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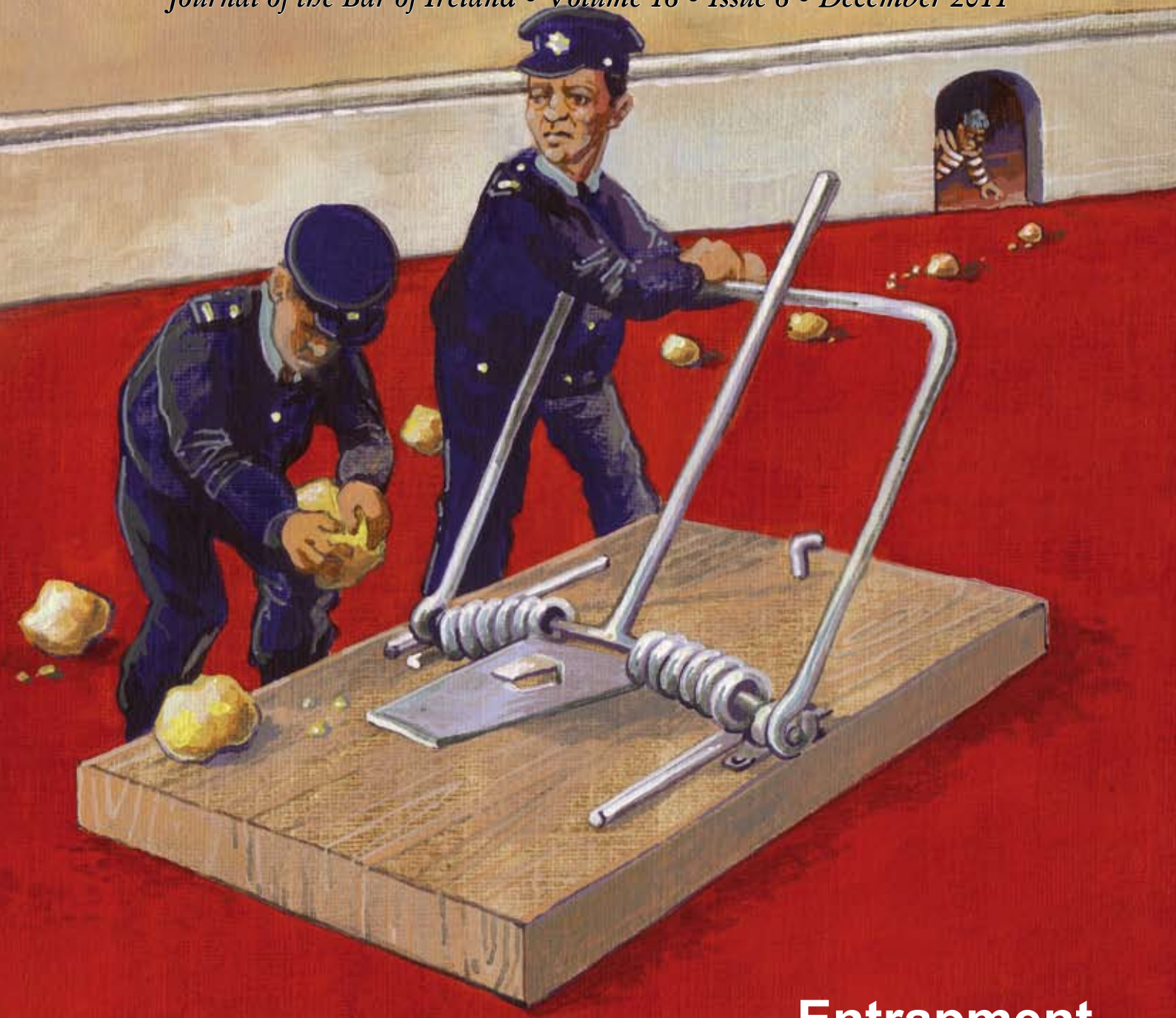

Entrapment

Travellers and School Admission

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Travellers, equality and school admission: *Christian Brothers High School Clonmel v Stokes*

Mel Cousins BL

This note examines the recent decisions in *CBS High School Clonmel v Stokes*[1] which concerned whether the rules for admission to the school – in particular a rule giving priority to children whose parents had attended the school – were compatible with the Equal Status Acts 2000-2008. An equality officer held that the rule was indirectly discriminatory as regards Traveller children and in breach of the Act.[2] However, on appeal the Court held that while the rule had a disproportionate impact on Travellers, it was objectively justified.

The facts

The facts of the case are quite straightforward. John Stokes was a Traveller and Roman Catholic child. He had attended a local primary school and was the oldest child in the family. His mother has attended secondary school but, like many other Travellers of his age, his father had not. He applied for admission to Clonmel CBS. Like many secondary schools, the High School received more applications than it had places and it had, over the years, developed a set of priorities for applications.

The Admissions Policy of the High School first offered places to applicants with maximum eligibility in accordance with the school's selection criteria and the mission statement and the ethos of the school. Any remaining places were allocated by lottery. The selection criteria were that the application was in respect of a boy:

> — whose parents are seeking to submit their son to a Roman Catholic education in accordance with the mission statement and Christian ethos of the school;
> — who already has a brother who attended or is in attendance at the School, or is the child of a past pupil, or has close family ties with the School
> — who attended for his primary school education at one of the schools listed …, being a school within the locality or demographic area of the school

John satisfied the Roman Catholic and local education requirements but could not satisfy the sibling requirement (being the oldest child) and he did not satisfy the parental link as his father had not attended secondary school. John was unsuccessful in the lottery. John's statistical possibility of obtaining admission declined at each stage in the process from about 80% initially (if access was allocated randomly) to 56-63% after admittance of sons of past-pupils.[3]

The law

It was argued that John had been discriminated against by the School on the 'Traveller community' ground in section 3(2)(i) of the Equal Status Acts by being refused admission to the High School. Section 7 provides that

> (2) An educational establishment [which includes a post-primary school] shall not discriminate in relation to—
> (a) the admission or the terms or conditions of admission of a person as a student to the establishment, ...

Section 3 (a) of the Act provides that discrimination shall be taken to occur 'where a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the [specified] grounds' which includes membership of the Traveller community. Finally, section 3(c) covers indirect discrimination and provides that

> where an apparently neutral provision puts a person referred to in any paragraph of section 3(2) at a particular disadvantage compared with other persons, unless the provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

The equality officer's decision

Before the equality officer, it was argued that as a member of the Traveller community, John Stokes' father was statistically much less likely to have attended second level education than the settled population. Therefore, the criterion of having a family member who attended the school disproportionately affected members of the Traveller community and amounted to indirect discrimination. The High School argued that there was no direct discrimination against Travellers and that, on the issue of indirect discrimination, the family criterion was a standard one in admissions policies which was entirely

1 [2011] IECC 1. The case is under appeal to the High Court.
2 DEC-S2010-056.
3 The data provided by the equality officer and the Court are slightly different.

justified. Finally, it argued that the school had an excellent record of working with students who are members of the Traveller community. There were 5 members of the Traveller community enrolled in the school in 2010 and all Travellers who applied for admission in both 2007 and 2008 were accepted. No Travellers applied in 2009 and the complainant was the only Traveller to have been unsuccessful in his application to date.

The equality officer first considered the impact of the sibling rule. The complainant argued that giving priority to brothers puts Travellers at a particular disadvantage in that, due to historical low participation by Travellers in secondary education, an older Traveller sibling is much less likely than a non-Traveller to have attended secondary school. However, the equality officer pointed out that Traveller family size is on average double that of the general population. Priority for siblings could therefore favour Travellers. The equality officer concluded that, on the balance of probabilities, he could not conclude that giving priority to brothers of either existing or former pupils was 'intrinsically liable to put Travellers at a particular disadvantage'. This finding was not appealed to the Circuit Court.

Turning to the parental rule, the equality officer noted that there was no evidence that any Travellers attended the High School during the 1980s. He concluded on the balance of probabilities that the policy of giving priority to children of past pupils put the complainant at a particular disadvantage compared with non-Travellers.

Therefore, he had to consider whether the rule was objectively justified by a legitimate aim and that the means of achieving that aim are appropriate and necessary. He referred to the justification for the rule as set out in the admissions policy, i.e. that of ' supporting the family ethos within education by providing education services for the children of families who already have, or have recently had, a brother of the applicant attend the School'. The equality officer took the view that while this might justify giving priority to siblings it did not, on its face, state an aim which required giving priority to the children of former pupils. In oral evidence, the High School stated that it had as its aim the strengthening of family loyalty to the school, by rewarding those fathers who supported the school by assisting in various ways. He accepted that strengthening bonds between the parents, as primary educators of a child and the school was a legitimate aim. However, the equality officer did not consider that giving a blanket priority in admission to children was appropriate (i.e. proportionate) or necessary because (i) the priority applied to the children of all past pupils, irrespective of the actual level of current engagement of the father with the school. In many cases therefore, the means would not achieve the aim; (ii) there were other ways of achieving this aim which would not disadvantage children whose fathers did not attend the school, such as organising a past pupils' union, by the activities of a parents' association etc.; and (iii) the impact on Travellers was disproportionate to the benefit of the policy.

As it was impossible to re-run the lottery under revised criteria, the equality officer ordered that the High School offer a place to the complainant; and that it review its admissions policy to ensure that it did not indirectly discriminate against pupils on any of the grounds covered by the Equal Status Acts.[4]

The Circuit Court judgment

The High School appealed to the Circuit Court which involves, in effect, a rehearing of the case. Although the claim against the Department of Education and Science was not pursued, it was argued that the Circuit Court could make findings against the school on the basis of alleged breaches of statutory duty under the Education Acts. Judge Teehan correctly did not accept that argument for two reasons. First, the principle of finality in litigation required that matters determined under the Education Act, 1998 could not be revisited; and, second (and rather more convincingly), he ruled that proceedings under the Equal Status Acts could only succeed where a breach of duty under *that* legislation had been established. Nonetheless, he pointed out that the court must necessarily be informed by relevant statutory provisions and, in particular, sections 6 and 15 of the Education Act 1998.[5]

On the issue of discrimination, Judge Teehan referred to the evidence painting "a very stark picture of members of the Travelling Community availing only in minuscule numbers of access to secondary education over the last few decades."

By contrast, he took judicial notice of the fact that "it is notorious that, since the advent of free secondary education in the late 1960s and the raising of the school leaving age to 16, the overwhelming majority of students in the general population have attended secondary school to at least Junior Certificate level."[6]

Accordingly, he found that it could

> "be stated unequivocally that the 'parental rule' - an ostensibly neutral provision as provided for by the amended section 3(1)(c) of the Equal Status Act 2000 - is discriminatory against Travellers. Of course, the Respondent must be shown to be at a *particular* disadvantage, but I am satisfied that groupings such as members of the Travelling Community (and also the Nigerian Community and the Polish Community, for example, where parents of boys were most unlikely to have attended the school previously) are particularly disadvantaged by such rule."[7]

With regard to the question of the legitimacy of the aim, Judge Teehan found that the aim of the Board in introducing the 'parental rule' was entirely in keeping with its goal (as set out in the admissions policy) of 'supporting the family ethos within education' and the 'characteristic spirit of the school', a concept to which it must have regard in accordance with section 15(2) (b) and (d) of the Education Act 1998.[8]

He, therefore, turned to whether the rule was appropriate and necessary. Here he relied on the evidence of the school

4 The equality officer also rejected a complaint against the Department of Education and Science for failure to enforce its guidelines. This issue was not appealed to the Circuit Court.
5 At 8.
6 At 15.
7 At 16.
8 At 17.

principal concerning the history of the admissions policy. This showed that, in most years, there had been more applicants than places. At one time, priority was given to students where there were 'exceptional circumstances' which had led to almost all applicants seeking admission under this heading. Prior to that, a lottery applied to all applicants, while at one time entry was by means of an assessment test. The evidence had been that these policies were 'for obvious reasons' highly unsatisfactory. Judge Teehan found that the current policy fell somewhere between these extremes. This did not, in itself, mean that the policy was appropriate, but it was one which is reviewed annually and he was satisfied that, having regard to all the many relevant considerations of which the Board must take account, it struck the correct balance and was, therefore, appropriate.

Finally, on the issue, of necessity, the principal had given evidence concerning the links between the school and the community in Clonmel going back to the nineteenth century. There was an active past pupils' union; former students had been active in providing mentoring, bursaries for sports and financial assistance for the sons of impoverished parents; and former students were active in (what was described as) the very difficult but necessary task of bridging the shortfall in State funds. He believed that these activities would most probably be considerably less were such a strong bond not in place. The principal spoke of 'a sense of ownership about the school where people have attended', and gave concrete examples of this in the course of his evidence.

Judge Teehan concluded that these issues were:

> "manifestly important considerations in the formulation of school policies. In the light of all this (and, in particular the highly important issue of funding) I find – and not without hesitation – that the inclusion of the 'parental rule' was a necessary step in creating an admissions policy which is proportionate and balanced."[9]

Therefore, he rejected the discrimination claim. He did, however, suggest that 'the Oireachtas should look (or look again) at the issue of providing a mandatory requirement for positive discrimination in schools' admissions policies.'[10]

Discussion

Although there has been some criticism of the Circuit Court decision, in fact both the equality officer and Circuit Court are to be commended for their analysis of this area of equality law (an area which has not always been blessed with judicial clarity). Both correctly identified the legal principles and relevant facts, both accepted that the rule did have a disproportionate impact on Traveller children; and differed only as to whether it could be objectively justified. On this point there is an absence of Irish judicial authority as to the correct approach.

The key issue is whether the admission rules were appropriate and necessary. With respect to the equality officer's approach, it is arguable that the parental rule is clearly appropriate, i.e. providing priority access to children of former parents is one way of implementing the legitimate policy of attempting to foster parental involvement. The fact that some parents may benefit from this rule (in respect of their children) without actively participating in school life does not make the policy inappropriate and, ultimately, the school is best placed to assess whether the policy is achieving its objectives. But the key question is whether the rule is necessary. Now 'necessary' here does not mean absolutely essential. Rather it directs the court (or tribunal) to examine whether there are other ways in which the objective could be achieved which would have a less negative impact on the group concerned.

The key issue is how stringently the concept of 'necessary' should be applied and, as noted, there is no Irish case law directly on this issue to date. The concept of objective justification is, of course, take from European law. However, again the extent to which it is rigorously applied depends on both the factual and legal issues involved.[11] In the case of *DH v Czech Republic*, the Court of Human Rights considered a case of indirect discrimination concerning the assignment of Roma children to special schools.[12] In that case, the Court stated that

> "Where the difference in treatment is based on race, colour or ethnic origin, the notion of objective and reasonable justification must be interpreted as strictly as possible."[13]

Without entering into questions of ethnicity, one might expect that a similar approach would be taken to discrimination on the Traveller community ground under the Equal Status Acts. However, the facts involved in cases such as *DH* are rather far from the circumstances involved in the Clonmel case. Traveller children had previously been successful in their applications to the school and John Stokes was the first unsuccessful application in recent years. In addition, the parental rule was not an absolute bar and made a small (though not insignificant) difference to his chances of being

9 At 19.

10 At 20.

11 Although Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin includes access to education, there does not appear to have been any relevant case law to date.

12 *DH v. the Czech Republic*, 57325/00, 47 EHRR 3 (2008). See also *Sampanis v. Greece,* 32526/05, 5 June 2008 and *Oršuš v Croatia*, 15766/03, 16 March 2010.

13 Ibid at 196. In *E v The Governing Body of JFS* [2008] EWHC 1535 (Admin), Munby J accepted that attempts to justify practices which are potentially racially discriminatory must be assessed strictly, the measure in question must be shown to correspond to a 'real need' and the means adopted must be 'appropriate' and 'necessary' to achieving that objective. There must be a 'real match' between the end and the means ((at 183-4). However, he found that the rule in question was objectively justified. This decision was overturned on appeal (ultimately) to the House of Lords which held, by a narrow majority, that the case involved direct discrimination which could not be justified *E, R (on the application of) v Governing Body of JFS* [2009] UKSC 15. However the unusual facts of the case make it of limited relevance. See also *Mandla (Sewa Singh) v Dowell Lee* [1982] UKHL 7; and *SG v Head Teacher & Governors St Gregory's Catholic Science School* [2011] EWHC 1452 (Admin) although the facts of these cases – which concern children excluded from school because of wearing a turban and a hair style relating to ethnicity respectively – are again far from the facts here.

admitted.[14] On balance, and pending clarification by the High Court of the approach to be adopted, it is arguable that Judge Teehan was correct to hold that the inclusion of the parental rule was justified in the instant case. Of course, this is not to say that schools could not adopt a different approach or indeed take positive action to include disadvantaged groups such as Travellers under section 14 of the Act. Indeed, there is much to be said for Judge Teehan's suggestion that the Oireachtas should look again at the law in this area.

Access to Travellers to education is clearly of critical importance. However, the parental rule involved in this case makes a rather marginal difference in terms of such access. Indeed, more children appear to have been admitted under the sibling rule. For reasons which were not explained, no appeal was lodged in relation to the finding that the sibling rule was not discriminatory. Mr. Stokes was clearly disadvantaged by the operation of the rule but this was, in part, because he was the oldest child. However, the figures quoted for Traveller participation and the fact that there are only 5 Traveller children in the High School would strongly suggest that the rule does have a disproportionate impact on Travellers (notwithstanding their larger families). However, it would appear that the rule could be objectively justified as there are additional arguments in favour of such an approach including the advantages to parents in having all their children (of a given gender) in one school and the support which may be provided amongst siblings attending a school. Such a rule appears to be common in other jurisdictions and does not appear to have attracted judicial notice.[15] More broadly a critical question is how to increase the numbers of Travellers *applying* to schools such as the High School and again broader legislative and policy action is required. ■

14 Judge Teehan questioned whether the difference between a 70% chance of getting a place before the application of the parental rule and 55% afterwards might be considered *de minimis* but did not find it necessary to decide the issue (the percentages appear to have been taken from the equality officer's analysis). On the facts, it is submitted that the difference in clearly not minimal but, in any case, this issue might better be addressed as part of the assessment of 'particular disadvantage' under s. 3. If the applicant's chances have only been minimally affected then s/he will not have suffered such a disadvantage.

15 See, for example, *Parents Involved in Community Schools v Seattle School District No. 1* 551 U.S. 701 (2007).

Irish Corporate Law Forum Seminar

Pictured at the recent Irish Corporate Law Forum seminar on Company Charges and Financial Assistance are left to right: Helen Dixon, Kelley Smith BL, William Johnston, Dr Deirdre Ahern, Barbara Cotter, David Mangan and Dr Noel McGrath. The ICLF was formed earlier this year and the Director is Dr Deirdre Ahern, Assistant Professor School of Law, Trinity College Dublin.

The members of the advisory board to the Forum are: The Hon. Ms Justice Mary Finlay Geoghegan, David Barniville SC, Eleanor Daly, in-house solicitor, FEXCO, Helen Dixon, Registrar of Companies, Gordon Duffy BL, David Mangan, Mason Hayes & Curran, Brian Murray SC, Jack O'Farrell, A&L Goodbody, Dr Ailbhe O'Neill BL, Trinity College Dublin and Conor Verdon, Department of Jobs, Enterprise and Innovation.

Deception and Entrapment

Garnet Orange BL

The members of An Garda Síochána have a duty to detect and prevent crime within the State.[1] Some criminal behaviour such as "consensual crimes" poses particular difficulties for them.[2] These offences generally occur in circumstances of secrecy and in the absence of anyone who will testify as a witness to the offence.[3] In order to gather evidence to prosecute this type of criminal activity, the gardaí occasionally resort to investigative procedures that involve the participation of an officer in the commission of the offence. Deception on the part of the gardaí is the hallmark of this type of investigative procedure and this has led to discussion on the issue of entrapment.[4] It may be commented that in spite of the number of cases in which these procedures have been utilised, curiously few judgments have emanated from the higher courts in Ireland relating to entrapment. Where an issue has been taken, the Irish courts have tended to follow the leading UK decisions and it seems safe to assume that this trend will continue.

The procedures that are used by the gardaí generally follow a particular blue print and each case can usually be described as being controlled purchase, test purchasing and controlled delivery. For convenience, these and other procedures can be described as being entrapment procedures. The purpose in each case is to dupe the suspect into believing that the officer is, in fact, simply another customer or (as the case may be) a delivery man.[5]

Controlled purchase

In a typical controlled purchase operation, an undercover officer will go to an area frequented by drug dealers and gather evidence against anyone offering to sell him drugs. A more elaborate approach occurs where an officer contacts a suspect (arising from information gathered by the gardaí during their investigations) and then arranges the purchase of a quantity of drugs. Two further purchases usually occur and each quantity is sent for analysis. The police may also get a warrant for the suspect's residence and any other relevant premises which are then searched for evidence. The suspect is arrested and usually admits the offence when confronted with the evidence.[6]

Test purchasing

Test purchasing (also known as "virtue testing"[7]) is in many respects identical to controlled purchasing but involves a state agency rather than the gardaí. Test purchasing occurs where a body such as a health authority or similar statutory body is given statutory powers to enforce particular legislation. A typical operation the body recruits a minor and then directs him to go to various shops and attempt to buy either cigarettes or alcohol. Where the shop sells the product, a prosecution may then follow.[8]

Controlled delivery

A controlled delivery occurs when the police or customs opportunistically encounter a package or container containing an illicit substance which is addressed to a particular individual at a particular address. The method and rationale of a controlled delivery have been described in the following terms. The package is delivered in the usual manner by a garda pretending to be an employee of the shipping company and the person receiving the package is arrested when he takes delivery.[9] The gardaí may also try to monitor any onward passage of the package.

UK entrapment procedures

Experience shows that the gardaí make only limited use of deception as an investigative technique. On the other hand, the UK case law shows that their police have a far more proactive approach to deception, trickery and entrapment procedures as a means of gathering evidence.[10] A recent example is *R v Jones*[11]. In that case, a police officer went into a shop selling the accoutrements and paraphernalia usually required to grow and smoke cannabis. The officer posed as a would-be cannabis grower. He engaged in a number of conversations with the accused regarding the cultivation of cannabis plants. At all times, the accused made it clear that he could not discuss growing cannabis but he was quite happy to speak at length about the growing of tomato plants. The prosecution argued that the reference to tomatoes was merely a sham to cover the imparting of advice on the cultivation of cannabis. The accused was subsequently charged and convicted of incitement to cultivate cannabis based on the evidence of the officer.[12]

1 Subsections 7(1)(e) and (f) Garda Síochána Act, 2005; and *Glasbrook Brothers Limited v Glamorgan County Council* [1925] AC 270. The gardaí are the focus of this article but the points made apply with equal force to any of the regulatory bodies that are empowered to enforce legislation.

2 *R v Looseley* [2001] 1 WLR 2060 at para 2.

3 The difficulty caused by the circumstances in which this type of crime occurs was referred to by Lord Nicholls in *R v Looseley* [2001] 1 WLR 2060 at p 2064 para 26.

4 See the comments of Lord MacDermott CJ in *Reg v Murphy* [1965] NI 138 at pp 147-148.

5 As a general rule it is not improper for the police to engage in deception as a means of gathering evidence. *R v Murphy* [1965] NI 138.

6 The details of a particular test purchase operation are set out in the speech of Lord Hutton in *R v Looseley* [2001] 1 WLR 2060 at paras 84 to 86.

7 *R v Jones* [2010] 3 All ER 1186.

8 A good example of the operation of such a procedure is detailed in *Syon v Hewitt* [2008] 1 IR 168 at para 11 et seq. Also, see *DPP v Marshall* [1988] 3 All ER 683 and *Nottingham City Council v Amin* [2000] 1 WLR 1071.

9 See *Illinois v Andreas* (1983) 463 US 765 regarding the US case law on controlled delivery.

10 In *R v Looseley* [2001] 1 WLR 2060 at p 2066, the House of Lords rejected an argument that the officers were required by the *Teixeira* judgment to act in an "essentially passive manner."

11 *R v Jones* [2010] 3 All ER 1186.

12 *R v Jones* [2010] 3 All ER 1186.

Other cases show that the issue of entrapment can arise in a variety of situations including customs and police officers engaging in smuggling heroin so that a foreign drug dealer might be lured into travelling to the UK[13], establishing a sham jewellery shop to entice suspects into selling stolen jewellery,[14] approaching a suspected forger in order to induce him into uttering forged banknotes[15], the placing of goods in a van to see who (if anyone) steals them in an ongoing investigation into theft from cars in a particular area,[16] posing as contract killers in order to make a recording of a husband who wanted to murder his wife[17] and posing as insurance company agents negotiating to secure the return of stolen artwork.[18]

The current position

It is now established law that the mere fact that the relevant evidence was obtained in circumstances in which the gardaí (in the exercise of their duty) had a role in the commission of the offence will not, of itself, give the accused a defence.[19] In addition, the involvement of a police officer in the commission of the offence does not, in the circumstances, render him an accomplice.[20]

The difficulty is that the word "entrapment" may have more than one meaning in the context of a criminal trial. The use of what may be described as entrapment procedures is acceptable as a means of gathering evidence of criminal behaviour. However, if a suspect has been induced or provoked into committing an offence or where the offence has been instigated by the officer, this may lead the exclusion of the evidence that was gathered on the basis that it might, in the circumstances, be unfair to the suspect to have it admitted in evidence against him. This makes the activities of the police officer the focus of the court's attention.

An unexceptional opportunity to commit a crime

There are two ways in which the court can measure the actions of the officer where this is in issue. In the leading UK decision of *R v Loosely*[21] the appellant was being prosecuted arising from a controlled purchase operation. The House of Lords gave four separate opinions on the issue of entrapment all of which are *ad idem* on the issue of entrapment. In considering whether the officer had acted either unfairly or unlawfully Lord Nicholls commented that:

> "The yardstick for the purpose of this test is, in general, whether the police conduct preceding the commission of the offence was no more than might have been expected from others in the circumstances. Police conduct of this nature is not to be regarded as inciting or instigating the crime, or luring a person into committing a crime. The police did no more than others could be expected to do. The police did not create crime artificially."[22]

In other words, did the officer, in order to gather evidence, act more or less as any ordinary "punter" would have done in the same circumstances? Where the accused contends that the police agent induced him into committing the offence the question may be asked whether the inducement "is consistent with the ordinary temptations and stratagems that are likely to be encountered in the course of criminal activity."[23] For instance, in a controlled purchase operation the garda's activities would have to be considered to see whether the officer had acted as any other customer would have done in the same circumstances. This approach can be encapsulated in the question of whether the officer did any more "than to present the defendant with an unexceptional opportunity to commit a crime."[24]

Ordinary participant or agent provocateur?

Another approach is to consider the actions of the officer with a view to determining whether he become the instigator of the offence. This approach is, in effect, the other side of the same coin. Where the officer has instigated the commission of the offence he ceases to be an ordinary participant and becomes, instead, an "*agent provocateur*". In the Report of the Royal Commission on Police Powers and Procedure (1929), such a person is described as "a person who entices another to commit an express breach of the law which he would not otherwise have committed, and then proceeds or informs against him in respect of such offence."[25] The activities of an *agent provocateur* have been described in terms of a "dishonest policeman, anxious to improve his detection record, tries very hard with the help of an agent provocateur to induce a young man with no criminal tendencies to commit a serious crime; and ultimately the young man reluctantly succumbs to the inducement."[26] The activities of an *agent provocateur* have also been defined as involving the "inciting, procuring or counselling the commission of any crime" or to "force, persuade, encourage or coerce" an individual into committing a crime.[27]

In making this determination, one of the factors that a trial judge must consider is the nature and extent of the participation of the undercover operative in the crime:

> "The greater the inducement held out by the police, and the more forceful or persistent the police overtures, the more readily may a court conclude that the police have overstepped the boundary: their conduct might well have brought about commission of a crime by a person who would normally avoid crime of that kind. In assessing the weight to be attached to the police inducement, regard is to be

13 *R v Latiff* [1996] 1 WLR 104.
14 *R v Christou* [1992] 4 All ER 559, [1992] 3 WLR 228.
15 *R v Sang* [1980] AC 402.
16 *Williams v DPP* (1993) 98 Cr App R 209
17 *R v Smurthwaite* [1994] 1 All ER 898.
18 *Jones and Doyle v HM Advocate* [2009] ScotHC HCJAC 86.
19 *Syon v Hewitt* [2008] 1 IR 168. In this judgment the decision in *R v Latif* [1996] 1 WLR 104 is cited is followed. Also, *R v Sang* [1980] AC 402; and *R v Looseley* [2001] 1 WLR 2060 at p 2064.
20 *Dental Board v O'Callaghan* [1969] IR 181.
21 *R v Looseley* [2001] 1 WLR 2060.
22 *R v Looseley* [2001] 1 WLR 2060 at para 23.
23 *Ridgeway v The Queen* 184 CLR 19, 92 cited in *R v Looseley* [2001] 1 WLR 2060 at para 102 and in *Syon v Hewitt* [2008] 1 IR 168 at para 57.
24 *R v Looseley* [2001] 1 WLR 2060 at p 2069 para 23 per Lord Nicholls of Birkenhead
25 Quoted from *R v Looseley* [2001] 1 WLR 2060 at para 49. Also see *R v Moon* [2004] EWCA Crim 2872 at para 22
26 *R v Sang* [1980] AC 402 per Lord Salmon at p. 443.
27 *Williams v DPP* [1993] 3 All ER 365 at p. 369

had to the defendant's circumstances, including his vulnerability. This is not because the standards of acceptable behaviour are variable. Rather, this is a recognition that what may be a significant inducement to one person may not be so to another. For the police to behave as would an ordinary customer of a trade, whether lawful or unlawful, being carried on by the defendant will not normally be regarded as objectionable."[28]

The most commonly cited decision of the European Court of Human Rights in relation to entrapment procedures is *Teixeira de Castro v Portugal* (1998) 28 EHRR 101.[29] In this case, the evidence was that two plain clothes police officers approached an individual, V.S. (a suspected drug dealer and user). The police were hoping to identify V.S.'s supplier. The agents offered to buy a large quantity of hash. V.S. was happy to assist but proved unable to actually find a supplier. On the night of 30th December, 1992 the officers went to V.S.'s house and said that they now wanted to buy heroin. At this stage, V.S. mentioned the plaintiff's name as being a potential supplier. V.S. did not know the plaintiff's address and had to find it out from a third party. Later, V.S., the two officers and the third party all travelled to the plaintiff's house. The plaintiff got into the car and agreed to get the buyers 20 grams of heroin. The plaintiff then went in his own car with the third party to another individual where they acquired the heroin in three packages. In the meantime, V.S. had returned to his own home with the officers. When the plaintiff arrived at V.S.'s house and produced a package of heroin, the officers identified themselves and arrested the applicant. In this case, the Court stated that an *agent provocateur* created a criminal intent that had been absent prior to the agent's actions. The Court found that the officers had crossed the boundary and had induced the commission of the crime.

The test to be applied

Where the court is considering whether the officer (or his agent) was an *agent provocateur* or merely providing the accused with an unexceptional opportunity to commit a crime, the judgment of Lord Bingham of Cornhill CJ in *Nottingham City Council v Amin* is regularly cited. In that case, the defendant was a taxi driver who stopped and carried two plain clothes officers when they had flagged him. The defendant carried the passengers through an area that was not covered by his licence and he was prosecuted for that offence. The defendant had sought to have the evidence excluded on the grounds that it was unfairly obtained on the basis that the officers were *agent provocateurs.* The position was summarised by Lord Bingham in the following terms:-

> "On the one hand it has been recognised as deeply offensive to ordinary notions of fairness if a defendant were to be convicted and punished for committing a crime which he only committed because he had been incited, instigated, persuaded, pressurised or wheedled into committing it by a law enforcement officer. On the other hand, it has been recognised that law enforcement agencies have a general duty to the public to enforce the law and it has been regarded as unobjectionable if a law enforcement officer gives a defendant an opportunity to break the law, of which the defendant freely takes advantage, in circumstances where it appears that the defendant would have behaved in the same way if the opportunity had been offered by anyone else."[30]

These sentiments have also been succinctly stated in the following terms:-

> "The specific element in entrapment which renders it unacceptable that evidence of the commission of the crime should be admitted is reflected in the word itself: that the police trapped the accused, by inducing him to commit an offence which he would not otherwise have committed for the purpose of prosecuting him for that crime."[31]

This particular approach was adopted by the Court of Criminal Appeal in *The People (DPP) v Mbeme*[32]. The gardaí had intercepted a package containing cannabis which had been addressed to M Dunphy at an address in Swords. A controlled delivery operation was put in place and when the package was delivered, the applicant signed for it. Before a search warrant could be obtained, the applicant placed the package in his car and was intercepted by gardaí after he had travelled a short distance. The applicant argued that the evidence was inadmissible because he had been entrapped. The Court rejected this argument and held that what had occurred was merely a controlled delivery. The Court considered the decisions in *Teixeira de Castro v Portugal* and *R v Looseley.* In giving judgment for the Court, Hardiman J quoted with approval the words of Lord Bingham and, in relation to the facts in the application before the Court, posed the following questions:

> "Is this a case where the garda, in approaching the defendant's premises wearing the DHL uniform and presenting a package consigned to Mick Dunphy, and gave it to the defendant when the defendant signed for it in the name Mick Dunphy, could that person be regarded as having been incited, instigated, persuaded, pressurised or wheedled into taking possession of the cannabis? Or is it a situation where it appears he would have behaved in the same way of the opportunity had been afforded by anyone else? It appears to us to be the latter situation...We see no reason to suggest he was pressurised or wheedled. We have every reason to believe he would have behaved the same way if offered the opportunity to anybody else or at least anyone he didn't believe to be a policeman."

Predisposition and reasonable suspicion

Clearly the gardaí must act in good faith when conducting such an operation. They cannot simply cast a wide net and

28 *R v Looseley* [2001] 1 WLR 2060 at p 2064 para 28.
29 *Texeira de Castro v Portugal* 1998 E.H.R.R. 101.
30 *Nottingham City Council v Amin* [2000] 1 WLR 1071 per Lord Bingham of Cornhill CJ at p 1075.
31 *Jones and Doyle v HM Advocate* [2009] ScotHC HCJAC 86 at para 10.
32 *The People (DPP) v Mbeme ex temp* decision of the Court of Criminal Appeal 22nd February, 2008 unreported.

see what happens. There should be evidence to show how the suspect became a target.[33] This may be proven by showing that the suspect brought suspicion onto himself or that he repeated the crime without provocation.[34] For this reason, the gardaí tend to target drug dealing in particular areas that are shown to be frequented by drug dealers or they rely on evidence of repeated drug purchases to show predisposition on the part of the suspect.[35] In test purchasing, the relevant authorities usually perform a general sweep through an area or rely on information showing that complaints have been made against a particular shop or off-licence of selling alcohol or cigarettes to underage purchasers.[36]

Stay of proceedings or exclusion of evidence?

At this stage two practical issues arise. Firstly, how should a court deal with a case in which the accused has raised the issue of entrapment? The cases from other jurisdictions show that the courts may either stay proceedings on the ground that to permit the case to proceed would be an abuse of the process of the court or, alternatively, it might rule that relevant evidence may be excluded (which may amount to the same thing). This question might be best addressed by taking the view that entrapment procedures are actually evidence gathering operations and that the issue should be considered from an admissibility point of view.

It will quickly become apparent from a reading of the UK authorities that the courts in that jurisdiction spent a considerable amount of time deciding whether or not the evidence obtained by an entrapment procedure could be excluded in the event that the court of trial was satisfied that it was unfairly obtained or if it would be an abuse of the process of the court to introduce it. It was initially held that entrapment was not a defence in English law which meant that the evidence gathered by entrapment would not be excluded.[37] Ultimately the problem was solved by the introduction of s. 78 of the Police and Criminal Evidence Act, 1984 which provided for the exclusion of evidence that had been obtained by "unfair or improper means."

While the issue does not seem to have arisen within this jurisdiction, it seems safest to assume that in a trial on indictment, the judge should rule on the admissibility of the evidence in the absence of the jury.[38] Anecdotal evidence suggests that this is the procedure that has been followed in the limited number of cases in which entrapment has been raised in this jurisdiction. In addition, this is the approach that is followed in Australia[39] and has recently been held to be applicable in Scotland.[40]

The second issue that arises is, if the judge finds that the gardaí did entrap the accused, on what basis should that evidence be excluded? In other words, the evidence may show that the gardaí acted unfairly in procuring the evidence against the accused but this is not the same as acting unlawfully. In answering this question, the provisions of Article 38.1 of the Constitution which guarantees trial in "due course of law" may be relevant. In a recent Scottish decision, a particular and limited definition of fairness was adopted that has much to recommend it:

> "The test concerned with "fairness" in the sense that it would offend against the court's (and the community's) sense of justice to admit evidence of a crime which the accused had been improperly induced to commit in order that he could be prosecuted for it."[41]

If Article 38.1 is applicable, it is suggested that if the trial judge finds that the gardaí acted unfairly or improperly (as distinct from unlawfully) in obtaining evidence against the accused, it would hardly be appropriate to allow the evidence be admitted. In these circumstances, the unfairness or impropriety would be the equivalent of an unlawful act on the part of the gardaí in the gathering of that evidence.

If these answers are correct they also point to the nature of the onus resting on both the prosecution and defence. In any criminal case, the prosecution are always obliged to prove beyond reasonable doubt that evidence was gathered in a lawful manner. This is the onus that would apply in an application to exclude evidence where entrapment is raised. The defence would be required to adduce or identify evidence raising a doubt about the lawfulness, fairness or propriety of the gardaí in the gathering of the evidence.[42] If they did so, the judge would have to exercise his discretion as to whether the evidence should be excluded which would, most likely, be the case.

The necessity for supervision

In spite of the limited use by the gardaí of entrapment procedures, there remains one area of potential controversy. This arises from the necessity for supervision of an operation.[43] In most cases, the gardaí can prove supervision through evidence that the operation was conducted under the direction of a senior officer.

Another element of supervision is the drawing up of codes or protocols governing these activities.[44] A trial court, having sight of the applicable protocol, should be able to measure the actual conduct of the officer against the contents of the documents governing the operations. However, it does not appear that such documents have been sought in any case before the Irish courts. If they are sought, it remains to be seen what claims of privilege will be made for them. ■

33 *Texeira de Castro v Portugal* 1998 E.H.R.R. 101 para 38.

34 In *R v Moon* ,in which the appellant was successful, the Court noted that there was only evidence of one deal given against the appellant and she had not previously been a suspect.

35 See *R v Looseley* [2001] 1 WLR 2060 at p 2064 para 27.

36 *Syon v Hewitt* [2008] 1 IR 168.

37 *R v Sang* [1980] AC 402.

38 The European Court of Human Rights in *Teixeira de Castro v Portugal* (1998) 28 EHRR 101 held, at para 34 of the decision, that the issue of the admissibility of evidence was a matter of national law.

39 *Ridgeway v R* (1995) 184 CLR 19; 3 LRC 273.

40 *Jones and Doyle v HM Advocate* [2009] ScotHC HCJAC 86. In this case the Court also held that entrapment was not a plea in bar in Scotland.

41 *Jones and Doyle v HM Advocate* [2009] ScotHC HCJAC 86 at para 12.

42 This appears to be in accordance with the views expressed by the Court of Criminal Appeal in *The People (DPP) v Smyth* [2010] 3 IR 688.

43 See *Texeira de Castro v Portugal* 1998 E.H.R.R. 101 and *R v Moon* [2004] EWCA Crim 2872.

44 See, for example, the protocols that have been reproduced in the judgments in *R v Looseley* [2001] 1 WLR 2060 at para 61; *Syon v Hewitt* [2008] 1 IR 168 at para 9; and *R v Moon* [2004] EWCA Crim 2872 at para 22.

Disciplinary Proceedings in the Health Professions and the European Convention on Human Rights

Cathal Murphy BL

The recent past has seen an explosion in legislation designed to govern the professions, in particular, the health professions. The Health and Social Care Professionals Act 2005, the Pharmacy Act 2007 and the Medical Practitioners Act 2007 are detailed pieces of regulatory legislation, which include comprehensive disciplinary procedures[1]. Unsurprisingly, there are significant similarities between these Acts in the manner in which they provide for disciplinary hearings to be conducted. Therefore, for the purposes of this article, I intend to refer to the provisions of the Medical Practitioners Act 2007 ("the 2007 Act") as illustrative of the general statutory regime that has been imposed across these professions.

The purpose of the legislation

The long title of the 2007 Act states that its primary purpose is *"… better protecting and informing the public in its dealings with medical practitioners"*. In pursuing that objective, the 2007 Act has introduced a more comprehensive regulatory regime than that imposed by the Medical Practitioners Act 1978, which was repealed by the 2007 Act. In particular, a more comprehensive disciplinary process is introduced. The 2007 Act provides that complaints will be considered, in the first instances by the Preliminary Proceedings Committee, which body will, in appropriate cases, send a complaint forward to the Fitness to Practise Committee ("the Committee"). Furthermore, the 2007 Act regulates the conduct of inquiries by the Committee. Of relevance for present purposes are the provisions of Section 65 of the 2007 Act, which states:

> "(1) The Fitness to Practise Committee shall, subject to sections 67 and 68, hear a complaint referred to it under section 63.
>
> (2) A hearing before the Fitness to Practise Committee shall be held in public unless–
>
> (a) following a notification under section 64, the registered medical practitioner or a witness who will be required to give evidence at the inquiry or about whom personal matters may be disclosed at the inquiry requests the Committee to hold all or part of the hearing otherwise than in public, and
>
> (b) the Committee is satisfied that it would be appropriate in the circumstances to hold the hearing or part of the hearing otherwise than in public."[2]

As can be seen, the 2007 Act imposes an obligation on the Committee to conduct its inquiries in public unless the conditions laid down in Section 65(2) are satisfied. Obviously, the making of a complaint against a medical practitioner is a serious matter. Even if a complaint is, ultimately, deemed to be not proven, the publicity surrounding a fitness to practise inquiry can itself be damaging to the medical practitioner's reputation. Accordingly, the majority of medical practitioners apply for an inquiry to be held in private. Consequently, the controversial issue to be considered is the obligation imposed on the Committee to satisfy itself that it *would be "… appropriate in the circumstances…"* to hold the hearing in private.

The European Convention on Human Rights Act 2003

Section 3(1) of the European Convention on Human Rights Act 2003 ("the 2003 Act") states the following:

> "Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions"

Section 1(1) of the 2003 Act defines "organ of the State" as including *"…a tribunal or any other body … which is established by law or through which any of the legislative, executive or judicial powers of the State are exercised."*

The Committee is established by the 2007 Act. Accordingly, it is a body established by law. Consequently, it is an organ of the State for the purposes of the 2003 Act. Therefore, pursuant to Section 3(1) of the 2003 Act, the Committee is obliged to perform its functions in a manner compatible with the State's obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention")

1 The Nurses & Midwives Bill 2010, which is making its way through the legislative process at present, will introduce a similar regulatory regime for these two professions.

2 For comparison, see Section 58 of the Health and Social Care Professionals Act 2005, Section 42 of the Pharmacy Act 2007 and Section 65 of the Nurses and Midwives Bill 2010.

The Convention

Article 8 of the Convention, entitled "Right to respect for private life and family life" states:

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

In *Campagnano v. Italy*[3], the European Court of Human Rights had occasion to consider the applicability of Article 8 of the Convention to an individual's professional life:

> "53. The Court observes that private life "encompasses the right for an individual to form and develop relationships with other human beings, including relationships of a professional or business nature" (see *C. v. Belgium*, 7 August 1996, § 25, Reports 1996-III). It also considers that Article 8 of the Convention "protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world" (see *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III) and that the notion of "private life" does not exclude in principle activities of a professional or business nature. It is, after all, in the course of their working lives that the majority of people have a significant opportunity of developing relationships with the outside world (see *Niemietz v. Germany*, 16 December 1992, § 29, Series A no. 251-B). Finally, the Court refers to its recent finding that a far-reaching ban on taking up private-sector employment did affect "private life" (see *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, § 47, ECHR 2004-VIII), particularly in view of Article 1 § 2 of the European Social Charter, which came into force in respect of Italy on 1 September 1999, and which states "[w]ith a view to ensuring the effective exercise of the right to work, the Parties undertake ... to protect effectively the right of the worker to earn his living in an occupation freely entered upon.
>
> 54. In the instant case the Court notes that the entry of a person's name in the bankruptcy register entails a series of personal restrictions prescribed by law, such as a prohibition on being appointed as a guardian (Article 350 of the Civil Code), a prohibition on being appointed as the director or trustee in bankruptcy of a commercial or cooperative company (Articles 2382, 2399, 2417 and 2516 of the Civil Code), exclusion ex lege from membership of a company (Articles 2288, 2293 and 2318 of the Civil Code), and the prohibition on carrying on the occupations of trustee in bankruptcy (Article 393 of the Civil Code), stockbroker (section 57 of Law no. 272 of 1913), auditor (Article 5 of Royal Decree no. 228 of 1937), or arbitrator (Article 812 of the Code of Civil Procedure). Further restrictions flow from the fact that the bankrupt, since he or she no longer enjoys full civil rights, cannot be registered as a member of certain professions (for instance as a lawyer, notary or business adviser). In the Court's view, restrictions of this kind, which would have affected the applicant's ability to develop relationships with the outside world, undoubtedly fall within the sphere of her private life (see, mutatis mutandis, *Sidabras and Džiautas*, cited above, § 48). Article 8 of the Convention is therefore applicable in the instant case."

Campagnano therefore makes clear that the protection afforded by Article 8 extends to an individual's professional life. Consequently, any interference with the rights protected under Article 8 must comply with the provisions of Article 8(2). Firstly, the interference must be in accordance with the law. Secondly, the interference must be necessary in a democratic society for the attainment of one, or more, of the aims specified in Article 8(2), i.e. national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals or the protection of the rights and freedoms of others.

Private Hearing

In light of *Campagnano*, the holding by the Committee of a fitness to practise inquiry in public undoubtedly constitutes interference, by an organ of the State, with a medical practitioner's right to respect for private life. Consequently, that interference must be compatible with Article 8(2) of the Convention. The holding of an inquiry in public is provided for in Section 65 of the 2007 Act. Accordingly, the interference is in accordance with the law within the meaning of Article 8(2). Therefore, it falls to be considered whether the interference is *"… necessary in a democratic society in the interests…"* of one, or more, of the aims specified in Article 8(2).In the present context, the only aims that the holding of a public inquiry could possibly achieve are public safety and the protection of health. Therefore, unless the Committee can satisfy itself that, in the circumstances of the inquiry before it, it is necessary in the interests of public safety or the protection of health to hold that inquiry in public, it is submitted that it is obliged, as an organ of the State, to accede to a request for the holding of a private inquiry.

Furthermore, in satisfying itself that it necessary in the interests of these aims to hold an inquiry in public, the Committee must also have regard to the provisions of Section 60(1) of the 2007 Act, which empowers the Medical Council to apply for the suspension of a medical practitioner in the following terms:

> "The Council may make an ex parte application to the Court for an order to suspend the registration of a registered medical practitioner, whether or not the practitioner is the subject of a complaint, if the Council considers that the suspension is necessary to

3 Application 77955/01, March 23rd 2006

> protect the public until steps or further steps are taken under this Part and, if applicable, Parts 8 & 9".[4]

As can been seen, an application can be made where it is necessary to protect the public. Accordingly, where such an application is not made, it must not be considered necessary for the protection of the public. Consequently, in any given case, where no application is made for a suspension order, no risk to the public must exist, or the risk must be considered sufficiently remote as not to warrant the making of an application for a suspension order. It follows that, if there is no risk to the public, or the risk is sufficiently remote, there is no justification within the meaning of Article 8(2) of the Convention for the interference, by way of a public inquiry, with the right to respect for private life of the medical practitioner the subject of the inquiry. Therefore, unless the Council has applied successfully for an order suspending a medical practitioner pending the determination of a complaint, the Committee must accede to a request for a private hearing as no risk to public safety or health exists such as to render the holding of a public inquiry compatible to Article 8(2) of the Convention.

Tension between Article 8 and Article 6 of the Convention

Some commentators have referred to the duties imposed on organs of the State by Article 6 of the Convention as obliging disciplinary bodies to hold inquiries in public[5]. Article 6, entitled "Right to a Fair Trial", provides 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 an 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."

However, in the context of an inquiry where a medical practitioner has applied for the hearing to be conducted in private, two points are noteworthy. Firstly, if a medical practitioner applies for a private hearing, he is clearly waiving his right to a public hearing. Consequently, there is no breach of Article 6. Secondly, in express terms, Article 6 provides for a derogation where the protection of the private life of the parties so require[6]. Accordingly, where a medical practitioner has applied for a private hearing on grounds that a public hearing would be an unjustifiable interference with his right to respect for private life protected under Article 8, the derogation provided for in Article 6 is engaged and the provisions of Article 8 take precedence over Article 6.

Conclusion

The Medical Practitioners 2007 Act provides that fitness to practise inquiries shall be held in public unless an application for a private hearing is made and the Committee is satisfied that, in the circumstances, it is appropriate to hold the inquiry in private.

The Committee is an organ of the State within the meaning of the European Convention on Human Rights Act 2003. Accordingly, it is obliged to perform its functions in a manner compatible with the Convention.

Article 8 of the Convention enshrines the right to respect for private life, which the European Court of Human Rights has interpreted as extending to cover an individual's professional life. Accordingly, the holding of a fitness to practise inquiry in public constitutes an interference with the right to respect for private life. Therefore, that interference must be compatible with Article 8(2) of the Convention. In the present context, that interference must be in accordance with the law and be necessary in a democratic society in the interests of public safety or the protection of health.

Section 60(1) of the Medical Practitioners Act 2007 empowers the Medical Council to apply for an order suspending a medical practitioner where it is deemed necessary for the protection of the public. If no order is applied for, this author submits that no risk to the public must exist, or the risk must be considered to be too remote to justify applying for a suspension order.

In my view, if there is no risk to the public, or the risk is considered to be too remote, then there is no justification for the holding of an inquiry in public as that interference with the right to respect for private life is not compatible with Article 8(2) being not necessary in the interests of any legitimate aim specified in Article 8(2) of the Convention, in particular, public safety or the protection of health. Accordingly, it is my conclusion, that where no successful application for a suspension order has been made, the Committee is obliged to deem it appropriate to hold the inquiry in private. ■

4 For comparison, see Section 60 of the Health and Social Care Professionals Act 2005 and Section 60 of the Nurses and Midwives Bill 2010.

5 Mills, "Disciplinary Procedures in the Statutory Professions", Bloomsbury Professional, para 5.40.

6 *Diennet v. France* (1996) 21 EHRR 554, para. 33: "Admittedly, the Convention does not make this principle an absolute one, since by the very terms of Article 6 para. 1 (art. 6-1), '... the press and public may be excluded from all or part of the trial in the interests of morals ..., where the ... protection of the private life of the parties so require[s], or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice'."

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A directory of legislation, articles and acquisitions received in the Law Library from the 13th October 2011 up to 18th November 2011
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COMPANY LAW

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Scheme of arrangement – Opposition by petitioner to scheme – Petitioner sole member of company – Payments made in course of examinership – Application to remove examiner – Whether proposal recommendation supported by facts – Whether removal of directors might be included in proposals – Whether conditional agreement with investor sufficient to ground confirmation of proposal – Whether scheme of arrangement might include compulsory transfer of shares by member – Whether property rights in shares with nil market value – Whether infringement of right to participate – Whether proposals were fair and equitable to member – Statutory interpretation – Contingent creditors – Whether continuing rights of guarantors after confirmation of scheme – *Vantive Holdings* [2009] IESC 68 [2010] 2 IR 118; *Cisti Gugan Barra Teoranta* [2008] IEHC 251 [2009] 1 ILRM 182; *Iarnrod Eireann v Ireland* [1996] 3 IR 321; *O Neill v Ryan* [1993] ILRM 557; *Foss v Harbottle* (1843) 2 Hare 461; *Prudential Assurance Co. Ltd v Newman Industries Ltd* (No. 2) [1982] Ch 204; *Blake v Attorney General* [1982] IR 117; *Byrne v Grey* [1988] IR 31; *Claim of Viscount Securities Ltd* (1978) 112 ILTR 17; *Re Traffic Group* [2007] IEHC 445 [2008] 3 IR 253; *Wogans (Drogheda) Limited* (Unrep, Costello J, 7/5/1992); *Re Selukwe Ltd* (Unrep, Costello J, 20/12/1991); *Re William Hockey Ltd* [1962] I WLR 555 and *County Bookshops Ltd v Grove* [2002] EWHC 1160 [2003] 1 BCLC 479 considered – *McEaney Construction Ltd* [2008] 3 IR 744 distinguished – Companies (Amendment) Act 1999, s.18, 19(h), 22, 23,24, 25, Companies Act 1963, s. 72 – Confirmation of scheme of arrangement refused (2009/677COS – Finlay Geoghegan – 5/3/2010) [2010] IEHC 57
Eylewood Limited (In Liquidation)

Share purchase agreement

Oral agreement – Legal and beneficial ownership of shares – Company owner of patents – Signed stock transfer form – Signature of defendant denied – Annual accounts not up to date – Late company returns – Absence of register of shares – Returns showing parties holding one share each not filed – Separate company established with equal shares to parties to promote products designed with patent – New company sole vehicle for marketing of patents – Resignation of defendant as director of new company – Disagreement over management – Break down in relationship – Defendant attempt repudiate agreement – Whether plaintiff held half of shares in company owning patent – Whether shares held in trust – Company returns filed by defendant purporting to show plaintiff neither director nor shareholder – Attempt remove plaintiff as director – Whether breach of agreement – Whether plaintiff remaining director of company – Whether failure to register transfer affected agreement to transfer – Companies Act 1963 (No 33), s 205 – Judgment for plaintiff (2004/14273P – Murphy J – 30/07/2010) [2010] IEHC 453
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– Significant materiality of new evidence – Banking syndicate participating in NAMA scheme – Likelihood of transfer company loans to NAMA – Long term receivership model unlikely to proceed – Balance of justice – Whether proceedings still alive – Whether strong reasons – Whether new evidence likely to have significant effect on court's considerations – Whether new evidence could reasonably have been put before court at initial hearing – *Lynagh v Mackin* [1970] IR 180; *Murphy v Minister for Defence* [1991] 2 IR 161; *Paulin v Paulin* [2009] EWCA Civ 221, [2010] 1 WLR 1057; *Cie Noga D'Importation et D'Exploration SA v Abacha* [2001] 2 All ER 513*; Millensted v Grosvenor House (Park Lane) Ltd* [1937] 1 All ER 736*; In re Vantive Holdings Ltd* [2009] IESC 69, [2010] 2 IR 118; *Henderson v Henderson* (1843) 3 Hare 100; *Dellway Investment Ltd v NAMA* [2010] IEHC 364, (Unrep, HC, 8/11/2010) and *A(A) v Medical Council* [2003] 4 IR 302 considered – Companies (Amendment) Act 1990 (No 27) – Matter reopened (2010/475COS – Clarke J – 21/1/2011) [2011] IEHC 25
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to plaintiff – Whether representations were negligent – Whether plaintiff suffered loss – Whether damages should be assessed as of date of breach – Whether grant to third party post dated sale of lands – Whether plaintiff carried out reasonable planning inquiries – Whether plaintiff delayed in discovering true position concerning distributor road – Whether plaintiff would have bought land without distributor road – Whether rescission available in cases of contracts induced by negligent misrepresentation – *Hedley Byrne v Heller* [1964] AC 465 followed; *Doran v Delaney* [1998] 2 IR 61; *Donnellan v Dungoyne* [1995] 1 ILRM 388; *McAnarney v Hanrahan* [1993] 3 IR 492; *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch 560; *Esso Petroleum Company Ltd v Mardon* [1976] QB 801; *Seddon v North Eastern Salt* [1905] 1 Ch 326; *Golden Strait Corporation v Nippon* [2007] UKHL 12, [2007] 2 AC 353; *Duffy v Ridley Properties Ltd* [2007] IESC 23, [2008] 4 IR 282; *Naughton v O'Callaghan* [1990] 3 All ER 191 considered – Judgment awarded (2010/2720P – Kelly J – 8/3/2011) [2011] IEHC 70
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CRIMINAL LAW

Arrest

Detention – Period extended – Direction for further detention made orally – Whether direction for further detention recorded in writing as soon as practicable – Whether detention unlawful – Account to be taken of particular facts and circumstances – Account to be taken of scale of investigation –*O'Brien v Special Criminal Court* [2008] 4 IR 514; *McC v Eastern Health Board* [1996] 2 IR 296; *Finnegan v Member in charge Santry Garda Station* [2007] 4 IR 62 considered –Criminal Justice Act 2007 (No 29), s 50 – Relief pursuant to article 40 refused (2067/2010 and 2068/2010 – Peart J – 10/11/2010) [2010] IEHC 469
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Assault causing harm

Joint venture – Indictment – Form of count on indictment – Judges charge – Whether form gave insufficient notice as to case applicant had to meet – Whether indictment should have referred to where and how injury was sustained – Whether indictment should have referred to kicks to head – Whether jury properly charged – *The People (DPP) v ED* [2006] IECCA 3, [2007] 1 IR 484; *Crean v Landy* [1981] 1 CLR 355 and *R v Galbraith* [1981] 1 WLR 1039 considered – Non-Fatal Offences against the Person Act 1997 (No 26), s 3 – Criminal Justice (Administration) Act 1924 (No 44) – Leave to appeal refused (23/2010 – CCA – 14/12/2010) [2010] IECCA 121
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Drink driving

Evidence – Description – Erratic driving observed by Garda – Garda left scene before arrival of arresting Garda – Arresting Garda did not observe driving – Insufficient evidence linking description to accused – Insufficient evidence accused committed or was committing offence of driving under the influence of an intoxicant – Application to dismiss – Request by prosecution for alternative conviction under Road Traffic Acts – Whether arresting Garda reasonable grounds to form requisite

opinion for arrest – Whether District Court judge correct in law in dismissing case on basis that arresting Garda could not reasonably have formed opinion required for arrest that accused committed or was committing offence of drunk driving – Whether judge correct in law in holding insufficient evidence to consider conviction under s 50 of the Road Traffic Act 1961 – Threshold for formation of reasonable suspicion – Whether arresting member entitled to have a reasonable cause to suspect based on what he is told – Whether High Court jurisdiction to determine matter given case stated procedure limited to points of law – *DPP (Garda O'Mahony) v O'Driscoll* [2010] IESC 42 (Unrep, SC, 1/7/2010) applied – *DPP v Gray* (Unrep, O'Hanlon J, 8/5/1987) followed – *DPP v Breheny* (Unrep, SC, 2/3/1993), *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] AC 286, *Proes v Revenue Commissioners* [1998] 4 IR 174, *DPP (Garda Lavelle) v McCrea* [2010] IESC 60 (Unrep, SC, 9/12/2010), *Hobbs v Hurley* (Unrep, Costello J, 10/6/1980) and *DPP (Hallinan) v Penny* [2006] 3 IR 553 considered – Summary Jurisdiction Act 1857 (c 43), s 2 – Courts (Supplemental Provisions) Act 1961 (No 39), s 51 – Road Traffic Act 1961 (No 24), ss 48, 49(4), 49(6)(a) & 50 – Road Traffic Act 1994 (No 7), s 10 – Road Traffic Act 2006 (No 23), s 18 – Case stated questions addressed (2010/1465SS – Kearns P – 4/2/2011) [2011] IEHC 40
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Evidence

Admissibility – Statement made prior to trial – Requirement that evidence be materially inconsistent – Requirement that evidence be voluntary and reliable – Sexual assault – Child witness – Whether statement admissible only in respect of organised crime offences – Whether statement that nothing was remembered was materially inconsistent for purposes of statute – Whether trial judge could rely on content of statement in deciding whether statement was voluntary and reliable and whether witness understood requirement to be truthful – Whether admission of statement would be unfair to the accused – *In re Haughey* [1971] IR 217; *Gill v Connellan* [1987] IR 541; *PS v Germany* (App No. 33900/96), (2001) 36 EHRR 1139 and *SN v Sweden* (App. No 34209/96), (2002) 39 EHRR 304 distinguished; *People (DPP) v Cronin (No 2)* [2006] IESC 9, [2006] 4 IR 329 considered – Criminal Justice Act 2006 (No 26), s 16 – Leave to appeal refused (200/2008 – CCA – 28/10/2010) [2010] IECCA 103
People (DPP) v O'Brien

Evidence

Burden of proof – Drugs – Possession of controlled drugs – Market value of drugs – Sample testing of packages for presence of drugs – Qualitative analysis only – Whether amount of controlled substance might be established by oral evidence of expert as to range within which amounts of controlled substance generally fell – *People (DPP) v Finnamore* [2008] IECCA 99, [2009] 1 IR 253 distinguished – Misuse of Drugs Act 1977 (No 12), ss 15 and 27 – Appeal allowed; no retrial ordered (478/2009 – SC – 15/11/2011) [2011] IESC 6
People (DPP) v Connolly

Evidence

Fingerprints – Admissibility – Applicant in prison following previous conviction – Fingerprints taken in prison – Fingerprints used in forming "reasonable suspicion" grounding application for arrest warrant – Whether fingerprints taken illegally and unconstitutionally – Whether statutory scheme empowered prison authorities to take fingerprints – Whether Rules *ultra vires* – Whether prison authorities empowered to retain fingerprints – Whether prison authorities empowered to disseminate fingerprints to An Garda Síochána – Whether fingerprints unlawfully used to secure arrest warrant – Whether arrest and detention tainted with unconstitutionality and illegality – Whether taking of fingerprints in breach of applicant's rights under European Convention of Human Rights – Whether trial judge's recharge of jury unfair and prejudicial – Whether trial judge erred in failing to direct jury to return verdict of not guilty in respect of murder charge – *People (Attorney General) v McGrath* (1965) 99 ILTR 59; *Hoffman-La Roche v Secretary of State for Trade and Industry* [1975] AC 295; *DPP v Cash* [2010] IESC 1, [2010] 1 IR 609; *People (DPP) v Shaw* [1982] 1 IR 1 considered – Rules for the Government of Prisons 1947 (SR&O 320/1947), r 12 – Regulations as to the Measuring and Photographing of Prisoners 1955 (SI 114/1955), regs 3, 4 & 5 – Rules for the Government of Prisons 1955 (SI 127/1955) – Prevention of Crime Act 1871 (c 112), s 6 – Penal Servitude Act 1891 (c 69), s 8 – Criminal Justice Act 1964 (No 5), s 4 – Criminal Justice (Miscellaneous Provisions) Act 1997 (No 4), s 19 – European Convention on Human Rights Act 2003 (No 20), ss 2 & 4 – Prisons Act 2007 (No 10), s 35 – Constitution of Ireland 1937 – European Convention on Human Rights, art 8 – Leave to appeal refused (53/2007 – CCA – 28/10/2010) [2010] IECCA 114
People (DPP) v Wade

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Hostile witness – Procedure – Pre-trial statement – Cross–examination of hostile witness – Extent of cross–examination permitted – Statement admitted in evidence – Whether prosecution inhibited from cross-examining with object of persuading witness to stand by previous statement – Purpose of cross-examination of hostile witness – Duty to furnish relevant evidence – Whether relevant photograph withheld – Refusal of requisitions – Benefit of doubt – Alleged jury irregularity – Separation of jurors – Whether minimum period for deliberations had elapsed prior to permission for majority verdict – *People (Attorney General) v Taylor* [1974] IR 97 distinguished – Criminal Procedure Act 1865 (28 & 29 Vict, c 18), s 3 – Juries Act 1976 (No 4), s 25 – Criminal Justice Act 2006 (No 26), s 16 – Civil Law (Miscellaneous Provisions) Act 2008 (No 14), s 58 – Leave to appeal refused (164/2009 – CCA – 27/20/2010) [2010] IECCA 101
People (DPP) v Hanley

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Remedy – Nature of *certiorari* – Function of court in judicial review –Discretionary nature of judicial review – Fair procedures –Impact of absence of stenographer on fairness of trial – Onus on judge regarding cross-examination – Bias – Test of bias – Double jeopardy – Purpose of rule of double jeopardy – Principle of continuity in hearing of criminal trials – Whether refusal to hear matters as preliminary issues breach of fair procedures – Whether refusal to direct stenographer attend at hearing breach of fair procedures – Whether curtailment of cross-examination breach of principle *audi alteram partem* – Whether bias on part of first respondent – Whether double jeopardy in circumstances where High Court had quashed previous conviction order and remitted case back to District Court for re-hearing – *O'Broin v District Justice Ruane [1989] 1 IR 214; Burke v Judge Martin* [2009] IEHC 441, (Unrep, Edwards J, 9/10/2010) considered – *State (Daly) v Ruane [1988] ILRM 117*; *O'Neill v McCartan* [2007] IEHC 83, (Unrep, Charleton J, 15/3/2007); *Costigan v Brady* [2004] IEHC 16, (Unrep, Quirke J, 6/2/2004); *Burke v Fulham* [2010] IEHC 448 (Unrep, Irvine J, 23/11/2010); *Tracey v Malone* [2009] IEHC 14, (Unrep, Cooke J, 20/1/2009) approved – *State (Hegarty) v Winters* [1956] 1 IR 320; *Director of Public Prosecutions v Special Criminal Court [1999] 1 IR 60*; *People (Attorney General) v McGlynn* [1967] 1 IR 232 applied –Protection of Animals Act 1911 (1911 1 & 2 Geo 5 c 27) – Protection of Animals Kept for Farming Purposes Act 1984 (No 13) – Control of Dogs Act 1986 (No 32) – European Communities (Protection of Animals Kept for Farming Purposes) Regulations 2000 (SI 127/2000), reg 7– European Convention on Human Rights 1950 – Application dismissed (2010/25JR – Irvine J – 23/11/2010) [2010] IEHC 452
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Legal aid

Refusal – Minor – Public order offence – Remand for preparation of probation report – Alleged failure to apply legislative provisions – Alleged failure to have regard to means or age – Alleged failure to interpret Act in manner consistent with Convention – Legal representation throughout trial – Whether breach of right to fair procedures – *The State (Healy) v Donoghue* [1976] IR 325; *O'Neill v Butler* [1979] ILRM 243; *Carmody v Minister for Justice* [2009] IESC 71, (Unrep, SC, 23/10/2009*); Director of Public Prosecutions (Kearns) v Maher* [2004] 3 IR 512; *Costigan v Brady* [2004] IEHC 16 (Unrep, Quirke J, 6/2/2004); *Joyce v Brady* [2007] IEHC 149, (Unrep, Feeney J, 24/4/2007) and *Poitrimil v France* (1993) EHRR 130 considered – Criminal Justice (Legal Aid) Act 1962 (No 12), s 2 – European Convention on Human Rights Act 2003 (No 20), s 2 – Relief refused and matter remitted to District Court for sentencing (2009/818JR – Hanna J – 18/2/2011) [2011] IEHC 64
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Proceeds of crime

Freezing orders – Discharge or vary– Circumstances applicable at time of application – Onus on respondents – Evidence regarding source of funds – Public policy – Assets belonging to third party – Standard of proof – Balance of probabilities – Property rights – Property in control of receiver – Delay – Entitlement to instigate application – Prejudice – Proportionality – Whether any part of property not proceeds of crime – Whether order caused injustice – Whether property funded from personal injury settlement – Whether property funded from unfair dismissal award – Whether property funded by loan funds – Whether property funded by gambling profits – False averments – Whether part of purchase price from identifiable legitimate source – Personal circumstances – Right to private life – Balancing exercise – *Murphy v Gilligan* [2008] IESC 70, [2009] 2 IR 271; *M(MF) v C(M)* (Unrep, Finnegan P, 26/4/2002); *M(MF) v M(B)* [2006] IEHC 396; (Unrep, Finnegan P, 3/11/2006); *Murphy v M(G)* (Unrep, O'Higgins J, 4/6/1999); *Murphy v GM* [2001] 4 IR 113; *Nestor v Murpy* [1979] IR 326; *McK v F & F* (Unrep, Finnegan P, 24/2/2003); *McK v D(M)* (Unrep, Finnegan P, 3/3/2003); *People (Director of Public Prosecutions) v Gilligan* [2005] IESC 78 [2006] 1 IR 107; *People (Director of Public Prosecutions) v Gilligan (No 3)* [2006] IESC 42, [2006] 3 IR 273; *McIntosh v Lord Advocate* [2001] 3 WLR 107; *Criminal Assets Bureau v O'B* [2010] IEHC 12, (Unrep, Feeney J, 12/1/2010) considered – Proceeds of Crime Act 1996 (No 30), ss. 2, 3 and 8 – 3 out of 4 orders refused; Finding that part of one property funded by legitimate funds (1996/10143P – Feeney J – 27/1/2011) [2011] IEHC 62
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Road traffic offences

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DPP v O'Neill

Road traffic offences

Driving without insurance –Approved policy of insurance – International motor insurance card – Green card – Temporarily imported vehicles – State of vehicle registration – Whether vehicle registered in Ireland and insured by unapproved policy covered by green card – Whether green card defence to offence of driving without insurance – *Jacobs v Motor Insurers Bureau* [2010] EWHC 231 considered – Courts of Justice Act 1947 (No 20), s 16 – Road Traffic Act 1961 (No 24), ss 56, 58, 62 and 78– Road Traffic Act 2002 (No 12), s 23 –European Communities Road Traffic (Compulsory Insurance) Regulations 1975 (SI 178/1975) – European Communities Road Traffic (Compulsory Insurance) (Amendment) Regulations 1987 (SI 322/1987) – European Communities Road Traffic (Compulsory Insurance) (Amendment) Regulations 1992 (SI 347/1992) – European Communities Motor Insurance Regulations 2008 (SI 248/2008) – Directive 72/166/EEC –Directive 84/5/EEC – Directive 90/232/EEC – Directive 2000/26/EC – Directive 2009/103/EC – Consultative case stated answered in negative (195/2007 – SC – 2/2/2010) [2011] IESC 3
DPP v Leipina and Suhanovs

Sentence

Assault causing harm – Damage to victim – Guilty plea – Unhelpful at interview – Captured on CCTV – Evidence events out of character – Alcohol – Blame directed to victim for not alerting Gardaí – Whether faced up to responsibility for actions – Medium risk of re-offending – One previous conviction – Father to four children – Long term partner – Remorse payment – Four year sentence – Whether error in principle – Non-Fatal Offences Against the Person Act 1997 (No 26), s 3(1) – Criminal Justice Act 1984 (No 22), s 13 – Criminal Justice (Public Order) Act 1994 (No 2), ss 6 & 8 – Leave to appeal refused (303/09 – CCA – 14/12/2010) [2010] IECCA 119
People (DPP) v Gray

Sentence

Community service order – Appropriate sentence of imprisonment – Respondent remorseful – Respondent in full time employment – Respondent from stable family – Whether Criminal Justice (Community Service) Act 1983 intended to cover all range of possible sentences other than where sentence fixed by law – Whether appropriate to impose community service order on respondent – Criminal Justice (Community Service) Act 1983 (No 23), ss 2, 3 & 8 – Community service order of 240 hours imposed (305/2008 – CCA – 2/12/2010) [2010] IECCA 115
People (DPP) v Carroll

Sentence

Manslaughter – Road traffic accident – Two counts – Seven years – Whether error in principle – Failure by trial judge to indicate where on scale of seriousness of offences of particular type particular offence of which accused convicted fell – Reference during sentencing by trial judge to unusual decision of DPP – Whether sentence appropriate notwithstanding error – Whether adequate consideration given for fact appellant owned up to offence and admitting being driver – Suspension of last two years of sentence– *The People (DPP) v M* [1994] 3 IR 306 followed– Sentence reduced (87/09 – CCA – 14/12/2010) [2010] IECCA 118
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Sentence

Rape – Ten year sentence – Mitigating circumstances – Regret, shame and remorse shown – Guilty plea – Acceptance of responsibility – No previous convictions – Low risk of re-offending – Personal circumstances of applicant – Aggravating factors – Frequency of offences – Effect on victim – Breach of trust – Whether error of principle – Whether mitigating circumstances taken into account – Whether aggravating circumstances overstated – Leave to appeal refused (310/2009 – CCA – 14/12/2010) [2010] IECCA 120
People (DPP) v Cunningham

Sentence

Reactivation – Suspended – Prohibition to restrain application to revoke suspended sentence – Conviction for production of article capable of causing serious injury – Appeal -Possibility of reactivation of earlier suspended sentence – Remand of matter to Circuit Court – Whether District Judge had jurisdiction to remand matter to Circuit Court – Whether District Judge *functus officio* – Inability to appeal against conviction alone to Circuit Court – Necessity for sentencing prior to appeal – Whether right to fair procedures mandated stay on procedure until appeal completed – Mandatory nature of procedure – Obligation to remand applicant to Circuit Court – Appeal against reactivation of sentence – *Quia timet* – Power of Circuit Court to uphold rights to fair procedures – Discretion of Circuit Court to enable appeal to be pursued – *State (Aherne) v Cotter* [1982] IR 188; *Muntean v District Judge Hamill* [2010] IEHC 391, (Unrep, McCarthy J, 6/5/2010); *Burke v Director of Public Prosecutions* [2007] IEHC 121 [2007] ILRM 371; *Harvey v District Judge Leonard* [2008] IEHC 209, (Unrep, Hedigan J, 3/7/2008); *Blanchfield v*

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Sharlott v District Judge Collins

Trial

Fair procedures – Stay – Seisin – Jurisdiction – Constitutional challenge to statutory provisions – No stay on prosecution – Jurisdiction of District Court judge to direct psychiatric treatment – Whether judge other than first respondent had seisin of case – Whether respondent had jurisdiction to hear case prior to determination of constitutional challenge – Whether psychiatric treatment part of order of first respondent – *Burke v Martin* [2009] IEHC 441, (Unrep, Edwards J, 9/10/2010) approved– Criminal Damage Act 1991 (No 31), s 2 – Application refused (2009/1070JR – Irvine J – 23/11/2010) [2010] IEHC 449
Burke v Judge Hamill

Trial

Fair procedures – Witness – Failure to attend – Failure to attach – Transcript – Stenographer – Cross-examination – Animal welfare – District Court appeal – Absence of transcript – Documentary evidence excluded – Whether applicant denied fair trial where failure to exclude witness from court other than when giving evidence – Whether first respondent biased against applicant – Whether custodial sentence unlawful – Whether first respondent obliged to consider if applicant able to pay fine before imposing custodial sentence – Whether unconstitutional to impose fine where fine already prepaid through seizure of livestock – Whether convictions should be quashed due to lack of evidence – Whether convictions should be quashed due to alleged confusion of first respondent – *Isaac Wunder* order – Applicant using judicial review proceedings to frustrate proceedings in District Court and Circuit Court – Whether necessary to impose *Isaac Wunder* order – *Tracey v Judge Malone* [2009] IEHC 14 (Unrep, Cooke J, 20/01/2009); *Riordan v Ireland (No 4)* [2001] 3 IR 365 considered – European Communities (Protection of Animals Kept for Farming Purposes) Regulations 2000 (SI 127/2000), reg 7 – Relief refused, *Isaac Wunder* order imposed (2009/791JR – Irvine J – 23/11/2010) [2010] IEHC 448
Burke v Judge Fulham

Trial

Procedure – Amendment of indictment – Timing of amendment of indictment – Extent of amendment of indictment – Prejudice to accused – Discretion of trial judge – Marrying of counts with evidence – Whether any time limit to amendment of indictment – Whether any limit to extent of amendment of indictment – *R v Smith* [1951] 1 KB 53, *R v McVitie* [1960] 2 QB 483, *R v Johal and Ram* [1973] QB 475, *R v Chuah* [1991] Crim LR 463, *R v Dossi* (1918) 13 Cr App R 158, *R v Dossi* (1918) 13 Cr App R 158, *People (DPP) v EF* (Unrep, SC, 24/2/1994) and *DO'R v DPP* (Unrep, Kelly J, 27/2/1997) considered – Criminal Justice (Administration) Act 1924 (No 44), s 6 (1) – Leave to appeal refused (200/2009 – CCA – 21/7/2010) [2010] IECCA 80
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Breach of contract

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Personal injuries

Assessment – Road traffic accident – Soft tissue injuries – Inability to continue job – Future loss of earnings – Appropriate multiplier – Pregnant at time of accident – Slow recovery – Anxiety – Depression – Evidence of private investigator – Whether plaintiff had pre-existing injuries – Whether depression was postnatal depression – Whether plaintiff would fully recover from injuries – Whether suitable employment available – Whether plaintiff exaggerated injuries – *Reddy v Bates* considered – Damages awarded (2008/6203P – McMahon J – 26/1/2011) [2011] IEHC 35
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Personal injuries

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Fogarty v Hannon

Personal injuries

Workplace accident – Negligence – Prohibition on identification of plaintiff – Plaintiff suffered serious burns on 50% of his body – Blood transfusion – Cryoprecipitate received from donor who contracted vCJD within weeks of donation – Death of donor within 12 months of donation – Risk of plaintiff contracting vCJD – Post traumatic stress disorder – Plaintiff suffering anxiety and depression from fear of contracting vCJD – Plaintiff's fears neither contrived nor overstated – Lack of independent evidence based research on actual risk to plaintiff's health – Proof of damage essential component of recovery in negligence – Proposal of provisional payment award rejected by defendants – Appropriate to permit plaintiff to return to court in future if vCJD contracted – Court not permitted to compensate plaintiff for possibility as opposed to probability of developing fatal disease – *Rothwell v Chemical & Insulating Co Ltd* [2008] AC 281 considered – Civil Law (Miscellaneous Provisions) Act 2008 (No 14), s 27 – Damages awarded (2006/5372P – Clark J – 31/1/2011) [2011] IEHC 88
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EMPLOYMENT

Duty of care

Contract for services – Contract of service – Nature of work relationship – Mutuality of obligation – Whether employee or independent contractor – Reasonable foreseeability – Risk of violence – Whether risk of harm to plaintiff obvious or foreseeable – Risk of infection – Fear of infection with sexually transmitted disease – Reasonableness of fear – Understanding of risk – Probability of infection – Medical practitioner – Whether fear of contracting sexually transmitted disease reasonable – *Minister for Agriculture and Food v Barry* [2008] IEHC 216, [2009] 1 IR 215 applied; *Henry Denny & Sons (Ireland) Ltd v Minister for Social Welfare* [1998] 1 IR 34 considered; *Hall v Kennedy* (Unrep, Morris J, 20/12/1993), *Walsh v Ryan* (Unrep, Lavan J, 12/2/1993), *Bates v Minister for Justice* [1998] 2 IR 81, *Kavanagh v Governor of Arbour Hill Prison* (Unrep, Morris J, 22/4/1993) and *Boyd v Ireland* (Unrep, Budd J, 13/5/1993) and *Carey v Minister for Finance* [2010] IEHC 247, (Unrep, Irvine J, 15/6/2010) followed – Claim dismissed (2003/2141P – Lavan J – 4/10/2010) [2010] IEHC 389
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Jurisdiction – Remitted claim – Successful judicial review – Claim returned to Tribunal – Additional evidence heard – Tribunal finding that were instructed by court to change original determination – Second determination reversal of first – Whether sufficient mutuality of obligation – Whether Tribunal erred in reversing previous determination – Whether second determination correct in law – Whether remittal of claim *simpliciter* or with direction to reverse determination – Whether matter of law or fact or both – Whether Tribunal obliged to make own decision in light of court findings – Obligation on administrative tribunal to apply law as determined by appellate court – Whether Tribunal divested itself of statutory authority to make determination in remitted proceedings – Whether additional evidence addressed error of law – Question of law – Onus on appellant – Relevance of code of practice – Status of contracts –Whether contract of or for services – Determination status of employees – *Minister for Agriculture v Barry* [2008] IEHC 216 [2009] 1 IR 215 and *O'Kelly v Trusthouse Forte plc* [1984] QB 90 followed – *Henry Denny and Sons (Ireland) Ltd v Minister for Social Welfare* [1998] 1 IR 34 and *National University of Ireland Cork v Alan Ahern* [2005] 2 IR 577 considered – Redundancy Payments Acts 1967 (No 21), ss 39(14) and 40 – Minimum Notice and Terms of Employment Act 1973 (No 4), s 11(2) – Relief refused (2009/1132Sp – Hedigan J – 9/2/2011) [2011] IEHC 43
Barry v Minister for Agriculture

Reduction in allowance

Defence forces – Motor travel and subsistence rates – Decline in economic circumstances – Conciliation and arbitration scheme – Constitutional mandate of government – Whether second respondent entitled to reduce allowance without first engaging within framework of conciliation and arbitration scheme – Legitimate expectation – Whether legitimate expectation that second respondent would first engage within framework of conciliation and arbitration scheme – Whether deduction in pay – Whether issue of deduction in pay justiciable – *Glencar Explorations plc v Mayo County Council (No 2)* [2002] 1 IR 84; *Curran v Minister for Education and Science* [2009] IEHC 387, [2009] 4 IR 300 considered – Defence Act 1954 (No 18), s 97 – Payment of Wages Act 1991 (No 25), s 5 – Constitution of Ireland 1937, art 28.2 – Application refused (2009/551JR – Edwards J – 30/11/2010) [2010] IEHC 461
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EUROPEAN UNION

Free movement of persons

Residence card – Spouse of resident and working EU citizen – Refusal of application for residence card – Request for review – Request for submission of documentary proof of residence – Entitlement of Minister to request proof – Good reason for querying discrepancy in addresses – Duty on Minister to make necessary inquiries to resolve discrepancies and given decision on review within reasonable time – Availability of administrative review facility – *N(BN) v Refugee Applications Commissioner* [2008] IESC 308, (Unrep, Hedigan J, 9/10/2008) and *D(A) v Refugee Applications Commissioner* [2009] IEHC 77, (Unrep, Cooke J, 27/1/2009) considered – *Mandamus* granted (2009/1271JR – Cooke J – 28/1/2011) [2011] IEHC 29
Menkari v Minister for Justice, Equality and Law Reform

Sincere cooperation

Commission approval – NAMA – Loans acquired – Impaired borrower – Eligible bank assets – Whether Commission's approval of NAMA scheme contained requirement that only loans to impaired borrowers would be acquired – Whether NAMA acting *ultra vires* – Court bound by principle of sincere co-operation – *Grad v Finanzamt Traunstein* [1970] ECR 825; *Telaustria Verlags GmbH Telefonadress GmbH v Telekom Austria AG* [2000] ECR –I 10745; *R v Licensing Authority, ex parte Generics* [1998] ECR –I 7967; *Grimaldi v Fonds des Maladies Professionnelles* [1989] ECR 4407; *Alassini v Telecom Italia SPA* [2010] 3 CMLR 17; *Nationale Raad van de Orde van Architecten v Ulrich Egle* [1992] ECR I- 177; *Deutsche Shell AG v Hauptzollamt Hamburg-Harburg* [1993] ECR I-363; *Van Gend en Loos* [1963] ECR 1; *Becker v Finanzamt Munster-Innenstadt* [1982] ECR 53 and *Costa v ENEL* [1964] ECR 585 considered–

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EVIDENCE

Expert witness

Statutory provision – Leave of court required to adduce expert evidence – Material disadvantage in cross-examination – Right to silence – Inequality of arms – Whether provision unconstitutional – Whether provision incompatible with European Convention on Human Rights Declaration – Whether proceedings premature in absence of refusal by any court to adduce evidence – Expert report commissioned but not available at leave hearing – No obligation to call unhelpful evidence – Importance of continuity of criminal proceedings – Whether leave requirement a procedural disadvantage – Different obligations on sides in criminal trial – Duty of judge – Legal privilege – Proportionality of interference – *DPP v Special Criminal Court* [1999] 1 IR 60 and *Fitzgerald v DPP* [2003] 3 IR 247 applied – *Kennedy v DPP* [2007] IEHC 3 (Unrep, MacMenamin J, 11/1/2007), *Malcolm v DPP* [2007] 1 WLR 1230, *Murray v UK* [1996] 22 EHRR 29, *Averill v UK* [2001] 31 EHRR 36 and *Salabiaku v France* [1991] 13 EHRR 379 followed – *Williams v Florida* (1970) 399 US 78 and *Writtle v Director of Public Prosecutions* [2009] EWHC 236 (Admin) (Unrep, Court of Appeal, 20/1/2009) approved – *Director of Public Prosecutions v Mackin* [2010] IECCA 81/82 (Unreported, CCA, Hardiman J, 19/7/2010), *Hardy v Ireland* [1994] 2 IR 550, *O'Leary v Attorney General* [1995] 1 IR 254 and *Rock v Ireland* [1997] 3 IR 484 considered – *JF v Director of Public Prosecutions* [2005] IESC 24 [2005] 2 IR 174, *O'Callaghan v Mahon* [2005] IESC 9 [2006] 2 IR 32 and *Bonisch v Austria* [1985] 9 EHRR 191 distinguished – Criminal Procedure Act 2010 (No 27), s 34 – European Convention on Human Rights, Art 6 – Relief refused (2010/1228JR – Kearns P – 4/2/2011) [2011] IEHC 39
Markey v Minister for Justice

EXTRADITION

European arrest warrant

Acquittal — Finally judged – Grounds for mandatory non-execution of arrest warrant – Whether acquittal bar on commencement of further criminal proceedings – Judgment of acquittal not final judgment – Acquittal not procedural obstacle to opening or continuation of criminal proceedings – *Criminal Proceedings against Pupino (Case C-105/03)* [2005] ECR I-5285; *Pheysey v Pheysey* 12 Ch D 305; *McKinney (Inspector of Taxes) v Hagans Caravans (Manufacturing) Limited* [1997] NI 111; *Minister for Justice v Altaravicius* [2006] 3 IR 148; *Minister for Justice v Stapleton* [2008] 1 IR 669; *R v Gozutok and Brugge* [2003] CMLR 2; *Van Esbroeck* [2006] 3 CMLR 6; Case C-491/07 *Turansky* [2008] ECR 1-11039 and *Van Stratten v Netherlands* [2006] ECR 1-9327 considered– European Arrest Warrant Act 2003 (No 45), ss 22 and 41 – Criminal Justice (Terrorist Offences) Act 2005 (No 2), s 80 – United Kingdom Criminal Justice Act 2003, s 76 – Council Framework Decision (2002/584/JHA), art 3 – Schengen Agreement, article 54 – Surrender affirmed (104/10 – Finnegan J – 11/2/2011) [2011] IESC 5
Minister for Justice v Renner-Dillon

European arrest warrant

Bail – Jurisdiction to grant – Whether inherent jurisdiction – Application for surrender to serve balance of sentence – Criteria for convicted persons – Whether presumption in favour of bail – Whether real and significant risk of prisoner absconding – Restrictions and conditions attaching to grant of bail – *People (DPP) v Corbally* [2001] 1 IR 180 distinguished – *People (AG) v Gilliland* [1985] IR 643, *People (AG) v O'Callaghan* [1966] IR 501, *Minister for Justice, Equality and Law Reform v Ostrovskij* [2005] IEHC 427 (Unrep, Peart J, 20/12/2005) and *People (DPP) v Connaughton* (Unrep, CCA, 17/12/1999) considered – European Arrest Warrant Act 2003 (No 45), s 16 – Bail refused (2010/383EXT – Edwards J – 10/2/2011) [2011] IEHC 45
Minister for Justice, Equality and Law Reform v Zielinski

European arrest warrant

Correspondence – Additional information – Suspended sentences revoked – Probation supervision – Good behaviour and non-offending inferred as conditions of probation – Requirement to notify probation supervisor of change of address and requirement to stay in contact with probation supervisor inferred as conditions of probation – Whether respondent fled from requesting state – Respondent not present at hearings when suspended sentences revoked – Whether hearing for revocation of suspended sentence within definition of 'trial' for purposes of s 45 of Act of 2003 – Whether respondent notified of hearings for revocation of suspended sentences – Family rights – Private rights – Whether surrender of respondent incompatible with respondent's right to respect for private and family life – *Minister for Justice, Equality and Law Reform v Tobin* [2008] IESC 3, [2008] 4 IR 42; *Minister for Justice, Equality and Law Reform v Stankiewicz* [2009] IESC 79 (Unrep, SC, 1/12/2009); *Minister for Justice, Equality and Law Reform v Sliczynski* [2008] IESC 73 (Unrep, SC, 19/12/2008); *Minister for Justice, Equality and Law Reform v Slonski* [2010] IESC 19 (Unrep, SC, 25/3/2010); *Minister for Justice, Equality and Law Reform v Gorman* [2010] IEHC 210 (Unrep, HC, Peart J, 22/4/2010); *Minister for Justice, Equality and Law Reform* [2009] IESC 76 (Unrep, SC, 18/11/2009) considered; *Minister for Justice, Equality and Law Reform v McCague* [2008] IEHC 154, [2010] 1 IR 456 followed – European Arrest Warrant Act 2003 (No 45), ss 10, 16, 37 & 45 – Council Directive 2002/584/JHA, art 5.1 – European Convention on Human Rights, art 8 – Order for surrender granted (2009/120EXT – Edwards J – 18/3/2011) [2011] IEHC 106
Minister for Justice, Equality and Law Reform v Ciechanowicz

European arrest warrant

Correspondence – European framework list – Principle of double criminality – Tax fraud – Money laundering – Conspiracy – Certainty of criminal offence – Whether internal conflict within warrant – Whether dual criminality could be established in terms of Irish law – Whether corresponding offence of conspiracy to cheat the Revenue – Whether circumstances of offence specified in warrant – *Attorney General v Hilton* [2004] IESC 51, [2005] 2 IR 374 followed – *Minister for Justice, Equality and Law Reform v Desjatnikovs* [2008] IESC 53, [2009] 1 IR 618; *People (DPP) v Cagney and McGrath* [2007] IESC 46, [2008] 2 IR 111; *Attorney General v Cunningham* [1932] IR 28; *King v The Attorney General* [1981] IR 233; *R v Hudson* [1956] QBD 252; *R v Bembridge* [1783] 22 State Trials 1 and *R v Mayji* [1987] WLR 1388 considered – European Arrest Warrant Act 2003 (No 45), ss 11 and 13 – Criminal Justice (Terrorist Offences) Act 2005 (No 2), s 72 – Council Framework Decision (2002/584/JHA), art 2.2 – Respondent's appeal allowed (20/2009 – SC – 21/12/2010) [2010] IESC 61
Minister for Justice, Equality and Law Reform v Tighe

European arrest warrant

Correspondence – Making gain or causing loss by deception — Essential element of corresponding offence not disclosed in warrant– Whether facts disclose offence of perverting course of justice – Conspiracy to pervert course of justice contrary to common law – Whether sufficient to establish what is alleged to have been done would constitute offence in this jurisdiction –Criminal Justice (Theft and Fraud Offences) Act 2001 (No), ss 2 and 6 – European Arrest Warrant Act 2003 (No 45), ss 21A, 22, 23and 24 – Surrender ordered (2010/39ext and 2010/201ext – Peart J – 18/1/2011) [2011] IEHC 12
Minister for Justice v Marciszewski

European arrest warrant

Documents – Provenance – Additional information ostensibly from issuing state and issuing authority – Whether necessary for applicant to prove how documents came into his possession – Whether necessary for applicant to provide sworn evidence of formal invocation of s 20 – Whether court entitled to receive additional information where not on affidavit or in other receivable form prescribed in s 20(3) of Act of 2003 – Hearsay – Whether court entitled to receive additional information where hearsay – Prison conditions in issuing state – Human rights and fundamental freedoms – Inhuman or degrading treatment – Whether substantial grounds for believing that respondent would be exposed to real risk of being subjected to inhuman or degrading treatment if returned to issuing state – *Minister for Justice, Equality and Law Reform v Ward* [2008] IEHC 53 (Unrep, HC, Peart J, 4/3/2008) followed; *Minister for Justice, Equality and Law Reform v Sliczynski* [2008] IESC 73 (Unrep, SC, 19/12/2008) applied; *Minister for Justice, Equality and Law Reform v Stapleton* [2007] IESC 30, [2008] 1 IR 669; *Minister for Justice, Equality and Law Reform v Rettinger* [2010] IESC 45 (Unrep, SC, 23/7/2010) considered – European Arrest Warrant Act 2003 (No 45), ss 16, 20 & 37 – Council Directive 2002/584/JHA – European Convention on Human Rights, art 3 – Order for surrender granted (2008/205&206EXT & 2010/191EXT – Edwards J – 4/2/2011) [2011] IEHC 41

Minister for Justice, Equality and Law Reform v Sawczuk

European arrest warrant

Flee – Interpretation – Sentence *in absentia* – Notification – Whether respondent fled Poland – Road Traffic Act 1961 (no 24), s 38 – European Arrest Warrant Act 2003 (no 45), ss 10, 21A, 22, 23, 24 and 45 – Order for surrender refused (2009/289Ext – Peart J – 24/11/2010) [2010] IEHC 471

Minister for Justice, Equality and Law Reform v Piskunowicz

European arrest warrant

Legal aid – Whether requested person entitled to legal aid as of right – Whether Attorney General's Scheme satisfies rights – Whether Attorney General has discretion to provide legal aid – Whether surrender permissible where final decision to prosecute for offences in European arrest warrant not made – Whether surrender permissible where investigation continuing – *Minister for Justice v McArdle* [2005] IESC 76, [2005] 4 IR 260 followed; *Carmody v Minister for Justice* [2009] IESC 71, [2010] 1 ILRM 157 and *The State (Healy) v Donoghue* [1976] IR 325 approved – European Arrest Warrant Act 2003 (No 45), ss 10, 13(4) and 21A – Council Framework Decision (2002/584/JHA), recital 10, articles 1(1) and 11(2) – Respondent's appeal dismissed (54/2008 – SC – 13/1/2011) [2011] IESC 1

Olsson v Minister for Justice

European arrest warrant

Minimum gravity – Correspondence – Theft offences – Point of objection – Alleged unreasonable prosecutorial delay – Prosecution – Whether surrender prohibited as incompatible with State's obligations under Convention or Constitution – Alleged denial of right to fair trial within reasonable period of time – Entitlement to effective remedy – Alleged failure to respect right to family and private life – Delay to be assessed in circumstances of case – Principle of mutual recognition of judicial decisions and mutual trust of legal systems – Whether issue of delay more appropriately litigated in requesting state – Evidential burden on respondent to displace presumption that effective remedy available in requesting state – *Minister for Justice, Equality and Law Reform v Stapleton* [2007] IESC 30 [2008] 1 IR 669; *H v France* (1990) 12 EHRR 74; *Stogmuller v Austria* (1979-80) 1 EHRR 155; *Zimmermann v Switzerland* (1984) 6 EHRR 17; *Guincho v Portugal* (1985) 7 EHRR 223; *Muti v Italy* (1994) A 281-C; *Sussman v Germany* (1998) 25 EHRR 64; *Reid v United Kingdom* (2003) 37 EHRR 21; *Abdoella v Netherlands* (1992) 20 EHRR 21; *Albo v Italy* (2006) 43 EHRR 27; *Simonavicius v Lithuania* (App No 37415/02), (27/6/2006); *Altun v Turkey* (App No 66354/01) (19/10/2006); *Apicella v Italy* (App No 64890/01)(29/3/2006); *Mitchell v United Kingdom* (App No 44808/98)(17/12/2002); *McFarlane v Ireland* (App No 31333/06)(10/9/2010); *Philis v Greece* (No 2)(1997) 25 EHRR 417; *Giannangeli v Italy* (App No 41094/98)(5/7/2001); *Porter v Magill* [2002] 2 AC 357; *PM v Malone* [2002] 2 IR 560; *PM v Director of Public Prosecutions* [2006] IESC 22, [2006] 3 IR 172; *Minister for Justice, Equality and Law Reform v Hall* [2009] IESC 40, (Unrep, SC, 7/5/2009); *Soering v United Kingdom* (App No 14038/88)(7/7/1989); *Vilvarajah v United Kingdom* (1991) 14 EHRR 248; *Norris v Government of United States of America* [2010] UKSC 9 (Unrep, SC, 24/2/2010); *Criminal Proceedings v Pupino* [2005] ECR-1-5285; *AG's Reference (No 2 of 2001)* [2003] UKHL 68 [2004] 2 AC 72; *Minister for Justice, Equality and Law Reform v Gheorge* [2009] IEHC 76, (Unrep, SC, 18/11/2009); *Minister for Justice, Equality and Law Reform v Altaravicius* [2006] IESC 23, [2006] 3 IR 148; *Minister for Justice, Equality and Law Reform v Brennan* [2007] IESC 21, [2007] 3 IR 732; *Minister for Justice, Equality and Law Reform v Gardener* [2007] IEHC 35, (Unrep, Peart J, 6/2/2007); *TH v Director of Public Prosecutions* [2006] IESC 48, [2006] 3 IR 520 and *Minister for Justice, Equality and Law Reform v Gorman* [2010] IEHC 210, (Unrep, Peart J, 22/4/2010) considered – European Arrest Warrant Act 2003 (No 45), s 37 – European Convention on Human Rights 1950, article 8 – Surrender ordered (2010/197EXT – Edwards J – 3/3/2011) [2011] IEHC 68

Minister for Justice, Equality and Law Reform v Adam

European arrest warrant

Minimum gravity – Correspondence – Theft offences – Surrender for serving of remainder of sentence – Point of objection – Whether surrender necessary – Family rights of respondent – Health concerns – Fear of grave risk of harm to health if surrendered – Ill health of husband – Delay in re-arrest – Integration of children – Whether surrender required in pursuit of legitimate aim – Whether surrender disproportionate to legitimate aim – Nature of offences – Absence of necessity for rehabilitation – Good behaviour of respondent – Entitlement of issuing state to seek surrender – Public interest in maintenance of law and order – Inevitability of negative impact on family rights where family member imprisoned – Necessity for exceptional circumstances – Balancing of rights of issuing state to prosecute and punish with family rights of respondent – European Arrest Warrant Act 2003 (No 45), s 37 – European Convention on Human Rights 1950, article 8 – Surrender ordered (2009/24&124EXT – Peart J – 28/1/2011) [2011] IEHC 36

Minister for Justice, Equality and Law Reform v Dunkova

European arrest warrant

Offences not requiring correspondence – Minimum gravity — Point of objection – Surrender for prosecution – Whether warrants lacking in necessary detail and information – Statutory requirements for contents of warrant – Whether warrants invalid – Whether sufficient detail to indicate role of respondent in offence – Absence of requirement for strong or *prima facie* case – *Von Der Pahlen v Government of Austria* [2007] EWHC 1672 (Admin); *Office of the King's Prosecutor v Cando Armas* [2006] 1 All ER 647; *Minister for Justice, Equality and Law Reform v Stafford* [2009] IESC 83, (Unrep, SC, 17/12/2009) and *Minister for Justice, Equality and Law Reform v Hamilton* [2005] IEHC 292 [2008] 1 IR 60 considered – European Arrest Warrant Act 2003 (No 45), s 11 – Surrender ordered (2009/263EXT – Peart J – 30/11/2010) [2010] IEHC 472

Minister for Justice, Equality and Law Reform v Jarzebak

European arrest warrant

Proportionality – Sentence – Number of days to be served less than one month – Gravity – Interpretation of minimum gravity – Whether order for surrender proportionate measure – Criminal Justice (Theft and Fraud Offences) Act 2001 (No 50), ss 4 and 12 – European Arrest Warrant Act 2003 (No 45), ss 13, 21A, 22, 23, 24, and part III – Council Framework Decision of 13/6/2002 – Order for surrender granted (2010/118Ext – Peart J – 17/11/2010) [2010] IEHC 470

Minister for Justice, Equality and Law Reform v Hooper

European arrest warrant

Time limit – Surrender – Unlawful detention – Postponement of surrender beyond initial ten days – Agreement for postponement made by central authorities rather than judicial authorities – Statutory interpretation – Meaning of "judicial authority" – Role of central authorities – Conflict between statute

and framework decision – Interpretation of national law in conformity with framework decision – Appropriate authority in issuing state – Whether applicant's detention in accordance with law – Whether postponement invalid – Whether reasonable grounds for postponement – Whether agreement in accordance with framework decision – Whether surrender prevented by circumstances beyond control of member states – *Dundon v Governor of Cloverhill Prison* [2005] IESC 83, [2006] 1 IR 518; *Minister for Justice v Altaravicius* [2006] 3 IR 148; *Criminal Proceedings against Maria Pupino (Case C-105/03)* [2005] ECR I-5285 considered – European Arrest Warrant Act 2003 (No 45), ss 10 and 16 – Constitution of Ireland 1937, art 40.4.2° – Council Framework Decision (2002/584/JHA), art 23(3) – Treaty on European Union, art 34(2)(b) – Applicant's appeal allowed (3 & 172/2008 – SC – 28/7/2010) [2010] IESC 47
Rimsa v Governor of Cloverhill Prison

Res judicata

Issue estoppel – Abuse of process – Finality in litigation – Second application for surrender of respondent – First application refused – Subsequent amendment to Act – New warrant issued in same terms as first warrant – Rule in *Henderson v Henderson* – Whether absolute right – Separation of powers – Whether amendment of s. 20 of Act of 2003 interference with judicial power – Whether sentence imposed prior to issuing state's accession to European Union excluded from provisions of Act of 2003 – Correspondence – Offence of grievous bodily harm by negligent driving – Whether offence corresponded to dangerous driving – Lack of clarity in description of sentence – Whether failure to comply with requirements of Framework Decision or s. 11 of Act of 2003 – Statute not published when application made to endorse warrant – Statute published when respondent deprived of liberty – Whether failure to publish statute when application made to endorse warrant abuse of process – Whether surrender of respondent disproportionate interference with family rights – Whether exclusion of respondent from benefit of provisions of s. 7 of Transfer of Execution of Sentences Act 2005 discriminatory – Adverse publicity and threats – Whether sufficient evidence to demonstrate reasonable apprehension that respondent's right to life and bodily integrity at risk if surrendered – Delay – Whether culpable delay by issuing state – *Re Vantive Holdings* [2009] IESC 69 (Unrep, SC, 14/10/2009); *Hungary v. Fenyvesi* [2009] EWHC 231 (Admin); *Office of the Prosecutor General of Turin v Barone* [2010] All ER (D) 219 (Nov); *Howard v Commissioners for Public Works (No 3)* [1994] 3 IR 394; *Costello v DPP* [1984] IR 436; *Buckley v Attorney General* [1950] IR 67; *Minister for Justice, Equality and Law Reform v Adach* [2010] IESC 33 (Unrep, SC, 13/5/2010) distinguished – *Minister for Justice, Equality and Law Reform v Doran* [2010] IEHC 403 (Unrep, HC, Peart J, 5/11/2010) approved – Courts of Justice Act 1936 (No 48), s 62 – Road Traffic Act 1961 (No 24), ss 47, 51A, 52 & 53 – Criminal Procedure Act 1967 (No 12), s 5 – State Authorities (Development and Management) Act 1993 (No 1), s 2 – European Arrest Warrant Act 2003 (No 45), ss 2, 3, 4, 10 & 11 – Interpretation Act 2005 (No 23), ss 2, 4 & 27 – Transfer and Execution of Sentences Act 2005 (No 28), s 7 – Criminal Justice (Miscellaneous Provisions) Act 2009 (No 28) – Criminal Justice (Miscellaneous Provisions) Act 2009 (Commencement) (No 3) Order 2009 (SI 330/2009) – Council Directive 2002/584/JHA – Constitution of Ireland 1937 – European Convention on Human Rights, art 8 – Order for surrender granted (2009/259EXT – Peart J – 11/2/2011) [2011] IEHC 72
Minister for Justice, Equality and Law Reform v Tobin

FAMILY LAW

Children

Foster placement – Foster couple unrelated to child – Interim care order – Full parental rights transferred to HSE – Failure to admit applicant and wife to hearing – Whether placement into foster care unlawful – Welfare of child – Applicant and wife in process of assessment as foster carers – Child cared for by mother's partner's family – Mother separated from partner – Partner not child's father – Applicant grandparent – Grandparents initially not considered possible foster candidates – Application by grandparents for guardianship and access – Court on notice of applicant's position – Whether applicant *locus standi* – Whether grant of relief revive mother's right to parental custody – *Meadows v Minister for Justice* [2010] IESC 3 [2010] 2 IR 136 applied – Childcare Act 1991 (No 17), ss 18 & 36(1) – Relief refused (2010/1129JR – Hedigan J – 8/2/2011) [2011] IEHC 42
D (R) v Judge Haughton

Divorce

Full and final settlement clause – Maintenance into future – Separation agreement –Regard to prior settlement — Medical and accommodation needs of applicant – Calculation of maintenance – Actuarial calculations – Life expectancies – Succession Act rights – Property adjustment order – Whether settlement final – Whether settlement fair distribution of physical assets of family – Whether applicant entitled to maintenance into future – *A(W) v A(M)* [2004] IEHC 387, [2005] 1 IR 1 and *T(D) v T(C)* [2003] 1 ILRM 321 considered – Judicial Separation and Family Law Reform Act 1989 (No 6), ss 15 and 17 – Family Law (Divorce) Act 1996 (No 33), s 20 – Divorce with financial relief granted (2005/15M – Abbott J – 4/7/2007) [2007] IEHC 317
F (N) v F (E)

Divorce

Proper provision for parties – Maintenance – Lump sum instalment payments – Pension adjustment order – Applicant wife highly dependent – Medical issues – Respondent husband's business interests and financial position – Income and assets of both parties – Assumption of risk – Open offers – Whether clean break possible – Whether ample resources – *T(D) v T(C)* [2003] 1 ILRM 321; *C(J) v C(M)* (Unrep, Abbott J, 22/1/2007)*; P v P (Financial Relief: Liquid Assets)* [2004] EWHC 2277 (Fam), [2005] 1 FLR 548; *C v C (Variation of Post Nuptial Settlement: Company Shares)* [2003] EWHC 1222, [2003] 2 FLR 493; *Wells v Wells* [2002] EWCA Civ 476, [2002] 2 FLR 97; *McM v McM* (Unrep, Abbott J, 29/11/2006) considered – Judicial Separation and Family Law Reform Act 1989 (No 6) – Family Law Act 1995 (No 26) – Family Law (Divorce) Act 1996 (No 33), s 20(2) – (2001/108M & 2006/8M – Abbott J – 15/3/2007) [2007] IEHC 491
B (G) v B (A)

Divorce

Separation agreement – Maintenance – Periodic payments – Lump sum order – Scheme of provision – Proper provision – Standard of living – Financial resources and needs of parties – Earning capacity – Disclosure of income and assets – Contributions to welfare of family – Maintenance conditional on applicant not cohabiting with anybody else and not being in employment – Failure to disclose – Whether maintenance commensurate with respondent's ability to pay – Whether maintenance sufficient for applicant's needs – Whether applicant dependent on respondent – Whether applicant provided for by new partner – Whether division of assets improvident or inequitable – *Shelley-Morris v Bus Atha Claith* (Unrep, SC, 11/12/2002); *K v K* [2003] 1 IR 326; *McFarlane v McFarlane* [2006] UKHL 24, [2006] 2 AC 618; *T(D) v T(C)* [2003] 1 ILRM 321 and *N(SJ) v O'D(PC)* [2006] IEHC 452, (Unrep, HC, Abbott J, 29/11/2006) considered – Family Law (Divorce) Act 1996 (No 33), ss 5(1), 13(1), 20 and 22 – Family Law Act 1995 (No 26) – Family Law (Maintenance of Spouses and Children) Act 1976 (No 11) – Civil Liability and Courts Act 2004 (No 31) – Decree of divorce granted (2003/41M – Abbott J – 30/7/2007) [2007] IEHC 492
D (S) v D (B)

Judicial separation

Grounds – No normal marital relationship for one year prior to commencement of proceedings – Adultery – Whether husband communicated withdrawal of consent to marriage to wife –Proper provision – Means and assets of parties – Statutory tests and considerations – Judicial Separation and Family Law Reform Act 1989 (No 6) – Decree of judicial separation granted on ground of adultery and ancillary orders made with respect to, *inter alia,* maintenance and property rights (2009/3M – Abbott J – 12/7/2010) [2010] IEHC 474
S (E) v S (O)

Judicial separation

Proper provision – Maintenance – Division of assets – Substantial assets – Economic downturn – Substantial debts – Assets in negative equity – National Asset Management Agency (NAMA) – Family home held on trust

– Whether both parties contributed equally to family welfare and resources – Whether applicant entitled to half of family assets – Personal guarantees given by respondent – Respondent's businesses unable to continue without support of banks or NAMA – Bankruptcy – Implications of bankruptcy and NAMA legislation – Whether court could set aside order obtained fraudulently and in bad faith for purpose of defeating creditors and not of making proper provision for spouse – Whether judgment mortgage ranked in priority to claim by spouse in judicial separation proceedings – Importance attached to protection of provision to be made by family law court – Duty of family law court to act with probity and only for purpose of making necessary provision – Property ordered to be charged as security for maintenance – Whether likely that court would declare charging of maintenance on unencumbered property a disposition to be void – Interests of justice – Division of speculative gains – *In re Abbott (A Bankrupt)* [1983] Ch 45; *Hill v Haines* [2008[2 WLR 1250 considered – Bankruptcy Act 1988 (No 27), s 59 – Judicial Separation and Family Law Reform Act 1989 (No 6), s 2 – Family Law Act 1995 (No 26), s 16 – National Asset Management Agency Act 2009 (No 34), s 211 – Relief granted (2007/65M – Abbott J – 14/07/2010) [2010] IEHC 440
Y (X) v X (Y)

FISHERIES

Statutory Instruments

Control of fishing for salmon (amendment) order 2011
SI 327/2011

Wild salmon and sea trout tagging scheme regulations 2011
SI 326/2011

FREEDOM OF INFORMATION

Access to records

Confidential evidence given in private to commission – Right to effective remedy – Whether plaintiffs entitled to access commission archive – Whether legally enforceable right of access to commission – Whether compatible with European Convention on Human Rights – Commission of Investigation Act 2004 (No. 23), ss 3, 11(3), 43(1) – Data Protection Act 1988 (No 25) – Freedom of Information Act 1997 (No 13) – National Archives Act 1986 (No 11), ss 2, 8 and 10 – Convention for the Protection of Human Rights and Fundamental Freedoms, articles 2, 6 and 13 Relief refused (2008/2669P – Laffoy J – 9/9/2010) [2010] IEHC 353
Byrne v An Taoiseach

HOUSING

Eviction

Warrant for possession –Order for possession –Warrant issued more than six months after making of order for possession –Warrant not in prescribed form – Warrant invalid – Whether eviction unlawful– Whether quashing warrant would achieve useful purpose – Rent arrears – *The King (M'Swiggan) v Justices of County Londonderry* [1905] 2 IR 318 and *McCann v UK* (2008) 47 EHRR 40 applied; *McMahon v Leahy* [1984] IR 525; *Quinn v Athlone Town Council* [2010] IEHC 270, (Unrep, Hedigan J, 8/7/2010); *Coisc v Croatia (Application No 28261/06)* ECHR, 15/1/2009; *Dublin City Council v Fennell* [2005] 1 IR 604; *The State (Abenglen Properties Ltd) v Dublin Corporation* [1984] IR 381 and *The State (Vozza) v O'Floinn* [1957] IR 227 considered – Housing Act 1966 (No 21), s 62 – Housing Act 1970 (No 18), s 13 – Landlord and Tenant Law Amendment (Ireland) Act 1860 (23 & 24 Vic, c 154), s 86 – European Convention on Human Rights Act 2003 (No 20), ss 2 and 4- Constitution of Ireland 1937, art 41 – European Convention on Human Rights, article 8 – Rules of the Superior Courts 1986 (SI 15/1986), Os 47 and 84 – *Certiorari* refused (2010/1041 JR – Peart J – 29/11/2010) [2010] IEHC 466
Moore v Dun Laoghaire Rathdown County Council

Statutory Instrument

Social housing assessment (amendment) regulations 2011
SI 136/2011

HUMAN RIGHTS

European Convention

Direct effect – Application of Convention within State – Retrospective effect – Compatibility with European Convention on Human Rights – Obligation to conduct investigation – Right to life – Commission of Investigation into the Dublin and Monaghan bombings 1974 – Whether Convention provisions directly justiciable – Whether defendants' investigation compliant with domestic law obligations under Convention – Whether plaintiffs entitled to Convention compliant investigation – Whether obligations imposed by Act applied to deaths which occurred prior to enactment – Whether defendants breached obligations under Act of 2003 – *In re Ó Laighléis* [1960] IR 93 and *Dublin City Council v. Fennell* [2005] IESC 33, [2005] 1 IR 604 followed; *Doyle v Commissioner of An Garda Síochána* [1999] 1 IR 249, *In re McKerr* [2004] UKHL 12, [2004] 1 WLR 807, *Brecknell v United Kingdom* (2008) 46 EHRR 42, *Lelimo v Minister for Justice* [2004] IEHC 165, [2004] 2 IR 178, *Magee v Farrell* [2005] IEHC 388, (Unrep, Gilligan J, 26/10/2005), *D v Residential Institutions Redress Review Committee* [2008] IEHC 350, (Unrep, Ó Néill J, 11/11/2008) and *O'Neill v An Taoiseach* [2009] IEHC 119 (Unrep, Murphy J, 18/3/2009) considered – European Convention on Human Rights Act 2003 (No 20), ss 2, 3, 4, 5 and 9 – Commission of Investigation Act 2004 (No 23), ss 3, 11(3), 43(1) – Convention for the Protection of Human Rights and Fundamental Freedoms, articles 2, 6 and 13 – Relief refused (2008/2669P – Laffoy J – 9/9/2010) [2010] IEHC 353
Byrne v An Taoiseach

Article

Cahill, Maria
McD v L and the incorporation of the European Convention on Human Rights
XLV (2010) IJ 221

IMMIGRATION

Appeal

Certificate for leave to appeal – Refusal to grant leave to apply for judicial review – Criteria to be applied – Test of unreasonableness or irrationality – Role of court in judicial review and applying test – Function and duty of court in respect of rights – Whether different approach to be applied where rights involved qualified – Whether state of law regarding test uncertain – Whether in public interest to appeal – *R(1) v Minister for Justice, Equality and Law Reform* [2009] IEHC 1, (Unrep, HC, Cooke J, 26/11/2009); *R(SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100 approved – *Meadows v Minister for Justice, Equality and Law Reform* [2010] IESC 3, (Unrep, SC, 21/1/2010); *State (Keegan) v Stardust Compensation Tribunal* [1986] IR 642; *O'Keeffe v An Bord Pleanála* [1993] 1 IR 39; *East Donegal Co-operative Livestock Mart Ltd v Attorney General* [1970] IR 317 applied – Refugee Act 1996 (No 17), s 5 – Immigration Act 1999 (No 22), s 3 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – European Convention on Human Rights Act 2003 (No 20) – Human Rights Act 1998 (1998 c 42) – Rules of the Superior Courts 1986 (SI 15/1986), O 84 – Constitution of Ireland 1937, article 40.3 – European Convention on Human Rights 1950, arts 8 and 13 – Certificate refused (2010/396JR – Cooke J – 17/12/2010) [2010] IEHC 457
ISOF v Minister for Justice, Equality and Law Reform

Asylum

Judicial review– Fear of persecution – Political and army involvement in Georgia – Credibility – Absence of identity documentation – Failure to make earlier application – Failure to seek state protection – Unfair procedures – Refusal of application for refugee status Whether delay in making application – Whether Georgian State able to protect applicant – Whether unfair procedures – *K(D) v Refugee Appeals Tribunal* [2006] IEHC 132, [2006] 3 IR 368 considered – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5(2)(a) – Refugee Act 1996 (No 17), s 11A(3) – Leave refused (2008/361JR – Clark J – 20/7/2010) [2010] IEHC 487
A(R) v Refugee Appeals Tribunal

Asylum

Persecution – Political opinion – Medical evidence of torture – Weight to be accorded to medical evidence – Whether first respondent failed to take relevant considerations into account – Whether findings of first respondent irrational – Whether first respondent made errors of law – Relief granted (2009/122JR – Clark J – 28/09/2010) [2010] IEHC 367
K (RM) v Refugee Appeals Tribunal

Asylum

Relocation – Asylum status in Poland – Dissatisfied with life in Poland – Fear agents of state from country of origin in Poland – Fear location by earlier enemies – Application for asylum for social reasons – Whether fear of persecution in Poland – Statutory provision precluding refugee declaration to person already recognised as refugee – Lack of evidence protection of Polish authorities sought – Whether Minister precluded from granting declaration of refugee status – Whether respondent entitled summarily to reject application on ground refugee status already granted by another state – *McD v L* [2009] IESC 81 (Unrep, SC, 10/12/2009) applied; *Horvath v Home Secretary* [2001] 1 AC 489 followed; *O'Domhnaill v Merrick* [1984] IR 151, *Orchowski v Poland* App 17885/04 (Unrep, ECHR 22/1/2010), *Minister for Justice v Rettinger* [2010] IESC 45 (Unrep, SC, 23/07/2010) considered; *Y v Refugee Appeals Tribunal* [2009] IEHC 18 (Unrep, McMahon, 13/1/2009) distinguished – Refugee Act 1996 (No 17), s 17(4) – Application refused (2007/1135JR – Hogan J – 23/11/2010) [2010] IEHC 421
S (AQ) v Refugee Applications Commissioner

Asylum

Revocation – Appellant convicted of series of offences – Refugee status revoked – Threat to "national security or public policy" – *Ordre public* – Whether respondent entitled to revoke refugee status – Whether respondent entitled to expel appellant without considering whether appellant convicted of particularly serious crime such that he constituted danger to community – Refugee Act 1996 (No 17), s 21 – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), reg 11 – Council Directive 2004/83/EC, art 14 – Geneva Convention on the Status of Refugees, art 1C – Appeal allowed (2010/87MCA – Cooke J – 17/12/2010) [2010] IEHC 458
Abramov v Minister for Justice, Equality and Law Reform

Deportation

Certificate of leave to appeal – Point of law of exceptional public importance – Public interest – Validity of deportation order – Duration of deportation order – Discretion – Whether decision involves point of law – Whether point of law of exceptional public importance – Whether desirable in public interest that appeal be taken – Whether law clear and established – Whether respondent had discretion – Whether respondent failed to exercise discretionary power – *Arklow Holidays Ltd v An Bord Pleanála (No 3)* [2008] IEHC 2, (Unrep, Clarke J, 11/1/2008) followed – *U(MA) v Minister for Justice, Equality and Law Reform (No 1)* [2010] IEHC 492, (Unrep, Hogan J, 13/12/2010); *U(MA) v Minister for Justice, Equality and Law Reform (No 2)* [2011] IEHC 95, (Unrep, Hogan J, 9/2/2011); *Raiu v Refugee Appeals Tribunal* (Unrep, Finlay Geoghegan J, 12/2/2003); *Arklow Holidays Ltd v An Bord Pleanála (No 1)* [2006] IEHC 102, [2007] 4 IR 112; *Glancré Teo v An Bord Pleanála* [2006] IEHC 250, (Unrep, MacMenamin J, 13/7/2006) and *Irish Press plc v Ingersoll Irish Publications Ltd* [1995] 1 ILRM 117 considered – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5(3)(a) – Immigration Act 1999 (No 22), s 3 – Planning and Development Act 2000 (No 30), s 50(4)(f) – Application refused (2009/881JR – Hogan J – 22/2/2011) [2011] IEHC 59
U (MA) v Minister for Justice, Equality and Law Reform

Deportation

Family rights – Father of citizen child – Mother residing in State with permission to remain – Constitutional right of child to company and care of parents – Practical effect of deportation – Deprivation of meaningful contact with father – Ministerial obligation to give consideration to relevant facts and circumstances – Ministerial obligation to identify substantial reason for deportation – Whether decision disproportionate – Whether substantial grounds for review – *G v An Bord Uchtala* [1980] IR 32; *Re JH* [1985] IR 375; *N v Health Service Executive* [2006] IESC 60; [2005] 4 IR 470; *Oguekwe v Minister for Justice, Equality and Law Reform* [2008] IESC 25, [2008] 3 IR 795; *Osheku v Ireland* [1986] IR 733; *AO and DL v Minister for Justice* [2003] 1 IR 1; *Alli v Minister for Justice, Equality and Law Reform* [2009] IEHC 595, (Unrep, Clark J, 2/12/2009); *U(MA) v Minister for Justice, Equality and Law Reform (No 1)* [2010] IEHC 492, (Unrep, Hogan J, 13/12/2010); *Buckley v Attorney General* [1950] IR 67; *Ofobuike v Minister for Justice, Equality and Law Reform* [2010] IEHC 89, (Unrep, Cooke J, 13/1/2010); *O(AN) v Minister for Justice, Equality and Law Reform* [2009] IEHC 448, (Unrep, Cooke J, 14/10/2009); *Irish Trust Bank Ltd v Central Bank of Ireland* [1976] ILRM 50; *Re Worldport Ltd* [2005] IEHC 189, (Unrep, Clarke J, 16/6/2005) and *PH v Ireland* [2006] IEHC 40, [2006] 2 IR 540 considered – Leave refused (2010/548JR – Hogan J – 22/2/2011) [2011] IEHC 66
I (K) v Minister for Justice, Equality and Law Reform

Deportation

Family rights – First applicant minor Irish citizen – Deportation order challenged on grounds that it would separate family – Child's constitutional right to care and company of parents principally for benefit of child – File assessment – Substantial grounds – Whether substantial grounds established to contend that first respondent did not conduct full and fair assessment of applicants' case – Credibility – Falsehoods in third applicant's application for asylum and in grounding affidavit – Whether third applicant distentitled to relief by reason of falsehoods and lack of candour – Whether falsehoods central to fundamental case of applicants – *State (Vozza) v O'Floinn* [1957] IR 227; *Dimbo v Minister for Justice, Equality and Law Reform* [2006] IEHC 344 (Unrep, HC, Finlay Geoghegan J, 14/11/2006); *I(K) v Minister for Justice, Equality and Law Reform* [2011] IEHC 66 (Unrep, HC, Hogan J, 22/2/2011); *Alli v Minister for Justice, Equality and Law Reform* [2009] IEHC 595 (Unrep, HC, Clark J, 2/12/2009) considered – Immigration Act 1999 (No 22), s 3 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Constitution of Ireland 1937, Art 41 – European Convention on Human Rights, art 8 – Leave granted (2009/511JR – Hogan J – 2/3/2011) [2011] IEHC 102
Oboh v Minister for Justice, Equality and Law Reform

Deportation

Family rights – Proportionality – Reasonableness – Married couple – Citizen of Ireland - Intellectual and physical disabilities – Naïve and vulnerable person – Nigerian spouse notified by respondent of intention to deport – Refusal of respondent to revoke deportation order – Identification – Whether order preventing publication or broadcasting of anything which could identify first applicant required – Competing interests – Integrity of asylum system – First applicant incapable of independent travel to Nigeria – Marriage of applicants when immigration status of second applicant precarious – Exceptional circumstances – Whether respondent's refusal to revoke deportation order disproportionate and unreasonable – *TC v Minister for Justice* [2005] IESC 42, [2005] 4 IR 109; *Omoregie v Norway* [2008] ECHR 761; *Boultif v Switzerland* (2001) 33 EHRR 1179 considered – Immigration Act 1999 (No 22), s 3 – Civil Law (Miscellaneous Provisions) Act 2008 (No 14), s 27 – Relief granted (2010/1100JR – Hogan J – 23/3/2011) [2011] IEHC 92
S (P) v Minister for Justice, Equality and Law Reform

Deportation

Irish born non-citizen child – Dependent – Asylum application never separately investigated – Born after recommendation in mother's case – Asylum claim made after recommendation in mother's case – Mother filled out ASY1 form – Whether within statutory definition – Whether respondent lacked power to make deportation order – Included as dependent in mother's application – Negative credibility finding in relation to mother – No separate interview conducted – No separate s 13 report – No objection raised – No fear specific to child put forward – Whether mandatory to conduct individual investigation of each child's circumstances – Whether mandatory to issue individual s 13 reports – Whether Tribunal had jurisdiction to include minor in an appeal where no investigation carried out by Commissioner – Whether applicants precluded from challenging decision of Tribunal and

Ministerial decision – Absence of statutory procedure for accompanied dependent minor applicants – Whether consent by mother to inclusion of child's claim with her own amounted to waiver of investigation – Whether child an independent asylum seeker – Whether independent fear of persecution – *O(J)(a minor) v Refugee Applications Commissioner* [2009] IEHC 478 (Unrep, Cooke J, 28/10/2009) followed; *SY and RY v Refugee Appeals Tribunal* [2009] IEHC 18 (Unrep, McMahon J, 13/1/2009) approved; *Oloo Omee v Refugee Appeals Tribunal* (*ex tempore*, Unrep, McCarthy J, 31/3/2009), *Gorman v Judge Martin* [2005] IESC 56 (Unrep, Supreme Court, 29/7/2005), *J v Minister for Justice* [2009] IEHC 437 (Unrep, Clark J, 9/10/2009) and *Emekobum (a minor) v Minister for Justice* (Unrep, Smyth J, 18/7/2002) considered – *Nwole v Minister for Justice* [2007] IESC 44 (Unrep, Supreme Court, 18/10/2007) distinguished – Immigration Act 1999 (No 22), s 3 – Refugee Act 1996 (No 17), s 11 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – Interpretation Act 2005 (No 23), s 5 – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), reg 2(1) – Asylum Procedures Directive (Council Directive 2005/85/EEC) art 12 – Relief refused – (2009/402JR – Clark J – 28/09/2010) [2010] IEHC 368
I (P) v Minister for Justice

Deportation

Notice – Required three month notice period not given – Meaning of "ordinarily resident" – Lawful residence – Residence grounded on fundamental deceit – Previous deportation order – Whether applicant "ordinarily resident" in State – Whether applicant entitled to special notice provisions – Whether applicant's residence lawful, regular and *bona fide* – Whether detention lawful – Whether arrest lawful – Whether arresting officer had reasonable cause – *The State (Goertz) v Minister for Justice* [1948] IR 45; *Dillon v Minister for Posts and Telegraphs* (Unrep, SC, 3/6/1981); *United States Tobacco International Inc v Minister for Health* [1990] 1 IR 394; *Sofrani v Minister for Justice, Equality and Law Reform* (Unrep, HC, Peart J, 9/7/2004); *Simion v Minister for Justice, Equality and Law Reform* [2005] IEHC 298, (Unrep, HC, MacMenamin J, 9/9/2005) and *Walshe v Fennessy* [2005] IESC 51, [2005] 3 IR 516 considered – Immigration Act 1999 (No 22), ss 3(9)(b) and 5(1) – Immigration Act 2004 (No 1), s 14(1)(b) – Aliens Act 1935 (No), s 5(5) – European Communities (Free Movement of Persons) (No 2) Regulations 2006 (SI 656/2006), reg 6(2)(a) – Constitution of Ireland 1937, article 40.4.2 – Application refused (135/2011SS – Hogan J – 25/1/2011) [2011] IEHC 24
Robertson v Governor of the Dochas Centre

Deportation

Parent of Irish-born citizens – Marriage to Irish citizen – Rights of family – Untruthful representations – Criminal convictions and outstanding charges – IBCO5 scheme – Fair issue to be tried – Damages – Balance of convenience – Proportionality – Substantial ground – Whether fair issue to be tried – Whether damages adequate remedy – Whether decision disproportionate – Whether irrelevant considerations taken into account – Whether rights of Irish children taken into account – Whether adequate assessment of applicants' submissions – Whether respondent's actions *ultra vires,* unreasonable, irrational or unlawful – Whether substantial ground – *Oguekwe v Minister for Justice* [2008] IESC 25, [2008] 3 IR 795 and *Meadows v Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 IR 701 considered – Immigration Act 1999 (No 22), s 3 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – European Convention on Human Rights Act 2003 (No 20) – Constitution of Ireland 1937, arts 2, 40 and 41– European Convention on Human Rights, art 8 – Application refused (2010/1345JR – Cooke J – 14/2/2011) [2011] IEHC 48
Odia v Minister for Justice, Equality and Law Reform

Deportation

Permanent exclusion from State – Judicial review – Statutory interpretation – Whether respondent had discretion to exclude first applicant from State non-permanently – *B(J) v Minister for Justice, Equality and Law Reform* [2010] IEHC 296 (Unrep, HC, Cooke J, 14/7/2010) considered – Immigration Act 1999 (No 22), s 3 – Leave refused (2009/881JR – Hogan J – 13/12/2010) [2010] IEHC 492
U (MA) v Minister for Justice, Equality and Law Reform (No 1)

Deportation

Proportionality – Rationale –Whether proportionality an issue in judicial review of decision affecting fundamental rights – Irish citizen children – Whether deportation amounting to unlawful interference with family rights – No examination of conditions in country of origin in assessment of interference with constitutional rights of citizen children – Whether failure to consider submissions – Balance rights of children and rights of State – Whether reasoned decision required – Whether possible to discern rationale for determination that constitutional rights fully considered – Whether unreasonable and disproportionate to expect family to move to Nigeria to enjoy family life – *AO and DL v Minister for Justice* [2003] 1 IR 1, *Fajujonu v Minister for Justice* [1990] 2 IR 151, *Ryan v Attorney General* [1965] IR 294, *Igiba (a minor) v Minister for Justice* [2009] IEHC 593 (Unrep, Clark J, 2/12/2009) and *State (Keegan) v Stardust Victims Compensation Tribunal* [1986] IR 642 applied; *O v Minister for Justice* [2009] IEHC 448, (Unrep, Cooke J, 14/10/2009), *Meadows v Minister for Justice* [2010] IESC 3, (Unrep, SC, 21/1/2010), *Alli (a minor) v Minister for Justice* [2009] IEHC 595, (Unrep, Clark J, 2/12/2009), *Asibor (a minor) v Minister for Justice* [2009] IEHC 594, (Unrep, Clark J, 2/12/2009) and *Bode v Minister for Justice* [2008] 3 IR 663 considered; *Dimbo v Minister for Justice* [2008] IESC 26, (Unrep, SC, 1/5/2008) and *Osunde v Minister for Justice* [2009] IEHC 448, (Unrep, Cooke J, 14/10/2009) distinguished – Refugee Act 1996 (No 17), s 5 – European Convention on Human Rights, Art 8(2) – Immigration Act 1999 (No 22), s 3 – *Certiorari* granted (2009/348JR – Clark J – 28/01/2011) [2011] IEHC 78
O-A (O) v Minister for Justice

Deportation

Refoulement – Fear of persecution and ill-treatment if returned to country of origin – Asylum refused – Deportation of applicant ordered by respondent – Whether plausible that prohibition on *refoulement* engaged – Respondent obliged to provide coherent reason justifying conclusion – Whether respondent gave any or any adequate reasons to support conclusion that deportation would not be contrary to prohibition on *refoulement* – *Meadows v Minister for Justice, Equality and Law Reform* [2010] IESC 3 (Unrep, SC, 21/1/2010) considered – Refugee Act 1996 (No 17), s 5 – Relief granted (2009/1025JR – Hogan J – 9/2/2011) [2011] IEHC 99
K (T) v Minister for Justice, Equality and Law Reform

Deportation

Revocation- Earthquake in Pakistan – New material submitted – Revocation refused – Prohibition on *refoulement* – Whether adequate reasons why prohibition did not apply – Whether decision irrational in light of country of origin information – Limited grounds to challenge valid deportation order – Continuation of prohibition after order made – Respondent under obligation to ensure prohibition not infringed on implementation of order – Limited obligation to state reasons for rejection of request for revocation – Whether new material constituted evidence of material change in circumstances – Whether change of circumstances amounting to risk prohibition infringed on implementation of order – *Dada v Minister for Justice* [2006] IEHC 140 (Unrep, Ó Néill J, 3/5/2006), *Akujobi v Minister for Justice* [2007] IEHC 19 [2007] 3 IR 603, *O v Minister for* Justice [2008] IEHC 325 (Unrep, Hedigan J, 22/10/2008), *A v Minister for Justice* (Unrep, Cooke J, 17/12/2009) and *Mishra v Minister for Justice* [1996] 1 IR 189 applied; *Meadows v Minister for Justice* [2010] IESC 3 (Unrep, SC, 21/1/2010) considered – Immigration Act 1999 (No 22), s 3(11) – Council Directive 2004/83/EC – Refugee Act 1996 (No 17), s 5 – Application refused – (2010/51JR – Cooke J – 23/11/2010) [2010] IEHC 422
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Deportation

Revocation – Wife and child Irish citizens – Marriage after application refused – No notification of intention to marry until after deportation order made – Respect for family life – Constitutional rights of Irish citizen child – Constitutional rights of Irish citizen wife – Whether proposed interference with constitutional rights lawful – Proportionality of decision to affirm order – Whether failure to consider adequately the rupture to the family – Whether respondent in breach of fair procedures by relying on need to maintain immigration control – Absence

of reason why unreasonable for wife and son to move to country of origin – Family rights not absolute – Whether unfair of respondent to refuse to revoke second revocation application given acquiescence in first revocation application – *Pok Sun Shum v Ireland* [1986] ILRM 593, *Osheku v Ireland* [1986] IR 733, *AO and DL v Minister for Justice* [2003] 1 IR 1 and *FP and AL v Minister for Justice* [2002] 1 IR 164 applied; *Omoregie v Norway* (App No 265/07, 31/7/2008), *R (Razgar) v Secretary of State of the Home Department* [2004] 2 AC 368, *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471, *Da Silva v Netherlands* (2007) 44 EHRR 34, *Boultif v Switzerland* (2001) 33 EHRR 50 and *Mawaka v The Netherlands* (App No 29031/04, 1/6/2010) approved; *Alli (a minor) v Minister for Justice* [2009] IEHC 595, (Unrep, Clark J, 2/12/2009), *Asibor (a minor) v Minister for Justice* [2009] IEHC 594, (Unrep, Clark J, 2/12/2009), *R (Mahmood) v Home Secretary* [2001] 1 WLR 840, *Chikwamba v Home Secretary* [2008] 1 WLR 1420, *Meadows v Minister for Justice* (Unrep, Supreme Court, 21/1/2010), *Oguekwe v Minister for Justice* [2008] 3 IR 795, *Berrehab v The Netherlands* (1989) 11 EHRR 322 and *Poku v UK* (1996) 22 EHRR CD 94 considered; *AB (Jamaica) v Home Secretary* [2008] 1 WLR 1893 distinguished – European Convention on Human Rights, article 8 – Application refused (2009/201JR – Clark J – 29/09/2010) [2010] IEHC 371
U (H) v Minister for Justice

Deportation

Temporary permission to be in State – Expiry of temporary entry permit – Remained illegally in State – Effective remedy – Residence in Germany – Alleged right to permanent residence in Germany – Whether remedy of judicial review fulfilled requirements of Convention – Declaration of incompatibility with European Convention – Declaration only where no other legal remedy adequate and available – Failure to include plea of lack of remedy – Refusal to amend grounds – Meaning of effective remedy – Purpose of judicial review – Flexibility of remedy – Proportionality – Whether Convention right required second level appeal from administrative decision – Whether *de novo* hearing required – Flexibility of judicial review – *Carmody v Minister for Justice* [2009] IESC 71 [2010] 1 IR 635 and *East Donegal Co-Operative v Attorney General* [1970] IR 317 applied – *Guo v Minister for Justice* [2010] IEHC 127 (Unrep, Herbert J, 28/4/2010), *B(M) v Minister for Justice* [2010] IEHC 320 (Unrep, Clark J, 30/7/2010) and B(J)(a minor) v Minister for Justice [2010] IEHC 296 (Unrep, CookeJ, 14/7/2010) followed – *Meadows v Minister for Justice* [2010] IESC 3 (Unrep, SC, 21/1/2010), *Oguekwe v Minister for Justice* [2008] 3 IR 795, *Dimbo v Minister for Justice* [2008] IESC 26, (Unrep, SC, 1/5/2008), *Muminov v Russia* (2011) 52 EHRR 23, *Swedish Engine Drivers' Union v Sweden* (1979-80) 1 EHRR 617, *CG v Bulgaria* (2008) 47 EHRR 51, *Soering v United Kingdom* (1989) 11 EHRR 439, *Vilvarajah v United Kingdom* (1992) 14 EHRR 248, *Bensaid v United Kingdom* (2001) 33 EHRR 10, *Smith and Grady v United Kingdom* (2000) 29 EHRR 493 considered – *Zambrano v. Office national de l'emploi (ONEm)* Case C-34/09 (Unrep, European Court of Justice, 8/3/2011) distinguished – Immigration Act 1999 (No 22), s 3 – Illegal Immigrants (Trafficking) Act 2000 (no 29), s 5 – European Convention on Human Rights Act 2003 (No 20), s 5(1) – Rules of the Superior Courts 1986 (SI 15/1986), O 84 – European Convention on Human Rights, arts 8 and 13 – Charter of Fundamental Rights of the European Union, art 24 – Leave refused (2009/946JR – Cooke J – 1/2/2011) [2011] IEHC 38
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Dismissal of proceedings

Abuse of process – Frivolous or vexatious – Reasonable prospect of success – Whether clear and compelling reason to stop proceedings – Inherent jurisdiction of High Court to dismiss claim – Judicial review – *Certiorari* of deportation order – Preliminary motion to dismiss proceedings Factors to be considered – *Barry v Buckley* [1981] IR 306; *In Re Majory* [1955] Ch 600; *Sean Quinn Group Ltd v An Bord Pleanála* [2001] 1 IR 505 and *Lowes v Coillte Teo* (Unrep, Herbert J, 5/3/2003) considered – Motion to dismiss refused (2010/1314JR – Cooke J – 14/2/2011) [2011] IEHC 47
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Family reunification

Dependent family members – Extended family – Internal review of decision – *Ultra vires* – Whether respondent had jurisdiction to conduct internal review – Whether internal review inconsistent with statutory scheme – Whether reasons sustainable – Constitutional rights – European Convention on Human Rights – Whether first applicant's constitutional rights potentially affected or engaged by decision – Whether constitutional guarantee of family life and protection of marriage potentially extendible to grandparents and siblings – Whether decision manifestly unreasonable – *Izevbekhai v MJELR* [2010] IESC 44 (Unrep, SC, 09/07/2010); *Carmody v MJELR* [2009] IESC 71, [2010] 1 IR 635; *Meadows v MJELR* [2010] IESC 3 (Unrep, SC, 21/01/2010); *O(G) v MJELR* [2008] IEHC 190 (Unrep, Birmingham J, 19/06/2008) considered – *M(T) v MJELR* [2009] IEHC 500 (Unrep, Edwards J, 23/11/2009) followed – *Caldaras v MJELR* (Unrep, O'Sullivan J, 09/12/2003) not followed – Refugee Act 1996 (No 17), s 18 – European Convention on Human Rights Act 2003 (No 20), s 5 – European Communities (Eligibility for Protection) Regulations 2006 (SI 518/2006), regs 3 & 4 – Constitution of Ireland 1937, art 41 – European Convention on Human Rights, art 8 – Decision quashed (2010/116JR – Hogan J – 10/12/2010) [2010] IEHC 446
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Family reunification

Spouse – Inability to furnish documentary evidence of marriage – Marriage in religious ceremony in Somalia – Conflict at time of marriage – Absence of civil registration system – Inability to register marriage – Application refused on ground of insufficient documentary evidence – Refugee status in another country – Whether foreign marriage contracted in religious ceremony capable of recognition in Irish law – Whether declaration of validity of marriage in Irish law necessary – Whether decision based on incorrect interpretation of applicable statutory test of marital relationship – Refugee Act 1996 (No 17), s 18 – Family Law Act 1995 (No 26), s 29 – *Certiorari* granted (2009/1054JR – Cooke J – 25/11/2010) [2010] IEHC 426
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Costs – Long-term residency – Naturalisation – Challenge delay in making decision – Long-term residency granted after proceedings brought – Application for naturalisation withdrawn – Repeat work permits – Application while applicant in employment – Applications processed chronologically – Priority sought on basis serious illness of wife and Irish citizen child – Full time carer – Voluntary redundancy – Lapse of work permit – Legal status affected by return to work of wife – Status preventing taking up employment – Right to apply – No right to certificate –Discretion of respondent – Resource related explanations for delay – Whether reasonable for applicant to issue proceedings – No evidence of arbitrary or capricious behaviour by respondent – Whether prospective job offer constituted exceptional circumstances – Whether applicant entitled to costs – Whether applicant liable to pay respondent's costs –*N (A) v Minister for Justice* [2009] IEHC 354 (Unrep, Clark J, 29/07/2009), *Garibov v Minister for Justice* [2006] IEHC 371 (Unrep, Herbert J, 16/11/2006) and *Nearing v Minister for Justice* [2009] IEHC 489 (Unrep, Cooke J, 30/10/2009) applied – *Mobin and Gafoor v Minister for Justice* (Unrep, Edwards J, 17/07/2007) considered – No order as to costs (2009/796JR – Clark J – 21/07/2010) [2010] IEHC 488
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Residence

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Duty of care

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Notice party – Attorney General – Constitutional protection – Embryos Substantive appeal determined in favour of first respondent – Whether costs order should be made against notice party – Whether justification for departure from rule that costs follow event – Point of exceptional public importance – Whether special circumstances – Relationship between appellant and first respondent – Rules of the Superior Courts (No. 15/1986), O 60, r 2 – Constitution of Ireland, 1937, Article 40.3.3° – Costs of High Court awarded against Attorney General but no order as to costs in relation to the appeal (469/2006 & 59/2007 – SC – 2/3/2010) [2010] IESC 10
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Mootness and lack of candour – Judicial review – Preliminary motion – Whether question of refusal to grant visa to immigrant student moot – Doctrine of mootness – Principles to be applied – Lack of candour – Whether live controversy affecting or potentially affecting rights between parties – Whether appropriate for court to deal with lack of candour in judicial review case as preliminary issue – *Goold v Collins* [2004] IESC 38, (Unrep, SC, 12/7/2004) and *O'Brien v Personal Injury Assessments Board (No 2)* [2006] IESC 62, [2007] 1 IR 328 followed – *Hall v Beals* 396 US 45 (1969); *Cahill v Sutton* [1980] IR 269; *DK v Crowley* [2002] 2 IR 744; *Clarke v Member in Charge* [2001] 4 IR 171; *Application of Zwann* [1981] IR 395; *Dunne v Governor of Cloverhill Prison* [2009] IESC 43 (Unrep, SC, 21/5/2009); *Fingal County Council v William P. Keeling & Sons Ltd* [2005] IESC 55, [2005] 2 IR 108; *State (Vozza) v District Justice O'Floinn* [1957] 1 IR 227 and *AGAO v Minister for Justice, Equality and Law Reform* [2006] IEHC 344, [2007] 2 IR 492 considered – Motion to dismiss refused (2010/665JR – Hogan J – 10/2/2011) [2011] IEHC 51
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Want of prosecution – Delay – Inordinate and inexcusable delay – Excusability – Balance of justice – Prejudice – Difficulties of recollection after twelve years – Conduct of defendants – Obligation to progress proceedings – Onus on both parties – Default by both parties – Fairness of procedures – Public interest – Supervisory function of court – Whether delay inordinate and inexcusable – Whether proceedings should be dismissed – Whether satisfactory excuse – Whether cause for delay lay with defendants – Whether defendants' delay amounted to acquiescence – Whether unfair to allow action to proceed – Whether fair trial possible – Whether prejudice caused to either party – *Desmond v MGN* [2008] IESC 56, [2009] 1 IR 737 and *Stephens v Paul Flynn Ltd* [2005] IEHC 148, (Unrep, Clarke J, 28/4/2005) followed – *Bord Fáilte Éireann v Castlefinn Multi-Activity Holiday Centre Ltd* [2005] IEHC 387, (Unrep, Herbert J, 16/11/2005) and *Mannion v Bergin & Bradley* [2009] IEHC 165, (Unrep, Hedigan J, 13/3/2009) considered – Application granted (2000/11091P – Hedigan J – 15/2/2011) [2011] IEHC 46
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Amend or vary order – Order for possession – Application to set aside portion of order – Family home – Consent – Clear letter of consent to order for possession – Conflict of evidence – Whether former solicitors had authority to consent to order for possession – Whether jurisdiction to amend order – Whether order reflected what court decided and intended – Whether exceptional circumstances in order to protect constitutional rights and justice – Whether jurisdiction to call solicitor for cross-examination – *Belville Holdings Ltd v Revenue Commissioners* [1994] 1 ILRM 29; *Ainsworth v Wilding* [1986] 1 Ch 673; *In re Greendale Developments Ltd (No 3)* [2000] 2 IR 514; *P(L) v P(M) (Appeal)* [2002] 1 IR 219; *Tassan Din v Banco Ambrosiano SPA* [1991] IR 569 and *The Ampthill Peerage* [1977] AC 547 considered – Rules of the Superior Courts 1986 (SI 15/1986), O 28, r 11 – Constitution of Ireland 1937, art 34.4.6° – Application dismissed (2008/571SP – Laffoy J – 18/11/2010) [2010] IEHC 419
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229; *Doyle v Independent Newspapers (Ireland) Ltd* [2001] 4 IR 594 applied – Rules of the Superior Courts 1986 (SI 15/1986), O 19 – Constitution of Ireland 1973, articles 34 and 40 – Application dismissed (2003/6170P – Hogan J – 10/12/2010) [2010] IEHC 447
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Pleadings

Amendment – Judicial review proceedings – Application to amend statement of grounds – Challenge constitutionality of s 3(1) of Immigration Act 1999 – Intention of Oireachtas that applicant advance entirety of grounds within 14 day period prescribed by s 5(2) of Illegal Immigrants (Trafficking) Act 2000 – Proposed challenge to constitutionality of s 3(1) of Act of 1999 not contemplated at commencement of proceedings – Whether exceptional circumstances for allowing amendment – *S(I) v Minister for Justice, Equality and Law Reform* [2011] IEHC 31 (Unrep, HC, Hogan J, 21/1/2011) distinguished; *Ni Eili v Environmental Protection Agency* [1997] 2 ILRM 458; *M(S) v Minister for Justice, Equality and Law Reform* [2005] IESC 27 (Unrep, SC, 3/5/2005) considered – Immigration Act 1999 (No 22), s 3 – Illegal Immigrants (Trafficking) Act 2000 (No 29), s 5 – European Convention on Human Rights Act 2003 (No 20), s 5 – Rules of the Superior Courts 1986 (SI 15/1986), O 28, r 1 – Application refused (2009/675JR – Hogan J – 9/2/2011) [2011] IEHC 104
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Summary judgment

Leave to defend – *Bona fide* defence – Dispute on facts – Facility letter – Agreement to advance sums to fund professional fees and planning contributions – Development of site – Alleged representation monies not repayable until development completed –Loan facility included express term monies repayable on demand – Written agreement clear and unambiguous – Whether reasonable basis on which defendants could have believed that monies not repayable until development complete – *Aer Rianta cpt v Ryanair* [2001] 4 IR 607 applied – *Harrisgrange Ltd v Dunkan* [2003] 4 IR 1 followed – Liberty to enter final judgment granted (2010/3257S – McGovern J – 3/12/2010) [2010] IEHC 478
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Summary judgment

Loan agreement – Leave to defend – Test to be applied – Whether arguable defence disclosed – Implied terms – Whether arguable basis for implication of non recourse term in written loan facility between parties – Principles to be applied – *Aer Rianta cpt v Ryanair Ltd* [2001] 4 IR 607, *McGrath v O'Driscoll* [2007] 1 ILRM 203 and *Associated Japanese Bank (International) Ltd v Credit du Nord SA* [1989] 1 WLR 255 applied – *First National Commercial Bank plc v Anglin* [1996] 1 IR 75, *Danske Bank a/s (t/a National Irish Bank) v Durkan New Homes* [2010] IESC 22 (Unrep, SC, 22/4/2010) and *Ringsend Property Ltd v Donatex* [2009] IEHC 568 (Unrep, Kelly J, 18/12/2009) considered – Summary judgment granted (2010/3061S – Finlay Geoghegan J – 28/1/2011) [2011] IEHC 26
Zurich Bank v Coffey

Summary summons

Lease – Calculation of rent – Interpretation of special conditions – Meaning of "outstanding monies due" – Whether specific payments included in rent– Whether conduct gave rise to estoppel – Whether appropriate to apply estoppel to clear provision within summary proceedings – Relevant considerations – Principles to be applied – *Aer Rianta Cpt v Ryan Air Ltd* [2001] 4 IR 607*; Danske Bank A/S (T/A Nationla Irish Bank) v Durkan New Homes & ors* [2009] IEHC 278 (Unrep, Charleton J, 26/6/2009**),** *Rickards v Oppenheim* [1950] 1 KB 616 and *Central London Property Trust Limited v High Trees House Ltd* [1947] KB 130 considered – Summary judgment refused and leave to defend granted (2009/4910S – Charleton J – 5/3/2010) [2010] IEHC 54
Helsingor v Walsh

Summary summons

Summary judgment – Liberty to enter final judgment – Whether requirement to include averment that no *bona fide* defence to claim – Whether failure to comply with requirement fatal to plaintiff's application – Relevance of court rules – Statutory interpretation – Whether rules mandatory in nature – Whether inherent jurisdiction of the court – Due process – Exercise of discretion within statutory framework – *Kennedy v Killeen Corrugated Products Ltd* [2006] IEHC 385 [2007] 2 IR 561 distinguished, *Swords v Western Proteins Ltd* [2001] 1 I.R. 324 applied – *Taylor v Clonmel Healthcare Ltd.* [2004] 1 I.R. 169; *Director of Corporate Enforcement v Bailey* [2007] IEHC 365 *Norbis v Norbis* [1986] 60 ALJR 335 and *Ward v James* [1966] 1 Q.B. 273 considered – Rules of the Superior Courts 1986 (No. 15/1986), O. 37, O. 122 – Held failure to comply not fatal to plaintiff's application (2008/2391S – Master HC – 5/3/2010)
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Third party notice

Set aside – Delay – Loan – Legal charge over properties – Solicitors – Certificate of title – Claim for negligence, misrepresentation and negligent misstatement – Order granting defendants liberty to issue and serve third party notice – Whether reasonable for defendants to wait for period in question before applying to join third party – Whether defendants proceeded with all deliberate speed prior to making decision regarding issue of third party notice – *Board of Governors of St Laurence's Hospital v Staunton* [1990] 2 IR 31; *Connolly v Casey* [2000] 1 IR 345; *Robins v Coleman* [2009] IEHC 486 (Unrep, HC, McMahon J, 06/11/2009); *Mulloy v Dublin Corporation* [2001] 4 IR 52 considered – Civil Liability Act 1961 (No 41), s 27(1)(b) – Rules of the Superior Courts 1986 (SI 15/1986), O 12, r 26 – Application dismissed (2009/1784P – Hogan J – 06/12/2010) [2010] IEHC 456
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Third party proceedings

Abuse of process – Original proceedings against third party statute barred – Renewed plenary summons set aside – Whether abuse of process to join third party where original claim against that party statute barred – Whether application to join third party can be brought outside limitation period – *Wallace v Litviniuk* (2001) ACBA 118 and *Royal Brompton Hospital NHS Trust v Hammond* [2002] UKHL 14, [2002] 1 WLR 1397 approved – Civil Liability Act 1961 (No 41), s 31 – Third party claim dismissed (2009/3119P – Clarke J – 1/6/2010) [2010] IEHC 218
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Trial

Failure to make proper discovery – Court order for discovery – Mistrial on basis of failure to make proper discovery– Prejudice – Legally enforceable right to obtain documents from particular person – Whether fair trial possible– *Murphy v O'Donoghue* [1996] 1 IR 123 followed; *Mercantile Credit Company v Heelan* [1998] 1 IR 81; *Radiac Abrasives Inc v Prendergast* [1996] (Unrep, Barron J, 13/3/1996); *Dunnes Stores (Ilac Centre) Ltd v Irish Life Assurance* [2008] IEHC 114, (Unrep, Clarke J, 23/4/2008); *Logicrose v Southend United Football Club* [1988] 1 WLR 1256; *Wicklow County Council v Fenton* [2002] 4 IR 44; *Taylor v Clonmel Healthcare Ltd* [2004] 1 IR 169; *Bula v Tara Mines (No 6)* [1994] 1 ILRM 111; *Bula v Tara Mines (No 5)* [1994] 1 IR 487; *Digicel (St Lucia) v Cable and Wireless plc* [2009] 2 All ER 1094; *Geaney v Elan* [2005] IEHC 111, (Unrep, Kelly J, 13/4/2005) considered; *Leicestershire County Council v Michael Faraday and Partners Ltd* [1941] 2 KB 205 and *Johnston v Church of Scientology* [2001] 1 IR 682 distinguished – Rules of the Superior Courts 1986 (SI 15/1986), O 31 – Application for mistrial refused (2005/89 SP – O'Keeffe J – 17/12/2010) [2010] IEHC 464
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Statutory Instrument

Prisons act 1970 (section 7) order 2011
SI 330/2011

PROFESSIONS

Medical profession

Professional misconduct – Inquiry – Confirmation of decision – Costs –Censuring of practitioner – Imposition of conditions upon registration –Whether applicant entitled to costs where consent to application – Jurisdiction of court – Power to award costs – Discretionary power – Obligation on council to

come to High Court – Whether reasons for not awarding costs – Inappropriate and unnecessary examination of baby – Inappropriate and excessive prescribing of medication – *Re The Solicitors Act 1954* [1960] IR 239; *M v The Medical Council* [1984] IR 485; *CK v An Bord Altranais* [1990] 2 IR 396 and *Medical Council v O(P.A)* [2004] IESC 22, (Unrep, SC,1/4/2004) considered – Medical Practitioners Act 2007 (No 25), s 76 – Order granted and costs awarded to applicant (2010/692SP – Hedigan J – 1/2/2011) [2011] IEHC 34
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SI 404/2011

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SOCIAL WELFARE

Statutory Instruments

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Social welfare (consolidated claims, payments and control) (amendment) (no. 3) (over payments) regulations 2011
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SOLICITORS

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Solicitors' Disciplinary Tribunal – Complaint dismissed – Allegation in relation to conduct of proceedings – Allegations regarding undue influence in making of a will – Allegations regarding collusion – Judgment secured by solicitor in relation to professional fees prior to complaint – General allegations of spurious nature – Jurisdiction of court – *Fay v Tegral Pipes Ltd* [2005] IESC 34 [2005] 2 IR 261 approved – Appeal dismissed (2009/109SA – Kearns P – 22/02/2010) [2010] IEHC 42
Carter v Shannon

Disciplinary procedures

Appeal – Solicitors disciplinary tribunal – Complaint of professional misconduct – Appeal against finding of no *prima facie* case for inquiry – Allegation that solicitor acted without retainer or instruction – Claim against executors of will – Estate administered by solicitor – Respondent instructed by insurer for solicitor to take over running of action at no cost to estate – Settling of proceedings without knowledge of executor – Filing of notice of change of solicitor in error – Failure to serve notice of change of solicitor on solicitor for executor – Failure of executor to object to taking over of proceedings – Express instruction that no contact be made with respondent – Contribution of executor to absence of communication – Absence of prejudice – Error not meeting legal standard of misconduct – Solicitors (Amendment) Act 1960 (No 37), s 7 – Appeal dismissed (2010/99A – Kearns P – 17/1/2011) [2011] IEHC 17
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Appeal – Solicitors Disciplinary Tribunal – Burden of proof – Finding of no misconduct – Full consideration given to appellant's complaints – Distinction burden of proof in professional misconduct and negligence claims – Claim in negligence previously dismissed by High Court – Same facts – Appeal dismissed (2009/56SA – Kearns P – 17/1/2011) [2011] IEHC 18
Tighe v Burke

Jurisdiction

Ultra vires – Probate –Administration of estate – Complaints by beneficiaries – Allegations of delay and inadequate service –Whether complaints committee had jurisdiction to deal with complaints from beneficiaries who were not clients – Meaning of client – Whether requirement that complainant be client that has instructed – Findings made in absence of solicitor – Notification given prior to hearing of inability to attend due to short notice – Length of notice period allowed – Whether fair procedures applied – Whether requirement to provide oral hearing and opportunity to cross examine witnesses – *Howard v Commissioner for Public Works* [1994] IR 101 and *Corrigan v Irish Land Commission* [1977] IR 3 considered – Succession Act 1965 (No 27) , s 117 – Solicitors (Amendment) Act 1994 (No 27), ss 1, 2,8,9 &68 – Relief refused (2008/903JR – Kearns P – 23/2/2010) [2010] IEHC 52
Condon v Law Society of Ireland

STATUTORY INTERPRETATION

Construction

Local government – Roads – Toll bye-laws – Overcharging – Intention of enactment – Literal construction – Absurdity – Whether bye-laws provided only for increase upwards – Whether construction reflected plain intention of maker of instrument – Whether defendant charging tolls in excess of maximum tolls permitted by bye-laws – *In re Greendale Building Company* [1977] IR 256; *Dublin Corporation v McGrath* [1978] ILRM 208; *Re Parke Davis & Co Trademark Application* [1976] FSR 195; *Ní Eilí v Environmental Protection Agency* [1997] 2 ILRM 458; *Howard v Commissioners of Public Works* [1994] 1 IR 101; *B(D) v Minister for Health and Children* [2003] 3 IR 12; *Monahan v Legal Aid Board* [2009] 3 IR 458 and *Mulcahy v Minister for the Marine* (Unrep, Keane J, 4/11/1994) considered – Roads Act 1993 (No 14), ss 59 and 61 – Interpretation Act 2005 (No 23), s 5 – Toll Bye-laws for the M1 Motorway (Gormanstown to Monasterboice), reg 14 – Injunction granted and declarations made (2011/365P – Kelly J – 11/3/2011) [2011] IEHC 71
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Literal interpretation

Appeals committee – Meaning of "appeal" – Jurisdiction of appeals committee when hearing appeal – Whether full rehearing or review of decision making process – Whether restricted to reviewing reasonableness – Education Act 1998 (No 51), s 29 – Preliminary issue held in favour of respondents (234/2009 – SC – 23/11/2010) [2010] IESC 57
St Mologa's National School v Dept of Education and Science

Article

O'Sullivan, Catherine
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TAXATION

Value added tax

Construction – Scheme of development – Letting agreement with builder prior to conveyance – Whether VAT exemption – Decision of tax inspector – Whether reason to believe tax due – Refusal to provide tax inspector as witness – Statutory interpretation

– Jurisdiction of Appeal Commissioners – Nature of tax appeal – Burden of proof – Grounds upon which appeal may be brought – Words and phrases – Meaning of "*reason to believe*" – Whether jurisdiction to inquire into validity of assessment – Whether jurisdiction to call tax inspector on assessment – Relevance of delay between assessment and ruling – Whether delay bar to relief sought – *Van Binsbergen v BestuurVan de Bedriffsvereniging voor de Metaalnijverheid (Case 33/74)* [1974] ECR 1229, *Halifax plc, v Commissioners of Customs and Excise (Case-225/02)* [2006] ECR 1609, *Cussens v Brosnan* [2008] IEHC 169; *Van Boeckel v Customs and Excise Commissioners* [1981] 2 AER 505; *Hanlon v Fleming* [1981] IR 489 , *State (Whelan) v Smidic* [1938] I R 626 and *Jussila v Finland* (2007) 45 EHRR 39 considered – *Inland Revenue Commissioners v Sneath* [1932] 2 KB 362 ; *TJ v CAB* [2008] IEHC 168; *JE Davy v Financial Services Ombudsman* [2008] IEHC 256 [2008] 2 ILRM 507 approved – *Viera v Revenue Commissioners* [2009] IEHC 431 distinguished – Value Added Tax Act 1972 (No 22), ss 4 and 23 – Value Added Tax Act 1994 (UK) – Taxes Consolidation Act 1997 (No 39), s 25, 933, 934 & 939 – Relief refused (2009/723JR – Charleton J – 26/2/2010) [2010] IEHC 49
Menolly Homes Ltd v Appeal Commissioners and Revenue Commissioners

TORT

Assault

Garda station – Reasonable force – Plaintiff allegedly assaulted – Plaintiff acting aggressively – Personal injuries – Plaintiff suffering from medical conditions – Plaintiff liable to bruise easily – Whether force used on plaintiff was disproportionate and unreasonable in circumstances – Claim dismissed (2009/8053P – McMahon J – 17/12/2010) [2010] IEHC 460
K (M) v Commissioner of An Garda Síochána

Concurrent wrongdoers

Third party – Same damage – Delay in serving plenary summons – Loss of opportunity – Whether loss of opportunity equates to same damage – *Wallace v Litwiniuk* (2001) ACBA 118 and *Royal Brompton Hospital NHS Trust v Hammond* [2002] UKHL 14, [2002] 1 WLR 1397 approved – Civil Liability Act 1961 (No 41), s 31 – Third party claim dismissed (2009/3119P – Clarke J – 1/6/2010) [2010] IEHC 218
Moloney v Liddy

Medical negligence

Expert evidence – Necessity for immediate treatment – Obligation to take safest course for patient – Applicable principles – Duty to provide surgical treatment of standard consistent with careful medical practitioner of like specialisation and skill – Consultant obstetrician and gynaecologist – Multiple claims – Diagnostic laparoscopy – Claim that secondary port incorrectly located in abdomen puncturing blood vessel – Failure to establish on evidence that pain and bruising caused by puncturing of major blood vessel – Possibility of penetration of minor blood vessel – Absence of medical evidence establishing penetration of minor blood vessel comprised negligence – Claim that salpingectomy incorrectly performed by way of open surgery – Ectopic pregnancy – Necessity for salpingectomy – Absence of experience with laparoscopic salpingectomy – Possibility of locating laparoscopically skilled practitioner *Dunne v National Maternity Hospital* [1989] IR 91 – Claims dismissed (2007/434P – Quirke J – 21/1/2011) [2011] IEHC 52
Laycock v Gaughan

Negligence

Duty of care – Proximity – Foreseeability – Public policy – Assault – Trespass – Personal injury – Rape by murder suspect brought to house of victim by Gardaí – Damages – Negligence – Breach of duty – Whether duty of care – Whether just or reasonable to impose duty of care – Whether defendants knew or ought to have known that suspect posed threat to plaintiff – Alleged failure to ensure safety of plaintiff – Whether action taken done in course of investigatory functions – *Hill v Chief Constable of West Yorkshire* [1988] 2 All ER 238; *Swinney v Chief Constable of West Cumbria Police* [1996] 3 All ER 449; *Cowan v Chief Constable of Avon and Somerset Constabulary* [2001] All ER(2) 204; *Chief Constable of Hertfordshire v Van Colle* [2009] 1 AC 225; *Osman v Ferguson* [1993] 4 All ER 344; *Z v United Kingdom* [2001] 29 FLR 612; *W(HM) v Ireland* [1997] 2 IR 141*; Lockwood v Ireland* [2010] IEHC 430, (Unrep, Kearns P, 10/12/2010) and *LM v Commissioner of An Garda Siochana* [2011] IEHC 14, (Unrep, Hedigan J, 20/1/2011) considered – Case dismissed against second, third and fourth defendants; damages awarded against first defendant (2001/15809P – Hedigan J – 25/2/2011) [2011] IEHC 65
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Negligence

Duty of care – Vicarious liability – Member of public attacked while assisting supermarket security guard – Expert evidence – Whether expert evidence required – Common practice – Whether sufficient to have only one security guard on duty – Whether means of communicating with supermarket managers sufficient – Liability for injuries suffered by rescuer – Whether liability for injury to rescuer extends to wrongful act of third party – Whether liable where precise nature of attack not foreseen – *Wagner v International Railway Co* (1921) 133 NE 437, *Breslin v Corcoran* [2003] 2 IR 203, *Dockery v O'Brien* (1975) 109 ILTR 127, *Dorset Yacht Co v Home Office* [1970] AC 1004 and *Attorney-General (Ruddy) v Kenny* (1960) 94 ILTR 185 followed; *Bradley v Córas Iompair Éireann* [1976] IR 215, *Morton v William Dixon Ltd* [1909] SC 807, *Walsh v Securicor (Ireland) Ltd* [1993] 2 IR 507 and *Smith v Littlewoods Ltd* [1987] AC 241 considered; *Phillips v Durgan* [1991] 1 IR 89 distinguished – Defendant's appeal dismissed (99/2007 – SC – 16/11/2010) [2010] IESC 53
O'Neill v Dunnes Stores

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Rescuing the law of tort? The decision of the Supreme Court in O'Neill v Dunnes Stores
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Railway safety act 2005 (section 26) Levy order 2011
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AT A GLANCE

European Directives implemented into Irish Law

European Communities (control on mussel fishing) regulations 2008 (amendment) regulations 2011
DIR/1992-43, DIR/2009-147
SI 402/2011

European communities environmental objectives (groundwater) (amendment) regulations 2011
DIR/2009-31
SI 389/2011

European communities (marketing of fruit plant propagating material) regulations 2011
DIR/2008-90
SI 384/2011

European Communities (transnational information and consultation of employees act 1996) (amendment) regulations 2011
DIR/2009-38
SI 380/2011

European Communities (waste and electronic equipment) (amendment) regulations 2011
DIR/2002-96
SI 397/2011

Environment Protection Agency act 1992 (first schedule) (amendment) regulations 2011
DIR/2009-31
SI 308/2011

European communities (calibration of tanks

of vessels) regulations 1976 (revocation) regulations 2011
DIR/2011-17
SI 316/2011

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DEC/2008-855, DEC/2009-254, DEC/2009-423, DEC/2009-952, DEC/2010-211
SI 312/2011

European Communities (clean and energy-efficient road transport vehicles) regulations 2011
DIR/2009-33
SI 339/2011

European Communities (conservation of wild birds (Lough Carra special protection area 004051)) regulations 2011
DIR/2009-147, DIR/1997-62
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European Communities (conservation of wild birds (Lough Foyle special protection area 004087)) regulations 2011
DIR/2009-147, DIR/1992-43
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European Communities (conservation of wild birds (Malahide estuary special protection area 004025)) regulations 2011
DIR/2009-147, DIR/1992-43
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European Communities (conservation of wild birds (Tramore Back Strand special protection area 004027)) regulations 2011
DIR/2009-147, DIR/1992-43
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European Communities (electronic communications networks and services) (framework) regulations 2011
DIR/2002-21, REG/717-2007, REG/544-2009, DIR/2009-140
SI 333/2011

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DIR/2009-31, DIR/2004-35
SI 307/2011

European communities (financial collateral arrangements) (amendment) (no.2) regulations 2011
DIR/2002-47
SI 318/2011

European Communities (machinery) (amendment) regulations 2011
DIR/2009-127, DIR/2006-42
SI 310/2011

European Communities (mergers and divisions of companies) (amendment) regulations 2011
DIR/2007-63, DIR/2009-109
SI 306/2011

European communities (passenger ships) regulations 2011
DIR/2010-36
SI 322/2011

European Communities (phytosanitary measures) (brown rot in Egypt)(amendment) regulations 2011
DEC/2008-857, DEC/2009-839
SI 282/2011

European Communities (settlement finality) (amendment) regulations 2011
DIR/1998-26
SI 319/2011

European Communities (sheep identification) regulations 2011
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European Union (Libya) (financial sanctions) (no. 6) regulations 2011
REG/204-2011
SI 342/2011

European Union (restrictive measures) (Syria) regulations 2011
REG/442-2011
SI 314/2011

Flourinated greenhouse gas regulations 2011
REG/842-2006
SI 279/2011

ACTS OF THE OIREACHTAS AS AT 17TH NOVEMBER 2011 (30TH DÁIL & 23RD SEANAD)

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

1/2011 Bretton Woods Agreements (Amendment) Act 2011
Signed 21/01/2011

2/2011 Multi-Unit Developments Act 2011
Signed 24/01/2011

3/2011 Communications (Retention of Data) Act 2011
Signed 26/01/2011

4/2011 Student Support Act 2011
Signed 02/02/2011

5/2011 Criminal Justice (Public Order) Act 2011
Signed 02/02/2011

6/2011 Finance Act 2011
Signed 06/02/2011

7/2011 Road Traffic Act 2011
Signed 27/04/2011

8/2011 Finance (No. 2) Act 2011
Signed 22/06/2011

9/2011 Social Welfare and Pensions Act 2011
Signed 29/06/2011

10/2011 Ministers and Secretaries (Amendment) Act 2011
Signed 04/07/2011

11/2011 Foreshore (Amendment) Act 2011
Signed 07/07/2011

12/2011 Medical Practitioners (Amendment) Act 2011
Signed 08/07/2011

13/2011 Biological Weapons Act 2011
Signed 10/07/2011

14/2011 Electoral (Amendment) Act 2011
Signed 25/07/2011

15/2011 Public Health (Tobacco) (Amendment) Act 2011
Signed 25/07/2011

16/2011 Residential Institutions Redress (Amendment) Act 2011
Signed 25/07/2011

17/2011 Defence (Amendment) Act 2011
Signed 26/07/2011

18/2011 Finance (No. 3) Act 2011
Signed 27/07/2011

19/2011 Child Care (Amendment) Act 2011
Signed 31/07/2011

20/2011 Environment (Miscellaneous Provisions) Act 2011
Signed 02/08/2011

21/2011 Communications Regulation (Postal Services) Act 2011
Signed 02/08/2011

22/2011 Criminal Justice Act 2011
Signed 02/08/2011

23/2011 Civil law (Miscellaneous Provisions) Act 2001
Signed 02/08/2011

24/2011 Criminal Justice (Community Service (Amendment) Act 2011
Signed 02/08/2011

25/2011 European Financial Stability Facility and Euro Area Loan Facility (Amendment) Act 2011
Signed 23/09/2011

26/2011 Insurance (Amendment) Act 2011
Signed 30/09/2011

BILLS OF THE OIREACHTAS AS AT 17TH NOVEMBER 2011 (31ST DÁIL & 24TH SEANAD)

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

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

Access to Central Treasury Funds (Commission for Energy Regulation) Bill 2011
Bill 61/2011
Committee Stage – Dáil *(Initiated in Seanad)*

Advertising, Labelling and Presentation of Fast Food at Fast Food Outlets Bill 2011
1st Stage – Dáil

Central Bank and Credit Institutions (Resolution) Bill 2011
Bill 11/2011
2nd Stage – Seanad *(Initiated in Seanad)*

Central Bank and Credit Institutions (Resolution) (No. 2) Bill 2011
Bill 20/2011
Committee Stage – Dáil

Central Bank and Financial Services Authority of Ireland (Amendment) Bill 2011
Bill 67/2011
1st Stage – Dáil **[pmb]** *Deputy Michael McGrath*

Central Bank (Supervision and Enforcement) Bill 2011
Bill 43/2011
2nd Stage – Dáil

Civil Registration (Amendment) Bill 2011
Bill 65/2011
Committee Stage – Seanad **[pmb]** Senator Ivana Bacik

Competition (Amendment) Bill 2011
Bill 55/2011
Order for 2nd Stage – Dáil

Construction Contracts Bill 2010
Bill 21/2010
2nd Stage – Dáil **[pmb]** *Senator Fergal Quinn (Initiated in Seanad)*

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

Criminal Justice (Female Genital Mutilation) Bill 2011
Bill 7/2011
Committee Stage – Dáil *(Initiated in Seanad)*

Criminal Law (Defence and Dwellings) Bill 2010
Bill 42/2010
Committee Stage – Dáil

Debt Settlement and Mortgage Resolution Office Bill 2011
Bill 59/2011
2nd Stage – Dail

Dormant Accounts (Amendment) Bill 2011
Bill 46/2011
2nd Stage – Dáil *(Initiated in Seanad)*

Electoral (Amendment) (Political Donations) Bill 2011
Bill 13/2011
Committee Stage – Dáil **[pmb]** *Deputies Dara Calleary, Niall Collins, Barry Cowen, Timmy Dooley, Sean Fleming, Billy Kelleher, Seamus Kirk, Michael P. Kitt, Brian Lenihan, Micheál Martin, Charlie McConalogue, Michael McGrath, John McGuinness, Michael Moynihan, Willie O'Dea, Éamon Ó Cuív, Seán Ó Fearghaíl, Brendan Smith, Robert Troy and John Browne.*

Energy (Miscellaneous Provisions) Bill 2011
Bill 54/2011
2nd Stage – Dáil

European Arrest Warrant (Application to Third Countries and Amendment) and Extradition (Amendment) Bill 2011
Bill 45/2011
Order for 2nd Stage – Dáil

Family Home Bill 2011
Bill 38/2011
Order for 2nd Stage – Seanad **[pmb]** *Senators Thomas Byrne and, Marc MacSharry*

Family Home Protection (Miscellaneous Provisions) Bill 2011
Bill 66/2011
Order for 2nd Stage – Dáil **[pmb]** *Deputy Stephen Donnelly*

Health (Provision of General Practitioner Services) Bill 2011
Bill 57/2011
2nd Stage – Dáil

Human Rights Commission (Amendment) Bill 2011
Bill 52/2011
1st Stage – Dáil **[pmb]**

Immigration, Residence and Protection Bill 2010
Bill 38/2010
Committee Stage – Dáil

Industrial Relations (Amendment) Bill 2011
Bill 39/2011
2nd Stage – Dáil **[pmb]** Deputy Willie O'Dea

Irish Film Board (Amendment) Bill 2011
Bill 60/2011
Order for 2nd Stage – Dáil

Jurisdiction of Courts and Enforcement of Judgments (Amendment) Bill 2011
Bill 10/2011
Order for 2nd Stage – Seanad *Senator Maurice Cummins*

Legal Services Regulation Bill 2011
Bill 58/2011
Order for 2nd Stage – Dáil

Local Authority Public Administration Bill 2011
Bill 69/2011
1st Stage – Dáil **[pmb]** *Deputy Niall Collins*

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

Mobile Phone Radiation Warning Bill 2011
Bill 24/2011
Order for 2nd Stage – Seanad **[pmb]** *Senator Mark Daly (Initiated in Seanad)*

NAMA Transparency Bill 2011
Bill
2nd Stage – Seanad **[pmb]** *Senators Mark Daly, Darragh O'Brien, Diarmuid Wilson*

National Tourism Development Authority (Amendment) Bill 2011
Bill 37/2011
2nd Stage – Dáil

Nurses and Midwives Bill 2010
Bill 16/2010
2nd Stage – Seanad *(Initiated in Dáil Éireann)*

Ombudsman (Amendment) Bill 2008
Bill 40/2008
2nd Stage – Seanad *(Passed by Dáil Éireann)*

Patents (Amendment) Bill 2011
Bill 17/2011
Committee Stage – Dáil

Privacy Bill 2006
Bill 44/2006
Order for 2nd Stage – Seanad *(Initiated in Seanad)*

Property Services (Regulation) Bill 2009
Bill 28/2009
Committee Stage – Dáil **[pmb]** *Senator Donie Cassidy (Initiated in Seanad)*

Public Service Pensions (Single Scheme) and Remuneration Bill 2011
Bill 56/2011
Order for 2nd Stage – Dáil

Qualifications and Quality Assurance (Education and Training) Bill 2011
Bill 41/2011
Committee Stage – Seanad *(Initiated in Seanad)*

Reduction in Pay and Allowances of Government and Oireachtas Members Bill 2011
Bill 27/2011
1st Stage – Dáil **[pmb]** *Deputy Pearse Doherty*

Registration of Wills Bill 2011
Bill 22/2011
Committee Stage – Seanad **[pmb]** *Senator Terry Leyden (Initiated in Seanad)*

Regulation of Debt Management Advisors Bill 2011
Bill 53/2011
1st Stage – Dáil **[pmb]** *Deputy Michael McGrath*

Reporting of Lobbying in Criminal Legal Cases Bill 2011
Bill 50/2011
Order for 2nd Stage – Seanad **[pmb]** *Senator John Crown*

Road Traffic (No. 2) Bill 2011
Bill 51/2011
Passed by Dáil Éireann *(Initiated in Seanad)*

Road Transport Bill 2011
Bill 68/2011
Order for 2nd Stage – Dáil

Scrap and Precious Metal Dealers Bill 2011
Bill 64/2011
1st Stage – Dáil **[pmb]** *Deputy Mattie McGrath*

Smarter Transport Bill 2011
Bill 62/2011
1st Stage – Dáil **[pmb]** *Deputy Eoghan Murphy*

Spent Convictions Bill 2011
Bill 15/2011
2nd Stage – Dáil **[pmb]** *Deputy Dara Calleary*

Statistics (Heritage Amendment) Bill 2011
Bill 30/2011
Order for 2nd Stage – Seanad **[pmb]** *Senator Labhrás Ó Murchú*

Thirtieth Amendment of the Constitution (Houses of the Oireachtas Inquiries) Bill Bill 47/2011
Committee Stage – Seanad *(Initiated in Dáil)*

Thirty-First Amendment of the Constitution (The President) Bill 2011
Bill
1st Stage – Dáil

Tribunals of Inquiry Bill 2005
Bill 33/2005
Report Stage – Dáil

Twenty-Ninth Amendment of the Constitution (Judges' Remuneration) Bill 2011
Bill 44/2011
Committee Stage – Seanad *(Initiated in Dáil)*

Veterinary Practice (Amendment) Bill 2011
Bill 42/2011
Committtee Stage – Dáil

Water Services (Amendment) Bill 2011
Bill 63/2011
Order for 2nd Stage – Seanad

Welfare of Greyhounds Bill 2011
Bill 21/2011
Committee Stage – Seanad *(Initiated in Seanad)*

Whistleblowers Protection Bill 2011
Bill 26/2011
Order for 2nd Stage – Dáil **[pmb]** *Deputies Joan Collins, Stephen Donnelly, Luke 'Ming' Flanagan, Tom Fleming, John Halligan, Finian McGrath, Mattie McGrath, Catherine Murphy, Maureen O'Sullivan, Thomas Pringle, Shane Ross, Mick Wallace*

ABBREVIATIONS

A & ADR R = Arbitration & ADR Review
BR = Bar Review
CIILP = Contemporary Issues in Irish Politics
CLP = Commercial Law Practitioner
DULJ = Dublin University Law Journal
ELR = Employment Law Review
ELRI = Employment Law Review – Ireland
GLSI = Gazette Law Society of Ireland
IBLQ = Irish Business Law Quarterly
ICLJ = Irish Criminal Law Journal
ICPLJ = Irish Conveyancing & Property Law Journal
IELJ = Irish Employment Law Journal
IIPLQ = Irish Intellectual Property Law Quarterly
IJEL = Irish Journal of European Law
IJFL = Irish Journal of Family Law
ILR = Independent Law Review
ILTR = Irish Law Times Reports
IPELJ = Irish Planning & Environmental Law Journal
ISLR = Irish Student Law Review
ITR = Irish Tax Review
JCP & P = Journal of Civil Practice and Procedure
JSIJ = Judicial Studies Institute Journal
MLJI = Medico Legal Journal of Ireland
QRTL = Quarterly Review of Tort Law

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

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Marriage and the Family: A Changing Institution? *Part II*

Peter Charleton and Sinéad Kelly*

This two part article concerns legislative and judicial attitudes to marriage and the family. Part I, which was published in the last issue, focused on the debate as to marriage as a bedrock for a stable society and how the Constitution of 1937 enforced protection of the family in law. In Part II, the authors turn their attention to the changes wrought in the fabric of Irish society by the diminution in the power of the apparently embedded attitudes, the increase in immigration and the introduction of new attitudes of what marriage is and what it ought to be. In that setting, fertility treatment, as well as monogamy, immigration and family unity are considered in the context of traditional and evolving judicial attitudes, particularly in the absence of definitive rules through legislation. Any attitude to such a keenly debated institution as marriage may be questioned, but aspects of the approach grounded in the Constitution of 1937 remain as a force for informing judicial decisions in contemporary Ireland.

The Old Certainties

The old certainties may be criticised; but those certainties did provide a bulwark of protection for married couples and their children. Marriage was to be respected. Children born to married parents could be fostered but not adopted. An Irish man or woman could choose a spouse of any nationality and the State would not baulk at the principle that Ireland was thereby their home. Until recently, any notion that a child could be Irish but the parents of the child foreign nationals was very unusual. Respect for the family based on marriage, however, would have ensured that no Irish judge would interfere in the union of that family within Ireland. Rather, it might be predicted that judicial decisions would favour the family as a legally untouchable organism within the structure of Irish society. It may be argued that much of this was based on the attitude that gave rise to the 1937 Constitution in the first place and that the law was interpreted to easily fit the ideology which had inspired it. Even a bulwark may be overcome, however.

Pressure built throughout the 1990s against the marital family as the fundamental unit on which Irish life was based. Marriages broke down. Divorce was introduced by referendum in 1995. As peace came to Ireland, the claim in our Constitution that the Irish Republic also comprised Northern Ireland was replaced by referendum with an aspiration towards unity. The economy improved in a real sense before the Irish banks lost all reason and common sense. The nationalist minority in Northern Ireland was guaranteed citizenship by a constitutional change to Article 2 which made everyone born on this island a citizen of the Republic.[1] An unexpected result was a wave of immigration attracted by good economic prospects and citizenship for every Irish born child.

With peace came the quasi-incorporation of the European Convention on Human Rights, through the European Convention on Human Rights Act 2003. Suddenly, we had new legal ideas about what a family is; large numbers of new people who were from outside the conservative strictures of an Irish upbringing; an asylum system that was suddenly cranked into gear and overwhelmed; claims for families to stay in Ireland based on the entitlement of an infant to citizenship; and a sudden liberalisation that arose from the self-destruction of the authority of the Church through sex abuse scandals. How did old certainties survive this?

Immigration, Marriage and the Family

The pressure on our asylum system tested Ireland's pro-marriage and pro-family values. The courts were confronted with the dilemma of deciding between the constitutional rights of the family and our Government's power to deport aliens. In *Fajujonu v. The Minister for Justice,* the applicants were a marital family comprising foreign national parents and their Irish born daughter.[2] She had acquired citizenship under legislative provisions that were prior to the 1998 Article 2 constitutional amendment. On refusing the father, a national of Nigeria, a work permit, the Minister requested that he leave the country. He had no legal right to remain here. The applicants, relying on the Irish born child's constitutional rights, challenged the Minister's decision and sought, *inter alia*, a declaration that the relevant provisions of the Aliens

* The Honourable Mr. Justice Peter Charleton is a judge of the High Court. Sinéad Kelly B.C.L., L.L.M. is a solicitor. This paper was delivered at the Colloque Franco-Britannique-Irlandais of the French, British and Irish judiciary in May 2011.

1 Article 2 of the Constitution, as amended by Article 2 of the Nineteenth Amendment of the Constitution Act 1998, provides that:- "It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish Nation…"

2 [1990] 2 I.R. 151; Section 5 of the Aliens Act 1935 provides, *inter alia*, that:- "The Minister may, if and whenever he thinks proper, do by order… all or any of the following things in respect of all aliens or of aliens of a particular nationality or otherwise of a particular class, or of particular aliens, that is to say… (e) make provision for the exclusion or the deportation and exclusion of such aliens from Saorstát Éireann and provide for and authorise the making by the Minister of orders for that purpose…". Regulation 13 of the Aliens Order 1946 (S.R. & O. No. 395 of 1946) provides that "… the Minister may, if he deems it to be conducive to the common good so to do make an order… requiring an alien to leave and to remain thereafter outside the State."

Act 1935 were inconsistent with Articles 40, 41 and 42 of the Constitution and a declaration that they were entitled to reside within the State. By the time the case reached the Supreme Court, two further Irish children had been born to the couple. Finlay C.J. acknowledged that the children, as citizens, had a constitutional right to the company and care of their parents within a family unit and that *prima facie* this was a right which they were entitled to exercise within the State. Walsh J. held that the applicants constituted a family within the meaning of the Constitution and that "in the particular circumstances", where the family had been in the State for an appreciable length of time (eight years), it would be contrary to Article 41 of the Constitution were the Minister to move to deport the parents. This right, said the Chief Justice, was subject to the exigencies of the common good and:-

> "if… the Minister is satisfied that for good and sufficient reason the common good requires that the residence of these parents within the State should be terminated, even though that has the necessary consequence that in order to remain as a family unit the three children must also leave the State, then that is an order he is entitled to make…"[3]

The Minister, however, could only exercise his discretion after due and proper consideration and with full recognition of the fundamental nature of the constitutional rights of the family. Any decision to deport the applicants would need to be justified by reference to a "grave and substantial reason associated with the common good". This left room for interpretation and thus, in appropriate cases, judicial intervention.[4]

Our asylum system, however, was open to abuse. Birth in Ireland after the constitutional amendment of Article 2 in 1998, after all, equalled citizenship. Stories abounded of heavily pregnant asylum-seekers entering the State (or the airspace of the State) with a view to attaining a derivative right of residence on giving birth to a citizen child. Deportation orders were challenged where the citizen child's connection to the State was less than obvious. In *A.O & D.L. v. The Minister for Justice*, Hardiman J. referred to such cases as "anchor child" applications.[5] Distinguishing *Fajujonu* on its facts, the Court in that case held that minor citizens do not have an automatic constitutional entitlement to the care and company of their parents in the State for an indefinite period into the future simply by virtue of their having been born in the State. An Irish citizen child's right to remain in the State was not disputed. However, the Court made it clear that this right could not confer on foreign national parents any constitutional or other right to remain in the State.

Unsustainable pressure on the asylum system prompted the Government to review its policy towards residency applications based solely on parentage of an Irish citizen child. In 2004, an amendment to Article 9 of the Constitution was accepted by an overwhelming majority (almost 80%). The right to Irish citizenship based solely on birth within the State was abandoned in favour of a new test in Article 9.2.1 that conferred citizenship on the basis of birth in Ireland and having at least one parent who was Irish.[6] This was followed by an administrative scheme ("the IBC 05 scheme") under which eligible applicants were granted permission to remain in the State, subject to certain conditions.[7]

Such cases have continued. In February 2011, Hogan J. considered the situation of a Nigerian father who sought permission to remain in Ireland with his pregnant wife (who had been granted IBC 05 status) and his three children, the youngest of whom, S., was an Irish citizen.[8] The children and their mother had been living in the State for seven years and the children were attending school here. Hogan J. clearly felt constrained by the "formidable weight of authority" in this area.[9] He acknowledged that Mr. I had abused the asylum system and should not be allowed to profit from such abuse. Yet, this was a case where the mother had indicated her intention to remain in the State even in the event that her husband was deported. A deportation order would, in effect, mean that S. would have little or no direct contact with her father. The marriage of the parents would also be at risk. However, Hogan J. noted that the case law is clear: the Minister for Justice cannot be held responsible for such

3 *Ibid* at 163; Walsh J. (at 166) put the test on the basis of requiring "predominant" and "overwhelming" reasons" to justify breaking up the family unit.

4 For the current position as to the principles to be applied on deporting the foreign parents of an Irish child, see *Oguekwe v. Minister for Justice* [2008] 3 I.R. 795; and on the relationship of proportionality to reasonableness in judicial review see *Meadows v. Minister for Justice* [2010] 2 I.R. 701. See further the review of this case by Hogan J. in *Efe v. M.J.E.L.R.* [2011] IEHC 214, (Unreported, High Court, Hogan J., 7th June, 2011).

5 [2003] 1 I.R. 1.

6 Article 9.2.1 of the Constitution now reads:- "Notwithstanding any other provision of this Constitution, a person born in the island of Ireland, which includes its islands and seas, who does not have, at the time of the birth of that person, at least one parent who is an Irish citizen or entitled to be an Irish citizen is not entitled to Irish citizenship or nationality, unless provided for by law." Section 6(1) of The Irish Nationality and Citizenship Act 1956 now provides that:- "Subject to section 6A (inserted by section 4 of the Irish Nationality and Citizenship Act 2004), every person born in the island of Ireland is entitled to be an Irish citizen." Section 6A then states:- "A person born in the island of Ireland shall not be entitled to be an Irish citizen unless a parent of that person has, during the period of 4 years immediately preceding the person's birth, been resident in the island of Ireland for a period of not less than 3 years or periods the aggregate of which is not less than 3 years." Certain persons are excluded from this requirement, including persons born "to parents at least one of whom was at the time of the person's birth a person entitled to reside in the State without any restriction on his or her period of residence (including in accordance with a permission granted under section 4 of the [Immigration] Act of 2004." See s. 6A(2)(d)(i) of the Act of 1956.

7 The Minister received 17,917 applications under the scheme and granted permission to remain to 16,693 people. Those granted IBC status had permission to remain in the State for two years and at the end of this period could apply to have their residency renewed, in most cases for a further three years. At the end of this second period of residence (*i.e.* after 5 years residence), an entitlement to apply for a certificate of naturalisation accrued.

8 *I. v. Minister for Justice, Equality and Law Reform* [2011] IEHC 66, (Unreported, High Court, Hogan J., 22nd February, 2011).

9 See *An. O. v. Minister for Justice, Equality and Law Reform* [2009] IEHC 448, (Unreported, High Court, Cooke J., 14th October, 2009); *Alli v. Minister for Justice, Equality and Law Reform* [2009] IEHC 595, (Unreported, High Court, Clark J., 2nd December, 2009); *Ofobuike v. Minister for Justice, Equality and Law Reform* [2010] IEHC 89, (Unreported, High Court, Cooke J., 13th January, 2010).

consequences. In refusing the application for leave, he stated that:-

> "If the matters were *res integra*, then I should have thought that in these circumstances the applicants would have demonstrated the existence of substantial grounds justifying the grant of leave [for judicial review] on the basis that the Supreme Court did not quite have a case of this kind in mind when deciding *AO and DL*. Judged by that standard, one might also contend that different considerations should possibly apply where – as here – the citizen child will inevitably be separated from one parent on whom she is dependent during her minority by reason of the operation of the deportation order in circumstances where the other parent has permission to remain in the State."

The approach of the Minister for Justice can be contrasted with that articulated by the Grand Chamber of the European Court of Justice in *Zambrano v. Office National De L'Emploi,* the facts of which are not dissimilar to the cases cited above.[10] Mr. Zambrano, a national of Columbia, moved to Belgium, together with his wife and daughter. While in Belgium, his wife gave birth to two more children. These children were entitled to Belgian and, by virtue of Article 20 T.F.E.U., E.U. citizenship. Mr. Zambrano applied for a residence permit on the basis of his children's rights as Belgian citizens but his application was refused on two occasions. His application for a work permit and subsequent application for unemployment benefit were also refused. When his case came before the Tribunal du travail de Bruxelles, a reference was made to the E.C.J. as to the manner in which Article 20 T.F.E.U. should be interpreted. The Grand Chamber of the E.C.J. stated at para. 45 that:-

> "… Article 20 TFEU [citizenship of the Union] is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizens."

The operative part of the judgment is remarkably short. Is this perhaps suggestive of discord in the Court? It is tightly and carefully drafted, yet its precise scope remains somewhat unclear: a number of cases are being referred to the E.C.J. for guidance as to whether it applies where the parent is not in employment or where he/she has been convicted of a criminal offence. On 21st March 2011, the Minister for Justice announced a ministerial review of at least 120 applications pending before the Irish courts to which the judgment may be relevant.[11] However, it is now understood that at least 1,057 cases are being reviewed by the Department of Justice and that a further 140 judicial review applications have been brought before the High Court.

The Issue of Polygamous Marriages

The raft of immigration cases which present before the courts by way of judicial review inevitably impact on aspects of family and constitutional law. Whether a person qualifies as a "spouse" for the purpose of a family reunification application can often be troublesome question, particularly where the marriage is significantly different in form to an Irish marriage, such as a marriage by proxy,[12] or a traditional, customary or religious marriage.[13] Polygamous marriages, including those that are potentially polygamous (*i.e.* neither party to the marriage has any other spouse but is permitted to take another spouse) give rise to particular difficulties. Irish law defines marriage as the union of "one man and one woman, to the exclusion of all others."[14] Bigamy is an offence. Polygamous marriages are, however, permitted in almost every state in which Islam is recognised as the primary religion, although the laws relating to polygamy differ greatly throughout the Islamic world. As a general principle of private international law, marriages are recognised where the parties to the marriage had the capacity to enter the marriage under their respective *lex domicilii* and the marriage complied with the formalities required under the *lex loci celebrationis*. This general rule applies unless contrary to public policy, which in Ireland may be informed by the Constitution. So, for example, a person domiciled in Ireland or the U.K. is not permitted to

10 Case 34/09, judgment of the Grand Chamber of 8th March, 2011; see also Advocate General Sharpston's opinion delivered on 30th September 2010 which considered the issue of reverse discrimination and the fundamental rights provisions. Compare also with the judgment in *Shirley McCarthy v. Secretary of State for the Home Department* Case 434/09, judgment of the Third Chamber of 5th May, 2011, which considered spousal rights of residence; the Court found that E.U. citizens who have never exercised their right of free movement cannot invoke Union citizenship to regularise the residence of their non-EU spouse.

11 Jamie Smyth, European Verdict Prompts Surge in Residency Cases, *The Irish Times*, 3rd June 2011; see also Jamie Smyth, Nigerian Mother of Irish Child Wins Right to Remain in the Republic, *The Irish Times*, 13th August 2011, where it is reported that as of July 2011, 181 applications had been granted by the State, while six had been refused. .

12 For a general discussion on proxy marriages, see the judgment of Cooke J. in *Hamza & Anor. v. Minister for Justice, Equality and Law Reform* [2010] IEHC 427, (Unreported, High Court, Cooke J., 25th November, 2010). Cooke J. makes the point that marriages celebrated according to the formalities of the Islamic rites of Shari'ah law, where the bride is not permitted to enter the masjid but is represented by a male representative, may not necessarily be marriages by proxy as both parties are in the same state when the marriage is taking place.

13 Under s. 18(3)(a) of the Refugee Act 1996, a refugee is entitled to apply to the Minister for Justice for permission for a member of his/her family (*i.e.* a spouse, parents or dependent child) or his/her civil partner to enter and reside in the State. Where the Minister is satisfied that the person concerned is in fact a member of the refugee's family or his/her civil partner, the permission sought must be granted (subject to any national security concerns or serious public policy considerations).

14 *per* Lord Penzance in *Hyde v. Hyde* (1866) L.R. 1 P. & D. 130 at 133; approved by Haugh J. in *Griffith v. Griffith* [1944] I.R. 35 at 40; In *B. v. R.* [1995] 1 I.L.R.M. 491 at 495, Costello P. stated that "[m]arriage was and is regarded as the voluntary and permanent union of one man and one woman to the exclusion of all others for life."

marry polygamously. In the U.K., the Matrimonial Causes Act 1973 allows recognition of polygamous marriages entered into outside the U.K. provided neither party was domiciled in the U.K. at the relevant time.[15] The Act also clarifies that a marriage is not regarded as polygamous if at its inception, neither party has any other spouse. In Ireland, the position as regards the recognition of such marriages is less clear.

This issue first came before our courts, albeit indirectly, in *Conlon v. Mohamed* where the marriage of an Irish woman and a South African man had been celebrated according to Islamic rites. It was accepted that the marriage was not formally recognised under South African law as it was potentially polygamous, had taken place by proxy and violated the ban that existed in South Africa at the time on interracial marriages. The issue, therefore, was whether, notwithstanding non-compliance with local requirements, the marriage could be recognised in Ireland as a common law marriage. Barron J. in the High Court held that "since it is accepted that such a marriage is potentially polygamous, it follows that the essential ingredients of a common law marriage were not present."[16] The Supreme Court agreed.[17]

Commenting on that decision, Cooke J. in *Hamza. v. Minister for Justice, Equality and Law Reform,* stated that it "ought not to be taken as a *dictum* that a potentially polygamous marriage can never be recognised as valid in Irish law as a general proposition".[18] He noted that in *Conlon,* the bride was at all times domiciled in Ireland and, as the validity of a marriage is determined by the pre-marriage domicile of the parties, she lacked the capacity to contract to a potentially polygamous marriage. Barron J. did not address the situation where both parties to the marriage were domiciled in a country that permits polygamy. On this point, Cooke J. concluded that the better view is that:-

> "… a foreign marriage validly solemnised in accordance with the *lex loci* may be recognisable as valid in Irish law, even if it was potentially polygamous according to that law, provided neither party was domiciled in Ireland at the time and neither has also been married to a second spouse, either then or since..."

In *H.A.H. v. S.A.A.*, Dunne J. in the High Court considered whether a marriage that was actually polygamous could be recognised in Ireland.[19] The applicant, a Lebanese man who had been granted refugee status in Ireland, applied for a declaration pursuant to s. 29 of the Family Law Act 1995 that his marriage to the respondent, his first wife, was a valid marriage. The applicant also had a second wife, who had previously been granted permission to reside in the State with him. The proceedings were connected to an application for reunification of the applicant with his first wife and the children of that marriage. The Court accepted that both marriages were valid marriages so far as Lebanese law was concerned. However, recognition in this State of an actually polygamous marriage raised public policy and constitutional issues. Dunne J. held that "marriage" in the context referred to in s. 29 of the Act of 1995 could only have been intended to refer to a monogamous marriage:-

> "… to interpret the word "marriage" in s. 29(1)(a) as including polygamous marriage would be to give it an interpretation which is simply not compatible with the constitutional understanding of marriage. In effect, if I were to construe the word "marriage" in s. 29 as including polygamous marriages I would be re-writing the understanding of marriage in this jurisdiction. That is something I cannot do. I think it is impossible to equate polygamous marriage with marriage as understood in the Constitution and to that extent I am driven to the conclusion that it is not possible to grant the declaration pursuant to s. 29(1)(a) sought in this case." [20]

A further issue can arise where a party to a potentially polygamous marriage, which is *de facto* monogamous, subsequently changes his or her domicile of choice to a country which prohibits polygamy. This will often be the case where a refugee arrives in Ireland with the intention of making it his or her permanent home. As he or she no longer has capacity to take a second spouse, is the potentially polygamous marriage thereby converted to a fully monogamous one? English and Canadian authorities would seem to suggest that it is; see, for example *Cheni v. Cheni* [1965] P. 85; Re *Hassan and Hassan* (1976) 69 D.L.R. (3d) 224 (Ont.).[21] Allowing the "conversion" of marriages in this way would undoubtedly facilitate the family reunification process for many refugees domiciled in Ireland who are parties to potentially, but not actually, polygamous marriages. Whether

15 Section 11(d) of the Matrimonial Causes Act 1973 provides that:- "A marriage celebrated after 31 July 1971 shall be void on the following grounds only, that is to say … (d) in the case of a polygamous marriage entered into outside England and Wales, that either party was at the time of the marriage domiciled in England and Wales... For the purposes of paragraph (d) of this subsection a marriage is not polygamous if at its inception neither party has any spouse additional to the other."

16 [1987] I.L.R.M. 172 at 179 to 180.

17 [1989] I.L.R.M. 523.

18 See fn. 12 above; see also *Hassan & Anor. v. Minister for Justice, Equality and Law Reform* [2010] IEHC 426, (Unreported, High Court, Cooke J., 25th November, 2010). Note, however, that both decisions are under appeal to the Supreme Court; See also *Mabuzwe v. Fakazi* (Unreported, High Court, Clark J., 27th May, 2011) where Clark J. stated that an *obiter* remark made by Finlay C.J. in *Conlon* that "it has not been contested that a polygamous marriage cannot be recognised in our law as a valid marriage" appears to have been somewhat misinterpreted and taken out of context as the validity of polygamous marriages was not the issue before the Court.

19 [2010] IEHC 497, (Unreported, High Court, Dunne J., 4th November, 2010).

20 The Court in *Mabuzwe* and also in *Hamza* and *Hassan* was extremely critical of the practice of the Department of Justice of requiring applicants in family reunification cases to obtain a declaration from the Circuit Court under s. 29 of the Family Law Act 1995 as to the validity of their marriage. In *Mabuzwe*, Clark J. referred to this practice as being "misconceived" and "inappropriate".

21 See also Rule 73 in Dicey & Morris, *The Conflict of Laws*, Vol. 2, 12th ed., (London, 1993) at p. 691 which provides that:- "A marriage which was polygamous at its inception, but is de facto monogamous, may be converted into a monogamous marriage (1) where, through a change of, or in, the personal law, or the happening of some event, neither party any longer has the capacity to marry another spouse, or (2) (perhaps) where the parties subsequently go through a monogamous ceremony of marriage."

this is legally and constitutionally permissible remains to be seen.

The issue was alluded to by Cooke J. in *Hamza* (at para. 42) and arose for consideration on an appeal taken by the Attorney General against a s.29 declaration as to marital status in *Mabuzwe v. Fakazi*.[22] While it was not necessary to determine the "conversion" argument, Clark J. expressly approved the *dicta* of Cooke J. in *Hamza* and held that the validity of marriages celebrated abroad can only be determined in accordance with the principles of private international law. The Court should consider whether the marriage conforms to the local law of the place where it took place; whether the parties to the union had capacity to enter it; and whether there are any public policy reasons for not recognising the relationship: consequently issues as to the validity of the marriage in Irish law should not arise. In the circumstances of the case, Clark J. recognised as valid for the purposes of family reunification the marriage of the Zimbabwean applicant to his wife of 13 years, referring to it as a *de facto* monogamous marriage, notwithstanding the fact that the laws of Zimbabwe permit polygamy.

As Ní Shuilleabháin points out, "a blanket policy rule against recognising potentially polygamous marriages has the effect of invalidating (in the eyes of Irish law) a very great number of marriages which are in fact monogamous."[23] We authors understand that the General Registry Office (the G.R.O.) treats births from potentially polygamous marriages as "non-marital" and the parents as "single". When one considers our strong constitutional preference for marital families, this view might be questioned.

One further point should be made. Where the subject of a reunification application is a spouse, s. 18(3)(b) of the Refugee Act 1996 requires that the marriage be subsisting at the date of the application. In cases where it cannot be shown that the marriage is valid in Irish law (which is not actually what the legislation requires), the practice until recently was to regard this condition as satisfied only where particular documentary proof of the foreign ceremony could be produced. This gives rise to inevitable evidentiary difficulties. As noted by Cooke J. in *Hamza*, "almost by definition, the refugee will be somebody who has been forced to flee from a country or region which is in the throes of war or civil strife and in which public or municipal administration may have broken down and records been destroyed." Where formal proof of marriage simply does not exist or is impossible to attain, an application for reunification might be refused and a marital family forced to live separate and apart. The correct approach, Cooke J. has stated, is to regard a spouse "as including the conjugal partner with whom the refugee can demonstrate the existence of a real and exclusive marital relationship over a period of time and which still subsists." This approach may be argued to harmonise with that adopted by the U.N.C.H.R. and the E.U. and could be presented as being more conducive to family unity and stability.[24]

Marriages of Convenience

If marriage supports stability not just in the relationship itself, but also in the wider community, what can be said of so-called "sham" marriages or marriages of convenience? To the naïve, the idea of marrying someone to secure for them a visa or rights of residence may, in some (deluded) sense, seem romantic. It was the basis of the Oscar winning Czech film 'Kolya' (1996) directed by Jan Sverák. The reality, however, is a world apart. A recent article in *The Sunday Times* reported that "fixers" typically charges as much as £15,000 to arrange a wedding.[25] Many have connections to serious organised crime. Efforts have been made in the U.K. to clamp down on the number of such marriages and, following the introduction of a requirement on non-E.U. nationals to obtain a certificate of approval from the Home Office, the number of suspected sham marriages has fallen: 3,578 in 2004 to 452 in 2005. The Church of England has followed suit by introducing strict guidelines of its own and encouraging vicars to report suspicions to the police or the U.K. Border Agency. Arrests at the altar are not unknown, although the almost comic nature of the charades often masks the menace that surrounds them.

Take for instance, the scene in a church in Tilbury, where a vicar, who was performing three marriages ceremonies one bank holiday Monday, married the second couple first, as the bride to the first marriage was almost three hours late. The vicar told *The Sunday Times*:

> "In the course [of the first marriage]… I watched what was going on at the back [of the church]. The woman who was late burst in and went to the far side of the church and stripped to her bra and knickers and rummaged in a black bin bag for an outfit. Her groom … didn't seem to recognise his bride. She was a very small woman, must have been a size 10, and the dress was about size 18."

Last year, marriage registrars in Ireland estimated that 10% to 15% of all civil ceremonies were sham marriages. The dark side to this industry was acknowledged by Hogan J. in *Izmailovic v. Commissioner of An Garda Síochána* when he stated that:

> "If citizens of other European Union states are being induced on a systematic basis to come to this State to enter into such marriages of convenience for monetary gain, then the shadow of organised crime, people trafficking and prostitution probably cannot be far behind."[26]

In *H. v. S*. the Supreme Court considered whether a marriage which had been entered into solely for the purpose of facilitating immigration to the United States could be annulled.[27] H. was a 21 year old Irish girl. She met S., a

22 (Unreported, High Court, Clark J., 27th May, 2011).

23 Máire Ní Shuilleabháin, "Accommodating Cultural Diversity under Irish Family Law", [2002] 24 D.U.L.J. 175 at 184.

24 Ireland is not bound by the E.U. Directive governing this area: Council Directive 2003/86/E.C. of 22 September, 2003, on the right to family reunification O.J. L.251/12 3.10.2003.

25 Flintoff, "…And the Bride Wore Handcuffs", *The Sunday Times*, News Review, 17th April, 2011 at p. 6.

26 [2011] IEHC 32, (Unreported, High Court, Hogan J., 31st January, 2011) at para. 23.

27 (Unreported, Supreme Court, 3rd April, 1992); See also the decision of the House of Lords in *Vervaeke v. Smith* [1983] 1 A.C. 145 where

Portuguese man aged 25, while on a two week holiday in Portugal. They had a relationship together and met again a year later when H. returned to Portugal for a further two weeks. S. then visited H. in Ireland and stayed with her at her family home. H. had secured a visa to work in the United States and wanted S. to travel with her. She made enquiries with the U.S. embassy and discovered that she could be accompanied by a spouse. This prompted the young couple to marry on the understanding that they would obtain a divorce in the United States. The marriage took place in a registry office unknown to H.'s parents. It was never consummated. S. returned to Portugal a few days after the ceremony and it appears husband and wife did not meet again. H. sought a decree of nullity only sixteen days after the marriage.

The argument was made that as there was no intention "to go the distance", there was no marriage. This was rejected by a majority of the Supreme Court.[28] McCarthy J. stated:-

> "I do not accept the proposition that where two adults… agree to go through a ceremony of marriage with a reservation that they do not intend it as a marriage at all or intend it as a marriage with a built-in provision for dissolution if either or both so decide, they can be permitted later to challenge the validity of that marriage which has been carried out in accordance with the law. It seems to me wholly contrary to public policy that individuals could be permitted to use the public law of marriage for private purposes in that fashion. The parties are not to be heard to say that what to the witnesses and Registrar appeared to be a perfectly valid marriage was subject to a mental reservation agreed between the parties, so as to invalidate an apparently valid ceremony."

Whether the "convenience" is to facilitate immigration, to avoid deportation or for financial security *etc*., the principle is the same: the marriage is valid, provided it complies with the necessary formalities. The Anglican formula, "if anyone knows of any lawful impediment why this man and woman should not be married", refers to matters such as age, consent, capacity, marital status and gender. It is not quite as all-encompassing as Hollywood romantic comedies might lead us to believe. As Hogan noted in *Izmailovic*, if generalised objections were to be permitted, well meaning relatives might object on the ground that the bride was marrying not for love, but for money; jilted lovers, maddened by jealousy, might object out of spite; and parents, perhaps wary of their prospective son or daughter in-law, might also be tempted to lodge an objection. Our system of marriage registration, which has its basis in the Civil Registration Act 2004, would be completely undermined.

In *Izmailovic,* officers from the Garda National Immigration Bureau arrested an Egyptian national at the registry office as he was about to marry a Lithuanian woman. The "groom" had no entitlement to remain in the State, a deportation order having issued against him. While it was clear the gardaí were entitled to arrest him for evasion of the deportation order, it was equally clear that the principal motive for his arrest at that particular place and time was to ensure that his proposed marriage did not take place. One would expect cogent reasons to justify the prevention of a marriage in such a manner. Hogan J. put it thus:

> "In a free society where the institution of marriage is constitutionally protected (Article 41.3.1), the courts must be especially astute to ensure that agents of the State do not seek to prevent what would otherwise be a lawful marriage, at least without compelling justification."

Had the gardaí allowed the marriage to take place, the groom would have acquired E.U. Charter rights, including, arguably, a right of residence pursuant to Directive 2004/38/E.C.[29] Was this a "compelling justification" for their actions? Hogan J. observed that none of the standard impediments to marriage were present in this case and the couple had complied with the notice requirements set out in the Civil Registration Act 2004. No free-standing power of objection was conferred by the Act, Were such a power to exist "it would open up a Pandora's box of mischief and abuse which none could easily close." Such a power could not be reconciled with the State's constitutional duty to guard with special care the institution of marriage:

> "The State would have singularly failed in its constitutional duties in this regard if it permitted an open-ended ground of objection to a proposed marriage to be made at the last minute, without the necessary procedural safeguards, especially in circumstances where the lodging of such an objection would inevitably have a suspensive effect so far as the proposed marriage is concerned."

Hogan J. concluded that, as the law stands, had the marriage been allowed to proceed, it would have been valid, even if it was one of convenience. He noted, however, that E.U. Directive 2004/38/E.C. allows member states to adopt measures to refuse rights of residence in the case of marriages of convenience. Regulation 2(1) of our transposing regulations excludes from the definition of a "spouse" any

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the purpose of the marriage was to enable a Belgian prostitute acquire British nationality and a British passport so that she could carry on her trade without fear of deportation. Ormrod J. in the U.K. High Court held that:- "where a man and a woman consent to marry one another in a formal ceremony, conducted in accordance with the formalities required by law, knowing that it is a marriage ceremony, it is immaterial that they do not intend to live together as man and wife…" This was upheld by the House of Lords at another stage in the proceedings in which the Law Lords refused to recognise a decree of nullity granted by the Belgian courts.

28 Finlay C.J, Hederman and McCarthy JJ.; Egan and O'Flaherty JJ. dissented: Egan J. took the view that the absence of any intention of the parties to form a lasting and long term commitment invalidated the marriage; O'Flaherty J. found that the lack of true matrimonial consent vitiated the whole transaction.

29 Council Directive 2004/38/E.C. of 29 April, 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (E.E.C.) No. 1612/68 and repealing Directives 64/221/E.E.C, 68/360/E.E.C, 72/194/E.E.C, 73/148/E.E.C, 75/34/E.E.C, 75/35/E.E.C, 90/364/E.E.C, 90/365/E.E.C and 93/96/E.E.C, O.J. L158/77 30.4.2004.

party to a marriage of convenience.[30] However, pursuant to regulation 24 (cessation of entitlements), the determination of whether a marriage is one of convenience can only take place *after* (and not before) solemnisation. It followed, Hogan J. said, that "no matter how well intentioned, An Garda Síochána are not empowered to prevent the solemnisation of a marriage on the grounds that they suspect – even with very good reason – that the marriage is one of convenience." While Hogan J. conceded that his decision may cause difficulties for the authorities, he stated that it was open to the Oireachtas to legislate in this area.[31] Some might argue that preventing sham marriages upholds the dignity of what is a fundamental human contract. Others may argue that throughout human history marriages have been solemnised between apparently willing parties in order to build alliances between nations, to preserve family lands and to secure a bright financial future. Any proposed legislation would be fraught with the difficulty of defining the line where marriage for mixed motives ends and sham marriage is clearly established.

Concern for the dignity inherent in the married state led Hogan J. to refer a deportation order against a foreigner married to an Irish person back to the Minister for reconsideration in *P.S. and B.E. v. Minister for Justice, Equality and Law Reform*.[32] Mr. S was an Irish citizen who suffered from an intellectual disability and various other conditions. He was described by the Court as "a naïve and vulnerable person". He married Ms. E, a Nigerian woman, whose immigration status at the time of the marriage was precarious. Shortly after their marriage, a deportation order was made against Ms. E, by then Mrs. S, who was subsequently arrested and imprisoned pending her deportation, causing enormous distress to Mr. S. In light of Mr. S's health, intellectual disability and his dependence on disability benefit, Hogan J. stated that it was not realistic to expect that he could travel independently to Nigeria to visit his wife were she to be deported. The practical effect of a deportation order, therefore, would be to condemn the couple "to the effective limbo of permanent separation". It fell to the Minister to balance the need to protect the integrity of the asylum system with the applicants' Article 41 rights to have the family unit upheld within Ireland.

In the circumstances, Hogan J. found that the Minister had tilted the balance unduly in favour of the former. Quashing the Minister's decision not to revoke the deportation order, Hogan J. stated:

> "… the requirement that the Minister must balance competing rights necessarily involves a recognition that, important as the principle of maintaining the integrity of the asylum system undoubtedly is, it must sometimes yield – if only, perhaps, in unusual and exceptional cases - to countervailing and competing values, one of which is the importance of protecting the institution of marriage. The rights conferred by Article 41 of the Constitution are nevertheless real rights and must be regarded as such by the Minister. They cannot be treated as if, so to speak, they were mere discards from dummy in a game of bridge in which the Minister as declarer has nominated the integrity of the asylum system as the trump suit."

Despite the frequent abuse of the asylum system, cases continue to require individual consideration. In this context, old fashioned notions of the importance of marriage still have a part to play in Irish law.

Marriage, Civil Partners and Cohabitants

The Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, which in the main commenced on 1st January 2011, was hailed by various gay rights activists as an historic civil rights reform.[33] The Minister for Justice at the time, Mr. Dermot Ahern, described it as "one of the most important pieces of civil rights legislation to be enacted since independence."[34] Even still concerns were raised that by legally recognising same sex couples and according them rights analogous to those of married couples, the State might fall foul of its constitutional duty to guard with special care the institution of marriage on which the family is founded.

The legislation does not, however, place civil partnerships on an equal footing to marriage – had it done so it would certainly have left itself open to constitutional challenge. It does not, for example, extend or alter the institution of marriage or its status by conferring a right to marry on same sex couples. Nor does it present civil partnership as an alternative to marriage – a civil partnership is a partnership of two persons of the same sex;[35] a marriage is a union of two persons of the opposite sex. Further, while the Act confers certain statutory (as opposed to constitutional) benefits and protections on non-marital relationships, it does not in any way penalise or disadvantage marital unions. The grounds for annulment and dissolution differ. Non-consummation is a ground upon which a marriage may be annulled, but not a civil partnership.[36] This reflects the intrinsic relationship between marriage, the family and the rearing of children. A decree of dissolution of a civil partnership may be granted on more liberal grounds than a decree of divorce. In the case of a civil partnership, the parties must have lived apart from one another for two out of the preceding three years; in the

30 European Communities (Free Movement of Persons) (No. 2) Regulations, S.I. No. 656 of 2006.

31 The Legislative Programme for the Oireachtas Autumn Session 2011, which was published on 14th September, 2011, includes a Marriages Bill to deal, *inter alia*, with marriages of convenience. The Bill, the Heads of which have yet to be approved by the Government, is expected to be published in 2012.

32 [2011] IEHC 92, (Unreported, High Court, Hogan J., 23rd March, 2011).

33 The Act of 2010 was signed into law on 19th July, 2010, and all sections (except s. 5) were commenced on 1st January, 2011; s. 5 was commenced on 23rd December, 2010: see S.I. No. 648 of 2010.

34 See "Ahern Welcomes Coming Into Law of Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010", at http://www.justice.ie/en/JELR/Pages.

35 See s. 3 of the Act of 2010; The U.K. civil partnership regime is also limited to same sex couples: see s. 1(1) of the Civil Partnership Act 2004. It is understood that a number of heterosexual couples in the U.K. who were refused a civil partnership are challenging the legislation in the European Court of Human Rights on the basis that it is discriminatory.

36 Part 11 of the Act of 2010 (ss. 107 and 108) deals with nullity of civil partnerships; the grounds for annulment may be broadly categorised as (i) a lack of capacity; (ii) a failure to observe the formalities for the registration of a civil partnership; and (iii) a lack of consent.

case of a divorce the requirement is four out of the preceding five years.[37] Unlike divorce, there is no requirement that the courts be satisfied that there is no prospect of reconciliation amongst the civil partners.

The stricter requirements in the case of divorce reflect a desire to create stable and lasting marital relationships insofar as possible. Finally, the privileges attaching to marriage, whether pursuant to the Constitution, the statute or the common law, are superior to those attaching to civil partnerships, *e.g.* civil partners cannot jointly adopt children and nor do they enjoy the same succession rights as spouses.[38] As regards cohabitants, prior to making an order in favour of a qualified cohabitant, the courts must have regard to the rights and entitlements of any spouse or former spouse.[39]

The Same Sex Marriage Debate

While the introduction of divorce in 1995 was a watershed in Irish attitudes to marriage, and while tolerance of same sex couples has always been high, it remains arguable that same sex marriage will radically change our legal concept of the family.[40] By law, rightly or wrongly, marriage remains the union of one man and one woman. Murray J. in *D.T. v. C.T.* described matrimony as "a solemn contract of partnership entered into between man and woman…"[41] In *Foy v. An tArd Chláraitheoir*, which concerned the legal status of a transsexual person, McKechnie J. called it "the union of a biological man with a biological woman"[42] Denham J. in *McD. v. L.*, referred to the family as being the "family based on marriage, the marriage of a man and woman."[43] The debate as to the sustainability of this position gathers momentum.

In *Zappone v. Revenue Commissioners,* the plaintiffs were a lesbian couple who had married in Canada.[44] On their return to Ireland, their claim to be treated as a married couple for tax purposes was rejected by the Revenue Commissioners on the ground that Irish tax law relating to married couples applies only in respect of a husband and wife. The High Court was asked to decide whether the right to marry inherent in the Constitution encompassed a right to same sex marriage. The Court heard extensive evidence from medical and other professionals as to the nature of homosexuality: it is an aspect of normality, a feature of the human condition; it is no longer classified as a mental illness or disorder. Studies were cited as evidence that children raised by same sex couples are no worse off from an emotional or other relevant perspective than children raised by heterosexual couples. The reliability of such studies was disputed: they were of recent origin; the samples were too small; only one longitudinal study was cited; insufficient scientific research exists as to the effect of new family styles on children. Marriage, it was reiterated, makes people better off, improves their physical and emotional health and produces better outcomes for children. The complimentarity of the sexes plays a role in respect of the benefits that accrue to children. These were the arguments, and we have already touched on their apparent validity.

The research, as we have seen, can be interpreted to argue both sides of the debate. Evidence, however, of a more recent origin, Dunne J. held, had to be viewed with some reserve. She stated that:

> "[u]ntil such time as the state of knowledge as to the welfare of children is more advanced, … the State is entitled to adopt a cautious approach to changing the capacity to marry *albeit* that there is no evidence of any adverse impact on welfare."[45]

As to whether the Constitution encompasses a right to same sex marriage, Dunne J. found that it does not. Marriage under the 1937 Constitution is understood to be confined to persons of the opposite sex. Judgments of the Supreme Court delivered as recently as 2003 confirm this. How then can it be said that this is some kind of "fossilised" understanding of marriage?[46] How can it be argued that in light of prevailing ideas and concepts, the definition of marriage has changed to encompass marriage? There was no evidence to support the plaintiffs' claim of a "changing consensus" – Canada, Massachusetts, South Africa, Belgium, The Netherlands and Spain might recognise same sex marriage but, Dunne J. stated, this could hardly be described as a "consensus".[47] Further, the Civil Registration Act 2004, which was not challenged, provides that there is an impediment to marriage if both parties are of the same sex. That Act, the judge stated, is an expression of the prevailing view as to the basis for capacity to marry. It enjoys a presumption of constitutionality which had not been rebutted. Recognition of a constitutional right of

37 Compare Part 9 of the Act of 2010 (ss. 109 to 138), providing for the dissolution of civil partnerships, with s. 5 of the Family Law (Divorce) Act 1996 and Article 41.3.2 of the Constitution, providing for decrees of divorce in the case of spouses.

38 Part 8 of the Act of 2010 deals with the succession rights of civil partners; the succession rights of spouses are set out in Part IX of the Succession Act 1965.

39 See Part 5 of the Act of 2010 (ss. 171 to 207) for the provisions relating to cohabitants.

40 A recent RedC poll for *The Sunday Times* found 73% in favour of gay marriage: 88% of 18 to 24 year olds said they would support it, compared with 49% of those over 65 years: see Kenny, "Let Gays Marry", *The Sunday Times*, 6th March, 2011.

41 [2002] 3 I.R. 334 at 405.

42 [2007] IEHC 470, (Unreported, High Court, McKechnie J., 9th July, 2002); see, however, the decision of the E.Ct.H.R. in *Goodwin v. United Kingdom* (2002) 35 E.H.R.R. 447, also a gender reassignment case, where the Court expressed the view that gender could be determined by criteria other than simply biological factors.

43 [2010] 1 I.L.R.M. 461 at 488.

44 [2008] 2 I.R. 417.

45 *Ibid* at 507.

46 There is some authority for the principle that fundamental concepts under the Constitution can change over time, such as the ideas of justice or liberty. The reliability of that as a dynamic for legal change is uncertain. Justine Quinn refers to the 'present-tense' approach to interpreting the Constitution, a term coined by the late Professor Kelly, and cites Kelly as stating that::- "…elements like 'personal rights, 'common good', 'social justice', 'equality' and so on, can (indeed can only) be interpreted according to the lights of today as the judges perceive and share them. The same would go, as Walsh J. says in the context of private property guarantees of Article 40.3 and 43 for concepts like 'injustice'." See Justine Quinn, "Love Makes A Family? – Not So For Civil Partners", The Golden Thread, December 2010, Vol. 11, No. 2.

47 See fn. 44 above at 506; since this judgment was delivered on 14th June 2006, the following countries have also granted recognition to same sex marriages: Norway, Sweden, Portugal, Iceland and Argentina. Same sex marriages are not recognised federally in the United States but are recognised by 6 states. Notably, on 24th June 2011, the New York Senate passed a bill legalising such marriages.

same sex couples to marry could have the effect of rendering the Act unconstitutional. Further, she held, any discrimination as against same sex couples could be justified both by the terms of Article 41 and by reference to the welfare of children. Finally, Dunne J. was of the view that the right to marry implicitly derives from Article 41.[48] It is very difficult, she said, to see how the definition of marriage could, having regard to the ordinary and natural meaning of the words of Articles 41 and 42, relate to a same sex couple.

Decisions of the European Court of Human Rights, viewed as more "liberal" than those of our own courts, are much quoted by those in favour of same sex marriage. Article 8 of the Convention provides that "everyone has a right to respect for his private and family life…" Article 12 provides that:-

> "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

It could be debated that the right to "marry and to found a family" is conjunctive and this implicitly recognises only marriage between a man and a woman; this is only an argument, however, and could not readily be predicted to be acceptable. While the E.Ct.H.R. has indicated a willingness to recognise same sex marriages, it is clear that a wide margin of appreciation is given to contracting states in this area. In *Schalk and Kopf v. Austria,* the Court noted that while the institution of marriage had undergone major social changes since the adoption of the Convention, there was no European consensus regarding marriage.[49] No more than six out of the forty seven contracting states allowed same sex marriage.[50] However, having regard to Article 9 of the Charter of Fundamental Rights of the European Union,[51] the Court held that it would "no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex". It went on to state that:-

> "[A]s matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State… Article 12 of the Convention does not impose an obligation … to grant a same-sex couple… access to marriage."

The Court rejected the argument that Article 14 of the Convention, which prohibits discrimination on grounds such as sex, imposed an obligation on contracting states to recognise same sex marriage. It was also against an argument that if a state chooses to provide same sex couples with an alternative means of recognition, it is obliged to confer on them a status identical to marriage in every respect but name:- "States enjoy a certain margin of appreciation as regards the exact status conferred by alternative means of recognition."

In *Zappone*, Dunne J. cited the decision of the U.K. High Court in *Wilkinson v. Kitzinger (No. 2)* to similar effect.[52] The applicants in that case also sought recognition of their same sex marriage entered into in Canada. Potter P. rejected their arguments based on Articles 8 and 14 of the Convention. He noted that the Convention does not require contracting states "to establish particular forms of social and legal institution to recognise particular relationships, especially in areas of social controversy." He cited the decision of the Court in *Johnston v. Ireland* (1987) 9 E.H.R.R. 203 to the effect that Article 8 does not impose on contracting states a positive obligation to establish for unmarried couples or those who are legally incapable of marrying a status analogous to that of married couples. Potter P. also dismissed the argument that the U.K. Civil Partnership Act 2004 infringed Article 14 by downgrading the status of same sex couples when compared to that of married couples. His approach was not alien to that enshrined in Article 41 of the Constitution:-

> "It is apparent that the majority of people, or at least of governments, not only in England but Europe-wide, regard marriage as an age-old institution, valued and valuable, respectable and respected, as a means not only of encouraging monogamy but also the procreation of children and their development and nurture in a family unit (or 'nuclear family') in which both maternal and paternal influences are available in respect of their nurture and upbringing.
>
> The belief that this form of relationship is the one which best encourages stability in a well-regulated society is not a disreputable or outmoded notion based upon ideas of exclusivity, marginalisation, disapproval or discrimination against homosexuals or any other persons who by reason of their sexual orientation or for other reasons prefer to form a same sex union.

48 In *Ryan v. Attorney General* [1965] I.R. 294 at 313 the right to marry was identified as a personal right deriving from Article 40.3.1; see also *McGee v. Attorney General* [1974] I.R. 284 at 296; and *O'Shea v. Ireland* [2007] 2 I.R. 313 at 324; Hogan and Whyte submit that:- "Nowadays this right, although it would seem a necessary derivative from the recognition accorded to the institution of marriage, is likely to be related to Article 40.3 rather than to Article 42". See Hogan & Whyte, *J.M. Kelly: The Irish Constitution,* 4th ed. (Dublin, 2003) at 7.6.12; Ennis submits that "the reason why this departure is significant is because rights under Article 40 emphasise the rights of the individual, whilst Article 41 dilutes the emphasis on personal rights in favour of the unit of the marital family. But, the family unit does not exist until a marriage has actually taken place, so it is illogical to suggest that the 'right to marry' derives from Article 41 as such rights only have resonance after a marriage has taken place: Jonathan Ennis, "Marriage: Redefined and Realigned with Bunreacht na hÉireann", (2010) 1(2) Irish Journal of Legal Studies at 29.

49 (2010) E.C.H.R. 995, Application No. 30141/04, 24th June, 2010; see also *P.B. and J.S. v. Austria* (2010) E.C.H.R. 1146, Application No. 18984/02, 22nd July, 2010; and *J.M. v. The United Kingdom,* Application No. 37060/06 (28th September, 2010).

50 The six contracting states referred to were Belgium, The Netherlands, Norway, Portugal, Spain and Sweden. The Court noted that thirteen contracting states had passed some form of legislation permitting same sex couples to register their partnerships. The legal consequences of registered partnerships varied from almost equivalent to marriage to giving relatively limited rights.

51 Article 9 of the E.U. Charter of Fundamental Rights of the European Union provides that :-"[t]he right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights."

52 [2007] 1 F.L.R. 295.

> If marriage, is by longstanding definition and acceptance, a formal relationship between a man and a woman, primarily (though not exclusively) with the aim of producing and rearing children as I have described it and if that is the institution contemplated and safeguarded by Art 12 of the European Convention then to accord a same sex relationship the title and status of marriage would be to fly in the face of the Convention as well as to fail to recognise physical reality."[53]

Dunne J. showed proper respect for persuasive precedent, therefore, in holding that "the legal provisions in relation to the right to marry and capacity to marry… in this jurisdiction are not incompatible with the European Convention on Human Rights."[54] The decision remains under appeal to the Supreme Court and when a hearing can be accommodated, a final determination on the matter will be eagerly awaited by the estimated 2,090 same sex couples living in Ireland.[55] While the decisions of courts in other jurisdictions recognising same sex marriage will certainly be of interest, the Court will no doubt be cognisant of the differing constitutional and legislative frameworks under consideration.

Advancements in Science

The area of assisted human reproduction is not something that can be completely ignored. Once thought to be the preserve of Hollywood celebrities, methods such as sperm donation and surrogacy are increasingly being used by Irish couples, whether married or cohabiting, heterosexual or homosexual, to have children. The area raises extremely complicated and sensitive social, ethical and legal issues. Yet, in Ireland, as a legal jurisdiction, decisions on this difficult area are being made in a legislative vacuum.

In December 2010, the Supreme Court delivered two judgments which considered the implications of developments in modern reproductive science. In the first, a unanimous five judge Supreme Court, held that a sperm donor father of a child born to a lesbian couple had a right of access to the child, although no guardianship rights existed in his favour.[56] In the second, the Court held that that a frozen embryo is not an "unborn" person and so is not protected by Article 40.3.3 of the Constitution.[57] It must always be borne in mind that people will go to great lengths to establish a family and in the area of family law, predictability and certainty as to the status of familial or parental rights is clearly desirable. Our courts have not yet had an opportunity to consider the minefield of legal issues which can arise in a surrogacy case, although one might expect that it is only a matter of time. Newspaper reports suggest an increase in the number of Irish couples travelling abroad to avail of surrogacy services, most often, it would appear, to the United States or the Ukraine. The law in many U.S. states and in the Ukraine provides for the names of the "commissioning parents" to be entered on the birth certificate. However, difficulties can arise where the foreign birth certificate is not recognised in Ireland or where the Irish authorities refuse to issue an Irish passport.

In March of this year, an Irish man and his E.U. citizen wife were granted leave to bring a challenge to the refusal of the Minister for Foreign Affairs to issue a passport or emergency travel documentation in respect of their daughter born in the Ukraine to a surrogate. In the leave application, the High Court heard that the child was not entitled to Ukrainian citizenship and was effectively "stateless". Without Irish travel documentation, she could not leave the Ukraine and, once her right to remain there expired, there was a danger she would be sent to a Ukrainian orphanage.

As we have seen, the Constitution mandates citizenship on the basis of birth in Ireland to at least one Irish parent. Traditionally, by law, Irish nationality has carried through generations to people born abroad to an Irish parent. The "grandmother rule", as it is known, has certainly enriched our soccer team. When one moves into the area of egg or sperm donation or, in effect, the loan of a womb for nine months, one treads on people's dreams and wonders how satisfactorily legal decisions will respond where the law has remained silent.

Surrogacy arrangements can arise in many shapes and forms, none of which are straightforward from a legal point of view. Consider, for instance, the situation of a married couple who enter into a traditional surrogacy type arrangement, *i.e.* the woman contributes her own egg, the man contributes his own sperm and a third party carries the baby to term. As the law currently stands, it is likely that the surrogate/birth mother would be considered to be the legal mother of the child. The commissioning couple would, therefore, have to adopt the child. Yet, our current adoption legislation excludes unmarried couples from the right to adopt.[58] Alternatively, the commissioning man, as the biological father, could apply for guardianship under the Guardianship of Infants Act 1964, but this option would not be available to the commissioning woman.[59] Further difficulties might arise where the surrogate is married. In such a case, her husband would be presumed to be the child's father and, under the Guardianship of Infants Act 1964, they would be its joint guardians.[60] They would be a family for the purposes of the Constitution and the child, being a child of married parents, could not be adopted by the commissioning couple. The Commission on Assisted Human Reproduction,

53 *Ibid* at 329.

54 See fn. 44 above at 512.

55 As recorded by the 2006 census, see www.cso.ie.

56 *McD. v. L.* [2010] 1 I.L.R.M. 461 ("the sperm donor case").

57 *Roche v. Roche* [2010] 2 I.L.R.M. 411 ("the embryo case"). Article 40.3.3 of the Constitution provides that:- "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."

58 This position may not be compatible with the European Convention; see the decision of the House of Lords in *In re P. and Others (A.P.)* [2008] UKHL 38 (18 June 2008) where the Court held that an outright prohibition on adoption by an unmarried couple was a disproportionate interference with Article 8 family rights.

59 Section 6A of the Guardianship of Infants Act 1964, as amended by s. 12 of the Status of Children Act 1987, provides that:- "Where the father and mother of an infant have not married each other, the court may, on the application of the *father*, by order appoint *him* to be a guardian of the infant." *[Emphasis added]*

60 Section 46 of the Status of Children Act 1987 presumes that where a woman gives birth to a child during a subsisting valid marriage, her husband is the father of the child. Section 6 of the Guardianship of Infants Act 1964 provides that the married father and mother of an infant shall be joint guardians.

in its 2005 report, recommended that legislation regulating the area of assisted human reproduction be enacted and that it contain a presumption that a child born through surrogacy is the child of the commissioning couple.[61] Legislation in this area will require careful drafting.

Conclusion

The family, marriage, sex and children can be legislated for on the basis of an ideal, but the ordinary human world of fraught relationships and the unexpected movements in the attitudes of society will always threaten to undermine any perfect world of prohibition and regulation. Society in Ireland changed little enough, perhaps, between the enactment of the guarantees to the family provided for in the Constitution of 1937 and the year 1980. Certainly, before that time there were rumblings about the one dimensional nature of family law in Ireland. It was supposed to be after all, and in the words of Eamon de Valera, the only one of the 1916 revolution leaders to escape execution, an island of happy industrious homesteads and comely maidens dancing at crossroads. This vision has often been derided, but the role of political leaders may be argued to be the fostering through legislation of what the people desire. That vision is what Irish people repeatedly voted for. Those who disagreed with the form and scope of our family law could make their own arrangements; but extra-legally. Such people, however, might justly complain that an early and unwise marriage left the children of a subsequent stable union unprovided for through inheritance.

While many people found Irish legal certainty comforting, others found it stifling. Between 1900 and 1960, our population dropped from approximately 3.2 million to 2.8 million, and hundreds of thousands departed our shores. They left because of economic, much more than social, reasons. The 1960s saw economic development and the 1980s an economic crash. Curiously, divorce was introduced in 1995 just at a time when sustainable economic growth had taken root. No longer was it necessary to leave Ireland in order to find employment, to establish and to foster the very family that our Constitution of 1937 proclaimed the bedrock of society. Many hundreds of thousands of Irish people founded their traditional families under an alien legal system abroad in America, Australia or Britain and many of these did well by choosing to follow on a voluntary basis the ideals set out in the law of their homeland.

From the year 2000, the out-rush of people had stopped and the inrush was in full swing. New forms of expression as to marriage came in and have become well established through the adoption of new people and new ideas. Polygamy, same sex unions and surrogate parenthood would not have been considered in 1937 when our Constitution was drafted. They are with us now. Increasingly, these forms of relationship are likely to require, if not universal acceptance in our society, then at least legal provision. Of all these issues, by far the most complex is the regulation of legal rights of guardianship and access and of inheritance in the case of those born in consequence of the intrusion of science into reproduction. There were reasons for the rules such as the presumption that a child was that of the mother's husband: it gave certainty; it stopped enquiry; it blocked off the nasty disputes between relations that can arise after a supposed parent's death.

Despite all these disparate models, the ideal of marriage between a young man and a young woman continues to capture our hearts. Possibly, the royal wedding of April 2011 in England expressed in a vivid way something resonant in the human psyche. The attraction of marriage as a concept is perhaps such that, even if it lasts a short time and rests on perhaps not the best foundations, judges in Ireland and the U.K. have decided that the divorced wife is entitled not just to reasonable maintenance but to a large proportion of her husband's wealth.[62] While writing this paper, the authors were also researching another lecture about the Grimm brothers. Something struck us: in none of the Grimms' folk stories do we meet same sex unions or indeed divorces. Heroic deeds leading to an ideal union of a young couple, yes, and unhappy marriages also. But, let us not get carried away.

Just because an ideal is apparently enshrined in myth does not mean that we must ignore what is happening around us. As Catherine McGuinness, one of our most distinguished jurists, recently remarked, the law must cope with society as it is and not how we would like it to be. When Yeats wrote in his poem 'The Wild Swans at Coole' about visiting after a gap of twenty years the place where his soul had been captured by Nature's perfection, he explained his youthful self as having "trod with a lighter tread". Well, things in family law were once simple too, one might say, twenty years ago. No surrogacy, no divorce and a bulwark of protection by our fundamental law for the nuclear and traditional family. With the arrival of the European Convention on Human Rights and the European Union Charter of Fundamental Rights, as the poet said, "all's changed". But, despite vast changes, respect for the choice people make to become, for instance, Mr. and Mrs. S, and traditional respect for the Irish children of foreign parents in their choice of Ireland as a home, live on yet. We are a more open and a much more complex society, but values that were dismissed by many as being rigid may still inform the decisions of judges in the years to come. ■

61 Commission on Assisted Human Reproduction, *Report of the Commission on Assisted Human Reproduction,* (Dublin: Government Stationery Office, 2005), recommendation 33. Note, however, that this was not a unanimous recommendation: one member of the Commission dissented, describing this aspect of its proposal as "extraordinarily far-reaching": see the reservation of Christine O'Rourke at pp. 76 to 77 of the Report.

62 See, for example, *D.T. v. C.T.* [2002] 3 I.R. 334; *M.K. v. J.K. (otherwise S.K.) (No. 2) (Divorce: Ample resources)* [2003] 1 I.R. 326; *C. v. C.* [2005] IEHC 276, (Unreported, High Court, O'Higgins J., 25th July, 2005); *C.D. v. P.D.* [2006] IEHC 100, (Unreported, High Court, O'Higgins J., 15th March, 2006); *McM v. McM* [2006] IEHC 451, (Unreported, High Court, Abbott J., 29th November, 2006); *M.B. v. V.B.* [2007] IEHC 484, (Unreported, High Court, Birmingham J., 19th October, 2007); see also the following decisions of the U.K. courts: *White v. White* [2000] 2 F.L.R. 981; *Cowan v. Cowan* [2001] 2 F.L.R. 192; *Lambert v. Lambert* [2002] EWCA Civ. 1685; *Miller v. Miller; McFarlane v. McFarlane* [2006] 1 F.L.R. 1186; *Charman v. Charman (No.4)* [2007] 1 F.L.R. 1246; and *McCartney v. Mills McCartney* [2008] EWHC 401 (Fam.).

Irish Rule of Law Project runs Professional Practice Course in Kosovo

Rachel Power and Alison de Bruir BL

Over the years, our familiarity with Kosovo has mainly been confined to contemporary histories, legal texts and newspapers. Unfortunately, 'conflict' and 'struggle' are words that all too often spring to mind. More recently however, the number of Irish lawyers working throughout Kosovo, and of course our own volunteers, speak of a country finding its feet.

Late September saw Irish Rule of Law International (IRLI) run its second Professional Practice Course for lawyers in Kosovo, in partnership with the Kosovo Chamber of Advocates (KCA).

Pristina has earned a reputation as a vibrant, youthful city and it certainly is that. Congestion, traffic and deteriorating infrastructure aside, the centre is awash with bustling cafes, bars and restaurants. There is a happy collide of a European and Eastern cafe culture where internationals and locals alike spend hours chatting over macchiatos and cigarettes.

Our stay happened to coincide with several notable events in Kosovo. The previous week saw a controversial ruling by Kosovo's Constitutional Court that members of parliament do not enjoy immunity from prosecution for actions and decisions taken outside the scope of their parliamentary responsibilities.[1] We held a lively seminar with Irish solicitor, and Senior Legal Advisor to the Constitutional Court, Michael Bourke, who gave a very interesting lecture on the new Constitutional Court, and the rules on admissibility thereto.

There was much debate amongst participants on this recent judgment, with some extolling this judgment as an assurance that immunity will not be misused to allow for the evasion of prosecution for offences allegedly committed by Assembly members. With the concept of a Constitutional Court only bedding down in Kosovo, even within the legal profession, there were some more pointed comments from other participants. Concerns relating to allegations of war crimes were not far from the surface. This reference from the Government to the Constitutional Court had related to a very specific point of law. No reference was made therein to any person or Assembly Member.

In speaking to Kosovars, however, there was often a feeling that the reference had been made to the Court as a result of a potential prosecution on charges of war crimes against a particular Member, who was viewed as a hero by some, and as a war criminal by others. During our time in Pristina, a man under a EULEX Witness Protection Scheme was found dead in Germany.[2] It was reported that he had committed suicide by way of hanging. Many Kosovars we spoke to believed that he was to give evidence in this potential war crimes prosecution. While it is possible that the incident may be entirely unrelated, it does give us some insight into the current situation in Kosovo.

We also watched as tensions escalated in northern Kosovo[3]. Relations have been strained in the period surrounding an agreement reached on the subject of trade between Serbia and Kosovo allowing for the free flow of exports in both directions through border checkpoints. This agreement was the first of its kind since Kosovo declared independence in 2008; previously, Serbia had banned all exports entering the country from Kosovo. Under the agreement, the Kosovo authorities would have overall authority over the crossings but would be under the supervision of EULEX (EU Rule of Law Mission in Kosovo).

While agreed by the two authorities, local Serbs on the ground in northern Kosovo have broadly opposed both the customs agreement and, still more, the deployment of Kosovar customs officials to border crossings with Serbia. Violent clashes erupted over the week as negotiators from Serbia and Kosovo were to meet in Brussels under EU auspices to try to difuse the matter.

IRLI sent ten volunteers to work with KCA lawyers and law students in four areas: Human Rights, Professional Ethics, Business Law and Advocacy. Our major focus over the weeklong training course was on building practical skills. Workshops and role-play backed up each lecture or module.

The week ended with an award ceremony in which our Kosovar colleagues were presented with certificates of completion and with Michael Irvine being named the first Honorary Member of the KCA.

This Course was originally to be extended into a five week Professional Practice Course, ultimately to be made compulsory for all lawyers. As funding streams aimed at the Balkans are drying up, we remain hopeful, but it is unlikely that the project will proceed as originally planned. Our team of volunteers however have been toying with alternative possibilities, so we hope this will not be the end of our partnership with the KCA and that we will live to teach another day. ■

Rachel Power is Co-ordinator of Irish Rule of Law International. This is an Irish Aid funded project.

1 Case No. KO-98/11, 'Concerning the immunities of Deputies of the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo and Members of the Governent of the Republic of Kosovo'. (Referral by the Government of Kosovo)

2 http://www.nytimes.com/2011/10/07/world/europe/death-of-war-crimes-witness-casts-cloud-on-kosovo.html

3 'Kosovo Serbs and NATO troops injured', Irish Times, September 27, 2011, http://www.irishtimes.com/newspaper/breaking/2011/0927/breaking55.html

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