's initial break from this standpoint was made by Denning MR in the case of *Hill v. Parsons*,[1] in which the Court granted an injunction restraining the dismissal of an employee in circumstances where trust and confidence still existed between the employer and employee (he was being dismissed as a result of a demand from a trade union operating a closed shop in the workplace). This case became part of English jurisprudence and was followed and indeed slightly extended by a series of cases into the 1980s and 1990s.

In Ireland the issue came before Costello J (as he then was) in 1985 in the case of *Fennelly v. Assicurazioni Generali*.[2] This involved a man who had been dismissed from a post which he held under a 12 year fixed term contract. In an application for interlocutory injunctive relief, Costello J held that there was a fair issue to be tried as regards the legality or otherwise of his dismissal, and further held that the balance of convenience favoured the grant of the interlocutory injunction. The Judge appeared to be swayed by the fact that the plaintiff would be 'virtually destitute' if he was without his salary pending the trial.

Despite this radical departure from the orthodox view of this type of application, this case was largely ignored for the next 9 years, until the decision of Keane J. (as he then was) in *Shortt v. Data Packaging Ltd*.[3] In an *ex tempore* judgment, he followed the Fennelly case and restrained the dismissal of the plaintiff pending the trial. He made this order subject to an undertaking from the plaintiff that he would do such work as he may reasonably be required to do by his employer pending the trial. An apparently important factor in the mind of Keane J was that the plaintiff would be 'totally without remuneration' pending the trial if the order were not made.

There was a steady flow of other cases on this issue during the mid 1990s, such as *(inter alia) Phelan v. BIC*,[4] *Harte v. Kelly*[5] and *Courtenay v. Radio 2000*.[6] Interlocutory injunctions restraining the dismissal were granted in all these cases, with the orders usually being of the variety that the plaintiff's salary be paid pending the trial subject to the plaintiff giving an undertaking that he would do such work as he was reasonably required to do by his employer (the defendant).[7] These interlocutory injunctions continued to be seen as exceptions to the general rule of equity outlined above. Unfortunately, the factors which made them exceptions to the normal rule were far from clear. While it could be mooted that the requirement of destitution of the plaintiff without his salary could be the key point, this view was gravely undermined in *Harte* when Laffoy J granted the order where the plaintiff was still receiving a large sum of money in royalty payments (which were completely separate to his salary) pending the trial. Mallon & Bolger[8] offer the opinion that the exceptional factor was where the rules of natural justice had not been obeyed in the dismissal of an employee. However, in *Phelan* there was no issue of misconduct and the rules of natural justice were not in issue, notwithstanding this the orders were still granted by Costello P.

What then was to be made of this "exceptional" injunction? Unfortunately there has been no decision of the Supreme Court to lay down definitive guidelines to practitioners on the matter. Instead, there have been a number of more recent decisions of the High Court which I propose to detail below. Whether it can be said that these change the situation as briefly outlined above is debatable.

Recent Cases

All the cases set forth below are applications for interlocutory relief, and are presented in chronological order.

Charlton v. Aga Khan's Stud[9] concerned a lady who had been employed by the defendant for 27 years. In July 1998 the defendant began internal disciplinary proceedings against the plaintiff. A letter was given

1. [1972] Ch. 305
2. (1985) 3 ILT 73
3. [1994] ELR 251
4. [1997] ELR 208
5. [1997] ELR 125
6. [1997] ELR 198
7. For an excellent overview of these cases see an article by Mallon & Bolger, (1997) Bar Review 113.
8. (1997) Bar Review 113
9. [1999] ELR 136

to the plaintiff requesting her to attend a meeting at which an inquiry was to be held into the alleged improper use of the defendant's property. She was informed that she could ultimately be dismissed as a result of the inquiry. The plaintiff did not attend due to medical problems, and the meeting was adjourned several times for this reason. Before the meeting could be held the plaintiff went to the High Court seeking interlocutory relief restraining the inquiry and also requiring the defendant to pay her sick pay. Laffoy J. held that there was a fair issue to be tried as to the true nature of the inquiry, investigative or disciplinary. Laffoy J noted that the allegations made by the defendant were very serious, and that the possible outcome of the inquiry (dismissal) meant that damages would be inadequate as a remedy if the plaintiff were subjected to an inquiry which was consequently found to have contravened the rules of natural justice. Laffoy J also merely baldly stated that the balance of convenience 'clearly' favoured the grant of the injunction.

In *Lonergan v. Salter-Townsend & Others*[10] the plaintiff sought reinstatement to his job as Chief Executive, payment of his salary and an order restraining the appointment of anyone else to his job. There were disputes as to whether the plaintiff actually held the job of Chief Executive, or whether he was merely a consultant employed from week to week, or a probationer. Macken J held that there was a fair issue to be tried as to whether or not he was actually employed under a contract of employment. She further held that damages would not be an adequate remedy as the plaintiff averred in his grounding affidavit that he was dependent on his salary to meet his daily expenses. Macken J decided to make the order concerning the payment of his salary, and ordered that he carry out such work of a nature ordinarily done by a chief executive as may be requested by his employer. However, she found that the plaintiff did not enjoy the wholehearted support of all the members of the board of his employer. Therefore she did not think it appropriate to make an order reinstating him at this stage.

Philpott v. Ogilvy & Mather Ltd[11] was a decision of Murphy J in March of 2000. The plaintiff was dismissed in February of 2000. At a hearing for an interlocutory injunction he sought orders restraining his dismissal and also for the payment of his salary pending the trial. The defendant stressed that there was no issue of misconduct alleged against the plaintiff, and Murphy J came to the conclusion that the argument between the parties concerned the plaintiff's notice entitlements, which were in dispute. The remedy for this lay in damages and not in injunctive relief. The learned judge re-iterated later in his judgment that as there was no allegation of misconduct the rules of natural justice were of no relevance to the application before the Court.

A further point was also canvassed by the defendant, which was that the reliefs claimed by the plaintiff in his main claim did not include a claim for wrongful dismissal. Murphy J followed the earlier Supreme Court decision of *Parson v Iarnród Éireann*[12] where it was held that the declaratory relief sought was in aid of the common law remedy of wrongful dismissal and had no existence independent from it. Murphy J noted that there was no claim for wrongful dismissal here. He decided that the plaintiff's application also failed on this ground, as there was no main claim for wrongful dismissal for the injunctive relief to aid. The claim for injunctive relief could not stand on its own.

Howard v. University College Cork[13] was an interlocutory application by the plaintiff head of the German Department of the defendant University to restrain the defendant from removing her from her position as head of the said department, from appointing anyone else to that position and from interfering with the performance of her functions as head of the department. The main arguments by the defendant were that the plaintiff would be adequately compensated by damages, and further that the balance of convenience would lie against the defendant being restrained from appointing a new head of the German Department. The plaintiff's income would not in any way be affected by her being removed as head of the department (she would still be a professor in the department). However, allegations of impropriety had been made against the plaintiff regarding her performance of the functions of head of the department. O'Donovan J was satisfied that if the plaintiff were to be removed from her position that the public's perception would be that her position as head of the department had been terminated due to misconduct of the kind alleged against her, and that 'the dogs in the street' would be aware of the allegations. He found that damages would not be an adequate remedy if her position were terminated in advance of a trial, due to the resulting inevitable damage to her reputation.

Concerning the balance of convenience, the defendant claimed that the department was in crisis, and that the only way to resolve this was to consider the appointment of a new head of department. O'Donovan J. drew attention to the fact that, whatever happened, the plaintiff would still be a Professor of German and that she had been head for 6 years. A crucial factor in the judge's view was that if a new head was appointed in advance of the hearing, the trial judge would be placed in an intolerable position, as he would have to decide not if the plaintiff was entitled to retain her position, but to decide between two identified persons and possibly remove a person from a post to which they had only recently been appointed. Therefore, the balance of convenience lay with the granting of the orders.

Harkins v. Shannon Foynes Port Company[14] was an application to restrain the defendant from advertising a position styled "Operations Manager", which job the plaintiff claimed was his own, and had been for several years. O'Sullivan J was satisfied that there was a fair issue to be tried, and further considered that if the defendant was permitted to continue with its course of action, the plaintiff's position would be seriously devalued, possibly irretrievably, and in a way for which money

10 [2000] ELR 15
11 [2000] 3 IR 206
12 [1997] ELR 203
13 [2001] ELR 8
14 [2001] ELR 75

could not compensate. On the other hand, the defendant had statutory obligations and functions, and should not be kept waiting for a lengthy period pending litigation, in a situation where it might be disabled from carrying out its statutory functions. O'Sullivan J. ordered that no advertisement should be made unless and until the advertisement made it clear that there was no overlap with the plaintiff's job, and was of the opinion that this would not unduly frustrate the legitimate purposes of the defendant.

The judgment in the much publicised decision of *Foley v. Aer Lingus*[15] was delivered by Carroll J on the 1st of June 2001. The plaintiff was the Chief Executive of the defendant, a company with some 6,000 employees. He was accused of sexual harassment and a committee was set up to investigate the allegations. This committee found that he had been guilty of sexual harassment, and a second committee was formed to decide what, if any, disciplinary action should be taken. The plaintiff sought to appeal the decision of the first committee. He was informed that that did not arise at that time. Before the second committee could report, the plaintiff sought interlocutory relief restraining the defendant from proceeding further with any disciplinary action and a variety of related reliefs. Carroll J held that damages were an adequate remedy in this case, as under his contract the plaintiff was entitled to 12 months notice or payment in lieu, irrespective of disciplinary proceedings. She noted that damage to reputation is dealt with in the courts by damages and not by injunction. She also examined closely the balance of convenience. The defendant, as a company with 6,000 employees, would suffer irreparable and unquantifiable damages if it were left without a Chief Executive for a protracted period. She noted that the defendant was in a vulnerable position. She further held that the balance of convenience did not favour the grant of the injunctions sought by the plaintiff and refused him relief.

Moore v. Xnet Information Systems Ltd. & Others[16] concerned an interlocutory application by the plaintiff for orders restraining the defendants from taking any further steps to terminate his employment, re-instating him, directing the payment of his salary and a variety of other orders. The plaintiff claimed that his position in the First Named defendant was being undermined by the other defendants. He alleged that he had been dismissed at a meeting on the 7th of December 2001, when he was simply told "You're out". The plaintiff claimed that he was told he was being dismissed for his incompetence. The defendants denied this, and stated they were letting him go by reason of redundancy. The First Named defendant had been going through a difficult financial period, and was trying to reduce costs. O'Sullivan J undertook an extensive review of the caselaw on the area. The learned judge was of the opinion that there were three fair issues to be tried, including whether the claimed redundancy was the real reason for his dismissal. O'Sullivan J then moved to the balance of convenience. He commented on the company's strained financial circumstances, but noted that this period seemed to be coming to an end, and that the company was about to engage in a substantial expansion by investing £350,000 stg. in a UK venture. Also, some of the first named defendant company's employees had received salary increases. O'Sullivan J considered that the balance of convenience favoured ordering the payment of the plaintiff's salary pending the trial, subject to the usual undertaking regarding the plaintiff carrying out such work as the company might reasonably require of him. However, as the relationship between the parties had broken down to a significant degree, O'Sullivan J did not think that the balance of convenience favoured ordering the plaintiff's re-instatement pending the trial.

Analysis

Position up to 1997

The original position as set forth by the introduction to this article was very difficult to discern. As already stated, the rationale for these type of injunctions being granted was not at all clear, with contradictory judgments. However, it seems to the author that the crucial factor which brought cases into the heading of "exception" in the judgments up to 1997 was if there was some factor which the Court could say meant that damages were not an adequate remedy in the circumstances of that particular case.

The decisions of the High Court in the years up to 1997 showed that the Court would hold damages to be an inadequate remedy in circumstances where the plaintiff would either lose a significant portion of his/her income due to the dismissal or would suffer damage to his/her reputation. The Courts had no real difficulty in discovering fair issues to be tried. The balance of convenience was not usually examined in any particular detail. An order restraining the dismissal would usually be made, together with the key relief of an order directing the payment of salary pending trial. This latter relief was normally subject to the undertaking by the plaintiff to carry out such work as reasonably directed by his employer. However, the balance of convenience was utilised by the Courts in deciding whether or not to re-instate plaintiffs in their positions pending trial. It was usually found that the balance of convenience did not favour this order in circumstances where trust and confidence no longer subsisted between the parties.

Exceptional Factors

There have been a large number of cases decided since 1997, and I have detailed seven of these above. How have these affected the law on the area? Unfortunately there is no clear trend. As regards the question of the "exceptional factor" the *Lonergan* decision of Macken J appears to be the only one which relied upon the by then familiar ground of the plaintiff being in financial difficulties without his salary. In *Howard* the plaintiff was not going to lose any money, but the exceptional factor raised was that there was possible irreparable damage to her reputation.

15 [2001] ELR 193

16 Unreported, High Court, O'Sullivan J., 8/2/02

The only case which appears to have possibly extended matters was the decision of Laffoy J in the *Charlton* case. Laffoy J seemed to simply state that as the consequences of the inquiry were so serious (i.e., dismissal), that damages would not be adequate if it were later shown that the inquiry was not conducted according to the rules of natural justice. This is an echo of Mallon & Bolger's view that breach of the rules of natural justice may be the "exceptional" factor. The difference in the *Charlton* case was that Laffoy J treated this as part of a consideration of the adequacy of damages, rather than as a separate exceptional factor.

The most significant case in my view is that of *Foley v. Aer Lingus*, in which Carroll J appeared to reject the use of the reputation argument as an "exceptional" factor. She stated at page 200 of the report:

> "Damage to reputation is dealt with in the Courts by damages and not by injunction...The traditional relief at common law for unfair dismissal is a claim for damages and damage to reputation is also compensatable by damages...in the circumstances I do consider that damages are an adequate remedy."

This view of Carroll J could, if utilised by defendants, sever one of the main legs upon which plaintiffs obtain relief in this type of injunction. The cases disclose that one of the main reasons these injunctions are sought is the possible damage to a person's reputation if they are dismissed for misconduct. However, as Carroll J states, that is what the law of defamation is for. This point has not apparently been canvassed in any of the cases since the *Foley* judgment. It is respectfully submitted that this comment of Carroll J could have a tremendous impact in this area.

Fair Issue & Balance of Convenience

The courts have had very little difficulty in discovering fair issues to be tried, and the case law demonstrates that plaintiffs rarely if ever fail to get over this hurdle. However, one area where there seems to have been some development recently is that of the balance of convenience. Previously the courts (in the author's opinion) did not pay much attention to this aspect, preferring to spend most of their time considering the adequacy of damages issue. However, recently, there have been a number of cases where there has been a close examination of this aspect of the injunction. The courts have continued with the general rule of thumb established by the decisions up to 1997 not to grant re-instatement, holding that the absence of trust and confidence sways the balance of convenience on this particular point in favour of the defendant.

In *Howard*, O'Donovan J. undertook an extensive examination of the balance of convenience, and finally held in favour of the plaintiff on this ground. In *Harkin*, O'Sullivan J noted that the defendant had statutory obligations and could not be expected to be prohibited from carrying out these functions for a lengthy period pending litigation. O'Sullivan J did eventually make an order in favour of the plaintiff. However, he constructed the order in such a way as to enable the defendant to appoint a person to the position of Operations Manager (the plaintiff was trying to restrain an appointment to this position).

The *Foley* case again is the one which most significantly shows a shift in favour of defendants in respect of the balance of convenience. Carroll J commented at page 200 of the report:

> "The balance of convenience must be taken into account. Aer Lingus with 6,000 plus employees being without a CEO for a protracted period, it would suffer irreparable and unquantifiable damages."

And later on the same page:

> "The plaintiff seeks to stay the disciplinary proceedings in total or alternatively that there should be no disciplinary proceedings save on his terms. The effect of which would be to leave Aer Lingus without a CEO until litigation has concluded which despite the plaintiff's optimism could be for a protracted period. I accept the evidence and submissions relating to the balance of convenience produced on behalf of Aer Lingus, which is in a vulnerable position. I consider that they far outweigh the reasons for the balance of convenience put forward on behalf of the plaintiff."

The most recent decision of *Moore v. Xnet* showed the greater inclination of the judiciary to investigate the balance of convenience in a comprehensive manner. On the facts O'Sullivan J found that the balance of convenience here favoured the plaintiff regarding the payment of his salary.

The *Foley* decision could, if followed by other judges, indicate an altered approach to the balance of convenience. The effect of the proposed order on the defendant was considered in detail, and was sufficient to outweigh the plaintiff's concerns. The *Harkin* judgment also indicates a similar approach by O'Sullivan J, who also engaged in a considered and detailed examination of the balance of convenience in the *Moore* case. It is submitted that the more recent cases show that the Courts will adopt a more stringent attitude towards the balance of convenience in these applications. Whilst this does not automatically mean that plaintiffs will be denied relief, it does raise the bar a little higher, and give defendants a greater ability to argue their case.

Conclusion

The situation has been altered by recent decisions, particularly by the *Foley* case. Whilst no judge has laid down definitive guidelines, it appears that it may be more difficult for a plaintiff to come within one of the 'exceptional' factors, especially that concerning damage to reputation. It also seems that the balance of convenience has the potential to become a new and fertile battleground for defendants to fight against these applications. It may be that in the near future the Supreme Court will get the chance to hand down a judgment on such an application. This would be a welcome development, as hopefully it would serve as the occasion to inject some much needed certainty into this area of employment law. ●

Wrongful Dismissal – A Right To General Damages?

Tom Mallon BL and Patrick Millen BL discuss whether general damages are recoverable in a common law action for wrongful dismissal.*

Introduction

As a wrongful dismissal action is based on the law of contract,[1] any assessment of damages attracts the normal principles of contract law. Contractual principles determine that any award of damages must seek (as far as money is capable) to place the claimant in a comparable position to that which he would have occupied had the contract been duly performed to conclusion. In a wrongful dismissal context this translates to an award of damages amounting to the pay due to him for the unexpired portion/remaining balance of the employment contract (less any sums representing his duty to mitigate) or the appropriate notice period.[2]

However, recognising that the ending of the employment relationship can and often does occur in less than friendly circumstances, the question arises whether in a wrongful dismissal action a claimant can receive a measure of damages that would take him beyond that which he could expect to recover under the traditional principles of contract law. To put the matter another way, if the circumstances in which a claimant is dismissed are so particularly harsh as to cause him mental stress, humiliation, damage to reputation, and to generally make it a more onerous task for him to obtain alternative employment, can he be compensated for this type of loss in a wrongful dismissal claim? This question, to date, has not been authoritatively decided in this jurisdiction, although it has been the subject of judicial comment.[3] With the volume of employment matters coming before our courts it would not be surprising if the matter arose for adjudication at some future point.

The Starting Point

Any analysis of this issue begins with the decision of *Addis v. Gramophone Company Limited*.[4] The plaintiff, a manager in the defendant's business, was given six months notice pursuant to his contract of employment. However, at the same time, his employer appointed another manager to assume his duties. In addition steps were taken to prevent Addis from discharging any of his duties during his notice period; he left his post the following month and subsequently issued proceedings for the money owed to him during his six-month notice period. At first instance he was successful and received a sum that was in excess of the outstanding salary due for that period. The implication of this outcome was that he had received a measure of damages for the humiliating manner in which his employment had come to an end, the damage suffered to his reputation and the subsequent problems that he encountered in obtaining alternative employment. On this basis the defendants appealed and the matter eventually found its way to the House of Lords. The House of Lords, by a 4 to 1 majority,[5] held that Addis was entitled to the salary that he would have earned during the six-month notice period, but that the manner of the dismissal could not be allowed to affect or influence these damages. Loreburn L.C commented on the damages issue as follows:

> "If there be a dismissal without notice the employer must pay an indemnity, but that indemnity cannot include compensation either for the injured feelings of the servant or for the loss that he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment." [6]

Atkinson LJ, while discussing the general principles applicable to the award of damages in a contractual action, recognised that circumstances surrounding dismissal could contain elements of fraud, defamation and violence - all of which could be capable of sustaining an alternative claim in tort. However, he pointed out that those who chose to pursue redress via wrongful dismissal suits had to accept that such actions had as their foundation the law of contract, such principles of contract allowing recovery of damages to reflect that which they would have received had the contract been properly

1. Wrongful Dismissal is a common law concept based upon dismissal that is in breach of the employment contract. The most common breach of the employment contract is where the employee is dismissed without notice, or the notice given to an employee is inadequate having regard to the notice period stipulated by his contract. Where the contract is silent on such matters, reference is made to those minimum periods of notice implied into employment contracts by the provisions of the Minimum Notice and Terms of Employment Act 1973, as amended, or those periods as might otherwise be reasonable.
2. This 'notice period' may be provided for expressly under the provisions of the contract of employment or, statutory minimum periods of notice are implied into such contracts under the provisions of the Minimum Notice and Terms of Employment Act 1973. As a last resort, the concept of reasonableness is often used.
3. Kennedy CJ in *Kinlan-v-Ulster Bank Limited* [1928] I.R. 171 at 184.
4. [1909] AC 488.
5. Collins LJ dissenting. [1909] AC 488 at 497-501.
6. [1909] AC 488. Loreburn LJ 488 at 491.

performed - and no more. His Lordship was of the opinion that any attempt to fuse the principles upon which damages are assessed in tort to cases of contract (and in doing so wrongful dismissal) would lead only to confusion, uncertainty and injustice.[7]

The effect of the decision in Addis was to make a clear distinction between damages that could properly be awarded for wrongful dismissal (lost remuneration or damages as a result of no notice or inappropriate notice) and damages which compensated the employee for any consequences arising from the manner of that dismissal, with no entitlement extending to the latter category.

A False Departure

And so the position remained until the decision of *Cox v. Phillips Industries Limited*,[8] which at first impression appeared to represent a departure from the position adopted by the court in Addis. Following an approach from a competitor for his services Mr. Cox entered into an agreement with his employer to the effect that he would receive increases in salary and positions of greater seniority. After complaints by Mr. Cox concerning the level of increases and the nature of his precise duties, a meeting was arranged (of which he was neither notified nor present at) at which the decision to demote him was taken. As a result he took time off work for depression and stress, and following his return he resigned his position and was paid the appropriate salary in lieu of notice. Lawson J considered the matter to be one of contractual remoteness (particularly the second limb of *Hadley v. Baxendale*)[9] and appeared to extend the reasoning adopted in the holiday cases of *Jarvis v. Swan Tours*[10] and *Jackson v. Horizon Holidays*[11] as supporting the view that in principle a breach of contract could give rise to an award of damages for stress and frustration. On this basis Mr. Cox was awarded £500 stg damages for the distress and frustration arising out of the breach of his employment contract.

A closer inspection of the judgment shows that it would be unwise to consider the case as a departure from Addis. Lawson J did not award the damages as part of a wrongful dismissal action; instead the damages were awarded for breach of the express contractual agreement entered into following the approach from the competitor. The demotion suffered by Cox was a clear breach of this agreement, and the court went on to further hold that the injuries sustained were of a type reasonably foreseeable as flowing from that breach. The very fact that Cox did not frame his case as wrongful dismissal was specifically mentioned by Lawson J,[12] who thought that having been paid a sum of money equal to his notice period any attempt to do so would have been unsustainable.

In 1985 the Court of Appeal took the opportunity to endorse the position expounded in *Addis* in the case of *Bliss v. South East Thames Regional Health Authority*.[13] Bliss was a consultant surgeon whose relationship with one of his colleagues deteriorated. His state of mind was brought to the attention of the hospital managers and Bliss was asked to submit to a medical examination. He refused and was suspended. Bliss, having written to his employers indicating that he accepted their repudiation, sued for damages for breach of contract including frustration, vexation and distress. He was awarded £2000 stg damages for breach of contract,[14] but appealed on the finding that he had affirmed the contract by his acquiescence. The defendant cross-appealed against the award of damages. Dillon LJ (on behalf of the Court of Appeal) simply stated that the trial judge's award of damages on the basis of *Cox* was incorrect:

> "The general rule laid down by the House of Lords in *Addis-v-Gramophone Company Limited* is that where damages fall to be assessed for breach of contract rather than in tort it is not permissible to award damages for frustration, mental distress, injured feelings or annoyance occasioned by the breach. In Cox Lawson J took the view that damages for vexation and frustration including consequent ill health could only be recovered for breach of contract of employment if it could be said to have been in the contemplation of the parties that the breach would cause distress etc.... For my part I do not think that this general approach is open to the courts unless and until the House of Lords reconsiders it's decision in Addis."[15]

In so holding the court in *Bliss* seems to have suggested that whether the loss is within the contemplation of the parties is irrelevant. On this analysis, despite the fact that a wrongful dismissal action has as it's foundation the law of contract, the contractual principle of *Hadley v. Baxendale*[16] is not a valid mechanism by which to calculate the extent of damages recoverable. Furthermore, the decision of the court in *Bliss* lends support for the view that the court in *Bliss* interpreted *Addis* as having established a rule independent of remoteness, in a sense a separate rule of policy the effect of which was to prohibit the recovery of damages of the type sought by the plaintiff.[17] However there is some confusion as to the exact nature of this rule of policy; the judgment itself is not very detailed in any regard and simply represents an endorsement of the views expressed by the majority in Addis. In addition there is confusion as to how the court in *Bliss* could have interpreted *Addis* as establishing a rule of policy, given that there is no mention of public policy (either express or implicit) in the *Addis* judgment itself. In any event there was no doubt after *Bliss* (at least in the opinion of the English courts) that the matter was not one of remoteness, yet the precise policy governing the matter remained shrouded in confusion and uncertainty. In these circumstances it would be wise to view *Cox* as a decision turning on its own facts.

7. [1909] AC 488. Atkinson LJ 493-497.
8. [1976] 1 WLR 638.
9. "Remoteness" is the test governing the extent of damages that are recoverable for a breach of contract laid down by *Hadley-v-Baxendale* (1854) 9 Exch 341. The second limb of this rule is to the effect that the "damages should be such as may be reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach" Alderson B at 354-355.
10. [1973] 1 QB 233.
11. [1975] 1 WLR 1468.
12. [1976] 1 WLR 638 at 644.
13. (1985) IRLR 308.
14. Bliss had been required to submit to a medical examination without reasonable cause. The suspicions had already been the subject of an inquiry by the hospital, which declared them to be unfounded.
15. (1985) IRLR 308 at Pp. 316, Col 59. Dillon J.
16. (1854) 9 Exch 341.
17. A view also adopted by the Court of Appeal in *O'Laoire-v-Jackel International Ltd* [1991] IRLR 170 CA.

Malik v BCCI : Damage to future employment prospects

This area underwent some development as a result of *Malik and Mahmud v. BCCI.*[18] The plaintiffs in this case successfully sued their employer for what became known as 'stigma damages' after they had been summarily dismissed, the dismissal having been facilitated by the employer's involvement in fraudulent banking practices. Both plaintiffs issued proceeding on the basis of the difficulty they experienced, due to their association with BCCI, in obtaining alternative employment. The House of Lords held that as a result of the bank's fraudulent activities it had breached the implied term of trust and confidence in the employment relationship: its conduct was such as was likely to destroy or seriously damage the relationship of trust existing between them. The breach of the implied term was sufficient to vest the employer with liability for the financial loss suffered by the two employees, such losses not being limited in any extent by reference to the notice period. The *Addis* authority was distinguished, albeit on differing grounds, by Nicholls LJ and Steyn LJ, with the former believing that damages were recoverable on the basis of the ordinary principles of remoteness.

It appears that the House of Lords thus viewed *Addis* as having simply decided that damages were not obtainable *inter alia* for injured feelings; however this did not apply to Malik as the claim was for financial losses.[19] It would therefore be wrong to look at *Malik* as having altered in any way the principle contained in Addis, because the basis for the claim in *Malik* rested not on any concept of damages for dismissal but for breach of the implied term of trust and confidence in the employment contract. As suggested by Redmond,[20] if *Malik* is potentially persuasive in Ireland, this persuasiveness stems somewhat from the possibility that it may offer a claimant a chance of recovering some measure of damages where his future job prospects have been adversely affected by the conduct of his employer. At the same time, while the development of the implied term of trust and confidence as a means to circumvent the effect of *Addis* is inventive, it may suffer from the limitation in the wake of *Malik* that its use may be confined to the recovery of financial losses.

Johnson v Unisys Limited

After *Malik* the position of the employee *vis-á-vis* dismissal appeared to improve, offering as it did the possibility that he or she could recover some degree of monetary redress over and above the notice period by relying on a breach of the implied term of trust and confidence. *Johnson v. Unisys Limited*[21] was seen by some as an opportunity to build upon Malik. Following his summary dismissal Mr Johnson had already obtained damages from an Industrial Tribunal for unfair dismissal. In seeking to obtain further damages to compensate him for the losses he suffered due to the manner in which he was treated and dismissed, the plaintiff sought to side step the *Addis* principle by arguing that such losses had arisen not from the manner of the dismissal, but (on the basis of *Malik*) that they were a consequence of his employer's breach of the implied term of trust and confidence. This breach, he alleged, arose from his employer's failure to afford him an opportunity to defend himself in disciplinary proceedings, and also from the failure of the company to follow it's own disciplinary code.[22] The House of Lords dismissed Johnson's appeal against an order striking out his proceedings, re-affirming the view that where an employee was wrongfully dismissed, any damages awarded could not include compensation for the manner of that dismissal or for any consequence thereof. Woolf MR, delivering the majority judgment in the Court of Appeal, distinguished the *Addis* and *Malik* cases on the ground that the *Addis* case related to a complaint concerning the manner of dismissal whereas *Malik* related to a complaint concerning "anterior" conduct - conduct unrelated to dismissal:[23]

> "... the true distinction between the *Addis* case and the Malik case is that the breach of contract in the Addis case was confined to the manner of dismissal while the breach in Malik's case, although it was repudiatory, was a breach by the bank of the trust and confidence it owed its employees during the period they were employed. The breach in Malik's case was of the gravity which entitled the employees to regard themselves as dismissed wrongfully but that was not their complaint. Their complaint related to anterior conduct."[24]

In his Lordship's opinion, Mr. Johnson's pleadings, in reality, showed a plaintiff seeking to rely on the manner of his dismissal and not on any breach of the implied term of trust and confidence.[25] On this point he thought it proper to limit the application of *Malik* to cases which had properly arisen from anterior conduct, and not to conduct that was principally concerned with the manner of the dismissal.

Lord Hoffman (delivering the majority judgment for the House of Lords) objected to the plaintiff's claim on policy grounds. Having found that the plaintiff was inviting the court to create a parallel right at common law right not to be unfairly dismissed, he went on to consider the statutory background to such an invitation. In particular, consideration was given to the provisions and purpose of the statutory unfair dismissal regime enacted by the UK parliament. In rejecting this proposition he referred to the comments of the trial judge, Ansell J:

> "... there is not one hint in the authorities that the tens of thousands of people that appear before the tribunal can have, as it were, a possible second bite of the cherry in common law...and I ask myself if this is the situation why on earth do we have this special statutory framework? What is the point if it can be circumvented in this way?"[26]

18. [1997] 3 All ER 1, [1998] AC 20 H.L.
19. [1998] AC 20 at 33-41. The presumption arises that in the absence of financial loss the *Addis* principle holds strong.
20. Redmond, *Dismissal Law in Ireland* (1998) at Col 11.29 p172.
21. [2001] 2 All ER 801 [HL].
22. These were the same grounds upon which Johnson succeeded in his claim for Unfair Dismissal.
23. [1999] 1 All ER 854 [CA].
24. [1999] 1 All ER 854 at 861 [CA].
25. [1999] 1 All ER 854 at 859 [CA]: "the plaintiff's only complaint is as to the manner of dismissal. While it is contended on his behalf by Lord Metson that the way in which he was treated breached the alleged implied terms, this does not alter the fact that the manner in which he was dismissed is being relied on by the Plaintiff."
26. [2001] 2 All ER 801 at 820 [HL].

As well as making a similar observation of his own:

> "... for the judiciary to construct a general common law remedy for unfair circumstances attending dismissal would be to go contrary to the evident intention of parliament that there should be such a remedy but that it should be limited in its application and extent."[27]

As a means to ensure its continued effectiveness, the majority declined to imply such a term, fearing that to do so would not only inevitably result in an overlap with the jurisdiction of the Industrial Tribunals, but also run contrary to the intentions of Parliament.[28]

Lord Hoffman also went on to address the question as to whether the implied term of trust and confidence in the employment contract applied to circumstances of dismissal. His Lordship doubted whether the term should be pressed so far, as in his opinion it had always been concerned with the preservation of the ongoing employment relationship, not it's determination. To extend the term to dismissal would have been inappropriate and unnatural. There was no obligation (at common law) on an employer who had decided to end that relationship to do so only for good cause - this was a matter for the law of unfair dismissal.

The decision in *Johnson* thus presents a very clear persuasive policy argument and one that is difficult for a plaintiff to overcome. Given that the Oirecthas has enacted a similar statutory scheme in this jurisdiction,[29] it is likely that this policy argument would feature prominently in any Irish judgment on the matter.

Post-Johnson

Two cases subsequent to *Johnson* illustrate not only the application of the principles expounded in the *Addis* line of authorities, but also certain further developments in this area. *Boardman v. Copeland County Council*[30] was the case of a revenue manager who issued proceedings claiming damages for stress, injury to his reputation and inability to secure alternative employment after he was dismissed for making unsubstantiated allegations against his superiors. In the same vein as the plaintiff in *Johnson*, Boardman attempted to side step the *Addis* principle by arguing that it was not the dismissal itself or the manner of the dismissal that grounded his claim, but the manner in which the employer behaved towards him during the currency of the employment - particularly the last six months. Such behaviour in Boardman's submission constituted an actionable breach the implied term of trust and confidence.

The Court of Appeal adopting the comments of Lord Hoffman to the effect that the implied term of trust and confidence did not apply to a dismissal, and rejected Boardman's appeal. The Court held that Boardman had been unable to establish that the employer's behaviour during his employment had caused the psychological damage in question. What had caused it had been the dismissal and the manner in which it was carried out, and so, following the decision in *Johnson*, there had been no breach of the implied duty of trust and confidence. As a result Boardman was unable to recover damages in excess of the normal measure for wrongful dismissal.

In *Gogay v. Hertfordshire County Council*[31] the plaintiff residential care worker issued proceedings claiming *inter alia* damages for stress following her suspension from work in relation to allegations of sexual abuse which were subsequently proven to have been unfounded. Having succeeded at first instance, the defendant appealed on the basis that damages could not be awarded for stress or injured feelings arising from a breach of contract. The Court of Appeal determined that as there had been a breach of the employment contract through the beach of the implied term of trust and confidence, the award of damages was beyond challenge. In arriving at this conclusion the court drew a distinction between a recognised psychiatric illness (which Gogay had suffered) and hurt/injury to feelings. On this basis the case was distinguished from the *Addis* line of authority. In addition (and in line with the court in Johnson) the Court of Appeal held that the award of damages was valid as Gogay had been suspended, not dismissed. In this connection the court commented that, had she been dismissed, the employment relationship would have been at an end and there would accordingly have been no likelihood of recovering damages for the breach of the implied term of trust and confidence.

The *Malik* decision therefore continues to offer a basis for allowing the recovery of damages for breach of the implied term of trust and confidence. The limitations alluded to above, following *Johnson*, appear to have been resolved by *Gogay* as it extends the nature of damages recoverable beyond those purely financial in nature. The precondition, if it be called that, to successfully invoke the reasoning in *Malik* and *Gogay* is the necessity that the employment relationship still be subsisting. In circumstances where that relationship has actually been determined, one will have to clearly point to conduct during the currency of the employment and unconnected with any notion of dismissal to support the claim that the implied term was breached.

The Position in Ireland

As mentioned at the beginning of this article, this question has never been authoritatively decided in Ireland. Nonetheless, there have been a number of cases that are of some relevance to the point, and in which the Irish courts have been prepared to award general damages for a breach of contract.[32] Not all of these cases have been decided in an employment context, in that some have concerned a breach of a contract other than one of employment, yet there are grounds for believing that the same principles would and should apply.

27. [2001] 2 All ER 801 at 821 [HL].
28. As Parliament had decided to introduce restrictions on the availability of the unfair dismissal remedy, the creation of a parallel common law right to challenge the fairness of a dismissal (entailing recourse to the ordinary courts and no restrictions) would have created fatal inconsistencies.
29. Unfair Dismissal Act, 1977 as amended
30. (Unreported Court of Appeal 13/06/2002). Available at the Court of Appeal's website, http://www.courtservice.gov.uk/
31. [2000] IRLR 703 C.A.
32. See also *Phelan-v-BIC (Ireland) Ltd & Ors* [1997] ELR 208 where Costello P suggested that on of the facts of that case, at the interlocutory hearing, by reason of the manner of the dismissal, an injunction might be the most appropriate remedy at the trial.

In *Dooley v. Great Southern Hotels Ltd*[33] the plaintiff was awarded general damages of IR£2000 for the stress brought about by his employer's breach of contract in failing to follow suitable disciplinary procedures. The judgment contains no discussion as to the basis upon which these damages were awarded, and while seeing fit to award damages (although he does not comment why) McCracken J expressly stated that he had only done so "reluctantly". In *Sullivan v. Southern Area Heath Board*[34] the Supreme Court held that the plaintiff was entitled to be compensated for the emotional upset caused to him by the failure of the defendant to provide him with the resources for the discharge of his duties, as it had agreed. This approach appears to sit squarely with that taken in *Cox v. Philips*,[35] in that the claim in *Sullivan* was found to be based upon an express agreement to provide a second medical consultant.

In *Lennon and Ors v. Talbot (Ireland) Ltd*[36] Keane J (as he was then) saw fit to award general damages for stress and anxiety arising from the wrongful termination of a dealership agreement despite finding the such symptoms often went hand-in-hand with the commercial realities within which the plaintiffs operated. In any event he held that the sum awarded in respect of such damages would of necessity be modest. An important aspect of the judgment is Keane J's application of the *Hadley v. Baxendale*[37] to the plaintiffs claim for damages.

In direct contrast to these cases, mention should be made to the comments of Kennedy CJ in the earlier Irish case of *Kinlan v. Ulster Bank Limited*,[38] as follows:

> "It is very clearly settled in this country and in England, and affirmed in many cases, that in actions for breach of contract damages may not be given for such matters as disappointment of mind, humiliation, vexation or the like."[39]

Similarly, in *Kelly v. Crowley*[40] it was held that in assessing damages for breach of contract for the defendant's failure to discover the true nature of a premise's liquor licence, damages could not be awarded for mental stress. Interestingly, though, the reasoning of the court on this point was that damages of this type were not reasonably foreseeable, and there is certainly evidence of at least one other incident of the Irish courts having recourse to the ordinary *Hadley* principle of foreseeability in this context. In *Garvey v. Ireland*[41] McWilliams J stated the view, identical to that in Addis, of what a wrongfully dismissed employee would be entitled to at common law, and in doing so appeared to ignore the plaintiff's claim for damages for the manner in which he was dismissed from his office.

Conclusion

It would be unwise to view any of these Irish cases as establishing any principle upon which general damages could be recovered in a wrongful dismissal action for the manner of that dismissal. The judgments themselves are lacking in detailed analysis (regarding the basis on which damages were either awarded or refused) and are often contradictory. In addition it is not clear to what extent, if at all, the *Addis* decision was taken into consideration. Mention should, of course, also be made of the fact that not all the authorities were decided in the context of employment relations.

A determined plaintiff may well force the Irish courts to consider the position. Whether they take the opportunity to develop the common law in line with modern views on how employees should be treated remains to be seen. When the time arrives, it is submitted, the English authorities have the potential to assume some degree of significance.[42]

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33. 2001 ELR 340
34. [1997] 3 I.R. 123
35. n.11
36. Unreported, Keane J, High Court, 1986 Vol.7 1009
37. n.9
38. [1928] I.R. 171
39. [1928] I.R. 171 at 184
40. [1985] 1 I.R.
41. [1981] I.R. 75
42. For the approach of other common law jurisdictions see : New Zealand - *Stuart-v-Armourgard Security Limited* [1969] 1 NZLR 484, *Vivan-v-Coca Cola Export Corp* [1984] 2 NZLR 289, *Whelan-v-Waitaki Meats Corp* [1991] 2 NZLR 74. Canada - *Vorvis-v-Insurance Corp of British Colombia* (1989) 58 DLR (4th) 193.

Caselaw on Judicial Review Applications in Asylum Law

Stephen O'Sullivan B.L.

Introduction

This article provides a catalogue, in chronological order according to category, of recent High Court and Supreme Court decisions in the area of asylum law, many of which are as yet unreported. In a typical unsuccessful application, an asylum applicant will be refused asylum by the Refugee Applications Commissioner (the Commissioner) and on appeal by the Refugee Appeals Tribunal (the Tribunal),[1] and finally after submissions to the Minister for Justice will have a deportation order made against him or her. An application for judicial review may seek to challenge any one or a combination of any three of these decisions. [2]

The Refugee Act 1996, the Immigration Act 1999 and the Illegal Immigrants (Trafficking) Act 2000 are the most relevant statutes in force. Section 5 of the Act of 2000 provides that most decisions under either the Act of 1996 or the Act of 1999 in relation to non-nationals can be challenged only by way of judicial review,[3] which application must be made within 14 days of the decision. This strict time limit can be extended only where the High Court considers there to be 'good and sufficient reason' for doing so. The *inter alia* application for leave must be made on notice to the Minister, and leave shall be granted only where the court is satisfied that there are 'substantial grounds' that the decision is unlawful. There is no appeal to the Supreme Court except with leave of the High Court to be granted only where the court has certified that its decision involves a point of law of exceptional public importance.[4] The Act of 2000 came into force on the 5th September 2000, which means that the normal judicial review procedures under Order 84 of the Rules of the Supreme Courts apply in respect of decisions on asylum made before that date.

Time limits

Time limit for internal appeals

There are very short time limits for internal appeal. In *Acquah v. Minister for Justice*,[5] the court considered sections 16(3), 12(5)[6] and 13(2)(b)[7] of the Act of 1996. A notice of appeal was received by the Tribunal some 10 days out of time, which the respondent therefore refused to accept. The applicant sought to review the refusal to allow the appeal of the former decision. The court held that the time-limits in the Act of 1996 were mandatory and not directory and that there was no evidence of impossibility or *force majeure* on the facts of the case.

Time limit for judicial review under s. 5 of the Act of 2000

In *Cumar v. Minister for Justice*[8] the applicant was refused an extension of time. The court pointed in particular to the fact that the applicant had had legal representation since before the hearing before the appeal authority and that the applicant could have applied for an extension of time before the time limit had expired even if the papers were not in order.

In *Gabrel v. Minister for Justice*,[9] the court refused an extension of time, before the operation of the Act of 2000, when the time limit was 6 months from the date of decision, where again the applicant had been represented at all stages, holding that the application was vicariously liable for the default of legal advisers, if any. In *G.K. v. Minister for Justice*[10] the High Court[11] had granted an extension of time to judicially review, firstly, a refusal of asylum by the appeals

1. For an analysis of the practise and procedure before the Commissioner and Tribunal in particular, see *Asylum law and policy in Ireland* and Ursula Fraser, *Refugee Law and Procedure*, Farrell and Gallagher, 2001 6(7) B.R. 432 and 2001 6(8) B.R. 488.
2. Before the Acts referred to came into operation it was a person designated by the Minister who made the original decision and the Appeals Authority, or in the case of an application deemed manifestly unfounded an officer of senior rank, who decided the appeal.
3. One parallel remedy that may be open is an application to the High Court under A. 40 - see *Gutrani v. Minister for Justice* [1993] 2 I.R. 427.
4. In *The Illegal Immigrants (Trafficing) Bill, 1999* [2000] 2 I.R. 360, the court upheld the constitutionality ss. 5 and 10 of the bill. For an analysis of that case see The Illegal Immigrants (Trafficking) Act, 2000, Skelly and Feeney, 2000 6 (3) B.R. 170.
5. (Unreported, High Court, Smyth J., 19th March, 2002)
6. This section imposes a 14 day time-limit for appeal to the Tribunal of a decision that the application is manifestly unfounded.
7. This section imposes a 21 day time-limit for appeal to the Tribunal of a refusal of asylum on other grounds.
8. (Unreported, High Court, Smyth J., 21st December, 2000, *ex tempore*)
9. (Unreported, High Court, Finnegan J., 15th March, 2001).
10. [2002] 1 I.L.R.M. 401.
11. In *G.K. v. Minister for Justice* [2002] 1 I.L.R.M. 81 the High Court had extended time and applied six specific criteria in reaching that determination namely the period of the delay, the approach in *Rainsford v. Limerick Corporation* [1995] 2 I.L.R.M. 561, the prima facie strength of the applicant's case, the complexity of the legal issues, language difficulties and difficulties obtaining an interpreter and any other personal circumstances affecting the applicant.
There is a dictum of Smyth J. to the effect that it may be appropriate to distinguish between the Refugee Legal Service and a solicitor in private practice, in determining vicarious liability for delay, although this has not been decided by the Supreme Court.

authority and secondly, a decision of the Minister to make a deportation order. The Supreme Court refused an extension of time in respect of the first decision on the ground that the applicant had delayed for a period of nearly a year, during most of which time the applicant was legally represented and in circumstances where none of the affidavits of the applicant addressed the reason for the delay.

In relation to the second decision, the Supreme Court did find evidence of excuse for the delay but held that the substantive claim was not arguable in respect of that decision. Hardiman J. stated as follows:-

> "I believe the use of the phrase good and sufficient reason for extending the period still more clearly permits the court to consider whether the substantive claim was or is arguable. If a claim is manifestly unarguable there can be no good or sufficient reason for permitting it to be brought, however slight the delay requiring the exercise of the courts discretion and however understandable it may be in the particular circumstances."

B. and S. v. Minister for Justice[12] decided that the refusal by the High Court of an extension of time was appealable to the Supreme Court even without leave of the High Court. The court held that a refusal of an extension of time was not 'a determination by the High Court of an application to apply for judicial review' for the purpose of section 5 of the Act of 2000. The court also held that no appeal can lie against a decision relating to the granting or refusal of a certificate for leave to appeal.[13]

In *B and S*, Geoghegan J warned that the strength of the case may not always be relevant at the application for an extension of time:-

> "[I]n many instances the issues on the application for extension of time would be quite different from the issues on the application for leave itself. All sorts of issues can arise on the application for the extension of time such as non-delivery of letters, delay by the applicant's solicitor, difficulties in language communication etc. which might not turn out to be relevant on the application for leave."

G.K. was applied in *Saalim v. Minister for Justice*[14] where, in respect of one applicant, the court allowed the appeal and extended time to judicially review a decision of the Tribunal where proceedings were issued some 2 weeks outside the 14 day time-limit. Denham J stated as follows:-

> "I am satisfied that there are good and sufficient reasons in the circumstances of this case to extend time for the application for judicial review. The circumstances and factors in this case are as follows: that the applicant has leave to apply for judicial review of the decision of the appeals authority made on 31st July, 2000, that the extent of the delay is short i.e., a matter of weeks; that the case straddles a time of transition in the law; that the reasons for the delay are largely the culpability of legal advisers; and that the State is not prejudiced by the delay."

G.K. was applied with converse effect in *Acquah*[15] to hold that the application for judicial review was out of time given that the "real reason why the applicant did not wish or was unwilling to return to his country of origin was not for a convention reason."

The availability of internal appeal

One question is whether the availability of an internal appeal bars an applicant from judicially reviewing a particular decision. Another is, if an applicant has appealed a decision of the Commissioner to the Tribunal, whether he or she can still judicially review the former decision.

In *Dascalu v. Minister for Justice*,[16] the court took into consideration the fact that the applicants had appealed the initial decision of the respondent to the appeals authority "without prejudice to our rights to seek judicial review" in holding that they had not acquiesced in the legitimacy of the procedures in the initial decision. It would be wise to include such correspondence in appropriate cases.

In *S. v. Minister for Justice*,[17] the applicant was refused asylum at first instance but the material before the person authorised by the Minister was defective in that the English translation of the Romanian questionnaire form omitted a portion of the answer to Question 84, the question which provides the applicant with an opportunity to set out the basis of his claim. The applicant appealed to the Appeals Authority, and this appeal was still pending when the matter came on for judicial review. The court held that the defect rendered the decision at first instance either *ultra vires* or in breach of fair procedures. The court also rejected the argument that the appeal to the Appeals Authority constituted an adequate alternative remedy to that of judicial review, on the basis that 'an insufficiency of fair procedures at first instance is not cured by a sufficiency on appeal'. The matter was remitted for fresh consideration to the Commissioner with costs to the applicant.

The respondent appealed in *S. v. Minister for Justice*.[18] The Supreme Court refused the appeal and held that certiorari would lie against the decision at first instance given that the Hope Hanlon procedure involved two separate decisions, one by the person authorised by the Minister and the other by the Appeals Authority. The Court distinguished *State (Abenglen Properties Ltd.) v. Dublin Corporation*,[19] in that S. involved a breach of natural justice by the decision maker and that while an appeal to the appeal authority was a factor in exercising the discretion whether to order certiorari, the court retained the jurisdiction to exercise its discretion to achieve a just solution. Denham J. listed factors to be weighed in such discretion as including 'the existence of an alternative remedy, the conduct of the applicant, the merits of the application, the consequences to the applicant if an order

12. (Unreported, Supreme Court, 30th January, 2002)
13. In post 33, the court again repeated that no appeal shall lie against the refusal by the High Court of a certificate.
14. (Unreported, Supreme Court, 5th March, 2002)
15. supra 5.
16. (Unreported, High Court, O'Sullivan J., 4th November, 1999)
17. (Unreported, High Court, Kelly J., 8th June, 2000 *ex tempore*)
18. (Unreported, Supreme Court, 13th November, 2001)
19. [1984] I.R. 381.

of certiorari is not granted, and the degree of fairness of the procedures."[20]

In *O.J. v. Minister for Justice*[21] the applicant was refused asylum on the manifestly unfounded ground under the Hope Hanlon procedures and then appealed to the Tribunal under the Act of 1996. The latter appeal was phrased "without prejudice to judicial review ..". In refusing an extension of time to review the decisions of the Commissioner and of the Tribunal, the court took into consideration *inter alia* the following:-

> "The applicant elected to proceed to appeal on reliance of the refusal at first instance at which time and at all subsequent times he had the benefit of legal advice...Both at the time of formulation of the appeal and the presentation of the section 3 application, the possibility of judicial review was adverted to but not pursued at the time."

In *Iqbal v. Refugee Applications Commisioner*[22] the applicant was refused asylum on the "manifestly unfounded" ground. The applicant appealed to the Tribunal but objected to the fact that there would be no oral hearing. The applicant sought an extension of time and leave to judicially review the decisions of the Commissioner and Tribunal, which applications were heard conjointly. The applicant made various criticisms *inter alia* of the interview and reports of the Commissioner. The court granted an extension of time in respect of the Tribunal's decision but not the Commissioner's decision, but ultimately refused leave to judicially review the former decision. Smyth J. stated as follows:-

> "If dissatisfied with the earlier decisions and having the benefit of legal advice at the time he could and should have challenged them if he considered them in any way improper or warranted challenge by way of judicial review...[Such] emphasis on ambiguities or distortions of reportage as are alleged in the course of this hearing to have occurred in the documentation, in particular that of the Commissioner, were capable of being satisfactorily addressed in writing at the time of the appeal, but no attempt was made to do that."[23]

Ground for judicial review

Transitional procedures

Some of the recent challenges in this area have concerned problems that have arisen in the transition period where the new procedures are being brought into force and after applicants have already made applications for asylum.

In *Dascalu v. Minister for Justice*[24] the applicant succeeded in judicial review where the respondent was "at fault in not notifying the applicant individually that the von Armin procedure had now been replaced by the Hope Hanlon procedure which included the possibility of a preliminary finding that his application was manifestly unfounded resulting in a refusal, without more, of his application." This opens the possibility of raising a natural justice point in cases where the legislature changes procedures in the course of dealing with an application for judicial review.

In *P. v. Minister for Justice*[25] the provisions of the Act of 1999 came into force during the period between the refusal of asylum on the part of the Appeals Authority and the date of issue of the deportation order. Leave to apply for judicial review was granted to one applicant on the ground the respondent had failed to comply with section 3(3)(a) of the Act of 1999 despite the fact that the subsequent correspondence was in compliance with the Act of 1999. The court pointed to the absence of a transitional provision in the Act of 1999. The court came to the same conclusion on similar facts in *R.B. v. Minister for Justice*.[26]

Constitutional issues

In *Fajujonu v. Minister for Justice*[27] the applicants were a non-national husband and wife who came to Ireland in 1981 and whose child was born in Ireland in 1983. The applicants sought to restrain the respondent from issuing a deportation order on the ground *inter alia* that the child was a citizen[28] of Ireland and was entitled to the protection of the constitutional rights under Articles 40, 41 and 42 of the Constitution which included *inter alia* a right to remain resident in the State and to be parented by her parents within the State. The court held that where a non national had resided for an appreciable time and become a family unit within the State with children who were Irish citizens, then such Irish citizens had a constitutional right to the company, care and parentage of their parents within the family unit and that "*prima facie* and subject to the exigencies of the common good, that that is a right which these citizens would be entitled to exercise within the state."[29]

Walsh J. stated, at p. 242, that before making a deportation order, the Minister,:-

> "[W]ould have to be satisfied, for stated reasons, that the interests of the common good of the people of Ireland and the protection of the State and its society are so predominant and so overwhelming in the circumstances of the case, that the action which can have the effect of breaking up this family is not so disproportionate to the aims sought to be achieved as to be unsustainable."

The matter was remitted to the respondent for reconsideration of the decision to deport.

20. The five member Supreme Court in *Re In The Illegal Immigration (Trafficking) Bill Act, 1999* approved this approach, albeit *obiter dicta*.
21. (Unreported, High Court, Smyth J., 15th January 2001)
22. (Unreported, High Court, Smyth J., 1st December, 2001)
23. A similar approach was adopted in *M. v. Minister for Justice* (Unreported, High Court, Smyth J., 21st December, 2001)
24. supra 16.
25. High Court and Supreme Court judgments are reported in [2002] 1 I.L.R.M. 16.
26. (Unreported, High Court, McKechnie J., 20th December, 2001).
27. [1990] 2 I.R. 151.
28. For current rules on citizenship see The Irish Nationality and Citizenship Act, 1956, as amended by The Irish Nationality and Citizenship Act, 1986 and The Irish Nationality and Citizenship Act, 2001. There is no guarantee of citizenship to a non-national spouse of an Irish citizen. S. 5 of the Act of 2001 states that the Minister has a discretion whether to grant a certificate of naturalisation to such person if satisfied of nine listed criteria.
29. Per Finlay C.J. at p. 162. Note that section 6 of the Act of 1999 incorporates many of these factors as criteria for the Minister in making a deportation order.

In *Laurentiu v. Minister for Justice*[30] the court held that section 5 of the Aliens Act 1935 was unconstitutional as contrary to Article 15.2 of the Constitution. Geoghegan J stated as follows:-

> "[The] Minister cannot have a legislative power in relation to deportation unless some policy or principles on foot of which he is to act are set out in the parent Act."

The court further held that Article 13(1) of the Aliens Order 1946 was *ultra vires* the Act of 1935, and also contrary to Article 15.2 of the Constitution insofar as it purported to confer a power to make deportation orders on the Minister. The Act of 1999 now provides for a power to deport in the Minister which remedies this legislative and constitutional gap.[31]

In *Baby O. v. Minister for Justice*[32] the applicant who was pregnant sought judicial review of a deportation order on various grounds. It was argued that the unborn child had a legal personality with rights under the Constitution to include *inter alia* the right to birthright under Article 2. The court held that entitlement to birthright under the said article was an entitlement of a person born in Ireland. Also, it was argued that the deportation would infringe the right to life of the unborn in that *inter alia* there was no stable system of antenatal care in the country to which the applicant would be deported. The court held that the right to life did not encompass with it any unenumerated rights as pleaded by the applicant. Also, it was argued that the unborn child was being discriminated against in a manner contrary to Article 40.1 when compared to a born person who had lived all his or her life in Ireland. In response, it was held that Article 40.1 did not mean that the State could not have regard to differences of capacity, physical and moral, and of social function, in drawing such distinctions.

In *Baby O. v. Minister for Justice*[33] the appeal was dismissed by the Supreme Court. The facts remained the same before that court. The court heard the case while the applicant was still pregnant and refused the appeal before judgment was delivered in the case. The court held *inter alia* that Article 30.3.3 of the Constitution was intended to prevent the legalisation of abortion except in limited circumstances, and had no application to the present case.

In *Lobe v. Minister for Justice*[34] the applicant arrived in the state with his pregnant wife and their three children and made an application for asylum. The Commissioner and the Tribunal refused asylum on Dublin Convention grounds. The applicant issued judicial review proceedings against the deportaton order served. The respondent gave an undertaking not to deport the applicant pending the determination of the proceedings, during which time the applicant's wife delivered a child. The applicant filed a supplemental affidavit dated after the birth of the child asserting on behalf of the new born child a choice of residence in Ireland.

The applicant raised constitutional grounds as grounds of judicial review. In respect of the Irish born child it was argued that, pursuant to Article 2 and Article 40.3..1 of the Constitution, amongst the personal rights of the citizen is the right to reside in Ireland and that where that citizen was a minor and unable because of that fact to make the decision to so reside, it was the parents of that child who were entitled to make a decision and to exercise that right for the child. In respect of the family, it was argued that it was a constitutionally recognised family which had rights under Article 41.1.1, Article 41.2 and Article 42 of the Constitution, by virtue of the fact that comprised in the family unit there was an Irish born child who was a citizen. The court applied *Fajujonu v. Minister for Justice* in refusing judicial review and held that the reasons considered by the respondent in ordering the deportation of the applicant were grave and substantial reasons associated with the common good, which included *inter alia* the length of time the family had been in the State and the duty to apply the Dublin Convention to which Ireland was a party.

European Convention of Human Rights

It has been argued that the procedures for asylum application are contrary to the European Convention on Human Rights, or that a decision was reached in contravention of same.

In *Adam v. Minster for Justice*[35] the Supreme Court upheld decisions of the High Court[36] on joint appeal and rejected the suggestion that, when considering the applications for asylum, the respondents, were obliged to take into account the Convention on the ground that same was not part of Irish domestic law and the Irish Court had no part in its enforcement.

The European Convention on Human Rights Bill, 2001[37], proposes that the European Convention and various other conventions and covenants shall have force of law in the State. Section 4 provides *inter alia* that an Irish court shall take into account judgments of the European Court of Human Rights in interpreting the Convention. The Bill is as yet unimplemented[38] but the fact that Ireland is now the only EU country not to have incorporated the Convention into domestic law makes it likely that it's provisions will come into force soon.

Errors in decisions of the Commissioner or Tribunal

In relation to the error referred to above in *S. v. Minister for Justice*[39], the High Court held that the defect rendered the decision of the Commissioner either *ultra vires* or in breach of fair procedures. The court rejected on the facts the argument that the information omitted was of so little relevance that certiorari should not be ordered, but questioned whether it was necessary at all to enter such analysis before an order for *certiorari* could be granted.

30. [1999] 4 I.R. 26.
31. *In The Immigration Act, 1999*, Mulcahy, 1999 5(1) B.R. 35, is an article which discusses the changes in the Act of 1999 and the reason for its introduction.
32. (Unreported, High Court, Smyth J., 18th January, 2001).
33. (Unreported, Supreme Court, 6th June 2002)
34. (Unreported, High Court, Smyth J., 8th April, 2002)
35. (Unreported, Supreme Court, 5th April, 2001).
36. *Adam v. Minister for Justice* (Unreported, High Court, O'Donovan J., 16th November, 2000) and *Iordache v. Minister* for Justice (Unreported, High Court, Morris P., 30th January, 2001). Note both cases decided that the High Court could strike out proceedings pursuant to the court's inherent jurisdiction or O. 19 r. 28 R.S.C. 1986, despite the High Court already having granted leave to apply for judicial review. This aspect of the decisions was also upheld on appeal.
    These decisions were however decided in respect of decision to which s. 5 of the Act of 2000 did not apply, which section requires the application for leave to be made on notice to the Minster.
37. For a discussion of the background to the introduction of the Bill see *The European Convention on Human Rights and Irish Incorporation - adopting a minimalist approach*, Murphy and Wills, (2001) 6(9) B.R. 541.
38. At the time of writing the Bill has reached the third stage before the Dáil.
39. supra 17.

In *A.B.M. v. Minister for Justice, Equality and Law Reform*[40] the applicant succeeded on the ground that there was a fundamental error on the face of the record of the recommendation of the Appeals Authority in that the applicant was referred to as being from the D.R. Congo and in the text as being a native of Zaire whereas he was in fact a native of the Republic of Congo as evidenced in his application. The respondent had argued that the admitted error was an error of fact which had not produced an error of law, and did not go to the jurisdiction of the respondent. The court applied *State (Holland) v. Kennedy* [1977] I.R. 193 and stated that this was "a mistake of fact which is so basic that it deprives the adjudicator of jurisdiction to make the adjudication, in which event the decision is susceptible to review by way of judicial review".

Natural Justice

In *B.O.J. v. Minister for Justice*[41] the applicant was deemed to have abandoned an application for asylum after the applicant failed to appear for interview under the Hope Hanlon procedures, and failed to respond to the respondents various correspondences sent pursuant to the Hope Hanlon procedures and the relevant statutes. The court found that the applicant had moved address and had not informed the respondent of its change of address. The court refused to find the deemed service provisions[42] to be contrary to fair procedures. A similar conclusion was reached in *D.R. v. Minister for Justice*[43].

In *Z. v. Minister for Justice*[44] the court, in citing *inter alia* various passages of the U.N.H.C.R. handbook, refused the applicant's argument that the failure to provide an oral hearing on appeal against a determination that an application for asylum was manifestly unfounded was in breach of the applicant's constitutional rights and the requirement of natural justice.

In *Hoti v. The Refugee Appeals Tribunal*[45] the applicant argued *inter alia* that during the course of the appeal before the respondent, the respondent judge 'persistently interjected to ask questions..[and] dominated the appeal hearing', and the applicant exhibited a note from his solicitor at the appeal hearing showing that the respondent had asked the applicant more questions than the applicant's own lawyer had in direct examination. The court in refusing the application held that the test was whether the conduct of the tribunal reasonably gave rise in the mind of an unprejudiced observer to the suspicion that justice was not seen to be done and found that the test was not satisfied on the facts of the case. The court pointed in particular to the inquisitorial nature of the appeal hearing.

In *Raiu v. The Refugee Appeals Tribunal*[46], the applicant sought an injunction restraining the respondent from proceeding with the applicant's appeal until such time as access to previous decisions of the respondent were furnished to the applicant which were relevant to the issues in the case. Such access had been refused on the ground *inter alia* of the constraints imposed by ss. 16(14) and 19 of the Act of 1996. The court held that the refusal to make available judgments of the respondent in cases other than the applicant's was not unlawful and in particular was not in breach of the applicant's right of access to the courts and was not in breach of the principles of natural justice.

The test applied in determining who is a refugee

This argument has formed the basis of many judicial review hearings in England, but has not as yet formed the basis of many judicial review applications in this jurisdiction.

In *T.A. v. Minister for Justice*[47] the applicant was Libyan and was refused asylum at first instance and by the appeals authority. The decision of the appeals authority included a paragraph to the following effect:-

> "It is clear that the situation in Libya poses great difficulties and opposition groups and the tribe to which he stated he belonged is closely scrutinised by the authorities. The appellant appeared tense and anxious at the hearing and I can appreciate his reluctance to return to Libya at the present, however I cannot find that he left the country for a convention reason."

The applicant argued that there was a misapplication of the test Section 2 of the Act of 1996 and cited English authority to point that the test is whether there is a current well-founded fear of persecution and that historic factors were not determinative.

The court accepted that the decision of the Tribunal was unhappily worded but held that the appeals authority had considered all the evidence and had appreciated the concern, fear or reluctance of the applicant to be returned to Libya but, "the appeals authority was entitled to review the position as a whole and to look at the historical context against which that fear might be said to have arisen or the information in its totality to see if there was a "real chance" or more likely than not the possibility that persecution would ensue on his return to Libya."

Challenging a deportation order on the ground of non-compliance with the Act of 1999 or the Act of 2000

An applicant might challenge the decision of the Commissioner, Tribunal or Minister on the grounds of non-compliance with a relevant statute. This ground has often been used in relation to deportation orders. In particular it has been argued that insufficient reasons have been furnished by the Minister for the decision.

40. (Unreported, High Court, O'Donovan J., 23rd July, 2001)
41. (Unreported, High Court, Smyth J., 5th December, 2001)
42. In s. 6 of the Act of 1999 as amended by s. 9 of the Act of 2000.
43. (Unreported, High Court, Smyth J., 6th December, 2001)
44. (Unreported, Supreme Court, 1st March, 2002)
45. (Unreported, High Court, Smyth J., 24th April, 2002)
46. (Unreported, High Court, Smyth J., 25th April, 2002).
47. (Unreported, High Court, Smyth J., 15th January, 2002).

In *P. v. Minister for Justice*[48], one applicant was refused asylum on the ground that the application was manifestly unfounded and applied for leave to remain under Section 3 of the Act of 1999. The court rejected the applicant's argument that the mere fact that a person had been refused asylum was not of itself a sufficient basis for the respondent to propose to make a deportation order for the purpose of Section 3. It was argued further that the notification in writing received by the applicant contained insufficient reasons and took into account extraneous matters unknown to the applicant, both contrary to Section 3(3)(ii)[49]. The court applied *Laurentiu v. Minister for Justice*[50] and held that the reasons were adequate. Hardiman J. stated as follows:-

> "It follows from this that the invocation of the 'common good' in s. 3(6) does not require or imply any opinion derogatory of the individual whose case is being considered. It simply entitles the Minister to have regard to the State's policy in relation to the control of aliens who are not, on the facts of their individual cases, entitled to asylum."

The court also rejected the argument that the deportation order itself as opposed to the notification of the decision should contain the reasons for the respondent's decision.

In *Wu v. Minister for Justice*[51], the applicant was served with a deportation order which the court held had an error on the face of the record in that the ground given for deportation was effectively Section 3(2)(e) of the Act of 1999 when it should have been more properly Section 3 (2)(h), if at all, and the respondent had not invoked the power to amend the order under Section 3(11) as was permissible. The court made an order quashing the deportation order.

In *Baby O. v. Minister for Justice*[52] the court rejected the argument that fair procedures required that deportation order should specify the reasons for holding that the prohibition on non-refoulement in Section 5 of the Act of 1996 or the similar provision in Section 4 of the Criminal Justice Act, 2000, did not apply to an asylum applicant. The court held that the reasons in the deportation order[53] had been sufficient.

Standard of proof

Standard of proof in determining refugee applications

In *Assion v. Minister for Justice*[54], the respondent argued that the appeals board applied the incorrect standard of proof in determining his asylum application, in particular that the applicant need not prove that it was more likely than not that he would have been persecuted if returned to his or her own country[55]. The court held that no essential difference existed between the standard as applied in the U.S., Australia or England and found that the respondent had applied the correct standard of proof in assessing whether the applicant had established on the balance of probabilities a "reasonable likelihood" of persecution if returned to his or her own country.

The standard of proof at leave stage

In *The Illegal Immigrants (Trafficking) Bill, 1999,* the Supreme Court considered the meaning of the phrase "substantial ground" for the purpose of Section 5 of the Act of 2000 and stated at p. 24." This is not an unduly onerous requirement since the High Court must decline leave only where it is satisfied that the application could not succeed or where the grounds relied on are not reasonable or are trivial or tenuous. " The matter is discussed fully in that case and various authorities cited.

The standard of review at the substantive judicial review

In *Mohsen v. Minister for Justice*[56] and *Camara v. Minister for Justice*[57], the court applied the traditional test set out in *Associated Providential Picture Houses Ltd v. Wednesbury Corporation*[58] and refused to submit the decision to "anxious scrutiny", an approach that the applicant had argued for, in particular, in the former case.

In *Z. v. Minister for Justice*[59] the Commissioner and Tribunal refused asylum to the applicant on the grounds that the application was manifestly unfounded. The applicant argued that the High Court[60] in refusing leave to apply for judicial review on many of the grounds for judicial review, was incorrect to apply the principles set out in *O'Keeffe*

48. The Supreme Court in supra 25.
49. The paragraphs material to the notification were as follows.:
    "In reaching this decision Minister has satisfied himself that the provisions of s. 5 of the Refugee Act, 1996 are complied with in your case.
    The reasons for Minister's decision are that you are a person whose asylum has been refused and, having regard to the factors set out in s. 3(6) of the immigrations act, 1999, including the representations received on your behalf, Minister is satisfied that the interests of public policy and the common good in maintaining the integrity of the asylum system outweigh such features of you case as might tend to support you being granted leave to remain in the State".
50. supra 30, where the same point was argued on the regime that applied before the Act of 1999 came into operation and where similarly phrased reasons were deemed adequate.
51. (Unreported, High Court, Smyth J., 25th January, 2002).
52. supra 33.
53. The material section included, "The Minister has satisfied himself that the provision of s. 5 of the Refugee Act 1996 are complied with in your case".
54. (Unreported, High Court, O'Caoimh J., 21st December, 2001)
55. The applicant cited *R.v. Secretary of State for the Home Department, Ex_Parte Sivakurumaran* [1988] 1 All. E. R. 193, the Australian case, *Chan v. Minister for Immigration and Ethnic Affairs* (1989) 169 C.L.R. 379, the American case, *Immigration and Naturalisation Service v. Cardoza-Fonseca* 480 U.S. (1876) 421, arguing in particular that a different standard between England and in the U.S.
56. (Unreported, High Court, Smyth J., 12th March, 2002)
57. (Unreported, High Court, Kelly J., 26th July, 2000). *In Judicial review, the doctrine of reasonableness and the immigration process,* Hogan, 2001 6(6) B.R. 329, that author criticises the decisions in Camara v. Minister for Justice for applying the principles in *O'Keeffe v. An Bord Pleanàla,* and advocates a more generous standard of review in relation to decisions on asylum. The author discusses *MJ Gleeson v. Competition Authority* [1999] 1 I.L.R.M. 401 and *Orange Communications v. ODTR* (Unreported, Supreme Court, 18th May, 2000), which it is argued applied a more generous test of review even in the case where expert bodies had made the decisions.
58. [1948] 1 K.B. 223.
59. (Unreported, Supreme Court, 1st March, 2002).
60. (Unreported, High Court, Finnegan J., 29th March, 2001)

v. An Bord Pleanála[61] in particular having regard to the approach in the U.N.H.C.R.[62] manual to manifestly unfounded applications for asylum. The court held that the trial judge was correct in applying the principles in *O'Keeffe*. It held that the court was committed to submitting the decision-making process in all cases to careful scrutiny and that the High Court had done this on the facts of the case. However, the legal significance of the phrase 'anxious scrutiny' had not been fully argued before the court and awaited further argument.

Conclusions

It is clear from the case law that an applicant should comply rigidly with time-limits for internal appeals and should inform the authorities at all stages of any change of address. Otherwise he/she may fall outside the asylum process.

An applicant should avail of internal appeals where available which requires very prompt action, "without prejudice to our rights to seek judicial review", but applicants should seriously consider judicially reviewing the decision of the Commissioner or Tribunal, where there is a serious error of fact or law in the decision of the Commissioner or Tribunal. This may work to the disadvantage of the State in creating more than one judicial review hearing for the same asylum applicant.

The fact that a refusal of an extension of time, for the institution of judical review proceedings can be appealed to the Supreme Court combined with the fact that *G.K.* requires the court to consider the merits of the application may mean the High Court will refuse leave to apply for judicial review in appropriate cases, rather than ruling on the time issue alone or at all[63]. Geoghegan J. in *B.* and *S.* questions whether it is permissible to adopt this approach.

It may be more difficult to succeed on constitutional arguments in these cases. In assessing constitutional arguments, the court often has regard to the distinct constitutional status of non-nationals, and have quoted general dicta from, in particular *Pok Sun Shum v. Ireland*[64], *Osheku v. Ireland*[65], *Laurentiu v. Minister for Justice* and *The Illegal Immigrants (Trafficking) Bill, 1999*[66], to refuse specific arguments before the court on any particular occassion. The court in *P. v. Minister for Justice* and *Z. v. Minister for Justice* placed emphasis on these cases and this general principle.

If the Human Rights Bill, 2001, is implemented in its current or amended form this will open up new grounds of judicial review to attack both procedures and substantive decisions in relation to asylum.

In cases where the procedures under the Acts are followed it will be difficult to argue a breach of fair procedures. Natural justice may be successfully pleaded, for instance, where an applicant is prevented from giving evidence at a hearing or a decision maker shows prejudgment. Administrative law texts and cases on judicial review of District Court trials may be useful on such points.

This reasons in the letter notifying deportation will not be readily open to challenge, in the wake of P. given that the Minister has tended to adopt a statutory formula which is applied to nearly all cases in which asylum is refused. Only where the grounds for deportation are incorrect or the reasons clearly unlawful is a remedy likely to lie.

It is still possible to challenge a decision on asylum on the basis of unreasonableness on the *O'Keeffe* principles, which does not give immunity from challenge to those decisions. In particular, judicial review may be successful in cases where the incorrect test or standard is applied by the decision maker. ●

61. [1995] I.R. 39.
62. Note in both decisions of the High Court in *Z. v. Minister for Justice* the court cited the manual in addressing the applicants contention that the manner in which the application for asylum was determined by the Tribunal was unlawful and in assessing whether the failure to provide an oral hearing in manifestly unfounded cases was in breach of natural justice.
63. In supra 33 the Supreme Court treated a refusal of leave to apply for judicial review in respect of some of the grounds, which were out of time, as in effect a refusal of an extension of time, albeit at the suggestion of the respondent.
64. [1986] I.L.R.M. 593.
65. [1986] I.R. 733, where the plaintiff failed in his claim that the Aliens Act, 1935, was unconstitutional.
66. supra 4. where at p. 382 the Keane C.J. enters a discussion on the constitutional status of non-nationals and cites various caselaw.

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Abattoirs act, 1988 (veterinary examination) (amendment) regulations, 2002
SI 165/2002

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Injunction
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Article

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Restriction of directors - Practice and procedure - Duties of directors - Evidence - Delay - Estoppel - Nature of section 150 proceedings - Whether section 150 application could be brought by way of notice of motion - Whether liquidator estopped from pursuing proceedings - Whether directors should be restricted - Companies Act, 1990 sections 150 (1994/225COS - McCracken J - 23/1/02) FL 4821
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Contract

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Whether High Court had jurisdiction to interfere with proceedings before Special Criminal Court - Role of Special Criminal Court - Drugs offences -Right to trial by jury - Fair procedures -- Criminal Justice Act, 1994 section 4 - Criminal Justice Act, 1999 section 25 (312/2001 - Supreme Court - 7/12/01) FL 4829
Gilligan v Special Criminal Court

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Arrest
Fair procedures - Evidence - Detention - Whether search of dwelling house carried out with consent - Whether arrest of accused lawful - Whether detention of accused lawfully extended - Criminal Justice Act, 1984 - Criminal Law Act, 1976 (1999/0125 CC - Herbert J - 7/12/01) FL 4878
People (DPP) v Cleary

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Sexual offences - Fair procedures - Expert evidence - Garda Síochána - Nature of psychological evidence required - Whether expert evidence satisfactory - Whether real risk of unfair trial had been established - Whether applicant prejudiced by delay (2000/150JR - Kearns J - 23/11/01) FL 4893
W (A) v DPP

Delay
Sexual offences - Motion - Right to trial with reasonable expedition - Whether indictment should be quashed - Whether admitted delay excusable - Bunreacht na hÉireann, 1937 Article 38.1 (2000/0007CC - Carney J - 27/7/01) FL 4823
DPP v O'C (J)

Delay
Sexual offences - Order of prohibition - Fair procedures - Expert evidence - Whether real risk of unfair trial had been established - Whether delay excessive - Whether applicant prejudiced by delay (2000/44 JR - Kearns J - 23/11/01) FL 4985
D (V) v DPP

Extradition
Constitutional law - Habeas corpus - Practice and procedure - Delay - Detention -Fair procedures - Statutory interpretation - International comity - Whether High Court judge correctly exercised discretion - Extradition Act, 1965 section 53 (35/2000 - Supreme Court - 31/7/01) FL 4857
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Fair procedures - Jurisdiction of District Court - Practice and procedure - Statutory interpretation - Evidence - Drug offences - Whether preliminary examination properly conducted - Whether additional evidence properly admitted - Criminal Procedure Act, 1967 section 6(4) - Misuse of Drugs Act, 1977 (2001/20 JR - Kelly J - 14/12/01) FL 4966
Hughes v Garavan

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Drunk driving - Case stated - Onus of proof - Evidence - Specimen of breath - Use of alcolyser or "intoxilyzer" - Right to fair trial - Whether necessary to demonstrate that

apparatus approved by Medical Bureau of Road Safety - Road Traffic Acts, 1961-1994 (2001/2295SS - Kelly J - 20/12/01) FL 4819
DPP v Daly

Road traffic offences
Powers of arrest - Drunk driving - Whether accused arrested under correct section - Whether person arrested under section 49(8) of the Road Traffic Acts, 1961-95 could be charged with offence under Section 50 of the Acts - Road Traffic Act, 1961 - Road Traffic Act, 1994 (2000/2201SS - Finnegan J - 20/12/01) FL 4820
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DAMAGES

Award
Whether excessive - General guideline as to damages - Road traffic - Medical evidence (181/1999 - Supreme Court - 8/12/00) FL 4924
Fitzgerald v Treacy

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Whether excessive - Personal injuries - Whether decision of trial judge perverse - Whether failure by trial judge to make findings of fact (154/2001 - Supreme Court - 20/12/01) FL 4846
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Article

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Cassidy, Pamela
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Employment

Termination of employment
Injunction - Balance of convenience - Company - Payment of salary - Re-instatement - Whether plaintiff's salary should be paid pending trial of action (2001/18271 P - O'Sullivan J - 8/2/02) FL 4951
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HMIL Ltd v Minister for Agriculture and Food

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Maintenance - Lump sum payment - Division of assets - Property - Policy of equal division - Rule of equality - Whether 'clean break' principle existed in Irish law - Whether decree of divorce should be granted - Family Law (Divorce) Act, 1996 sections 5, 20 (2000/30 M - Lavan J - 28/11/01) FL 4972
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Divorce - Recognition of foreign divorce - Preliminary issue - Whether respondent had discharged onus of proof that he had relinquished domicile of origin - Whether foreign divorce entitled to recognition - Judicial Separation and Family Law Reform Act, 1989 - Family Law Act, 1995 - Family Law (Divorce) Act, 1996 - Family Law (Maintenance of Spouses and Children) Act 1976 - Domicile and Recognition of Foreign Divorces Act, 1986 (2000/82M - Morris P - 23/11/01) FL 4839
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Recognition of foreign divorce - Domicile of choice - Domicile of origin - Capacity - Nullity - Whether marriage of parties valid and subsisting - Litigation -- Lay litigant - Right to legal representation - Application to adjourn - Custody - Welfare of children - Guardianship - Rights of access - Whether judgment of High Court should be set aside - Whether foreign divorce recognisable in Irish law - Whether respondent received fair hearing - Guardianship Of Infants Act, 1964 - Domicile and Recognition of Foreign Divorces Act, 1986 (68, 76 & 77/2001 - Supreme Court - 19/12/01) FL 4889
S (A) v B(R)

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Application for interim increase in maintenance - Repairing of family home - Affidavit of means - Whether amount of maintenance should be increased - Whether matters should be resolved at full hearing - Family Law (Divorce) Act, 1996 (2001/38M - Morris P - 16/11/01) FL 4816
C (V) v C (D)

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Statutory interpretation - Disclosure - Whether disclosure of documents should be ordered - Freedom of Information Act, 1997 (1999/96 & 107MCA - O'Neill J - 21/12/01) FL 4947
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Statutory Instrument

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Statutory Instruments

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Garda Síochána

Compensation
Personal injuries - Damages - Medical evidence - Whether applicant entitled to compensation (2001/231 Sp - Murphy J - 12/11/01) FL 4969
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Complaints
Procedure -- Meaning of "vexatious" - Whether complaint vexatious - Garda Síochána (Complaints) Act, 1986 (2001/134 JR - O'Sullivan J - 15/2/02) FL 4918
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Guarantee

Construction
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S (I) v Minister for Justice, Equality and Law Reform

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Certiorari - Immigration - Hope Hanlan procedure - Failure to give reasons - Whether statutory procedures complied with - Whether deportation order valid - Immigration Act, 1999 (2000/170 JR - McKechnie J - 20/12/01) FL 4967
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Asylum
Deportation - Fair procedures - Whether respondent acted ultra vires - Whether deportation order valid - Whether application processed accordingly - Refugee Act, 1996 - Immigration Act 1999 (2001/503 JR - Smyth J - 5/12/01) FL 4979
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Deportation - Fair procedures - Whether respondent acted ultra vires - Whether deportation order valid - Whether application processed accordingly - Refugee Act, 1996 - Immigration Act, 1999 (2000/679/JR- Smyth J - 29/11/01) FL 4980
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Deportation - Fair procedures - Whether respondent acted ultra vires - Whether deportation order valid - Whether reasons given in notice from respondent proper, intelligible and adequate - Refugee Act, 1996 - Immigration Act, 1999 (2001/325 JR - Smyth J - 7/12/01) FL 4978
O (JA) v Minister for Justice, Equality and Law Reform

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Judicial Review -Leave to extend time - Immigration - Refugee and asylum law - Criteria to be applied - Whether delay by applicant should act as bar to granting relief - Rules of the Superior Courts, 1986 SI 15/1986 Order 84 rule 21 - Illegal Immigrants (Trafficking) Act, 2000 (2000/1161A - Finnegan J - 2/4/01) FL 4811
Saalim v Minister for Justice, Equality and Law Reform

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Refugee status - Leave to extend time - Criteria to be applied - Whether claim for refugee status manifestly unfounded - Whether applicant should have been afforded oral hearing - Rules of the Superior Courts, 1986 Order 84 rule 21 - Illegal Immigrants (Trafficking) Act, 2000 (2001/1141 A - Smyth J - 1/12/01) FL 4977
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Balance of convenience
Interlocutory injunction - Contract -

Competition law – Interference with economic interests – Inducing breaches of contract – Plaintiff's economic interests – Dispute resolution procedure – Whether appropriate to grant injunctive relief – (2001/1667P – O'Donovan J – 29/11/01) FL 4731
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Motion to set aside proceedings – Jurisdiction – Litigation – Insurance claim – Financial loss – Forum non conveniens – Whether service outside jurisdiction should have been ordered – Whether proceedings should be set aside – Rules of the Superior Courts, 1986 Order 11, rules 1 and 5; Order 12, rule 26 (171/2001 – Supreme Court – 24/1/02) FL 4971
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DPP v McDonnell and Zoe Developments Ltd

Prohibition
Criminal law – Evidence – Duty to preserve evidence – Fair procedures – Injunction sought to prohibit the DPP from prosecuting – Whether applicant could receive fair trial – Whether unfair to applicant to permit trial to proceed – Whether applicant's defence prejudiced (2000/138JR – Murphy J – 20/12/01) FL 4842
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Licensing

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Fisheries – Environmental law – Grounds for seeking judicial review – Whether applicant had demonstrated substantial grounds – Whether leave to seek judicial review should be granted – Whether error in granting licence rendered licence void – Fisheries (Amendment) Act, 1997 – Aquaculture (Licence Application) Regulations, 1998 SI 236/1998 – European Communities (Natural Habitats) Regulations, 1997 SI 94/1997 (2000/359JR – Finnegan J – 28/2/01) FL 4735
Beara v Minister for the Marine and Natural Resources

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Article

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Clissmann, Alma
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Negligence

Liability
Employer's liability – Damages – Personal injuries – Health and safety – Safe system of work – Failure to inspect premises – Whether defendants guilty of negligence – Whether plaintiff guilty of contributory negligence – Safety, Health and Welfare at Work Act, 1989 (1998/2884 P – O'Donovan J – 28/1/02) FL 4948
McMahon v Irish Biscuits Ltd

Planning

Development
Telecommunications - Role of An Bord Pleanála - Change of use - Statutory interpretation - Whether work exempted development - Whether "works" and "material change of use" mutually exclusive concepts - Whether hearing before High Court "*de novo*" hearing - Whether material change of use had taken place - Local Government (Planning and Development) Act, 1963 sections 4 (1) (g) and 5 - Local Government (Planning and Development) Regulations, 1994 (2000/506 Sp - Kearns J - 25/1/02) FL 4897
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Perpetual injunction application - Environmental law - Statutory interpretation - Conservation - Locus standi - Whether minister acted in accordance with relevant regulations - European Community (Natural Habitats) Regulations, 1997 SI 94/1997 (1997/3740P - Murphy J - 20/12/01) FL 4939
Minister for Arts, Heritage, the Gaeltacht and the Islands v Kennedy

Waste
Waste management - Local Authorities - Locus standi - Disposal of household waste - Leave to seek judicial review - Whether local authority obliged under statute to collect waste - Whether applicant had established arguable case - Waste Management, Act, 1996 sections 33 & 38 (125/2000 - Supreme Court - 31/7/00) FL 4828
O'Connell v Cork Corporation

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Ryall, Aine
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Costs
Personal injuries - Litigation - Insurance - Recovery of damages from non-party to action - Limitations on policy as to liability - Whether costs could be recovered by way of notice of motion (1997/8625P - O'Neill J - 1/2/02) FL 4945
Curran v Finn

Costs
Taxing Master - Company law -Whether findings of Taxing Master unjust - Rules of the Superior Courts, 1986 SI 15/1986 Order 99 - Companies Act, 1963 section 204 - Court and Court Officers Act, 1995 section 27 (1998/585Sp - Lavan J - 7/12/01) FL 4818
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Want of prosecution - Dismissal of proceedings - Appeal - Medical negligence - Lay litigant - Whether delay inordinate and inexcusable (190/2000 - Supreme Court - 23/11/01) FL 4851
Brennan v Fitzpatrick

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Want of prosecution - Dismissal of proceedings - Negligence - Whether delay inordinate and inexcusable - Whether defendants prejudiced by delay - Discretion exercised by trial judge (112/1999 - Supreme Court - 7/3/00) FL 4856
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Discovery
Contract - Litigation - Legitimate expectation - Aviation - Whether documentation sought probative to facts sought to be proved - Whether discovery should be ordered (2001/11259P - Master Honohan - 23/1/02) FL 4946
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Discovery
Personal injuries - Litigation - Whether discovery should be ordered (1998/7226 P - Master Honohan - 29/1/02) FL 4926
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Limitation of actions
Motion to strike out judicial proceedings - European law - Public procurement - Contract - Delay - Principle of equivalence - Whether time to challenge award of contract should be extended - Whether proceedings initiated at earliest opportunity - Rules of the Superior Courts, 1986 Order 84A (1999/114JR - O'Neill J - 2/11/01) FL 4917
Dekra Erin Teoranta v Minister for the Environment and Local Government

Limitations of actions
Personal injuries - Company law - Litigation - Identity of operator of hotel premises - Whether claim statute barred - Whether plaintiff could reasonably have ascertained name of correct defendant - Occupiers Liability Act, 1995 - Hotel Proprietors Act, 1963 - Statute of Limitations, 1957 - Statute of Limitations (Amendment) Act, 1991 - Companies Act, 1963 section 22 (1997/9811p - Kinlen J - 23/1/02) FL 4962
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Motion
Motion for judgment - Landlord and tenant - Retail law - Summary judgment - Non-payment of rent - Credit and security - Management of shopping centre - Set-off - Equity - Counterclaim by defendant - Whether judgment should be granted - Whether equitable set-off available - Whether stay on judgment should issue - Rules of the Superior Courts, 1986 Order 37, rule 6 (2001/563 S - Master Honohan - 22/2/02) FL 4995
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Service of proceedings outside jurisdiction - Injunction - Proceeds of crime - Oireachtas - Whether statutory injunctions came within ambit of Order 11 rule 1(g) - Whether service of proceedings should be set aside - Rules of the Superior Courts, 1986 SI 15/1986, Order 11 rule 1(g) - Proceeds of Crime Act, 1996 (2001/10513P - Finnegan J - 18/7/01) FL 4835
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Shipping

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Solicitors

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Disciplinary procedures - Investigation by Law Society - Damages -Judicial review - Accountancy - Role of investigating accountant - Whether investigation *bona fide* and in accordance with relevant regulations - Whether accountant's report could be severed - Solicitors Accounts Regulations (No 2), 1984 SI 304/1984 - Solicitors (Amendment) Act, 1994 section 14 - Solicitors Act, 1954 (312/1999 - Supreme Court - 20/12/01) FL 4952
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Disciplinary procedures - Law Society - Jurisdiction of High Court - Whether sanction imposed too severe - Solicitors (Amendment) Act, 1960 - Solicitors (Amendment) Act, 1994 (176/1997 - Supreme Court - 13/3/00) FL 4838
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Practice and procedure - What constitutes a valid appeal - Validity of certificates - Locus standi - Proceeds of crime - Criminal Assets Bureau Act, 1996 - Taxes Consolidation Act, 1997 sections 933, 957 - Interpretation Act, 1937 section 11 - Rules of the Superior Courts, 1986 Order 122, rule 10 (1998/13 R - Kearns J - 16/11/01) FL 4868
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SI 84/2002

Tribunals of Inquiry

Tribunals of inquiry
Contempt - Discovery - Committal - Practice and procedure - Public interest - Evidence - Whether defendant had failed to comply with order of discovery - Whether defendant in breach of court orders - Whether High Court entitled to jail defendant for contempt - Tribunals of Inquiry (Evidence) (Amendment) Act, 1997 - Rules of the Superior Courts, 1986 SI 15/1986 Order 31, rule 13 (2000/SP 553 - Smyth J - 31/7/01) FL 4742
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Statutory Instrument

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AT A GLANCE

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Committee - Dail

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1st stage - Dail (order for second stage)

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1st stage - Dail (order for second stage)

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1st stage - Dail (order for second stage)

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1st stage - Dail (order for second stage)

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Committee - Dail

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1st stage -Dail (order for second stage)

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1st stage - Dail (order for second stage)

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[Order of business: Motion re Restoration of bills to the Order paper Tuesday 18/06/2002 2:30pm]

Abbreviations

BR =	Bar Review
CIILP =	Contemporary Issues in Irish Politics
CLP =	Commercial Law Practitioner
DULJ =	Dublin University Law Journal
FSLJ =	Financial Services Law Journal
GLSI =	Gazette Society of Ireland
IBL =	Irish Business Law
ICLJ =	Irish Criminal Law Journal
ICLR =	Irish Competition Law Reports
ICPLJ =	Irish Conveyancing & Property Law Journal
IFLR =	Irish Family Law Reports
IILR =	Irish Insurance Law Review
IIPR =	Irish Intellectual Property Review
IJEL =	Irish Journal of European Law
IJFL =	Irish Journal of Family Law
ILTR =	Irish Law Times Reports
IPELJ =	Irish Planning & Environmental Law Journal
ITR =	Irish Tax Review
JISLL =	Journal Irish Society Labour Law
JSIJ =	Judicial Studies Institute Journal
MLJI =	Medico Legal Journal of Ireland
P & P =	Practice & Procedure

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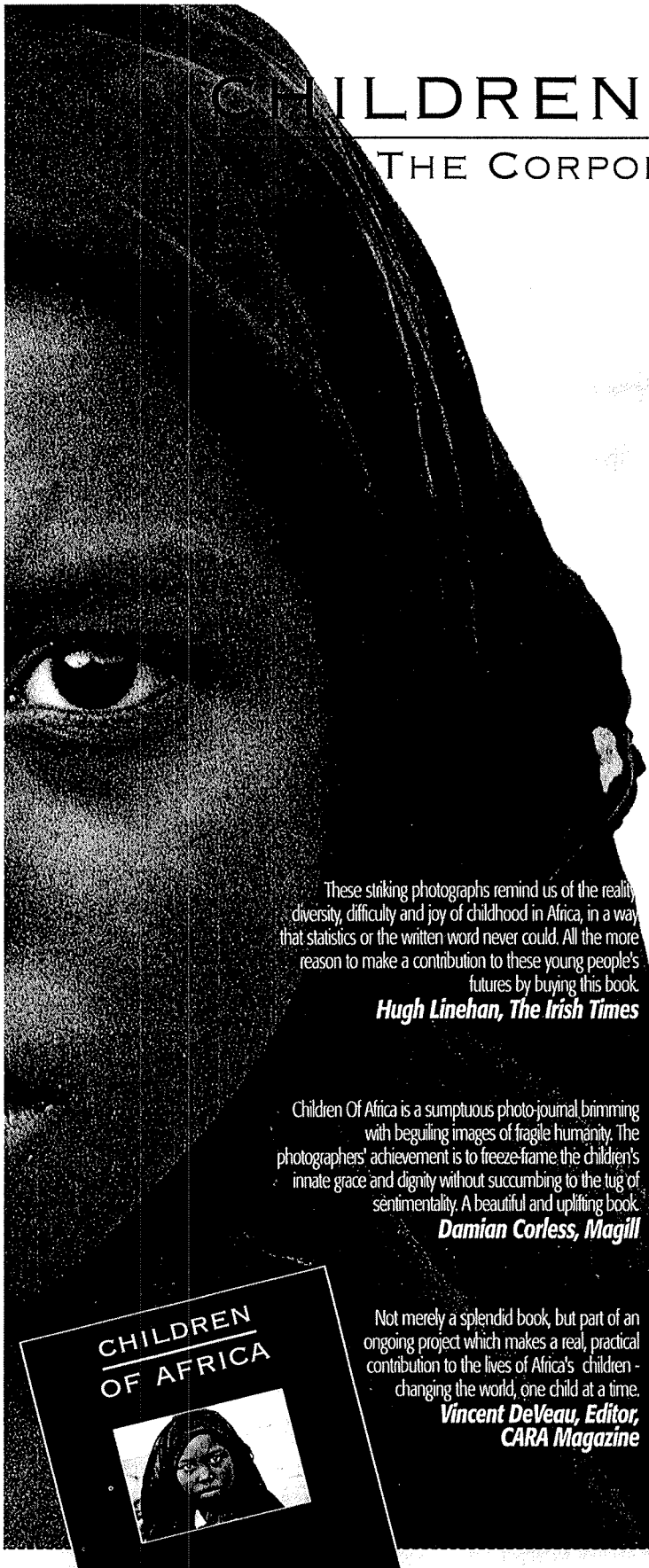

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Proposed Changes To The Handling Of Personal Injuries Claims

Conor Maguire SC, Chairman of the Bar Council

Individually we are all aware of the enormous rise in insurance premiums that has occurred over the last two to three years. Whether it be household insurance, car insurance or professional indemnity insurance, premium rates have soared and will continue to rise in the coming years. It is entirely understandable in this context that the business community should pressurise the Government to act. Against this background, the continuous cry from the insurance industry has been to blame "ever-increasing legal costs". This term inevitably points the finger at the two branches of the legal profession, and lawyers' fees are blamed for the increase in the cost of insurance.

Against this background, the political response of Government has come from the Department of Trade and Enterprise. Almost surreptitiously, and certainly without any consultation with the legal professions at the formative stages, the notion of the introduction of a Personal Injuries Assessment Board (PIAB) was born in the Department of Trade, Enterprise and Employment. It is significant in the overall context that the impetus for this 'reform' did not come from the agencies of government concerned with justice or law reform.

As more information emerged as to what was contemplated in terms of a Personal Injuries Assessment Board, the more obvious it became that this was an inappropriate response to the problems which it aimed to redress. Again, it was clear from the manner in which this project was dealt with in Government, that the fundamental aim was to develop an alternative method of resolving personal injury disputes, with little, if any, involvement from either branch of the legal profession. In the run up to the last General Election, the establishment of a Personal Injuries Assessment Board became a joint policy objective of the government parties. It was included in the Programme for Government. The project received a further impetus from the report of the Motor Insurance Advisory Board (chaired by Dorothea Dowling), which included amongst its sixty-seven recommendations a proposal that such a Board be established.

We have been criticised for failing to meet with the Implementation Board, but that is not a fair representation of what took place. The Bar Council was asked for its view, but upon enquiry as to the nature of the subject matter and the deliberations of the Implementation Board thus far, the Board declined to give us the necessary detail to make a meaningful contribution. It was accordingly necessary for us to seek a Freedom of Information request in order to obtain at least some information. Based on the limited information thus received, the Chairman of the Bar Council presented the views of the Council on this proposal in a paper he delivered to the Dublin Insurance Institute seminar. The Bar Council then held a Conference which was addressed by Mr. Frank Cunneen (chairman of the Second Working Group) and again, the views of the Council and its members were expressed at that conference.

As a result of the concerns of the Bar Council as to the advisability of the proposal, it was decided to engage an independent consultant. Dr Peter Bacon, to independently review it. Having looked at the information available, he indicated that this was not the way to proceed; that what was necessary was a cost benefit analysis of the intended reform. His view was that it was necessary to look at the economic effect in terms of benefit and cost to the economy. He was told to carry out the research and analysis he felt was necessary. This is the genesis of the Bacon Report. It is not necessary to recite here all his findings, which are now widely published and available (including on the Bar Council website, www.lawlibrary.ie). His main view was that the type of Personal Injuries Assessment Board being discussed was appropriate to systems where compensation for personal injuries is dealt with on a public insurance basis. In other words, it is suited to a situation where the State picks up the cost of providing compensation and where that in turn is passed on to the tax payer in the form of insurance contributions. Significantly, he indicated that if such a system were to be imported into this country, it would cost approximately €2.9 billion per annum, or an additional ten per cent on the tax bill. The system in this country is that, with minor

exceptions, compensation for personal injury is borne by private insurance. Essentially, the plan to introduce a Personal Injuries Assessment Board borrows from one system and inappropriately grafts it on top of an existing system of compensation based on private insurance. The State can opt for such a system, but it is not an efficient one. The alternative is to reform the existing system so as to reduce inefficiencies in its operation and Dr. Bacon concludes that that is the appropriate way to proceed.

Taking all of the above into consideration, and being totally familiar with the operation of the present system, the Bar Council has recommended a significant reform of the system for dealing with personal injuries cases that come before the courts. These reforms will be at no cost to the taxpayer, will lead to a significant reduction in costs and will speed up the time it takes to get cases to the courts, where they can be dealt with appropriately. This will require a change in the manner in which the courts and practitioners manage cases, but it will be a worthwhile change. It is in everyone's interest that cases move more efficiently through the system and are dealt with in a fair manner with the best possible result for the client.

The answer to the problem of high insurance premiums does not lie solely with the legal profession. We have recognised that lawyers are part of the problem, albeit a small part, and the Bar Council has come up with solutions, which will lead to a significant reduction in legal costs. However, it seems unlikely that this in turn will lead to a reduction in premia on the part of the insurance companies. The industry has already conceded that the introduction of PIAB will not have this effect, which begs the question. Why introduce it? The legal costs are an easy target, but the Government and the media should look closely at insurance figures, management and profits before jumping to conclusions. Why are insurers so keen on PIAB if they have stated on the record that it will not lead to a reduction in costs? What is the benefit to them?

There are other reasons for high premia, but it is convenient for the insurance industry to lay the blame on legal fees. Bad investments in the equity markets, the fallout from September 11th, losses in other geographical markets and poor management have all been major factors in pushing up the cost of insurance.

Barristers account for a very small percentage of legal costs, often less then those of expert witnesses, as pointed out in the MIAB report. Barristers are also the value added part of the system, advising on cases, giving expert opinion as to their worth, preparing the case and presenting it in court, if it is not settled beforehand. Any examination of the system will conclude that barristers' costs are low when considered in the context of the services provided. The Bar Council is now formulating reforms to the existing system, which will streamline our work and bring even more value.

A person bringing a case before the courts is faced with the resources and wealth of an insurance company. All they have protecting their right to fair compensation is their legal representation in the form of counsel. PIAB proposes to assess their case based on documentation before a board, which will include an insurance industry representative. This will not lead to justice or fair compensation by any reckoning.

The Bar Council is willing to work with the Government to improve the legal system and bring about a reduction in costs, through reform. But this cannot be done in a vacuum. Assurances must be sought and obtained from the insurance industry that these efforts will result in a comparable reduction in premiums. The purpose of insurance is to compensate people if they suffer loss as a result of an accident and not to ensure profit for a large multinational.

Questions need to be asked as to what is the real purpose of PIAB and what will be gained from setting it up. Answers are now required of the policymakers as to who is going to benefit? It is certainly not the consumer whose insurance costs will continue to rise or the injured victim who receives inadequate compensation. ●

Article 6 of the European Convention on Human Rights, Administrative Tribunals and Judicial Review

In the first part of a two-part article, William McKechnie* considers the potential impact of Article 6 of the European Convention on Human Rights on the procedures of administrative tribunals within the State.

Part I

The European Convention on Human Rights Bill 2001

The European Convention on Human Rights is set to become part of Irish domestic law at some point in the near future. This much is certain. The exact means by which the Convention is to be incorporated remains uncertain. The proposal of the last government is embodied in the European Convention on Human Rights Bill, 2001[1] Under section 2(1) of this Bill the courts will be obliged to interpret any statutory provision or rule of law in accordance with the State's obligations under the Convention provisions. The Bill goes on in Article 3 to place a duty on all organs of the State, subject to any statutory provision or rule of law, to perform their functions in accordance with the provisions in the Convention and allows for recovery of damages in the High Court for loss sustained from a breach of such a duty. Section 5 then, sets out how the Superior Courts may make a declaration of incompatibility with the Convention which, while not affecting the validity of the rule of law in respect of which it was made, must be placed before the Oireachtas within a period of 21 days.

Article 6 - The Right to a Fair Trial

Experience in the United Kingdom[2] has shown that the area of perhaps greatest potential effect is the right to a fair trial as guaranteed by Article 6 of the Convention. The first paragraph of Article 6 states that:

> " In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by and independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

It is clear therefore that Article 6 guarantees the right to a fair trial in the context of both the determination of civil rights and obligations and the determination of criminal charges. It should be stated at the outset however that this article is concerned solely with the application of Article 6 in a civil law context. Part I will deal with the potential impact of Article 6 on the procedures of administrative tribunals within the state. In Part II, the 'full jurisdiction requirement' will be considered as will the question of whether the present standard of judicial review is in itself sufficient to satisfy the requirements of Article 6 where these requirements have not been met at the initial administrative decision making level.

The Potential Scope of Article 6

The first task therefore is to delimit the potential scope of Article 6 in the civil law context. The European Court of Human Rights has consistently applied the following criteria in determining whether or not a particular set of proceedings are covered by Article 6. The Court asks:

i) Was there a dispute over a right?

ii) Was the result of the proceedings concerning the dispute at issue directly decisive for such a right?

iii) Was this right of a 'civil' nature?

Formerly the application of the Article was limited by a literal interpretation of the term "civil rights and obligations." As a result of its 'civil law' origins, the term was originally deemed to refer solely to private law rights, thereby excluding from the ambit of Article 6 all proceedings relating to rights and obligations in public law. It is generally accepted, however that this contention was rejected in *Ringeisen v Austria*[3] and that Article 6 can apply to proceedings that are of a public law character provided they are directly decisive for civil rights and obligations[4] As a result of this extension Article 6 has been applied in the context of a wide range of administrative decision making processes including; professional disciplinary proceedings[5]; the determination of social welfare entitlements;[6] the grant of liquor licences;[7] state compensation for injury caused by the supply of contaminated blood;[8] wardship/adoption disputes;[9] planning disputes;[10] land consolidation proceedings[11] and prison disciplinary proceedings.[12]

1. Reached third stage, before the Dail select committee on Justice, Equality, Defence and Womens' Rights, but has yet to be re-initiated by the present Government.
2. The Human Rights Act 1998 incorporated the European Convention on Human Rights into UK domestic law.
3. 1 EHRR 355
4. see "Human Rights - The 1998 Act and the European Convention," Grosz, Beatson & Duffy
5. *Konig v FRG*, 2 EHRR 170
6. *Feldbrugge v The Netherlands* (1986) EHRR 425
7. *TreTraktorer v Sweden* (1991) 13 EHRR 309
8. *X v France* A 234 C (1992)
9. *W v United Kingdom* (1988) 10 EHRR 29
10. *Ringeisen v Austria* 1 EHRR 355
11. *Sporrong & Lonroth v Sweden* 5 EHRR 35
12. *Campbell & Fell v United Kingdom* (1984) 7 EHRR 165

* LLB(Ling.Germ). Legal Researcher at the Office of the Attorney General. The views expressed are personal and do not purport to relect the views of the Office of the Attorney General.

The Content of Article 6

Article 6 sets out a number of procedural guarantees which must be respected. First and foremost the Article provides for a general right of access to the Courts. Of primary importance in this regard is the requirement that in order to satisfy Article 6, a tribunal determining civil rights or obligations must be competent to take legally binding decisions. The capacity to make recommendations or give advice is not enough.[13]

Secondly this tribunal must be "independent" of both the executive and the parties to the case. The court has enumerated a number of factors, which should be taken into account in assessing whether or not a particular body is "independent" in the sense of Article 6:

a) the manner of the appointment of its members,
b) the duration of their term of office,
c) the existence of guarantees against the outside pressures,
d) the objective appearance of independence.[14]

It is clear therefore that the test not only covers actual bias, but also 'objective bias'.

The tribunal must also be impartial. The requirement of "impartiality" is closely linked to the stipulation regarding "independence" while it has been stated that more litigation has arisen claiming lack of impartiality.[15] In *Findlay v United Kingdom*,[16] the court explained the distinction between the two terms:

> "In order to establish whether a tribunal can be considered as "independent" regard must be had inter alia to the manner of the appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence. As to the question of 'impartiality', there are two aspects to this requirement. First, the tribunal must be subjectively free from personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer guarantees to exclude any legitimate doubt in this respect."[17]

It is clear therefore that impartiality means lack of 'prejudice or bias',[18] and to satisfy this requirement a tribunal must comply with both a subjective and an objective test.

Beyond the guarantee of access to an independent and impartial tribunal, Article 6 also provides for a fair hearing generally. While the contents of such a provision in relation to criminal proceedings is expressly enumerated in Article 6(3) in cases determining civil rights and obligations the court must have recourse to a more general principle of fairness.

Article 6 further guarantees a public hearing. The Court has repeatedly affirmed this right and extended it to include entitlement to an oral hearing, unless there are exceptional circumstances justifying the denial of such a right.[19] Cases that have been found to involve exceptions to the general rule include disciplinary proceedings in prisons. In *Campbell and Fell v United Kingdom*[20] it was stated that:

> "To require disciplinary proceedings concerning convicted prisoners to be held in public, whether inside or outside the prison precincts would for reasons of public order and security impose a disproportionate burden on the authorities of the state."

Finally Article 6 guarantees a hearing within a reasonable time, a general stipulation that must be assessed in accordance with the particulars in each individual case.

Potential Impact of Article 6 on the Procedures of Administrative Tribunals

To a certain extent the requirements contained in Article 6 are already covered by the guarantees of natural and constitutional justice as enforced by the Irish Courts. However there are at least two identifiable ways in which Article 6 could affect the procedures of Irish administrative decision- making bodies. Firstly Article 6(1) requires that any such body involved in the determination of civil rights or obligations is obliged to afford the individual concerned a fair and public hearing. Within this jurisdiction there is no recognised right to an oral hearing. The question of whether such a hearing should be provided is decided on "...the circumstances pertaining, the nature of the inquiry being undertaken by the decision maker, the rules under which the decision-maker is acting and the subject matter with which he is dealing."[21] A number of administrative bodies within the state make preliminary decisions which could be seen as affecting civil rights without affording the individual concerned the right to an oral hearing. Examples include certain decisions of social welfare officers, prison governors in prison disciplinary proceedings and the decision of the Minister for Justice to grant or refuse temporary release to a prisoner.

Secondly, Article 6 requires that where such a fair and public hearing is afforded to an individual that hearing must take place before an independent and impartial tribunal. Again within the State this requirement may cause difficulties in a number of cases such as prison disciplinary proceedings, proceedings before various professional disciplinary bodies, and proceedings before the Garda Complaints Board.

The potential impact of Article 6 on the procedures of the many administrative tribunals operating throughout the state is therefore quite sizeable. However this impact will depend to a large extent on the ability of judicial review proceedings to remedy a breach of Article 6 at the initial administrative decision making level. In the second part of this paper, the issue will therefore be considered as to whether the availability of judicial review proceedings is sufficient judicial scrutiny so as to satisfy the requirements of Article 6. In other words does judicial review, when viewed as part of any decision making process, render that entire process, including the initial administrative stage, compatible with Article 6? If the answer to this question is yes then the lack of procedural protection at the adminstrative stage will not be viewed as a breach of Article 6 but rather as one stage in a decision making process which does comply with the provisions of Article 6. ●

13. *Benthem v Netherlands* A 97 (1985)
14. see *Campbell and Fell v United Kingdom* (1985) 7 EHRR 466, para. 64.
15. Ibid para C6-55
16. [1997] EHRR 1
17. Ibid, para 73
18. *Piersack v Belgium* A 53 (1982)
19. *Fredin v Sweden* (No.2), (1991) 13 EHRR 784
20. Ibid. at para 86
21. *Galvin v Chief Appeals Officer* [1997] 3 I.R. 240

Sed Quis Custodiet Ipsos Custodies[1]

"But Who Will Police The Police" Caroline Carney SC

Introduction

Independence, openness and transparency are qualities deemed necessary for any public authority which declares itself accountable to society. Without these there is no real accountability, and when they are present the public can have greater confidence in the service in question. Public confidence is a particularly important element in effective policing.

The Programme for Government states that it is the intention of the present government to review the management structures of the Garda Siochana to establish an independent Garda Inspectorate which will have the power to investigate complaints and have the other powers of an Ombudsman.[2] The purpose of this article is to consider the sufficiency of the provisions of the Garda Siochana (Complaints) Act 1986 in the context of the decisions of the European Court of Human Rights relating to the requirement under Article 2 of the Convention to have a procedure for an independent investigation into unlawful actions in the use of lethal force involving State authorities. For this purpose, the position in this State is compared with the powers vested in the office of the Police Ombudsman in Northern Ireland.

Accountability

The Garda Complaints Board set up under the Garda Siochana (Complaints) Act 1986 is charged with investigating complaints against members of the Garda Siochana by members of the public. Prior to the establishment of the Board, a member of the public who wished to make a complaint against the Guards had to complain directly to the Garda Commissioner - there were no means by which members of the public could seek an independent assessment of the propriety of Garda actions towards them save for a private civil action in the courts. If there was concern about Garda behaviour, the Commissioner could conduct an internal Garda inquiry or, if there was wider public concern, the government might establish a public inquiry. The Complaints Board as established by the 1986 Act was intended to fill this gap in providing for an independent, cost effective and relatively speedy procedure for dealing with complaints about Gardai by members of the public.

In its third and most recent report, the Complaints Board outlined the difficulties it is facing in discharging its statutory obligations:

> "The Board's direct experience is that there is a lack of confidence in the current complaints system itself. This lack of confidence stems from a belief that the Garda Siochana (Complaints) Act 1986 does not provide either an independent or effective system for dealing with complaints against members of the Garda Siochana."[3]

The report recommended certain changes which any proposed amendments to the current legislation ought to introduce. In particular, the Board urged greater independence in the following respects:

* The right to decide how each complaint should be dealt with.
* The establishment of an independent civil unit to conduct investigations where the Board considers this appropriate.
* The right to appoint officers from a list provided to it by the Garda Commissioner.
* The right to decide on the level of supervision of investigation.
* The right to refer a matter to the Attorney General where no complaint has been received and the right of the Attorney General to request the Board to conduct an investigation.
* The need for the Board's staff to be independent of, and to be perceived as being independent of, the Department of Justice Equality and Law Reform.
* The need for the Board to be provided with sufficient staff to fulfil all of its responsibilities.

That the Board itself has called for these reforms provides a ready indication that it presently lacks the powers and means to carry out its functions in an autonomous manner, and that its restricted powers may frequently prevent the Board from carrying out a truly independent investigation of complaints and reporting thereon.

1. Juvenal
2. Programme for Government
3. Garda Siochana Complaints Board Annual Report 1999

Types of complaint within the remit of the Board

The Board concerns itself with complaints of improper conduct by any member of the Force (other than the Garda Commissioner) where the conduct is of a sort that could result in the member being charged with a criminal offence or could constitute a breach of discipline under the terms of the Act. Conduct which would constitute a breach of discipline on the part of a member of the Force is set out in a formal schedule to the Act and may be summarised as follows:-

* Discourtesy.
* Neglect of duty, i.e., failing to do something which it is his or her duty to do.
* Falsehood or prevarication, i.e., making or getting someone else to make a statement or an entry in an official document which to his or her knowledge is false or misleading.
* Abuse of authority, i.e., oppressive conduct or unnecessary violence.
* Corrupt or improper practice, i.e., accepting bribes, using his or her position improperly to make a private gain, putting himself or herself under a financial obligation to anyone in such a way that he or she could be compromised in the performance of his or her duty.
* Misuse of property or money in his or her custody belonging to a member of the public.
* Being drunk on duty or in uniform.
* Other discreditable conduct.
* Accessory to the above conduct.

Who can make a complaint

Perhaps the most important power the Board lacks is that it cannot operate of its own motion - a complaint must be made to it. Section 4 of the Garda Complaints Act 1986 provides that any member of the public who is directly affected by or who witnesses conduct of the above nature can make a complaint. It is of significance that in the fortunately infrequent cases which involve death or serious injury in Garda custody or otherwise involving the Gardai, a next friend or next of kin or other interested party is precluded from making a complaint under the legislation. It is necessary to have witnessed such an incident; it is not sufficient to have heard about or to know of any such incident; and, as already indicated, the Board itself is not empowered to initiate an investigation without a complaint being made to it.

If a statutory body expressly set up with responsibility for complaints cannot receive a complaint from next of kin etc, nor in the absence of a complaint, initiate an investigation into the unlawful use of lethal force by the State Authorities, who can? More importantly, who can investigate any such acts, and thereby discharge the State's obligation of effective investigation into possibly unlawful acts of homicide by State authorities under the European Convention of Human Rights? Although the mechanisms of police investigation, inquest, public inquiry or private prosecution provide each in their own way for a measure of investigation and accountability, it is arguable that no independent procedure exists in the State for the effective investigation of possibly unlawful acts on the part of State authorities leading to death. 'Effective' in this context means capable of leading to a determination of whether the force used was or was not justified in a particular set of circumstances and leading to the possible identification and punishment of those responsible. It is therefore a procedural obligation of some significance, and the present procedures appear to fall manifestly short of full effectiveness. In particular:

* A police investigation which does not result in published findings or reasons and which is not amenable to public scrutiny is not conducive to public confidence, particularly where the circumstances surrounding the incident being investigated are controversial. This contributes little to a system of openness, transparency and accountability.

* An inquest, limited as it is by law and rules of procedure, is confined to the narrow remit of identifying the deceased and making certain very general findings as to the nature of the circumstances of the death. It does not constitute a wide-ranging or full inquiry into the circumstances in which the deceased met his death.

* A private prosecution may or may not result in a file being sent to the Director of Public Prosecutions, who is not obliged to give reasons for a decision not to prosecute. Nor is the decision of the Director amenable to challenge by way of judicial review.

* A public inquiry may be set up but is not automatic.

It is suggested that the above procedures fail to put in place an effective system of investigation and that the State may be failing to meet its obligations under Article 2 of the European Convention of Human Rights to vindicate the right to life. The State also has obligations under Article 40.3.2 of the Constitution in the case of unjust attack to vindicate the life of every citizen. The European Court of Human Rights has recognised in its jurisprudence that Article 2 of the European Convention on Human Rights is to be read in the context of Article 1. Article 1 requires the State to secure the rights and freedoms guaranteed by the Convention to all those within its jurisdiction. According to the Court's established case law, "these rights and freedoms must be secured in a way which is practical and effective and not merely theoretical and illusory".[4] In this specific context, the Court has stated in its judgment in *McCann & Others v UK* that "a general prohibition of arbitrary killing by the agents of the State would be ineffective in practice if there existed no procedure for reviewing the lawfulness of the use of lethal force involving the State Authorities."[5] Furthermore, in *Kaya v Turkey* the Court stated that "the

4. See particularly in this context McCann v. UK (1996) 21 EHRR 97 and Kaya v. Turkey (European Court of Human Rights 19th February, 1998

5. (1996) 21 EHRR 97, at paragraph 161

required procedural protection should ensure such accountability by subjecting the actions of the agents of the State to some form of independent and public scrutiny capable of leading to a determination of whether the force used was or was not justified in a particular set of circumstances."

In *Shanaghan & Others v. UK*,[6] the European Court of Human Rights examined the police complaints system in respect of investigations into deaths arising from the use of lethal force by State authorities in Northern Ireland. The Court unanimously held that there had been a violation of Article 2 of the Convention in that the police complaints system in Northern Ireland did not provide for an effective system of investigation into the deaths of the applicants' relatives. Even if the precise duty of investigation would naturally vary from case to case, the system fell short of the primary requirements for an effective investigation which the Court identified as follows:

* The investigation must be prompt and reasonably expeditious and it must be effective.
* It must be capable of leading to a determination of whether the use of force was or was not justified in the circumstances.
* It must be carried out by those who are independent of those under investigation.
* There must be an element of public scrutiny.

Among the arguments advanced on behalf of the United Kingdom government in *Shanaghan* was that sufficient safeguards were in place to ensure effective investigation, namely:

* Police investigations were supervised by the Independent Commission for Police Complaints and Independent Police Monitoring Authority (in Northern Ireland at that time the ICPC had a supervisory role in relation to Police Investigations, in particular a power to require the RUC's Chief Constable to refer the investigation report to the Director of Public Prosecutions).
* The Director of Public Prosecutions is an independent legal officer with responsibility to decide whether to bring a prosecution in respect of any possible criminal offences carried out by a police officer.
* Inquest proceedings.
* Criminal trials.
* Civil proceedings.

The United Kingdom government's position was that even if one part of the investigative procedure failed to provide a particular safeguard, taken as a whole the system ensured the requisite accountability of the police for any unlawful act in the use of lethal force. The European Court of Human Rights found that none of these were capable of being effective to meet the procedural obligations deriving from Article 2 of the Convention. The Court found that it was not for it to specify in any detail which procedure the authorities should adopt in providing for the proper examination of the circumstances of a killing by State agents: while reference was made for example to the Scottish model of inquiry conducted by a judge of criminal jurisdiction, there was no reason to assume that this might be the only method available providing always that the available procedures struck the right balance.

In seeking to determine the appropriate balance, it is instructive to consider the Court's approach to the adequacy of the safeguards advanced and its reasoning on the overall shortfall in protection to which they gave rise:

* In respect of police investigations, the Court found that such investigations were neither prompt nor effective. In particular, the existence of a chain of command between those investigating and those being investigated did not provide an adequate safeguard to satisfy Article 2 of the Convention.

* While the DPP was independent of the police[7] and of the executive, the DPP is not required to give reasons for his failure to prosecute and is not amenable to judicial review to require him to give reasons.

* Inquest proceedings did not satisfy the procedural requirements for an effective investigation under Article 2 for a number of reasons. Firstly, the person suspected of causing death may not be compelled to give evidence. Secondly, in the inquest procedure it was then common for there to be non-disclosure by the police of witness statements.[8] Thirdly, any verdict or findings were ineffective in securing a prosecution in respect of any criminal offence which may have been committed. More generally, the proceedings were slow and the remit of an inquest was quite narrow in that the function must focus on matters directly causative of death and must be confined to those matters alone. "It is a fact finding exercise and does not involve the apportioning of guilt or responsibility... In an inquest it should never be forgotten there are no parties, no indictment, there is no prosecution, there is no defence, there is no trial, simply an attempt to establish the facts ... it is an inquisitorial process, a process of investigation quite unlike a trial."[9]

* In relation to criminal trials, the Court accepted that these need not take place in every case, but it was necessary that the investigative procedure should be capable of leading to criminal proceedings if the investigation identifies criminal conduct, which will not be so in every case. In *Shanaghan* no one was prosecuted for the offence. Likewise there was no prosecution in *McCann v UK* or in *Jordan v UK*. In *McKerr*, whilst officers were charged with the offences the ensuing prosecution was not successful.

* While civil proceedings would provide a forum for judicial fact-finding leading to a decision on the legality or otherwise of the actions of the alleged perpetrators, together with the possibility of

6. (European Court of Human Rights 4/5/2001) EHRR. The three cases associated with the decision in *Shanaghan*, decided on the same day, were *Jordan v UK*, *McKerr v UK* and *Kelly v UK*.
7. For example the DPP can and does require police to pursue further and different investigations, and he did precisely that in the McKerr case.
8. Since the *McCann v. UK* case the practice of non-disclosure by police of witness statement has been changed.
9. *R v Coroner* for *Western District of East Sussex, ex parte Homburg* (1994) 158 JP 357; *R v South London Coroner, ex parte Thompson* (1982) 126 SJ 625.

an award of damages, this is a procedure initiated by a private plaintiff and not by the authorities, and it was accordingly found not to be sufficient to meet the State's procedural obligation under Article 2 of the Convention. There was also the consideration that a settlement might defeat the investigation.

Two further considerations are relevant in the Irish context. Firstly, the Garda Siochana (Complaints) Act 1986 makes no provision for any member of the police force to make a complaint. Accordingly, if there is a persistent, fictitious and malicious complaint towards a Guard, he has no redress under the legislation. There is no police supervisory authority in the State as in Northern Ireland or the United Kingdom. Secondly, an anonymous complaint is not admissible under the Act. This is in contrast to the situation in Northern Ireland where the Police Ombudsman's Office may receive an anonymous complaint and, if an issue raised in the complaint should give cause for concern and if it is in the public interest to do so, the Police Ombudsman may initiate an investigation under Section 55(6) of the Police (Northern Ireland) Act 1998 and may use the complaint as part of the information in the context of an investigation.

Other elements of the complaints procedure

A complaint may be made at any of the following locations: to the Board; at the Offices of the Board where a member of staff may meet the Complainant and take a short history of the complaint; to a member of the Force at a Garda Station; or to the Garda Commissioner, his Deputy or Assistant. Complaints must be made within six months after the incident giving rise to the complaint. Complaints received by the Board directly or referred to it by the Garda Commissioner are initially considered as to their admissibility. The complaint is admissible if the admissibility conditions set out in the Act are satisfied, as follows

- The Complainant was a member of the public.
- The Complainant was directly affected by or witnessed the conduct alleged in the complaint.
- The conduct would constitute an offence or a breach of discipline.
- The complaint was made within six months or is relative to behaviour which occurred within the previous six months.
- The compliant is not frivolous or vexatious.

If the chief executive determines that the complaint is so admissible under the Act, the complaint can be dealt with in one of two ways, either by informal resolution or by formal investigation. In either case, as soon as the chief executive decides that the complaint is admissible he sends a copy of the complaint to the Commissioner. On receipt by the Commissioner of a complaint, he notifies the member concerned that a complaint the nature of which will be specified has been made. If the matter is to be dealt with informally, this requires a consent in writing of both the person making the complaint and of the member of the Garda Siochana against whom the complaint is being made. The informal resolution is often not used, the declared reason being that to agree to the informal resolution the Garda must do so in writing and that this may be perceived as an admission of guilt. If the individual Guard consents to have the matter dealt with in this way, the chief executive sends the complaint in writing to the Garda Commissioner, and it is the Garda Commissioner who in turn decides whether or not the matter may be formally investigated or informally resolved. However, the chief executive can direct the Garda Commissioner to carry out the investigation at any stage. Section 5(1) of the Garda Complaints Act 1986 implicitly provides for the Garda Commissioner to decide whether the complaint should be formally investigated. As has already been said, before a complaint can be resolved informally the written consent of both the person making the complaint and the member complained of must be obtained. The experience has been that members of the public do not have the same difficulty in agreeing to this procedure as Gardai do. Consequently, this non-cooperation by the Garda means that relatively minor matters which could be dealt with informally must go forward for formal investigation.

Formal Investigation

If a Chief Executive decides that the matter is serious and deserving of formal investigation he will state so in writing and send the matter on to the Garda Commissioner. It is then for the Garda Commissioner to decide who should investigate the complaint. The Board lays down general guidelines and principles with regard to investigation but nonetheless the Board has no right of veto or suggestion as to whom the complaint is sent for investigation - this is entirely a matter for the Garda Commissioner.[10] Regardless of the integrity and bona fides of the investigating officer, this procedure is flawed in that it may be reduced to a process of the police simply investigating the police. Furthermore, even though the Act specifies that the formal investigation should be undertaken by a member of the Garda Siochana above the rank of inspector i.e., a superintendent, typically it is an inspector who carries out the investigation.

The Board's powers of supervision

The Board through its chief executive may nonetheless request interim reports from the Garda officer investigating the complaint. Whilst the Act therefore provides for a measure of general supervision of the investigation by the Board, it is felt that this supervision is too remote to be of any real effect. It is more akin to a paper review of the investigation; it remains the case that the investigation is not carried out by and before the Board. The Board is not represented at any stage of the complainant's interview nor at the interview of the Garda whose behaviour is the subject of complaint. Therefore it is not possible to form a proper judgment as to the credibility, bona fides, or veracity of the complainant and of the Garda the subject of the complaint. Accordingly, the Board's supervisory role is limited. Furthermore, these procedures limit the Board's ability to inform itself on matters of police practice. It also highlights the Board's lack of control over investigative procedures. All that the Garda Commissioner is required to do in the case of an informal resolution is to simply send a note to the chief

10. This may be contrasted with the former system in the UK, where the equivalent authority had the right to reject a person named by the Chief Constable to carry out an investigation.

executive of the Board that the matter has been resolved and in what manner. This prevents the Board from keeping an audit in relation to the informal resolution of complaints.

The principal weaknesses in the supervisory powers of the Board under the Act may therefore be summarised as follows:

- The Act provides for an overseeing body which in many respects is left in the position of ratifying the actions and decisions taken by the Garda Commissioner.
- The Board cannot exercise its powers without a complaint being made to it.
- It is essentially the Garda Commissioner who decides on the nature of the investigation.
- The Board through its chief executive has to be prepared to accept that the Garda Commissioner has carried out the investigation according to best practice.
- Of its very nature that investigation is pro-police orientated and may be perceived as such.
- The investigation is dependant upon the individual investigating officer appointed by the Garda Commissioner who will have his own strengths and weaknesses in the context of the police officer investigating his own.
- Even where the matter is informally resolved, the Chief Executive will only have a note informing him that the matter has been resolved.

In these circumstances it can never be established whether matters have truly been satisfactorily resolved or whether, alternatively, because of a subjective judgment, the Garda Commissioner has decided not to have the matter taken any further. The police investigate and the Board oversees with only limited powers. The Board is required to say whether or not it is satisfied with the investigation, yet what it does not and cannot know is what information has been given and what forensic opportunities have been missed. The difficulty lies not with any one incident but with the cumulative effect that many such incidents lead inexorably to a lack of public confidence in the Garda Complaints system.

Police Inspectorate or Ombudsman: The Northern Ireland Precedent

The Patten Report

It appears that the reform contemplated by the present government is a Police Inspectorate having two functions:-

- Making policy and reviewing existing policy.
- Dealing with complaints.

However, the carrying out of both of these functions by the same body may give rise to a conflict. Consider the case where a body approves of a particular police code of operation in respect of public order. Subsequently this body receives a number of individual complaints in respect of alleged breaches of that code. Does this not create a conflict of interest? Could it be said that the body or authority can be seen to be acting independently? It could hardly avoid acting under the influence of its own interests. Is it to be accountable to itself?

The Independent Commission on Policing in Northern Ireland which produced The Patten Report was set up as part of The Belfast Agreement. This report called for a new beginning to policing in Northern Ireland and for an effective process to handle public complaints against the police.

In preparing its report, the Committee undertook a cultural audit of the police including a survey of public attitudes towards the police. It consulted widely with other police forces including the Garda Siochana in the Republic and a number of other police services in Britain and abroad as well as with the United Nations and the Council of Europe. The main focus of the report was to make the police accountable not to the State but to the people. The report observes that the best way in which to achieve such popular accountability is to be transparent, open and informative about its work and to be amenable to public scrutiny. From this report came a recommendation on best police practice and the establishment of a credible system for dealing with complaints against the police.

While the problems faced by the police service in Northern Ireland are in many respects unique to the particular history and culture of Northern Ireland, the principle holds true that accountability not only places limitations on the power of the police but also gives that power legitimacy and ensures its effective use in the service of the community. The first limitation on abuse of power, as Lord Scarman pointed out in his 1981 report on the Brixton disorders, is of course the law itself. "Abuse of power by a police officer, if it is allowed to occur with impunity, is a staging post to a police state." While the Garda Siochana have with some exceptions behaved in an exemplary manner and have for the most part the confidence of the people, increasing changes in the ethnic composition of the population in the Republic of Ireland will present the Gardai with new challenges and these must be met in the same spirit of protection of human rights and an avoidance of an abuse of those rights.

Police Ombudsman

The Patten report further states :

> "In a review of complaints procedures in British Columbia, Professor Phillip Stenning argued that an effective process for handling public complaints against the police requires many things - a sound legislative foundation; dedicated, competent and experienced and/or trained personnel to administer it; a reasonable level of commitment and co-operation on the part of the police organisations and personnel to whom the process applies; an adequate degree of knowledge of and confidence in and willingness to use the process; good faith on the part of potential complainants in particular and the public more generally; and the commitment and adequate resources for full and effective implementation of the process. The report recommended that the process should be accessible both to complainants and police officers, respectful of human rights and dignity, open and accountable, timely, thorough, impartial, and independent, and should take account of both the public interest and the interest of parties involved in the complaint. It should also be appropriately balanced between formal and informal procedures for resolving complaints, between remedial and punitive dispositions and between internal management and external oversight. Dr Maurice Hayes was asked by the Northern Ireland Secretary of State in 1996 to review the Northern Irish

police complaints system. His report of January 1997 found the existing system inadequate and recommended an independent Police Ombudsman with his or her own independent team of investigators. He also recommended a change in the standard of proof required in police disciplinary cases. The Hayes Report was accepted by all parties in Northern Ireland and by the police themselves. ... At the time of writing this report, the office of the Ombudsman is still in the process of being established and we are not in a position to assess how successful it will be. However this Commission as a whole aligns itself fully with Dr Hayes recommendations and believes that a fully independent Police Ombudsman operating as he envisaged in his report should be a most effective mechanism for holding the police accountable to the law."

While all the recommendations of the Patten Report are worthy of note, it is suggested that the following five recommendations are particularly relevant to the issue of the regulation of the Gardai in this State.

* The Police Ombudsman should be and should be seen to be an important institution in the governance of Northern Ireland and should be staffed and resourced accordingly.
* The Police Ombudsman should take initiatives and not merely react to specific complaints received.
* He should exercise his powers to initiate inquiries or investigation even if no specific complaint has been received.
* The Police Ombudsman should have a dynamic cooperative relationship with both the police and the policing board.
* The Police Ombudsman should exercise the right to investigate and comment on police policies and practices where these are perceived to give rise to difficulties even if the conduct of individual officers may not itself be culpable, and should draw any such comments to the attention of the Chief Constable and the policing board. The institution is critical to the question of police accountability to the law, to public trust in the police and to the protection of human rights.

The Police (Northern Ireland) Act 1998 set up the Office of the Police Ombudsman and abolished the Independent Commission for Police Complaints for Northern Ireland. The office provides an impartial and independent system for investigating complaints against the police in Northern Ireland. Prior to the establishment of the Police Ombudsman's Office, complaints made against the police by the public were investigated by the police themselves although the investigation of certain types of complaint was supervised by the Independent Commission for Police Complaints (the ICPC) which existed from 1988 until its abolition by the Police (Northern Ireland) Act 1998. The ICPC could not, however, undertake of its own motion independent investigations of police complaints. That essential specific power has been legislated for in the Police (Northern Ireland) Act 1998. The Police Ombudsman operates independently of the police service and is accountable to Parliament and also to the Secretary of State for Northern Ireland. An annual report and accounts must be laid before Parliament. The office is also subject to the provisions of the Human Rights Act 1998. Additional powers for the office are contained in the Police (Northern Ireland) Act 2000.

Broadly speaking the functions of the Police Ombudsman are:-

* To receive complaints against the police.
* To decide how to deal with them.
* To investigate situations where a police officer may have committed a criminal act or been in breach of the disciplinary code.
* To gather all evidence and to make a decision as to whether the evidence is such that he should recommend criminal or disciplinary proceedings against the officer.
* To analyse trends and patterns in complaints, and to research and report thereon.

Section 51(4) of the 1998 Act states that the Police Ombudsman shall exercise his powers in such manner and to such extent as appears to him to be best calculated to secure the efficiency, effectiveness and independence of the police complaints system and, in addition, the confidence of the public and of members of the police force in that system.

Section 52 requires that all complaints about the police force shall either be made to the Police Ombudsman or, if made to a member of the police force, that the police authorities or the Secretary of State shall refer the matter immediately to the Police Ombudsman. Under the Northern Ireland Police Ombudsman system, therefore, no complaint should escape the Ombudsman's scrutiny. This is in contrast to the Garda Complaints Act 1986 where complaints may be made to the Commissioner, to any member of the Garda Siochana authorised on behalf of the Commissioner, and to the chief executive of the Police Complaints Board. This allows scope for a gap in the information available to the Complaints Board in relation to the level and nature of complaints made against the Garda Siochana.

Where a complaint is made to the Chief Constable it is also a matter for the Police Ombudsman whether that matter should be investigated. It is for the Police Ombudsman to decide how a complaint is dealt with whether by informal resolution or by formal investigation. This is in contrast with the Garda Complaints Board where the view of the chief executive on the same matters is not determinative.

Sections 55 - 57 of the 1998 Act contain the most significant powers of the Police Ombudsman. These are the powers of investigation without any specific complaint but where the Policing Board or the Secretary of State refers a matter to the Ombudsman; or where the Chief Constable considers that it is in the public interest that he should do so. The Police Ombudsman may also of her own motion formally investigate any matter which appears to the Police Ombudsman to indicate that a member of the police force may have committed a criminal offence or behaved in a manner which would justify disciplinary proceedings and is not the subject of a complaint if it appears to the Police Ombudsman that it is desirable in the public interest that she should do so.

It is a matter for the Police Ombudsman to appoint an officer of the Police Ombudsman to conduct any investigation, and any person so appointed shall have for the purpose of conducting or assisting in the conduct of an investigation all the powers and privileges of a Constable

throughout Northern Ireland and the United Kingdom. Where a Complaint is referred, this includes the power to refer the matter to the Chief Constable who would appoint a police officer to investigate it formally on behalf of the Police Ombudsman; the Police Ombudsman may require that no appointment of a person to conduct an investigation is made unless the Police Ombudsman gives notice to the Chief Constable that she approves the person whom it is proposed to appoint. If such appointment has already been made and the Police Ombudsman is not satisfied with the appointment, the Chief Constable shall select another Police Officer and the appointment shall not be made without the Police Ombudsman's approval. Notwithstanding the above statutory powers, the Police Ombudsman has now made it a matter of policy that all investigations shall be conducted by her own staff.

From this it can be seen that the core investigative responsibilities in relation to police complaints lie with the Office of the Police Ombudsman. The staff of the Police Ombudsman's Office have considerable powers in relation to the investigations they carry out. They have powers to arrest police officers where the allegation is that the officers have committed an offence in respect of which arrest is lawful. They have powers of search and seizure of property which forms part of the investigation. Among those items which may be seized are police uniforms, boots, batons, firearms, notebooks, police logs and vehicles. There are also statutory powers which compel the police to supply the Police Ombudsman or her staff with such material as she may require to fulfil her functions under the Police (Northern Ireland) Act 1998. The Police are also under a duty to preserve crime scenes and to otherwise facilitate the work of the Office.

It is a criminal offence to assault, restrict, impede or obstruct a criminal investigation being carried out by the Police Ombudsman or one of her staff. Powers of intrusive and covert surveillance are currently the subject of legislation and should be available to the Police Ombudsman's office in the near future. In exercising their considerable powers the Police Ombudsman and her staff are subject to the Police and Criminal Evidence Order Northern Ireland 1989 (as amended) and the Human Rights Act 1998.

The Police Ombudsman may receive anonymous complaints and, should that complaint disclose a matter of concern and/or a matter of public interest, that information may form part of a further investigation at the initiative of the Ombudsman. The Police Ombudsman may also receive a complaint from the Chief Constable about another member of the force, and can investigate further if it is in the public interest so to do. In circumstances, for example, of intimidation of a member from a minority community, and where there may be a wall of silence surrounding any such harassment, these powers could be pertinent.

It is the Police Ombudsman who decides what will be investigated and by whom. It is the Police Ombudsman who decides what information she will receive in relation to the investigation and what controls she will have over the investigation. To this extent, there can never be any gap in her information with regard to any complaint whether resolved informally or by formal investigation, and this allows for a proper audit of all complaints procedures.

Investigation without complaint covers those situations where a fear or inability to complain arises for whatever reason and to deal with those situations where there is evidence of police misconduct but no complainant. This power meets the constitutional duty of the Northern Ireland state to vindicate the right to life as prescribed by the Human Rights Act. It is intrinsic to the independence of the system that it has powers to initiate an investigation without complaint, e.g., if a matter is brought to the attention of the Police Ombudsman that something significant has occurred within her statutory domain, where no complaint has been received and the Police Ombudsman feels it is in the public interest to investigate, her office will do so. A notable case is the Omagh bombing. No complaint was received from a member of the public, but the Police Ombudsman considered that it was in the public interest that an investigation should be undertaken.

Conclusion

In contrasting the Police Ombudsman's office in Northern Ireland with the structures in the State, a number of significant and important comparisons can be made:-

- The Police Ombudsman's office possesses the vital elements of an independent complaints system.
- It carries out effective lawful investigations and has the statutory powers so to do.
- It has a right of initiative by which it can investigate without complaint.

While the situation with policing in the North has been radically different to the situation prevailing within the State, the solutions found there for dealing with police complaints require to be examined carefully here.[11] There has been an attempt in the North to create a body that is independent, transparent and accountable and this, it is suggested, is vital in dealing with any complaint, whatever the nature. It is also important to realise that the Gardai, as a body, would also be protected by independent scrutiny of any complaint against them from an independent examination in which they themselves can have confidence. At one stroke, the accusation that they may not have dealt properly with a complaint is removed. At present, such accusations are far too easily made, whether justified or not.

Mr Justice Barr has been charged with conducting an inquiry into the events which gave rise to the death of John Carthy in Abbeylara. This is obviously necessary and important, however it is not satisfactory to have a situation where there is no procedure which can be invoked by all citizens equally. ●

11. The core legislative provisions and regulations governing the Office of the Police Ombudsman in Northern Ireland are the Police (Northern Ireland) Act 1998 Part VII; the Police (Northern Ireland) Act 2000; the Royal Ulster Constabulary (Complaints etc.) Regulations 2000; and the Royal Ulster Constabulary (Complaints)(Informal Resolution) Regulations 2000.

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THOMSON ROUND HALL

Asset Backed Securities: Securitisation of the Irish mortgage and public credit markets

Aillil O'Reilly BL

Introduction

The Asset Covered Securities Act 2001[1] (the Act) was published in July 2001. The Act creates new financial instruments called asset covered securities. Asset covered securities (ACS) under the Act are securitised private or public sector loans and mortgages. Bonds are issued to investors who wish to participate in the securitisation. These bonds enjoy a statutory priority of claim in the event of issuer insolvency, the specification of strict matching of assets and liabilities and a strong regulatory environment. As a result they have advantages for institutional investors[2] in both quality and quantity.[3]

Such financial products will increase liquidity in the Irish credit market and allow for increased investment from the same asset base. It allows institutions that have issued the types of loans covered by the Act to sell their interest in the loans. The capital invested in the loans is freed and the return on capital is obtained without the wait. The securities will establish Ireland as a niche player in the securitisation market: the approximate global value of this market in 1997 was €2.6 trillion.

The Act appoints the Central Bank of Ireland (the Authority) as the regulatory authority. A right of appeal from the Authority's decisions lies to the High Court. The Act applies to assets which are mortgage[4] and public sector loans in respect of money borrowed or raised that is secured from property located in the State[5] or other defined countries.

Securitisation

Securitisation raises cash by pooling an institution's interests in identifiable cash flows over time and selling them to investors. An undertaking securitising its assets is selling a cash stream that would otherwise accrue to it. Cash flows or claims against third parties are identified, separated from the originating entity and then fragmented into securities to be sold in the form of bonds.

For example, a number of mortgage repayment obligations are pooled and then sliced into securities called tranches, representing different levels of risk and duration and sold into the marketplace.

> "Securitisation" in its widest sense implies every such process which converts a financial relationship into a transaction.[6] Securitised bonds are also known as asset backed securities (ABS) or mortgage-backed securities (MBS). They are supported by the assets behind the cash-flow - commonly mortgage repayments.

An application of securitisation is the creation of marketable securities based on different types of receivables. Receivables form a large part of the total assets of some entities, and securitisation tends to be a feature of all industries holding receivables as assets. This market is very large.[7]

Asset Covered Security

Irish institutions have issued bonds in the past. The Act allows a particular type of securitised bond to be sold; one that will attract a strong credit rating because of its legally guaranteed composition.[8]

The Act provides for the following:

* statutory priority in the event of insolvency of the issuer.
* comprehensive cover to provide sufficient assets to meet bondholders' claims if the receivables fail.
* strict requirements as to the quality of loans included.
* strict requirements as to the origin of loans included.
* provisions relating to the exposure to different countries and regions.
* specific interest rate risk management requirements.
* express powers to enter into hedging contracts to manage risk.
* tiered regulatory protection for investors.

1. Number 47 of 2001.
2. These bonds have a low default probability, a high credit rating and are available in the huge amounts required by institutional investors.
3. See the extensive article by Roy Parker and Hugh Beattie ("The Asset Covered Security Act, 2001", CLP May 2002, 99).
4. The Minister may designate credit of a specific kind to be "mortgage credit" for the purpose of the Act, thereby potentially permitting the Act's extension to the full spectrum of securitisation transactions as are commonplace in the global market such as bonds based on telephone Act, credit card repayments or hire-purchase agreements.
5. Section 4.
6. The earliest, and by far unequalled, contribution of corporate law to the world of finance was the ordinary share.
7. DePfa Deutsche Pfandbriefbank AG (a bank that has indicated its intention to take advantage of the Act) specialises in public sector finance. It had €123 billion exposure to public sector financing alone as at 30 June 2001. DePfa has announced its intention to establish a subsidiary in Ireland to apply for authorisation from the Central Bank.
8. 'Pfandbreife' (which means secured "bond" or "debenture" in German) is a mortgage based ABS. It has become the benchmark Euro denomination bond; it offers a cost-effective and competitive means of raising finance accounting for nearly 20% of all euro denominated bond issuance, including bonds issued by nation states (sovereigns). European Commission Directorate-General Economic and Financial Affairs F1: Financial markets and financial intermediaries and SOF-B5: Borrowings and Treasury. The Irish ACS is a superior financial product in terms of credit rating.

Asset Covered Securities Act 2001

The Act permits Irish based institutions[9] to issue asset covered securities (ACS). It creates a regulatory structure to govern the securities and their issuers, and establishes certain offences. The Authority is named as the regulator for the purposes of the Act.[10] It provides for regulations by Statutory Instrument to complete the structure and will be commenced on order of the Minister for Finance.

Procedure for Issuance of ACS

There are two types of ACS: Mortgage credit securities, which may only be issued by designated mortgage credit institutions; and public credit securities[11], which may only be issued by designated public credit institutions. An institution may designate its issue in both types. Designated institutions must comply strictly with the Act and the Regulations; failure so to do risks their actions being deemed ultra vires.[12] Regulations[13] define formulae for changes to the ACS as a result of a shift in interest rates.

Obtaining authorisation

In order to issue an ACS, an institution must be authorised by the Central Bank. Unauthorised sale can result on conviction to a fine of up to €250,000.[14] A time limit of two years from the date of discovery of the wrong is given for all offences.[15] The Authority may grant or refuse authorisation, and it also regulates the supervision of the institutions.[16]

Applicants for authorisation must be banks, companies or juristic persons incorporated or formed in Ireland.[17] Authorisation may be granted if the Authority is satisfied that the applicant is capable of performing the responsibilities required of it in the Act; that the applicant complies with, or will be able to comply with the Act; and that such requirements as are prescribed by the regulations have been or will be followed. The Authority may also impose such conditions (other than conditions prescribed by the regulations or by a regulatory notice) on the applicant with respect to the orderly and proper regulation of the applicant's business as it considers appropriate.[18] This gives the Authority a wide power to regulate the institution and to require whatever information, measures or undertakings it deems necessary prior to authorisation. Any conditions imposed or any refusal to authorise may be appealed to the High Court[19] which will determine the appeal by way of a full rehearing.

The Authority may, by reasoned written direction, revoke (with the consent of the Minister) the authorisation[20] or direct an institution to suspend its business if it reasonably believes that there are grounds for revocation.[21] Suspension prevents winding-up, bankruptcy, receivership, sequestration or attachment of the assets of the institution without High Court approval.[22] An appeal lies to the High Court against suspension or revocation[23]; and in any such appeal the Court may award a stay[24] on the operation of the revocation or suspension irrespective of whether the institution appeals the decision.[25]

Creating Security

No regulations yet exist for the exact configuration of a security, although certain statutory criteria apply. These relate to the location of the assets or underlying obligations in respect of which the loans or mortgages relate.[26] The financial obligations that may be converted into bonds include an obligation given as a guarantor or surety, an obligation that is indirect, and an obligation that is contingent on the happening of some event.

Cover Asset Pool

An institution issuing securities[27] under the Act is required to secure them on a pool of underlying assets, known as cover assets[28] which are designated as such by entering them in a register.[29] Cover assets consist primarily of mortgages or public sector loans, and their value must exceed that of the securities[30] issued. In addition, commercial property may not represent more than 10 percent of the pool.[31] In contrast to conventional securitisation, the assets remain the property of the institution issuing the securities and remain on that institution's balance sheet. The explanatory memorandum describes these asset pools as "dynamic" because new assets may be substituted for those

9. Section 13. An entity is eligible to apply for authorisation under the Act only if it is a credit institution incorporated or formed in the State that holds an authorisation issued by the Central Bank authorising it to carry on business (confined to specific areas) as a credit institution.
10. Section 3.
11. The definition for the purposes of s 42(3) is as defined by SI 383 of 2002, Asset Covered Securities Act, 2001 (Section 42(4)) Regulation, 2002. The institution shall be authorised in an EEA country and rated Moody's A1 or higher.
12. Sections 27 (mortgage credit) and 42 (public credit) state that those activities can only be carried out in accordance with the Act; the sections contain no "substantial compliance" clauses.
13. SI 386 of 2002 (Sensitivity to interest rate changes regulation, 2002).
14. Section 12(3). Section 91 provides that breach of Regulations pursuant to the Act carries a fine of up to €100,000.
15. Section 97.
16. Section 9. The Central Bank may change the conditions attaching to an authorisation but only after it has given the institution an opportunity to respond in writing to the proposed changes.
17. And be in possession of authorisation from the Central Bank to act as a credit institution.
18. Section 14.
19. Section 26.
20. Section 19.
21. Section 20(1); additional restraints follow suspension of solvent companies or building societies, and institutions not building societies or companies. The duty to examine the affairs of institutions fall on the Cover Assets Monitor and the Central Bank.
22. Section 20.
23. Section 26 provides for a full rehearing, and the High Court may make any order that the Authority could have made plus ancillary orders. A strict time limit of 42 days is provided for all appeals under the section, and the Authority must be served in order for the appeal to be valid.
24. No guidelines are provided for the exercise of the discretion of the High Court in this regard.
25. Section 22(2).
26. See below at Location of Cover Assets.
27. Asset covered securities in the Act means mortgage covered securities in relation to a designated or formerly designated mortgage credit institution and public credit covered securities in relation to a designated or formerly designated public credit institution.
28. Sections 32 and 47. "Cover assets'" includes mortgage loans, public sector loans substitution assets and any associated cover assets hedge contract which may be used as collateral for the issue of securities under the terms of the Act.
29. Sections 37 and 52.
30. Sections 32(8)(b) and 47(8)(b).
31. Section 33(5).

that lose value.[32] Mortgage credit assets must be denominated in the same currency as the securities.[33]

Substitution Assets

The pool assets that may be used to substitute for cover assets that have lost value are called substitution assets. Security deposits with an eligible financial institution[34], Tier 1[35] assets and property designated by regulation are substitution assets for the purposes of the Act.[36] Substitution assets may not exceed 20 percent of the cover assets.[37]

Location of Assets

Cover assets and substitution assets may be located in European Economic Area countries.[38] Assets from Japan the USA or Switzerland (category "A" countries[39]) may form no more than 15 percent[40] of the combined total of mortgage credit or public credit assets and substitution assets. Assets located in other countries (category "B" countries[41]) may be included only if designated by the Minister for Finance and may form no more than 10 percent[42] of the combined total of mortgage credit or assets and substitution assets. Public credit assets from category "B" may only be included up to a percentage to be set by the Minister.[43]

The Act requires that the principal amounts of all mortgages will not exceed 80 percent[44] of the total prudent market value of the property on which they are secured. Prudent market value is calculated by reference to a regulatory notice to be published in Iris Oifigiúil. As long as the prudent market value is correctly calculated,[45] this will mean that there is an extra 20 percent of security. For principal coverage purposes (pool assets to asset covered securities), to the extent that the principal amount of a mortgage asset in the pool exceeds a loan to value of 75% in the case of residential property, or 60% in the case of commercial property, the excess is disregarded.

Cover Asset Monitors

A Cover Asset Monitor is is a person who will independently oversee the cover assets and cover asset hedge contracts in order to ensure that the interests of security holders are protected.[46] His responsibility extends to monitoring compliance with the regulation prescribing changes in reaction to interest rate changes[47]. As soon as practicable after a Monitor discovers, or has formed a reasonable suspicion, that the institution has breached or failed to comply with a provision of the Act relating to the monitor's responsibilities he must provide the Authority with a written report of the matter.[48]

Cover Asset Monitors[49] are mandated for each credit institution[50] to ensure that, after taking into account any cover assets hedge contracts, adequate assets are maintained to offset the bond issued.[51] The value of the cover assets must be greater than the principal amounts of the securities. Assets from countries in category A may comprise up to no more than 15 percent of the combined total of cover and substitution assets. Assets from countries in category B may be included following Ministerial order. Commercial property may not exceed 10 percent of the value of the mortgage assets of the combined total of the cover and substitution assets. Substitution assets cannot exceed 20 percent of the value of the cover assets.

The Cover Assets Monitor has a duty to monitor the assets included in the security issued by the institution,[52] but section 62 makes it clear that the institution retains a separate obligation to comply with the terms of the Act. Section 33(6) particularly requires that the issuer, not the Cover Assets Monitor, ensures that buildings entered as mortgage assets are ready for occupation. A credit institution must provide information to and cooperate with Cover Asset Monitors.[53]

Cover assets included are all assets, substitution assets and hedge contracts[54] recorded in the Register of Cover Assets[55]. The Monitor is charged with monitoring compliance in respect of these assets with provisions governing their duration,[56] the content of the assets pool,[57] approval of replacement assets,[58] use of the proceeds of realised cover assets,[59] and the register.[60] Before issuing an ACS or entering hedge contracts, the Monitor shall take reasonable steps to check compliance with duration, contents of the asset pools and registration of obligations.

32. Section 32 and 47. Cover and substitution asset rules categorise assets according to their risk profile.
33. Section 32(8)(d).
34. As defined by SI 387 of 2002, Asset Covered Securities Act, 2001 (Section 6(2)) Regulation, 2002. The institution shall be authorised in an EEA country and rated A1 or higher.
35. Section 3. Assets designated as such by the European Central Bank to give effect to the monetary policy of the European System of Central Banks but not including certain public credit asset securities.
36. Section 6. SI 385 of 2002 Substitution Assets Regulation, 2002, prescribes the kinds of substitution assets that may be included in a cover assets pool for a public credit institution.
37. Section 35 (8) and 50(8).
38. Sections 33 and 48. EEA comprises all of the member states of the EU plus Norway, Iceland and Liechtenstein.
39. Section 5(1)(a). USA, Japan, Swiss Confederation, or countries specified in an order made under section 5(4).
40. Sections 33(2) and 48(2).
41. Section 5(1)(b). A country not in category "A" that is a member of the Organisation for Economic Co-operation and Development, but only if it has not rescheduled its external debt during the preceding 5 years.
42. Section 33(5)
43. Section 48(5).
44. Section 31(1).
45. Sections 41 and 56.
46. From the definition contained in the explanatory memorandum to the Bill.
47. SI 386 of 2002 Asset Covered Securities Act, 2001 (Sensitivity to Interest Rate Changes Regulation, 2002).
48. Section 67(1).
49. "Cover-assets monitor" is a person who will independently oversee the cover assets and cover asset hedge contracts in order to ensure that the interests of security holders are protected.
50. Section 59(1). Institutions must appoint monitors in respect of each type of authorisation held. The Central Bank is to provide criteria for the appointment of Cover Asset Monitors.
51. Sections 61 and 62. To ensure that the assets in the pool give sufficient security to investors holding the paper.
52. Sections 61 and 62.
53. Sections 65 and 66 give the Monitor extensive powers to ensure co-operation by the institution. Section 59(5). The credit institution must also remunerate the monitor for performing his duties; such remuneration counts as the claim of a "super-preferential creditor".
54. Section 3.
55. Kept at the registered office or head office of the designated institution, or such other office as has been notified in writing to the Authority (Asset Covered Securities, 2001 (Sections 38(6) and 53(6)) Regulations, 2002).
56. Sections 32(8) and 47(8).
57. Section 33 (subsection (6) excluded). A designated public credit institution cover asset monitor does not appear to have an ongoing obligation in respect of the contents of asset pools - his obligations end after the issue of the ABS.
58. Sections 35(2) and (8) and 50(2) and (8).
59. Sections 36(1) and (4) and 51(1) and (4).
60. Sections 38(4) and (5) and 53(4) and (5).

In certain circumstances[61] (e.g., to safeguard the interests of investors or in apprehension of insolvency) the Authority may request the National Treasury Management Agency to appoint a manager who would exercise the functions of a designated credit institution in relation to its asset covered securities and cover-asset pools.[62] The Monitor's appointment can be terminated by the institution only with the written consent of the Authority.[63]

Risk Offset

Designated institutions may enter into derivatives contracts to hedge against risk (such as interest rates, exchange rates or credit rating). To the extent that such contracts relate to asset covered securities or to cover assets of the designated credit institution, it may secure its obligations under such contracts on the assets in the pool.[64]

Insolvency Provisions

A most beneficial element of the securities is that their holders take precedence over almost all creditors in respect of clams over the cover assets[65] of the issuing institution. Preferred creditors[66] are the holders of an Asset Covered Security, any person who has rights in respect of the security by virtue of any legal relationship with the holder of the ACS, cover assets contract parties, and super-preferred creditors.[67] These preferred creditors will have recourse to the assets held in the relevant pool in priority[68] to the institution's shareholders, contributories and all other creditors of the issuing institution (including tax claims and those of fixed charge holders) notwithstanding any other legislative provision.[69]

Insolvency or potential insolvency does not affect the rights of holders of an ACS.[70] ACS holders rank equally among themselves and in the event that their claims cannot be satisfied in full, they are abated in proportion to the amounts of their claims.[71] If the claims are still not fully met from the cover assets pool, the unsatisfied part of their claims rank as unsecured creditors against any remaining assets of the issuer.[72] If an institution is authorised to issue both mortgage covered securities and public credit covered securities, then the asset pools for each type may be used to pay claims for the respective security only and not interchangeably.[73]

Nothing in the Act prevents Asset Covered Securities, hedge contracts and cover assets monitor contracts being subject to an enactment or rule of law that would render the security or contract void due to fraud, misrepresentation, fraudulent preference,[74] fraudulent transfer of assets,[75] or below value transactions.[76]

The institution may not create an interest in any of the cover assets that would adversely affect the priority of the preferred creditors.[77] Nonetheless, an institution may create security interests if the assets are located outside Ireland[78] in circumstances where the person that directly or indirectly has the benefit of the interest is the same person who is entitled to security in accordance with the order of priority in the Act.[79]

Commenting on the Act when in draft form, Moody's Investors Service[80] indicated that it expects the Irish framework to compare with existing secured mortgage bond legislation in other European countries. In particular, the rating agency said that elements of bankruptcy-segregation from the issuer's parent as well as the special privilege granted to bondholders translate into both a lower default probability and especially a lower loss severity for Irish ABS compared to senior unsecured obligations of the same institution. In addition, Moody's noted that the legislation contains asset and liability management guidelines - addressing cash flow and maturity mismatching risks - that are strong compared to other existing frameworks in Europe. Finally, Moody's said that the credit risk provisions under the Act are in line with the other frameworks, for example limiting the inclusion of commercial mortgage assets.

The rating agency pointed out that when assessing and rating Irish covered bonds (ACS), the first step of the analysis will be to evaluate the creditworthiness of the institution issuing the bonds. In the case of bank subsidiaries issuing such instruments, elements of their creditworthiness would include their strategic importance for the refinancing of their parent financial institutions, as well as the implied or explicit support coming from these parents. All these elements would be reflected in the issuing entity's deposit and unsecured debt ratings. Certain issues not included in the draft legislation - property valuation guidelines - are expected to be dealt with in forthcoming regulations issued by the Central Bank of Ireland.

61. Section 71(1).
62. Section 72 .
63. Section 63.
64. Sections 30 and 45.
65. Part 7 of the Act.
66. Section 3.
67. Section 3. Cover Assets Monitors and managers appointed in respect of the institution; they rank above the preferred creditors but in the event that the preferred creditors claims cannot be met they abate in proportion to the amounts of the claims.
68. In the event of insolvency of the issuing institution, the cover assets must be first used to meet the claims of the holders of the securities. Only when the full obligation to the security holders has been met, can general creditors make a claim against these assets.
69. Section 83(1).
70. Section 82. Also covered are claims of preferred creditors per section 3, asset cover monitors, hedge contract parties or the NTMA.
71. Section 83(2).
72. Section 83(5).
73. Section 90.
74. Section 286 of the Companies Act 1963 and section 57 of the Bankruptcy Act 1988.
75. Section 139 of the Companies Act 1990.
76. Sections 58 and 59 of the Bankruptcy Act 1988.
77. Section 88(1).
78. Or are section 5(1)(e) securities generated by the European Communities (or any one of them) or the European Investment Bank.
79. Section 88(2).
80. One of the major investment rating companies. Moody's and Standard & Poor are seen as market leaders in the field. These rating agencies assess the creditworthiness of everything from bonds to countries; the value of a favourable rating from them is enormous. Similarly a poor rating will drastically reduce the price of a product.

Selling securitisation

Creating a bond (a security such as the ACS) based on a mortgage, for example, allows the institution to obtain a faster return on its capital and operates to "release" that sum from the mortgage transaction. Once the bond is sold, the money tied up in the mortgage is once again in the possession of the financial institution who may lend it out again.

Critics worry that securitisation depends on a particularly risky assumption - that the markets will always function:

> "Securitization creates the illusion of unlimited liquidity and marketability. This, of course, does not prevail all the time. There are hidden risks in securitization that from time to time result in very substantial losses." [81]

So far, the biggest threat to asset-backed securities has not been loan delinquencies but prepayments. In the US home mortgage market, when many smaller lenders tried to offer better deals to consumers, borrowers took advantage of the bargains and began prepaying their loans faster than expected. The loss of anticipated income forced issuers to write down their future profit assumptions.

Securitisation creates tradeable securities out of financial claims which would otherwise have remained bilateral deals.[82] This reduces transaction costs and makes financial markets more efficient. Securitisation can have the advantage of allowing lending to happen outside the constraints of the capital base of the banking system.[83]

Conclusion

The Act creates securities designed to attract the best possible credit rating. Asset Covered Securities are a premium financial product. They have several substantial selling points:

* They have guaranteed statutory priority in the event of issuer insolvency.
* They are collateralised on assets to meet ACS holders claims if the receivables fail. Due to the requirements of the Act there is an indirect over-collateralisation by 20 percent.
* They can possess a substitution asset pool of not more than 20 percent of the value of the cover assets, to be substituted into the cover assets if they fail.
* They have strict requirements as to the location of the assets and the percentage of exposure to different countries and regions.
* They have a maximum exposure limit to commercial property, set currently at 20 percent of the value of mortgage assets in the cover assets pool.
* Mortgage cover assets must be denominated in the same currency as the ACS.
* They have express powers to enter into hedging contracts to manage risk.
* They are surrounded by tiered regulatory protection for investors including an independent Cover Assets Monitor.
* They are subject to a prohibition on the inclusion of unfinished property as mortgage credit assets.
* They include a continuing obligation on the issuer to care for the fiscal health of the cover assets and substitution assets.

The Act will attract finance houses wishing to sell this bond - the Irish Asset Covered Security. Response from the banking sector has been positive, and the Central Bank's decision to consult with industry before publishing regulations showed great sensitivity to the commercial aim of the legislation. ●

81. Henry Kaufman, the former Salomon Brothers Inc. economist who is now president of Henry Kaufman & Co.
82. The conversion of illiquid loans into liquid securities may lead to an increase in the volatility of asset values; and a preponderance of assets with readily ascertainable market values could promote liquidation as opposed to trading for valuing banks.
83. Although this might have the effect of leading to a decline in the total capital in the banking system, thereby reducing the financial strength of the system as a whole.

Establishment of office of Chief Prosecution Solicitor

Claire Loftus, Chief Prosecution Solicitor

On the 3rd of December, 2001 the Chief Prosecution Solicitor was formally appointed as the Solicitor to the Director of Public Prosecutions, taking over from the Chief State Solicitor. Ms Claire Loftus was selected for the post in November 2000, having previously worked in the Criminal Division of the Chief State Solicitor's Office since 1993. The movement of all operational staff working on behalf of the Director to his office was one of the central recommendations contained in the report of the Public Prosecution Systems Study Group chaired by Mr. Dermot Nally, former Secretary to the Government.

The stated objectives of the recommendations, as they applied to the Office of the DPP, were:

* The greater cohesion of the prosecution service under the DPP and the elimination of "waste and duplication".
* Greater consistency in implementation of the Director's decisions.
* Greater transparency in the operation of the office which has been achieved through the publication on an Annual Report and the Statement of General Guidelines for Prosecutions.
* The possible delegation of some decision-making powers to the Professional Officers in the Solicitor division and in due course to the State Solicitors.

Implementation involved the transfer of a group of staff previously dealing with criminal prosecutions in the Chief State Solicitor's Office. A significant number of additional staff will be recruited during 2002.

On the 11th of May 2002 the office of the Chief Prosecution Solicitor was formally launched at a reception following the 3rd Annual Prosecutors Conference in the Royal Hospital Kilmainham. Members of the Judiciary, the Bar and other invited guests attended. Mr. Dermot Nally, as the Chairman of the study group, addressed the reception. In his remarks, he expressed satisfaction that an anomaly, which had existed since the creation of the office of the Director of Public Prosecutions, had been rectified. He went on to say that, as an architect of the Top Level Appointments Commission (TLAC) system in the Civil Service, he felt strongly that there should be maximum freedom of movement of legal staff between departments in the Civil Service.

In her address to the reception, the Chief Prosecution Solicitor said that the re-organisation had already resulted in a greater interaction between directing and operational staff within the Office of the Director of Public Prosecutions. It had, for example, allowed for shared IT databases which have speeded up communication.

The Chief Prosecution Solicitor intends carrying out a review of the structure of the legal departments in her division with a view to creating more manageable units.

Ms. Loftus went on to say that the re-organisation also represents an opportunity to review the relationship of the DPP with the various groups which they deal with on a daily basis. These are *inter alia* the Courts Service, the Garda Siochana, victims, professional witnesses, and defence solicitors. It is her objective to improve communications and working relationships with all of these players in the Criminal Justice System, and this forms a major part of the strategy of the office for the years ahead.

Another important recommendation of the report proposed that the State Solicitor service for the entire country would be transferred from the Attorney General to the DPP. Most of their work as State Solicitors is in fact carried out on behalf of the Director. It is hoped that the legislation to effect this transfer will be introduced soon. ●

Corrigendum Conclusion

The Law of Workplace Stress, Bullying and Harassment - Wesley Farrell BL

Due to a printing error in Volume 7, Issue 5 of the Bar Review (June/July 2002), the concluding paragraph of the above article was inadvertently omitted. It is reproduced here with the apologies of the Editor.

In summary, an employer has a duty to take reasonable care for the health and safety of his or her employees including safety from mental, psychological or psychiatric injuries that emanate from stress, bullying and harassment in the workplace. A claim for workplace stress, bullying or harassment may be based on breach of statutory duty, breach of common law duty of care or breach of contract. The relevant statutory duties derive principally from the Employment Equality Act 1998 and the Unfair Dismissals Act 1977-1993, whereas breach of the common law duty of care may arise from negligence, intentional infliction of emotional suffering, or wrongful dismissal. As appears from the analysis of the English Court of Appeal in *Sutherland v Hatton*, the contractual claim in this context will arise where the harm is the reasonably foreseeable product of specific breaches of a contractual duty of care towards the employee. ●

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