The Bar Review

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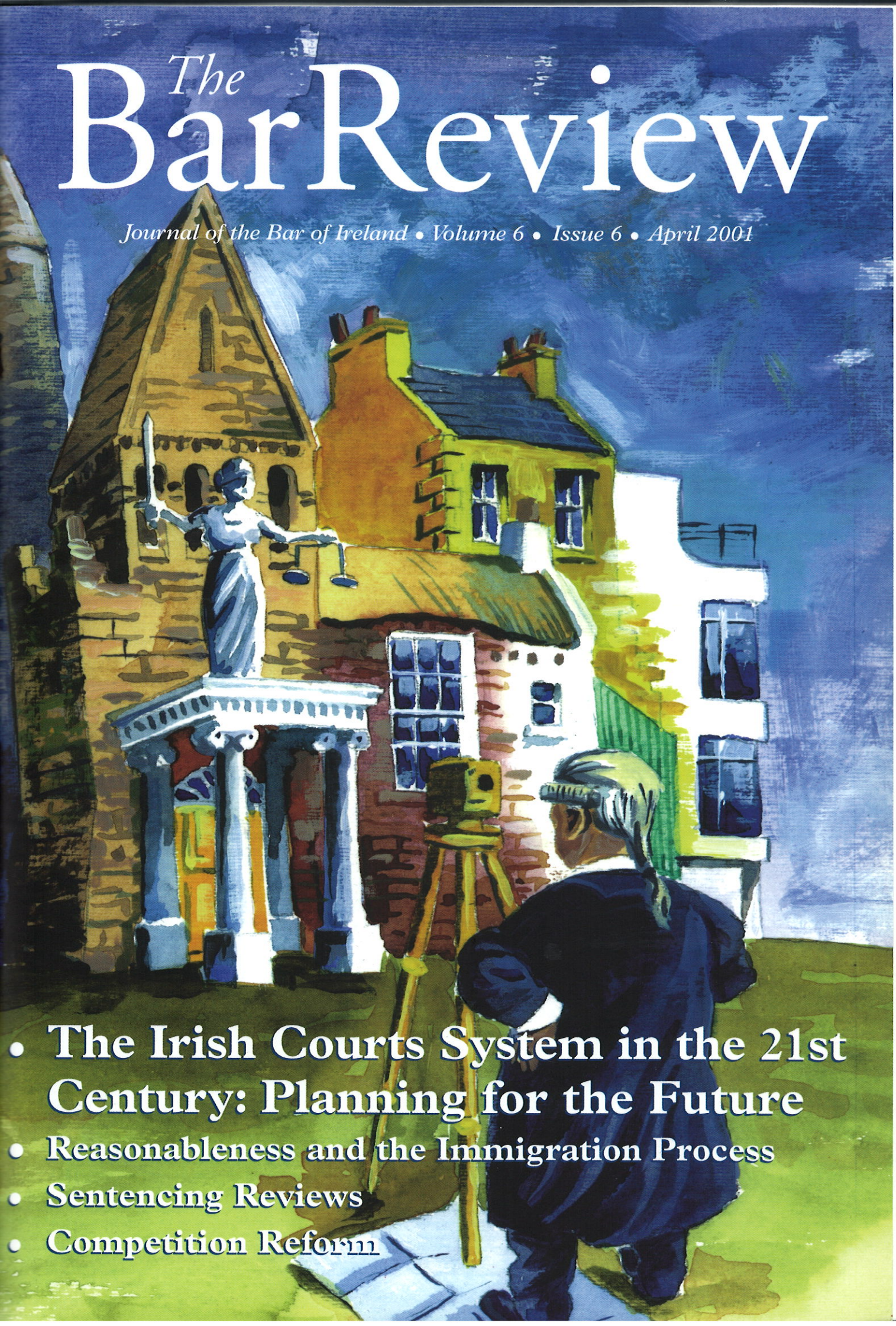

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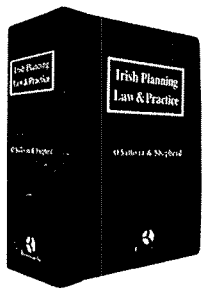

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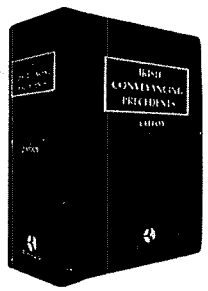

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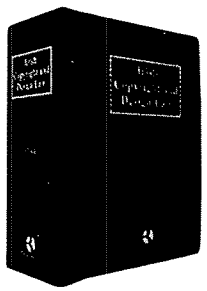

By Robert Clark BA, LLM, PhD, BL, Professor of Law, University College Dublin

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The Bar Council will be holding a conference on Saturday 12th May on the incorporation of the Eurpean Convention on Human Rights into Irish law.

Further details are available from Jeanne McDonagh at (01) 804.5014 or jmcdonagh@lawlibrary.ie

Law Reform (Miscellaneous Provisions) Bill

The Law Reform Commission is currently drafting its first annual Law Reform (Miscellaneous Provisions) Bill. The aim of these Bills is to effect technical and minor amendments to legislation and non-controversial modifications to the common law. It is hoped that these amendments will result in the removal of archaic provisions, and legislative anomalies and the general simplification of the law.

Practitioners, government departments , state agencies and others are hereby invited to submit suggestions for suitable amendments for inclusion in this year's Law Reform (Miscellaneous Provisions) Bill. The Commission is particularly interested in removing anomalies and mistakes that tend to cause problems in practice.

There is no need for any respondent to carry out extensive research as the Law Reform Commission has full time researchers, who can conduct background research.

Please forward suggestions to the following address:
Law Reform Commission
IPC House, 35-39 Shelbourne Road, Ballsbridge, Dublin 4
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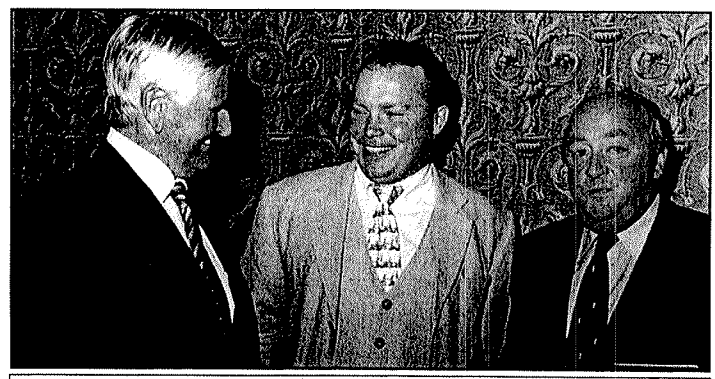
Educate Together

The official opening of Educate Together, a multi-denominational primary school, located at 11 Henrietta Street, took place on Friday 9th March. The Chief Justice, the Hon. Ronan Keane officiated at the ceremony and welcomed the arrival of the primary school to King's Inns. Over 50 pupils have been enrolled in the school.

Guests Nights

Guest nights are taking place in the King's Inns on Friday 4 May at 7.30pm and Friday 22 June at 7.30 If you are interested in reserving a table, please contact Claire Hanley at 878.0414 or 086-257.5289



Author Patrick O'Callaghan BL with President of the High Court, the Hon. Mr Justice Frederick Morris and Fergus O'Hagan SC, at the launch of his book, Law on Solicitors in Ireland'

THE EUROPEAN CONVENTION ON HUMAN RIGHTS BILL 2001

The recent publication of the European Convention on Human Rights Bill, 2001 (incorporating into Irish Law the Convention on Human Rights and Fundamental Freedoms) is a welcome development. The background to this legislative initiative is the Good Friday Agreement and the objective is to ensure parity of legal treatment for all persons on the island of Ireland. It is in that context that this legislation will inform the jurisprudence developed by our Courts to protect and vindicate the human rights and fundamental freedoms of every person within the State. Furthermore, the establishment of a Human Rights Commission, in earlier legislation, gives teeth to the enforcement of the rights conferred by virtue of the Convention. A proactive Human Rights Commission will be a significant addition to the protections afforded, in this State, to those whose rights have been violated.

However, it is the operation of the Convention in the sphere of litigation that will present the greatest challenges to the legal profession. We are entering new territory but one which has many signposts based on our written Constitution. There will be many changes to our legal system and our laws as a result of the Convention. By way of illustration it is to be noted that the Bill requires that State and its institutions to act in a manner compliant with the Convention and affords a legal remedy for failure to so comply. In addition a person may apply to the Courts for a declaration that a provision of Irish law is not compatible with the Convention. In terms of changes in legislation, it is instructive to note the observations of the late Mr Justice Brian Walsh on the role of the European Court of Human Rights. In his Foreword to Vincent Berger's 'Case Law of the European Court of Human Rights' Walsh J. (himself a member of the Court) stated:

'When the Court was founded it was not envisaged that it would in time become the very busy Court it is today. It was not very active in its earlier years due to the fact that it received very few cases. In the first seventeen years of the court's existence, when it was little known, the Court handed down only seventeen decisions. However, by the end of 1987, which is the period up to which this work brings the reader, the number of decisions handed down had risen to one hundred and seventeen. By the end of the present decade it will have exceeded two hundred. It has become probably the most influential Court in the world. Its decisions affect the lives and liberties of almost four hundred million people in twenty-one States, soon to be increased to twenty-three.

The European Court of Human Rights has proved itself to be a most effective organ for the protection of human rights. In its very first case, decided in 1960, the Court emphasised the fundamental right to be found in most western democracies that persons are not to be arrested unless they are to be charged and then are to be brought promptly before a judge.' In a similar fashion there is likely to be a proliferation of cases, in Ireland, asserting the existence of rights stemming from the Convention. While this State is rightly proud of the protections enshrined in our Constitution and the constitutional rights enumerated by case law what will now be of profound importance to Irish Society is the operation of an independent Human Rights Commission. Northern Ireland, which has enjoyed the benefits of the operation of a similar commission under the Chairmanship of Professor Brice Dickson, has witnessed a significant level of human rights activity. The Northern Ireland Human Rights Commission has sought to intervene in public interest litigation and has, in addition, argued for an increase in its powers. It has set a tempo that will probably be regarded as a good guide to the role to be performed by our Human Rights Commission. We are fortunate that the Commission, in this State, is chaired by Mr Justice Donal Barrington who, as a lawyer in practice at the Bar, played a major role in the evolution of the constitutional rights of the citizen many of which parallel rights set forth in the Convention. His subsequent experiences as a member of the Irish judiciary (both in the High Court and the Supreme Court) and as a member of the European Court of Justice (Luxembourg) will provide a blend of practical and theoretical skills that will ensure that our Human Rights Commission is an effective organ for the protection and vindication of human rights.

The Bar Council will shortly be organising a conference on the Bill which will focus on, inter alia, its practical implications for our citizens, our lawyers and our legislators.•

HE IRISH COURTS SYSTEM IN THE 21ST CENTURY: PLANNING FOR THE FUTURE

*The Hon. Mr Justice Ronan Keane, Chief Justice.**

The Irish courts system, since it was first established in 1924, has never been subjected to any critical analysis conducted with a view to ascertaining how far it falls short of achieving the presumed objectives of any such system. I do not suggest for a moment that within the compass of a short paper I can hope to fill that remarkable void. What I hope to do is to survey the structure itself, compare it with those that exist in other countries and identify what seem to be any problem areas. Again, it would be over ambitious to suggest any detailed solutions to such problems as appear to arise: I will content myself with indicating possible strategies that might at least be considered.

As to the objectives, it would probably be generally agreed that it is the duty of the State to provide citizens with a system of civil and criminal justice that is accessible to all and which functions in a manner that is impartial, open and expeditious. As a preliminary to assessing the extent to which the Irish system falls short of achieving those objectives, it may be helpful to begin with a summary of its history and the changes it has undergone.

The Development of the Irish Courts System

As with much of the rest of the Irish mechanics of government, the current court structure can be traced to a combination of what was in place under British rule and the consequences of the turbulence of the War of Independence and the Civil War. The British legal system was considerably reformed during the 1870s, a period best remembered in legal circles for the fusion of the jurisdictions of equity and common law. These changes were also reflected in Ireland, where there was established a unified court called the Supreme Court of Judicature, comprising the High Court of Justice and the Court of Appeal. There was a final right of appeal to the judicial committee of the House of Lords. A further rationalisation between 1897 and 1907 resulted in a new structure: a High Court of Justice, divided into the King's Bench Division and Chancery Division, along with two judicial commissioners of the Irish Land Commission who were High Court judges and the Court of Appeal. The right of appeal to the House of Lords remained.

At the lower levels, there was a three tier structure. First, there were the assize courts which dealt with important civil and criminal cases outside Dublin. The quarter sessions, presided over by judges known as justices of the peace, sat about four times a year to deal with less serious criminal matters. These judges also sat at what were called the petty sessions, dealing with minor civil and criminal matters. The preliminary hearing for indictable crimes was before the body known as the "*Grand Jury*", a group of property owners who, until the reform of local government in 1898, also struck the rate for their area. A person did not have to be legally qualified to sit as a justice of the peace and the institution - which survives, of course, in the United Kingdom to this day - was regarded with suspicion by Irish nationalists because of their doubts as to its genuine independence. In some cases, they were replaced by resident magistrates sitting outside Dublin. Finally, the county courts dealt with minor civil cases.

In 1920, Dáil Éireann (which was technically a seditious gathering) passed a decree establishing a court system. This existed in parallel to the British system and in practice supplanted it throughout much of the country, despite operating under constant threat of suppression by the forces of the Crown. It established a four tier system: at the bottom were the parish courts, which met weekly and dealt with minor civil and criminal matters. Above them were the District Courts, which sat monthly in each parliamentary constituency and dealt with more serious civil and criminal matters

"It is difficult to get accurate and up-to-date statistics on court delays. ..Whatever the reason for the delays, the statistics, such as they are, mask a disquieting feature of the present system. This is the extent to which judges in some areas at least endeavour to dispose of their crowded lists by holding protracted daily sessions, sometimes sitting late into the evening."

and with appeals from the parish courts. There were also circuit courts which sat three times a year and had unlimited civil and criminal jurisdiction. Finally, there was the Supreme Court which sat in Dublin and acted both as a court of first instance (for prerogative writs) and as an appellate court.

Following independence, the executive council of the Irish Free State appointed a Judiciary Committee in January 1923 to recommend a new court structure to be established under the 1922 Constitution. The recommendations were implemented by the Courts of Justice Act 1924 and the structures which they established have remained in place, largely unchanged, to the present day. Although the judiciary committee was given wide terms of reference, its final recommendations broadly retained in being the structures that existed before independence, but with significant changes which reflected the experience of the Irish under what was seen to be a "foreign" legal system.

"When appeals are made by the Presidents of the different jurisdictions for more judges, the reply sometimes given by the executive is that judges in some areas sit for only part of the day. That merely emphasises that the present system is not merely under-resourced: it is failing to make the most efficient use of such resources as are available."

At the local level, lay participation in the administration of justice, other than through the jury system, ended completely. The justices of the peace went, as did the grand jury. Their places were taken by the professionally qualified "District Justices", now to become a permanent feature of the legal scene. At the next highest level, there was a major increase in local jurisdiction: the old system of county courts, quarter sessions and assizes was replaced by the newly established "Circuit Court". This had a substantially wider common law jurisdiction than the county court - probably not far off the present Circuit Court ceiling of £30,000 in contract and tort cases in 1923 values - and a significantly greater equity jurisdiction. It dealt with all serious crime other than capital offences.

The work begun by the Judicature Acts in fusing the systems of law and equity was completed by the abolition of the division between the common law and chancery courts. (In practice, it remained the norm for the next half century for two judges to be assigned virtually exclusively to chancery work.) The High Court, as required by the Constitution, had an unlimited original jurisdiction. The "Central Criminal Court" - the name proposed by the committee for the new High Court exercising its criminal jurisdiction - sat in Dublin exclusively and tried all capital crimes (principally murder). For the first time, there was provision for an appeal in all indictable crime to the new Court of Criminal Appeal. Again, as required by the Constitution, there was a final court of appeal, called "The Supreme Court", consisting of three judges, the president of the court being called the Chief Justice.

The system thus established has remained broadly unchanged until the present day. The jurisdiction of the District Court and the Circuit Court in civil cases has been increased from time to time. Those changes sometimes did no more than reflect the fall in the value of money. On occasions, they reflected a more significant expansion of the jurisdictions of those courts.

The court structures, as they now exist, are as follows. In criminal cases, there are essentially five tiers. The District Court is the most important court in this area in terms of its workload, although many of the offences with which it deals are relatively minor, since it is a court of summary jurisdiction and cannot try indictable cases, i.e., cases which must be heard by a judge and jury. Until recently, it also conducted the preliminary inquiry which had to be held before a person could be returned for trial on indictment to the Central Criminal Court or the Circuit Criminal Court. This procedure may soon be abolished.[1] The Circuit Court sitting with a judge and jury has full criminal jurisdiction in all serious offences, except for murder, rape, aggravated sexual assault, treason, piracy and allied offences. The Central Criminal Court also sits with a judge and a jury, but is confined to trying cases which cannot be dealt with in the Circuit Court, in practice almost exclusively murder and rape. There is an appeal from the District Court to the Circuit Court which is by way of rehearing. Appeals from the Circuit Court and the Central Criminal Court are heard by the Court of Criminal Appeal. Appeals on points of law of exceptional public importance can be brought to the Supreme Court, if the Court of Criminal Appeal certifies that such a point arises and grants leave to appeal.

In civil matters, the District Court has jurisdiction where the claim does not exceed £5,000. The ceiling of the Circuit Court jurisdiction is £30,000. Both courts deal with a wide range of family law matters, such as maintenance and barring orders in the District Court: the Circuit Court can grant decrees of divorce, judicial separation and nullity. An appeal lies in most civil cases from the District Court to the Circuit Court and takes place by way of rehearing.

The District Court enjoys some important statutory jurisdictions, e.g., under the Intoxicating Liquor Acts. The Circuit Court also has jurisdiction in licensing cases, but the Oireachtas has vested in that court a wide range of additional statutory jurisdictions in recent years in areas such as planning and employment.

The High Court has unlimited original jurisdiction in all civil cases, can review the decisions of inferior tribunals and, alone among the courts of first instance, can consider the question of the validity of any law having regard to the provisions of the Constitution. It sits regularly at venues outside Dublin at specific times of the year to hear personal and fatal injury actions. The criminal business of the High Court, commercial and chancery cases and judicial review proceedings are transacted exclusively in Dublin.

There is an appeal from the Circuit Court to the High Court in all civil cases which takes the form of a rehearing. Such appeals outside Dublin are heard by "the High Court on Circuit". There is no appeal from the decision of the High Court on a circuit appeal (as there is also no appeal from the decision of the Circuit Court on a District Court appeal).

Questions of law may, however, be referred by the Circuit Court and the High Court to the Supreme Court by means of the case stated procedure.

The Supreme Court is the final court of appeal in all civil matters and constitutional cases. Questions of European Union law can be determined by any of the Irish court levels, but the final arbiter in all questions of European Union law is the Court of Justice of the European Communities in Luxembourg.

The Constitution allows for the establishment of special courts sitting without juries to try serious crime in cases where the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order. This has been availed of under the Offences Against the State Act 1939 to establish a special criminal court from time to time. At present, the court sits with three judges and no jury, although retired judges and army officers have sat on the court in the past.

How the present system operates

It is difficult to get accurate and up-to-date statistics on court delays. The survey which follows is based on such information as I have been able to garner. It is obvious that more systematic research needs to be undertaken in this area.

In the District Court, there is generally no delay in dealing with criminal cases. Where such arrears exist, judges will arrange special sittings. Civil cases, outside Dublin, Cork and Limerick, are dealt with by way of special sittings and this can lead to some delays. In family cases, there is an average delay of 10 to 12 weeks in Dublin, and 7 to 8 weeks in Cork. Urgent cases are, in general, heard immediately. In the processing of applications to the Small Claims Court, there is a delay of up to 6 months in Dublin and 12 months in Dun Laoghaire, with no delays outside Dublin.

In the Circuit Court, the level of delay varies very much from venue to venue. In criminal cases, there is no delay in 14 venues. There is a delay of three months (i.e. to the next session) in three venues (Kilkenny, Trim and Waterford). There is a delay of 6 months in 4 venues (Dundalk, Naas, Portlaoise and Trim), 9 months in Wicklow, 12 months in Cork and Tralee and 18 months in Limerick and Longford.

In family law, there is no delay in 12 venues, and a delay of three months in seven venues (Kilkenny, Limerick, Naas, Tullamore, Sligo, Waterford and Wexford), a delay of six months in three venues (Wicklow, Letterkenny, Mullingar and Tralee), a delay of nine months in Cork and a delay of 12 months in Clonmel. In Dublin there is no delay in criminal or civil cases and a delay of about two months in family law cases.

All High Court chancery, judicial review and civil cases certified as ready are given a date for hearing in the following term. Personal injuries cases can obtain a hearing within 14 days if they are ready. There is a delay of three months in family law cases.

In the Central Criminal Court, there has been a considerable increase in the number of cases returned for trial: in the year ending 31st December 1994, the number was 58 and in the year ending 31st December 1999, 163, an increase of 181%. This is contributing to the delays in the hearing of cases, currently running at approximately 11-12 months. In the Special Criminal Court, there is approximately 10 months delay. In the Court of Criminal Appeal, the waiting time for the hearing of an appeal is 9 to 12 months from the date the appeal is lodged. Finally, in the Supreme Court the average waiting time for the hearing of cases is three to six months from certification as ready.

It is obvious from examining the above statistics that there are considerable difficulties in the administration of justice in Ireland. Justice delayed can often be justice denied; in a civil case, a delay of a year or more can lead to drastic changes in circumstances and considerable hardship. In a criminal case, a delay may lead to the incarceration of an innocent person for longer than is necessary, or it may mean that a guilty person is free on bail while awaiting a hearing of his case.

It is interesting to note that the figures vary across the country - indeed, in some venues, judges are underworked. This could be for a variety of reasons: a larger demographic base, a more efficient Judge, more efficient local practitioners.

Whatever the reason for the delays, the statistics, such as they are, mask a disquieting feature of the present system. This is the extent to which judges in some areas at least endeavour to dispose of their crowded lists by holding protracted daily sessions, sometimes sitting late into the evening. While there can be no question as to the dedication and professional commitment of the judges concerned, this gives rise to anxiety as to the quality of justice being dispensed in courts where fatigue must inevitably set in for both judges and practitioners. When appeals are made by the Presidents of the different jurisdictions for more judges, the reply sometimes given by the executive is that judges in some areas sit for only part of the day. That merely emphasises that the present system is not merely under-resourced: it is failing to make the most efficient use of such resources as are available.

Court Structures in Other Jurisdictions

The following is a sketch of the court structure and jurisdiction in various other countries. It is somewhat brief and omits many points of detail. In particular, it does not deal with the administrative law systems which exist in parallel to the "normal" courts, particularly in civil law countries, or with

"Problems arising from the inadequacy of court premises, the inefficient deployment of staff and the absence of information technology, which have been allowed to fester for far too long, can and are being dealt with in a systematic and coherent manner by the newly established Court Service. At the High Court level, where particular problems tend to arise, the introduction of case management techniques is under active consideration."

many specialised judicial or quasi-judicial bodies, such as coroners' courts, courts-martial and special tribunals, which may or may not be considered "courts" in particular countries. The emphasis here is on providing an overview of the day-to-day legal business which concerns most citizens of a state. The jurisdictions chosen are a sample from around the world: our nearest geographical neighbour, the United Kingdom, some European jurisdictions (both civil law and mixed), the American state of Connecticut (as it is comparable to Ireland in size and population), Canada (as an example of a large federal system) and New Zealand (as a small island nation with a legal system rooted in the Common Law).

"That there are a number of anomalies and irrational features of the present system is clear. There appears no reason why the High Court cannot deal with major crimes such as manslaughter, fraud, the importation and sale of drugs, robbery with violence and kidnapping. Equally, there seems no reason why the Circuit Court, which is entrusted with the trial of those offences, is precluded from trying murder and rape cases."

England and Wales[2]

In England and Wales, there is a five-tier system in civil cases and a four-tier system in criminal cases. It is simplest to consider the two branches in turn. The lowest level in civil cases are the Magistrates' Courts which have a limited jurisdiction largely dealing with family law, local taxation and administrative functions. Above them are the County Courts which have jurisdiction to try cases up to £5,000. There are also specialist facilities for arbitration and small claims.

The High Court hears more complicated civil cases, appeals from tribunals and appeals from Magistrates' Courts (in both civil and criminal matters). There are three divisions: Family, Chancery and Queen's Bench (which has the widest jurisdiction and includes specialist Admiralty and Commercial courts). Above the High Court is the Court of Appeal (Civil Division) and finally the House of Lords.

In criminal cases, the Magistrates' Courts deal with about 98% of business. Summary offences can be tried here directly and more serious offences (such as murder, manslaughter, rape and robbery) are heard on indictment by the Crown Court. Some offences ('either way' offences) can be tried either by the magistrates or by a jury in the Crown Court, depending on the circumstances of the case and the wishes of the defendants. There are specialist Youth Courts, which are a Division of the Magistrates' Court.

The Crown Court is essentially the High Court sitting as a criminal court and is divided into six circuits. It hears the most serious offences, always with a jury of twelve. Appeals from the Magistrates' Court lie to the Crown Court against sentence and to the Queen's Bench Division of the High Court on points of law and procedure. Appeals from the Crown Court lie to the Court of Appeal (Criminal Division) and then to the House of Lords which is the final appeal court. The House of Lords will only consider cases if they involve a point of law of general public importance.

Scotland[3]

The Scottish system is somewhat simpler. Again, as the two branches are somewhat distinct, they will be described separately.

In civil matters, the Sheriff Court is the court of local jurisdiction, and above that is the Court of Session, which is divided into two houses, the Inner House and the Outer House. The Outer House is a court of first instance, whereas the Inner House is a Court of Appeal. There are no specialist divisions.

In criminal cases, the District Court deals with minor offences before a lay magistrate. It hears offences summarily and can impose a maximum sentence of sixty days and a maximum fine of £2,500. Sheriff Courts and District Courts (with stipendiary magistrates) deal with less serious crimes (with power to impose unlimited fines on conviction on indictment and £5,000 in summary proceedings; and a maximum prison sentence of three years on indictment and six months in summary proceedings). The High Court of Justiciary is the highest criminal court. It hears the most serious offences. Both a High Court and the Sheriff Court can sit in what is known as solemn procedure, that is to say with a jury of 15. There is no appeal from the High Court of Justiciary to the House of Lords.

Northern Ireland[4]

The structure of the Northern Ireland courts are somewhat similar to that of England and Wales. The Magistrates' Courts are the lowest courts and deal with minor criminal cases, some family law cases and a very limited civil jurisdiction. The County Courts have a primarily civil jurisdiction.

The High Court is divided into a Queen's Bench Division (for most civil matters) and a Chancery Division (for probate, real property and company law). The Crown Court deals with all serious criminal cases; it may sit without a jury for terrorist offences. Above the High and Crown Courts, there is a right of appeal to the Court of Appeal, and possibly to the House of Lords.

The Netherlands[5]

The Netherlands has a four-tier court system. At the bottom is the Sub-District Court (*Kantongerecht*), which sits with a single judge. It deals with minor criminal offences and civil cases up to NLG 5000, along with labour and landlord and tenant cases. The District Court (*Arrondissementrechtbank*) is the second level court. It tries all indictable criminal offences (with three judges, rather than with a jury), all civil cases not within the competence of the Sub-District courts (divorces, bankruptcy, compulsory purchase orders and claims in excess of NLG 5000) and appeals from Sub-District courts. There is also a Children's Division.

Above this are the Courts of Appeal (*Gerechthof*). All District Court judgments at first instance can be appealed against. Finally, there is the Supreme Court (*Hoge Raad der Nederlanden*) which is essentially a court of *cassation*.

Denmark[6]

The Danish court structure has three levels. At the bottom are the County Courts. Practically all civil matters fall within their jurisdiction. In criminal matters, they deal with less serious offences (where the prosecution requests a sentence of less than four years' imprisonment).

The next level is the High Court, which has two divisions, Eastern and Western. There is also the Maritime and Commercial Court of Copenhagen, which has a specialised jurisdiction. The High Court hears civil cases involving a claim in excess of DKK 1,000,000, appeals from the County Courts, cases that are referred from the County Courts (where the case concerns a question of general public interest) and cases concerning the validity of decisions made by a Ministry or a government agency authorised to adopt the final administrative decision in disputes between the state and private individuals. In criminal cases, where the prosecution requests a sentence in excess of four years, the case is heard on indictment before a jury of twelve. The High Court hears criminal appeals without a jury.

Finally, the Supreme Court is the highest court. This hears civil appeals from judgments of the Maritime and Commercial Court and of the High Court in first instance and, when leave is granted by the Board of Appeal on the grounds that it concerns a question of general public interest, appeals from judgments and rulings of the High Court in appeal cases. High Court decisions in jury trials may be appealed to the Supreme Court on points of law and sentence. High Court decisions in appeal cases may only be appealed to the Supreme Court with leave from the Board of Appeal. Somewhat outside the structure is the Special Court of Indictment and Revision, which is primarily concerned with the resumption of criminal cases and also processes complaints against judges.

France[7]

The French court system can be considered as a four-tier system. In civil matters the lowest courts are the *Tribunaux d'Instance* (TI), which deal with cases of value less than FF 30,000. There are several specialised courts which can be considered as roughly equivalent to the TI: the *Conseils de Prud'hommes* (employment law), the *Tribunaux des Affaires de Sècuritè Sociale* (general social security matters), and the *Tribunaux Paritaires des Baux Ruraux* (agricultural tenancy). The *Tribunaux de Grande Instance* (TGI) deal with general civil claims exceeding of FF30,000 which are not explicitly assigned to other courts. There is also the specialised jurisdiction of the *Tribunaux de Commerce*, which can be considered as equivalent to the TGI and deals with commercial cases. Above these, there is a right of appeal to the *Cours d'Appel* for claims greater then FF 13,000. Finally, at the apex of the system is the *Cour de Cassation*, which hears appeals on points of law.

In criminal matters, the lowest court is the *Tribunal de Police*. This can be considered as equivalent to the TI and deals with minor offences (called *contraventions*) in a summary fashion before a single judge. The *Tribunal Correctionel*, which is roughly equivalent to the TGI, tries intermediate offences (*délits*) before one or three judges. *Crimes* (the most serious offences) are tried before the *Cour d'Assises*, which does not have a direct civil equivalent and sits with three judges and a jury of nine. There is an appeal from the *Tribunal Correctionel* to the *Cour d'Appel*, but not from jury decisions of the *Cour d'Assises*. Appeals on a point of law can always be taken to the *Cour de Cassation*. There are also special youth courts and two very specialised courts which do not have equivalents in most other jurisdictions: the *Haute Cour de Justice* (for cases of high treason by the President of the Republic) and the *Cour de Justice de la Rèpublique* (to try government ministers for crimes and *délits* committed in the exercise of their functions).

Connecticut[8]

Although Connecticut has four distinct court levels, it can be considered a three-tier system. At the bottom is the Probate Court which has a specialised jurisdiction over the estates of deceased persons and related matters. Its decisions are appealable to the Superior Court, which hears all legal controversies except those of which the Probate Court has exclusive jurisdiction.

The Superior Court is divided into 13 judicial districts, 22 geographical areas and 14 juvenile districts. There are four principal trial divisions: Civil, Criminal, Family and Housing. In general, major cases and cases not involving juveniles are held at district court locations. Cases involving juveniles are held in specialised locations.

Above the Superior Court is the Appellate Court which is strictly an appeals court and does not hear testimony.

Finally, there is the Supreme Court which reviews decisions made in the Superior Court and also reviews selected decisions of the Appellate Court. In general only cases involving the invalidity of the State Constitution or State statutes and convictions of capital offences are appealed directly to the Supreme Court. The Supreme Court may also transfer

"The anomalous and irrational features of our court system principally derive from the fact that we have a three tier system of courts of first instance, unlike most of the other systems which I have examined and in which a two tier system is the norm. A rationally designed Irish system would consist, at the first instance level, of a District Court with a significantly enhanced civil jurisdiction and an expanded High Court to which would be transferred all the existing civil and criminal jurisdiction of the Circuit Court."

"Under such a system, the High Court, while remaining a unified court of first instance with unlimited original civil jurisdiction and exclusive criminal jurisdiction in serious crime, would sit as a regional court. Inevitably, of course, major constitutional and judicial review cases and commercial/chancery cases, would be tried by the High Court in Dublin and to avoid any tendency for a two tier High Court to emerge, it would be necessary for all the High Court judges to sit in rotation in the different regions, including Dublin."

any matter pending before the Appellate Court to it and conversely may transfer any matter pending before it to the Appellate Court.

Canada[9]

The court system in Canada, a large federal jurisdiction, is as follows. At the federal level there is the Supreme Court of Canada, the Federal Court of Canada (which contains an Appellate and Trial Division) and the Tax Court of Canada (which has an obvious specialised jurisdiction).

At the provincial level, the structure varies widely but can be generally described as being a three-tiered system. Each province will have a Supreme Court or a Court of Superior Jurisdiction, which may be separated into Appellate and Trial Divisions or may even establish these divisions as separate courts. The Trial Division is generally equivalent to the Irish High Court, with unlimited jurisdiction, hearing indictable offences with or without a jury and civil matters over a given monetary amount.

Below these are the County or District Courts. Each province will also have Provincial Courts, which are generally divided into specialist areas such as Youth Courts, Family Courts, Criminal Courts (dealing with summary offences and some indictable offences) and a Small Claims Court. The Surrogate Courts, which have federally appointed judges, generally deal with questions of Probate.

New Zealand[10]

Although New Zealand can be considered to have as many as ten distinct courts, the court structure there is really a three-tier one. There are several courts that do not fit neatly into the court structure but stand somewhat outside it: the Maori Land Court (which hears cases under the *Te Ture Whenua Maori/Maori* Land Act 1993), the Employment Court and the Environment Court.

The District Court, which is the lowest level of court jurisdiction for most cases, hears civil actions where the value of the claim is not more than $200,000 and has criminal jurisdiction to hear summary offences, indictable offences triable summarily, summary offences triable indictably and the preliminary hearing of indictable offences. It also has three specialised divisions, the Family Court, the Disputes Tribunal (which is in fact an arbitration mechanism for small claims, with no direct involvement of lawyers and judges) and the Youth Court.

Above the District Court lies the High Court. This has almost unlimited original jurisdiction, which means that it can hear all civil matters outside the jurisdiction of the District Court and matters which have been transferred to it from the District Court. It hears trials of indictable offences, almost always before a jury of twelve.

The Court of Appeal hears appeals from all lower courts except the Environment Court (which has a limited right of appeal to the High Court). There is also a specialist Maori Appellate Court for the Maori Land Court, but the High Court can review decisions in that specialised jurisdiction.

The Court of Appeal is the final court of appeal within New Zealand but in common with several other Commonwealth countries, New Zealand has maintained the right of appeal to the Judicial Committee of the Privy Council. It is intended to abolish this avenue of appeal but not until a satisfactory second tier of appeal has been set up. There is some talk of an Australasian Court of Appeal, but these proposals are very vague.

Conclusions

While there are undoubtedly serious delays and other deficiencies in the existing court system, they are by no means all the result of the nature of the system itself. Problems arising from the inadequacy of court premises, the inefficient deployment of staff and the absence of information technology, which have been allowed to fester for far too long, can and are being dealt with in a systematic and coherent manner by the newly established Court Service. At the High Court level, where particular problems tend to arise, the introduction of case management techniques is under active consideration.

These urgently needed reforms can be implemented without any serious alteration to the present court system. But that is no reason for deferring any further a complete reappraisal of that system and of how suited it is to actual conditions in Ireland today.

That there are a number of anomalies and irrational features of the present system is clear. There appears no reason why the High Court cannot deal with major crimes such as manslaughter, fraud, the importation and sale of drugs, robbery with violence and kidnapping. Equally, there seems no reason why the Circuit Court, which is entrusted with the trial of those offences, is precluded from trying murder and rape cases.

The anomalies in the civil law area, although not so immediately apparent, are also striking. Cases which are within the jurisdiction of the Circuit Court may produce complex issues of law and/or fact but the procedures are markedly different from those in the High Court. In the case of actions for defamation, a particularly remarkable situation exists: a person who wishes to have the issue of *"libel or no libel"* determined by a jury, regarded as a right of paramount importance, must sue in the High Court, even though he may be happy with the level of damages available in the Circuit Court, since jury trial in civil actions does not exist in the Circuit Court. In every civil case, moreover, no matter how important the issues, there is no right of appeal to the Supreme Court: the only appeal is to the High Court whose decision is final. Points of law of major importance may thus not be

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decided at the Supreme Court level unless the protracted and cumbersome procedure of a Case Stated is invoked. Finally, it should be noted that, in the family law area, the legislation, as judicially construed, has resulted in the High Court and the Circuit Court having concurrent jurisdiction to grant divorces, judicial separations and decrees of nullity with no guidance to the hapless litigants in choosing the court in which to institute the proceedings.[11]

These anomalous and irrational features of our court system principally derive from the fact that we have a three tier system of courts of first instance, unlike most of the other systems which I have examined and in which a two tier system is the norm. A rationally designed Irish system would consist, at the first instance level, of a District Court with a significantly enhanced civil jurisdiction and an expanded High Court to which would be transferred all the existing civil and criminal jurisdiction of the Circuit Court.

Under such a system, the High Court, while remaining a unified court of first instance with unlimited original civil jurisdiction and exclusive criminal jurisdiction in serious crime, would sit as a regional court. Inevitably, of course, major constitutional and judicial review cases and commercial/chancery cases, would be tried by the High Court in Dublin and to avoid any tendency for a two tier High Court to emerge, it would be necessary for all the High Court judges to sit in rotation in the different regions, including Dublin.

These proposals would not require any amendment of the Constitution, since a court of local and limited jurisdiction in the form of the District Court would remain. The proposal, indeed, would be more in harmony with the spirit of the requirement in the Constitution that the High Court should be invested with a "*full original jurisdiction empowered to determine all matters and questions whether of law or fact, civil or criminal.*"

The possible changes to the appeal structure must next be considered. Again, the Irish system is unusual in that the Supreme Court fulfils all the functions of final courts of appeal in other jurisdictions, not merely in cases involving important points of law and in constitutional cases, but in all cases decided by the High Court except where a right of appeal is excluded by an Act of the Oireachtas. In the result, the Supreme Court regularly hears appeals in cases which are of no general public importance leading to inevitable delays in the hearing of those cases which are.

In this area, Ireland is unusual in having a one tier appeal system in civil cases. It would be far more satisfactory if a permanent Court of Appeal existed which sat in both civil and criminal divisions and which heard appeals from the High Court in all civil cases and cases of serious crime. That court in turn could grant leave to appeal to the Supreme Court where it was satisfied that a point of law of public importance was involved.

There would appear to be no necessity to amend the Constitution in order to provide for the establishment of a new appeals structure of this nature. The Supreme Court has already held that there was nothing in the Constitution to preclude the establishment by the Oireachtas of the Court of Criminal Appeal in its present form.[12] It was held that it was open to the Oireachtas to establish both courts of first instance and courts of appeal other than those mandated by the Constitution, i.e., the High Court and Supreme Court. In criminal cases, a permanent court of appeal would not suffer from the problems which now arise from the fact that the Court of Criminal Appeal consists of three judges chosen for a particular list of cases. This has led to serious inconsistencies in the jurisprudence of that court and, in particular, in the all important area of sentencing. A provision in the Court and Court Officers Act 1995 for the transfer of the entire jurisdiction of the Court of Criminal Appeal to the Supreme Court has never been implemented.

The existing appeals structure from the District Court to the Circuit Court and the Circuit Court to the High Court is also clearly defective. In the case of appeals from the Circuit Court to the High Court, the hearing of such appeals outside Dublin by the High Court on Circuit is a seriously wasteful use of judicial resources. Members of the High Court, and, on occasions, the Supreme Court, frequently travel to the appointed venues to find that there is virtually no work for them to do. This is at a time when there are huge lists of cases to be dealt with in the High Court and it is constantly asked to supply judges to deal with other work of public importance, such as tribunals and other enquiries.

One feature of the present appeal system which is particularly unsatisfactory is the fact that every civil appeal from the District Court to the Circuit Court and the Circuit Court to the High Court is by way of rehearing. This is particularly unfortunate in family law cases. However much judges may endeavour to soften the adversarial nature of the proceedings, increased bitterness and tension is often engendered by the hearing and these difficulties are exacerbated if one party decides to appeal, since there then must be another confrontation at the next level. With the growing introduction of technology to all the courts, it is inevitable that there will be a full audio recording available of all court proceedings and this would enable appeals in such cases to be taken directly from the District Court to the Court of Appeal on a transcript of the proceedings, in the same manner as appeals are at present taken from the High Court to the Supreme Court, thus

avoiding the necessity for a second confrontational hearing.

There is also a strong case to be made for vesting the entire family law jurisdiction in the District Court, with the exception of nullity cases. Unless and until the legislature intervenes to clarify the boundaries of the last mentioned jurisdiction, the development of the relevant jurisprudence should be left to the High Court and the Supreme Court.

The vesting of some statutory jurisdictions in the courts also calls urgently for reappraisal. Local authorities are now entrusted with the grant of permissions and licences in areas of enormous importance, such as planning and the environment generally. The retention by the District Court and the Circuit Court of a licensing jurisdiction in the case of alcohol can be seen, in this context, as an anachronistic survival which is also wasteful of judicial resources.

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Many of these changes will be ineffective unless there is also a greater allocation of resources to the courts. In such areas as staff, court accommodation and information technology, this is now the responsibility of the Courts Service. But it is also clear that we have not enough judges in Ireland to cope with the hugely increased volume and complexity of litigation today. The number of judges per head of the population in Ireland is one of the lowest - perhaps the lowest - in the European Union. That remains a problem which must be dealt with by the executive and the legislature.

I have emphasised the importance of having a court structure which not only functions efficiently in the interests of all citizens but one which is also seen by them as reasonably accessible. Clearly, a legal system to which people are unwilling to have resort, unless they are effectively compelled so to do, because of the high cost of litigation cannot be regarded as genuinely accessible to all. That, in turn, points to the necessity for an efficient system of legal aid in both criminal and civil cases. The question as to what improvements may be required in the present system of legal aid lies outside the scope of this paper. I would hope, however, that the establishment of a more rational and less cumbersome court system would contribute to at least some extent to reducing the high cost of litigation. In particular, changes which are designed to ensure that justice is administered, so far as possible, at the local level, may ultimately help to reduce the cost of litigation: it would certainly make the system more genuinely accessible than is at present the case.

The changes I have proposed would not provide an instant or magic solution to the difficulties at present being experienced. There may be other models which might be thought more appropriate to Irish conditions. I have no doubt, however, that a reappraisal of the present system is seriously overdue. The reports of the Denham Working Group led to the greatest revolution in the administration of justice in this country since independence with the establishment of the Court Service. Now seems to be the appropriate time for the establishment of a body composed, as was the Denham Group, not merely of representatives of the judiciary and the legal professions, but also of all interested sections of the public, and equipped with similar resources. The first task of such a body would be a fact finding one: to establish the extent to which the present system is failing to achieve the administration of justice in a manner which is accessible, fair and expeditious. Its terms of reference should obviously be sufficiently broad to enable the body to investigate all the issues which I have endeavoured to identify in this lecture and in addition any other features which their enquiry, as it proceeds, may identify.

The adoption of such a strategy would, I am convinced, enable the Irish courts to face with confidence the challenges which the new century will undoubtedly bring.•

* This paper was first delivered as a lecture to UCC Law Society on 23 March 2001.

1 This abolition is provided for in the Criminal Justice Act, 1999, but the relevant provisions have not been brought into force at the time of writing.

2 See generally *Britain's Legal Systems* (HMSO, 1996), pp. 17-33.

3 See generally *ibid.*, pp. 78-85.

4 See generally *ibid.*, pp. 104 -106.

5 See generally *The Court System in the Netherlands* (Dutch Ministry of Justice, 1990).

6 See generally *A Brief Account of the Judiciary and the Administration of Justice in Denmark* (Danish Court Administration, 1999).

7 See generally West et al., *The French Legal System* (Butterworths, 1998), pp. 76-95.

8 See generally *Organisation of the Courts*, http://www.jud.state.ct.us/ystday/orgcourt.html, 5 February 2001.

9 See generally Gall, *The Canadian Legal System* (Carwsell, 1995), Chapter 7.

10 See generally *Court Structure*, http://www.adls.org.nz/lawnz/court.html, 4 February 2001.

11 See *R. v. R.* [1984] I.R. 296.

12 *The People (Attorney General) v. Conmey* [1975] I.R. 341.

JUDICIAL REVIEW, THE DOCTRINE OF REASONABLENESS AND THE IMMIGRATION PROCESS*

Gerard Hogan SC *asks whether the doctrine of curial deference owed by the courts to specialist tribunals is justified in the case of the Refugee Appeals Tribunal and other similar statutory bodies.*

Perhaps one of the most frequently quoted judicial statements in judicial review applications is that of Lord Brightman in *Chief Constable of North Wales Police v. Evans*:[1]

> "Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will, in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."[2]

In a way, it is curious that this statement should be regarded as so authoritative, since part of it is clearly wrong. While it is true that the judicial review is mainly concerned with administrative procedures, it is beyond argument that certain central doctrines of judicial review - reasonableness, irrationality and proportionality - are, of course, concerned with the merits of the decision itself and not simply with the decision-making process. Although it may seem heretical to say so, in those cases, judicial review operates as a form of limited appeal from the decision-maker. One uses the words "limited appeal' advisedly, since judicial review is hedged in with technical and doctrinal restrictions which do not obtain in the case of an appeal in the strict sense of that term. Nevertheless, the fact remains that when the court quashes a decision on grounds of unreasonableness it is in effect saying that the merits of the decision are so plainly flawed or the reasoning of the decision-maker so palpably inconsistent that the courts will not stand over the decision. In effect, in such cases the court allows a form of very appeal against the impugned decision. No amount of judicial endorsement of Lord Brightman's dictum in Evans can disguise this essential legal reality.

But before we examine the relevance of this to judicial review of immigration decisions, it is necessary first to re-trace our steps and consider briefly the evolution of the doctrine of reasonableness. Just as in the case of their English counterparts, the Irish courts have always enjoyed a residual discretion to interfere to quash an administrative decision which is plainly at variance with common sense or which is absurd or which disproportionately interferes with legal rights. Prior to about 1975, this doctrine was rarely invoked by litigants in judicial review matters, still less applied by the courts. Undoubtedly, however, one of the difficulties with this doctrine is its very subjectivity.

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In the leading modern case, *The State (Keegan) v. Stardust Victims' Compensation Tribunal*,[3] the applicants were a husband and wife who were awarded substantially differing sums by the respondent tribunal. The husband (who actually received nothing) sought to have the decision in his case quashed, but the Court refused to intervene, saying that there were (unspecified) differences between his case and that of his wife which explained this apparent discrepancy. The test enunciated by Henchy J. has since become canonical:

"I would myself consider that the test of unreasonableness or irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense. If it does, then the decision-maker should be held to have acted *ultra vires*, for the necessarily implied constitutional limitation of jurisdiction in all decision-making means that the decision-maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision." [4]

The Irish courts have subsequently sought to stress the limited nature of the judicial review function, especially in the context of challenges to decisions taken by specialist tribunals. In *O'Keefe v. An Bord Pleanala*[5] the Supreme Court indicated unease at the increasing number of judicial review applications whereby it had been sought to impugn administrative decisions on the grounds of reasonableness and it sought to stress that judicial review could not be regarded as a form of statutory appeal. As Finlay C.J. emphasised:

> "The Court cannot interfere with a decision of an administrative decision-making authority merely on the grounds that:
>
> (a) it is satisfied on the facts as found that it would have raised different inferences and conclusions; or
>
> (b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it."[6]

Thus, the Supreme Court concluded that the specialist planning appeals board (An Bord Pleanala) was entitled to grant planning permission for a large television mast, despite the reservations which had been expressed by a planning inspector appointed by the Board about the possible negative consequences of such a decision. The Court also stated that it could not intervene in such cases unless there was "no relevant material' on which the planning authority could have arrived at the conclusion which it did.

While it is probably true to regard the *O'Keefe* test as being especially applicable to specialist tribunals[7] (such as the Planning Board), this cautious approach has had a huge influence in other areas of administrative law. Thus, for example, the decision of Barr J. in *ACT Shipping Ltd. v. Minister for Marine*[8] is also along similar lines. A cargo vessel owned by the plaintiffs had been badly damaged in bad weather and was abandoned by its crew. The vessel was carrying heavy bulk oil and an attempt was made to salvage it while it was drifting some 300km. off the south-west Irish coast. The Minister, acting on the basis of professional advice, made an order refusing the ship entry into Irish territorial waters. The salvage efforts failed and the ship was ultimately scuttled. Barr J. refused to hold that the decision to refuse entry was unreasonable in law. The right of safe haven for a vessel in distress was "primarily humanitarian rather than economic" and in this case there was no risk to life. On the other hand, there was a very real risk of coastal pollution and widespread environmental damage is the stricken vessel had proceeded to an Irish harbour. Barr J. said that the *Stardust* and *O'Keefe* decisions made it clear "that the courts should be loath to interfere...with intra vires administrative decisions on the merits, particularly where the decision-maker is acting within his own area of professional expertise" and that in this regard the plaintiffs had not overcome the "difficult onus of proof." Barr J. was anxious to stress that this case involved a review of a difficult decision based upon specialised expertise, thereby raising the inference that the task of a putative applicant might be easier task where the decision under review had not been based on such expertise.

"While it is probably true to regard the O'Keefe test as being especially applicable to specialist tribunals (such as the Planning Board), this cautious approach has had a huge influence in other areas of administrative law...There is, of course, a very fine line to be drawn here, since it has been judicially accepted that the incorrect interpretation of relevant legislation may amount to an error of law which, of course, would be susceptible to judicial review."

This trend was continued by the Supreme Court in *Garda Representative Body v. Ireland.*[9] In this case the applicants sought to quash a decision which had been made by a civil service conciliation body regarding an aspect of Garda overtime. The Supreme Court found that the decision was not manifestly unreasonable according to the *O'Keefe* formulation and continued:

> "Judicial review is what it says it is, namely, a review and not an appeal and for the courts to give to the plaintiff a declaration that the chairman of the council had been incorrect in his interpretation, as distinct from declaring that his interpretation was void or invalid, would be to conduct an appeal from his decision."[10]

All of this prompts the following comments. First, all of the decisions under challenge were effectively those of specialist bodies, so that the applicant's task of establishing unreasonableness was all the more exacting. Secondly, there is, of course, a very fine line to be drawn here, since it has been judicially accepted that the incorrect interpretation of relevant legislation may amount to an error of law which, of course, would be susceptible to judicial review. Thirdly, in *O'Keefe* the Supreme Court never satisfactorily explained why it would only interfere if there was no evidence before the Planning Board. Naturally, the specialist nature of that body's expertise ought to be respected, but to confine the court's judicial review functions into a set 'no evidence' cases strikes one as too inflexible and rigid. This test - which, it is probably not an exaggeration to say, was simply invented for that purpose by the Supreme Court in *O'Keefe* - has already forced the High Court on a number of occasions to uphold planning decisions it considered to be plainly unreasonable, simply because individual High Court judges could not say that in the case before them there was no evidence whatever on which the planning authority made its decision.

"In O'Keefe the Supreme Court never satisfactorily explained why it would only interfere if there was no evidence before the Planning Board. Naturally, the specialist nature of that body's expertise ought to be respected, but to confine the court's judicial review functions into a set 'no evidence' case strikes one as too inflexible and rigid."

"Both Kearns J. in MJ Gleeson and the Supreme Court in Orange accepted that such appeals should proceed by reference to the judicial review standard, they all accepted that the courts could review a decision of an expert tribunal if clearly satisfied that a wrong inference had been drawn in respect of a matter going to the root of the decision. This is a fairer - albeit more elastic - test than the rigid 'no evidence' test which had emerged in *O'Keefe*."

Finally, a different and somewhat more subtle test emerged in the two recent leading 'curial deference' cases, *MJ Gleeson v. Competition Authority*[11] and *Orange Communications v. ODTR*.[12] These were statutory appeals against complex decisions of expert bodies. While both Kearns J. in *MJ Gleeson* and the Supreme Court in *Orange* accepted that such appeals should proceed by reference to the judicial review standard, they all accepted that the courts could review a decision of an expert tribunal if clearly satisfied that a wrong inference had been drawn in respect of a matter going to the root of the decision. This is a fairer - albeit more elastic - test than the rigid 'no evidence' test which had emerged in *O'Keefe*. The very flexibility of the *MJ Gleeson/Orange* test enables the courts to avoid a manifest injustice, while at the same time it fully respects the specialist nature of the expert decision-maker.

All of this brings us to the issue of reasonableness in the context of judicial review of immigration cases. Here is a danger that both the *O'Keefe* principles plus the emerging curial deference doctrine can be taken too far. In the leading case of *Camara v. Minister for Justice*[13] Kelly J. observed of the Refugee Appeals Authority[14] that it was a body

> "with particular experience and expertise. It deals on a daily basis with the assessment of claims for refugee status. This is something which I bear in mind in approaching the application for certiorari of the recommendation in suit."[15]

In this case Kelly J. refused - apparently on this basis - to quash on reasonableness grounds a recommendation of the Authority to refuse political asylum to a claimant from Equitorial Guinea, despite the fact that it was accepted by the Authority that Mr. Camara had 'quite appalling scars to his upper body which is consistent with the evidence he gave in relation to the alleged torture.' Kelly J., applying the *O'Keefe* test, asked whether the Authority 'did not have any relevant material before him which could support his decision.' In this regard, Kelly J. drew attention to the fact the Authority had noted that aspects of the applicant's case lacked credibility and that there was material before the Authority 'which could support and justify a decision that the applicant's claim was lacking in credibility'. In this context, Kelly J. found the applicant's (benign) version of prison conditions was at odds with US State Department Reports and there were also two mutually inconsistent versions of how a particular passport was acquired.

Kelly J. then concluded thus:

"It was suggested by counsel for the applicant that the issue of his credibility assumed too great an importance before the Authority who lost sight of the actual question which he had to decide. The contention is not made out. The recommendation made by the Authority poses the appropriate question and answers it in a manner which is not irrational."[16]

It is hard to avoid characterising *Camara* as a classic instance of why the doctrine of curial deference has gone too far, since the basic reason for the special rule of deference illustrated by cases such as *Orange Communications* simply is not present in the immigration cases. In *Orange* the plaintiffs had attacked on reasonableness grounds aspects of the methodology and scoring which had been utilised by a highly expert evaluation panel to determine the outcome of a competition for the third mobile telephony licence. As Keane C.J. observed, the courts simply did not have the expertise to review an expert and specialist decision of this nature along conventional lines. Accordingly, great caution was necessary before the courts should presume to say that a conclusion reached by such a body was wrong, still less that such an error was so manifest that it went to the root of the decision-maker's adjudication.

It was, therefore, one thing for Kelly J. to comment in *Camara* that the Authority has experience of dealing with such applications and that appropriate weight must be given to this fact. Such an approach is quite unexceptionable. It is, however, quite another to say that members of the Authority (who are either distinguished professional lawyers or former judges) have the specialist expertise in dealing with such complex issues as the details of African politics or the prison conditions in obscure countries or whether, indeed, it is likely that a claimant was tortured or is likely to be tortured such as would merit according the decision-makers the heightened judicial deference which specialists enjoy. This is all the more so when the decision-maker is attempting to evaluate a future event (risk of persecution) in circumstances where considerable

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reliance has to be placed on third-hand reports (such as the Reports of the US State Department). Moreover, if *Camara* is anything to go by, the case for greater judicial activism in the area of immigration judicial review is a strong one indeed. Why should credibility (in the legal sense of that term) assume such great importance in such cases? In many of these countries it is notorious that the dominant culture is to hide and disguise facts and even lie in the face of officialdom.

And yet, on the other hand, there is a danger of the courts moving in the opposite direction to grant relief on grounds of unreasonableness in difficult cases. Two recent examples can be mentioned. In *Farrell v. Attorney General*[17] the Supreme Court quashed a decision of the Attorney General to direct the holding of a fresh inquest when it was shown that he had changed his mind following representations from the deceased's family. Keane J. held that such a *volte face* was irrational. But it seems harsh to characterise a change of mind as evidence of irrationality: after all, a willingness to change one's opinion is generally regarded as evidence of open-mindedness rather than irrationality. Where are the *O'Keefe* principles at work in this sort of case? Why was there no judicial reminder in this case of Lord Brightman's dictum in *Evans* about judicial review being concerned with the procedures followed as opposed to the substance of the decision?

The second case is *Duff v. Minister for Agriculture & Food*[18] concerned the manner in which the Minister had allocated milk reference quantities pursuant to his discretionary powers under Council Regulation EEC/857/84. The plaintiffs were development farmers who found that the Minister had failed to retain any adequate milk reference quantities for this particular category of farmers, but who, instead, had succumbed to political pressure and allotted all available quota to existing milk producers.

A majority of the Supreme Court held that the plaintiffs were entitled to damages as a consequence of the wrongful manner in which the Minister had exercised his discretionary powers. The minority judges (Hamilton C.J. and Keane J.) did not dispute that the exercise of ministerial power was reviewable - they merely considered that it was impossible to say that the power had been exercised unfairly or unreasonably. It is hard to avoid the conclusion that the majority concluded that the Minister's decision was unreasonable simply because with the benefit of hindsight and the passage of time it was demonstrated to be unfair to one group of farmers and that it had affected them harshly.

But are *Farrell* and *Duff* not examples of whether the courts have effectively converted judicial review applications into a form of appeal against the decision of the Attorney in one case and the Minister on the other? And if this can be done in these sort of judicial review cases, why should it not be done in immigration cases where the even more important questions of personal liberty and freedom are at stake? These are the lingering questions which a series of unsatisfactory judicial decisions force us to ponder.•

1. [1982] 1 WLR 1155.
2. At 1173-4.
3. [1986] IR 642.
4. Ibid.
5. [1993] 1 IR 39. See also *O' Donoghue v. An Bord Pleanala* [1991] ILRM 750 and *Schwestermann v. An Bord Pleanala* [1995] 1 ILRM 269 (where O'Hanlon J. described the onus resting on an applicant seeking to challenge a planning decision as being "very heavy").
6. [1993] 1 IR 39,71. This statement of principle has acquired almost canonical status and has been applied on numerous occasions by both the High Court and Supreme Court: see *Ryanair Ltd. v. Flynn* [2001] ILRM 283, 301-305, *per* Kearns J. Of course, the definition of statutory requirement is a matter for the courts and "no other body has the authority to usurp the powers of the court in performing that function.' On the other hand, this principle does not imply that the planning authority is not entitled to conclude that a particular development conforms with a statutory obligation, since this "is a matter which is peculiarly within the competence of the planning authority and the court ought not to interfere unless there is no reasonable basis on which the decision of the authority might be upheld." ": see *Shannon Regional Fisheries Board v. An Bord Pleanala* [1994] 3 IR 449, *per* Barr J.
7. See also, e.g., *Madigan v. Radio Telefis Eireann* [1994] 2 ILRM 472 (decision as to the manner in which the television authority discharged its statutory duty of impartiality to all candidates held not to be unreasonable on the facts having regard, inter alia, to RTE's acknowledged expertise in the matter) and *Brandon Book Publishers Ltd. v. RTE* [1993] ILRM 806. In this case Carney J. upheld a decision not to allow an advertisement for a book of short stories written by Mr. Adams, President of Sinn Fein. Carney J. held that RTE could reasonably have concluded using its judgment and "broadcasting experience" that such an advertisement would have amounted to solicitation of support for Sinn Fein, a matter then banned by virtue of s.31 of the Broadcasting Authority Act, 1960. This conclusion seems questionable, as the issue of whether or not the proposed broadcast would have amounted to an invitation of support for Sinn Fein within the meaning of the relevant s. 31 order is, in the final analysis, one for objective judicial appraisal and not merely by reference to standards of reasonableness in judging the validity of that decision.
8. [1995] 3 IR 406.
9. [1994] 1 ILRM 81.
10. Id., 89. See also the similar comments of O'Hanlon J. in *Rajah v. College of Surgeons* [1994] 1 IR 384, 388:

    "...it is important that the High Court should not be turned into a court of appeal from decisions of administrative tribunals generally and that the tendency to invoke the jurisdiction of the High Court by way of judicial review proceedings in every case where a party is dissatisfied with the decision of such a tribunal is one which must be resisted."

    It is may be significant that these comments were made in the context of an application to review a decision of a medical school to exclude a student for want of academic progress.
11. [1999] 1 ILRM 401.
12. Supreme Court, May 18, 2000.
13. High Court, July 26, 2000.
14. Now the Refugee Appeal Tribunal: see Refugee Act, 1996, s. 15 (as inserted by s. 11(1)(j) of the Immigration Act 1999).
15. At p. 8 of the judgment.
16. At p. 16 of the judgment.
17. [1998] 1 ILRM 364.
18. [1997] 2 IR 22.

HE "MONTI REFORM" OF COMPETITION LAW - NEW RULES FOR ENFORCEMENT[1]

Paul Christopher BL provides an overview of EU Commission proposals for significant structural reforms of EC and domestic competition law.

On 27 September 2000 the Commission issued a proposal for a new Council Regulation on the implementation of the EC competition rules[2] to replace those established by Regulation 17/1962.[3] The newly proposed regulation reflects the comments of the European Parliament (EP), the Economic and Social Committee (ESC), the member States and various third parties on the Commission's white paper of 28 April 1999[4] and has been described as the most radical development in the area of EC competition law for thirty years.

Briefly, the new proposal:

1. Eliminates the requirement that companies notify agreements containing restrictive provisions to the Commission for approval;
2. Empowers national competition authorities and courts to apply fully the main EU competition law provisions in reviewing such agreements;
3. Prohibits the application of member State competition laws to any restrictive agreement or abusive conduct that is capable of affecting trade between member States, and;
4. Increases the investigative and enforcement powers of the Commission in competition law infringement cases, particularly cartels, *inter alia* by providing for searches of private homes and by imposing higher financial penalties for non-compliance.

The Reforms

Various factors have brought the Commission to its decision to reform the present structure, not least the likelihood that the Community will admit 10 or more additional Member States which would make the task of the Commission under the notification and authorisation system untenable. One commentator has noted that even before the prospect of enlargement, the present system was far from ideal:

"Regulation 17/1962 corresponded to the needs of, but also to the concepts and perspectives, of the early years of the EC. [when] there were hardly any administrative structures in the Member States that would have allowed an efficient decentralised application of EC competition law in general, and of Article 81(3) in particular. Even if such structures had already been present, it would have been too risky to share the responsibility for exemption decisions with national authorities. During the first decades of the EC, there was no "competition culture" comparable to the one we have today."[5]

In the recitals to the proposed Regulation, it is stated that "the centralised scheme set up by Regulation No. 17 ...hampers application of the Community competition rules by the courts and competition authorities of the Member States, and the system of notification it involves prevents the Commission from concentrating its resources on curbing the most serious infringements. It also imposes considerable costs on undertakings. The present system should therefore be replaced by a directly applicable exception system in which the competition authorities and courts of the Member States have the power to apply not only Articles 81(1) and 82....but also Article 81(3)." It is therefore hoped that the proposed de-centralisation of the EU competition law enforcement system will ease the pressure on the resources of the Commission[6] and allow it to deal with the more serious infringements of Competition law effectively.

The Commission

At present, an agreement that falls under Article 81(1) is only legal and valid if it has been notified to the Commission and exempted by an administrative decisionof the commission. Regulation 17/1962 established the Commission's monopoly to apply Article 81(3)[7] as well as the corresponding requirement of prior notification of agreements for which an exemption is requested. The Court of Justice held in *Delimitis v. Henninger Brau*,[8] at paragraph 44, that:

> "the Commission is responsible for the implementation and orientation of Community competition policy. It is for the Commission to adopt, subject to review by the Court of First Instance and the Court of Justice, individual decisions in accordance with the procedural rules in force and to adopt exemption regulations. The performance of that task necessarily entails complex economic assessments, in particular to assess whether an agreement falls under Article 85(3) (now Article 81(3))."

Regulation 17/1962 therefore establishes "an unusual degree of centralisation if the competition sector is compared with other areas of Community law."[9]

"Article 7 of the proposals provides that for the purposes of bringing to an end infringements of Articles 81 or 82 of the Treaty by undertakings and groups of undertakings "it may impose on them any obligations necessary, including remedies of a structural nature." This would, for the first time, empower the Commission to interfere directly with private property rights."

Under the present notification system, a comfort letter is not binding on national courts, but is evidence of an agreement's legality under EU competition law. This results in some innocuous agreements being notified as a precautionary measure. The abolition of the notification and authorisation system in the proposed Regulation should allow the Commission to concentrate its enforcement actions on serious infringements, which companies do not notify but practise secretly, by freeing up resources presently occupied with cases that present very little interest in terms of effectively protecting competition.

Article 4 of the proposed Regulation sets out the powers of the Commission and establishes a system of registration whereby undertakings will be obliged to register certain types of agreements, decisions of associations of undertakings and concerted practices caught by Article 81(1) of the Treaty. There may, however, be practical difficulties in the operation of this provision as it depends on undertakings registering on their own initiative. It differs from the present procedure for negative clearances and exemptions whereby registration, of itself, does not confer any entitlements on undertakings that so register. The point has been made that undertakings that are in merger negotiations may avail of this provision as a negotiating weapon to tie-in their partner to the agreement under discussion. If the proposed merger is formally notified under Article 4 it may send out a tactical dissuading message to other potential suitors of the partner.[10]

Article 7 of the proposals provides that for the purposes of bringing to an end infringements of Articles 81 or 82 of the Treaty by undertakings and groups of undertakings "it may impose on them any obligations necessary, including remedies of a structural nature." This would, for the first time, empower the Commission to interfere directly with private property rights. That this is intended is clear from the explanatory memorandum which states that "structural remedies may be necessary to bring an infringement to an end. This may, in particular, be the case with regard to co-operation agreements and abuses of a dominant position where divestiture of certain assets may be necessary." To date, the Commission has had no power to interfere with private property rights and this proposal has been described as "the most dramatic extension of the Commission's powers since the beginning of EU competition law."[11]

Under the present system, the Commission only has the power to conduct so-called 'dawn raids' on the premises of undertakings and to make written requests for information. Article 20 of the proposed Regulation would allow agents of the Commission to enter not just the premises of the undertakings but the homes of staff of undertakings suspected of infringing European competition law.[12] However, the new power will be dependent on the issue of a warrant by a judicial authority.[13]

The Competition Authority

Presently, power is conferred on the Irish Competition Authority by the Competition Acts 1991-1996 to administer Irish competition law in this jurisdiction. Moreover, national competition authorities are permitted to apply the provisions of Article 81(1) of the Treaty as long as the Commission has not instigated an investigation procedure.[14] In applying competition law to cases before them, however, the Authority must respect the principle of the supremacy of Community law over national competition rules and should disapply national competition laws if they conflict with the Treaty.[15]

Article 1 of the proposed Regulation will make Article 81(3) fully and directly applicable so that national competition authorities will be empowered to decide whether an agreement is valid or prohibited (and void) when a case comes before them. However, to ensure a coherent application of competition rules across the Community and to avoid a 're-nationalisation' of competition law, the Commission decided to make use of the legal basis in Article 83(2)(e) of the Treaty[16] by proposing a rule providing for exclusive application of EC competition law to cases affecting trade between Member States.[17] In the future, therefore, the Competition Authority will only be able to apply the provisions of the Competition Acts 1991-1996 to cases before it that do not involve a cross-border element, and will be compelled to apply Treaty provisions to any case having a cross-border element.

Notwithstanding this safeguard, the EU Committee of the American Chamber of Commerce in Brussels, in a press release of 19 February 2001, expressed its concern about this proposal and said that it would "do more harm than good" in its present state as it feared that this reform would lead to inconsistent application of Community competition rules that "would increase the legal uncertainty for companies wishing to invest in Europe....as they will risk facing multiple challenges in various jurisdictions with no guarantee of consistent outcomes."[18]

Exchange of information

The Court of Justice in paragraph 31 of its judgment in the *Spanish Banks*[19] case set out the principle behind Regulation 17. It held that:

"Regulation No 17 does not govern proceedings conducted by the [competition] authorities in the Member States, even where such proceedings are for the implementation of Articles 85(1) and 86 [81 and 82] of the Treaty. The purpose of Article[s] 9(3),... 20(2)... and 10...is to lay down the conditions under which the national [competition] authorities can act in such a way as not to hamper the proceedings conducted by the Commission."

As a result, the Court of Justice held that information passed to national authorities by the Commission based on their investigations could only be used internally by the authorities when deciding whether to institute proceedings or not and could not be passed to other national authorities or used by the competition authorities in the subsequent conduct of their investigations. At paragraph 42, the Court held that:

> "Such information cannot be relied on by the authorities of the Member States either in a preliminary investigation procedure or to justify a decision based on provisions of competition law, be it national law or Community law. Such information must remain internal to those authorities and may be used only to decide whether or not it is appropriate to initiate a national procedure."

Article 12 of the proposed Regulation will have the effect of overruling the decision in the *Spanish Banks*[20] case to a limited extent by allowing the Competition Authority to use information provided to it by the Commission in applying Community competition law. There are two restrictions on the use of such information provided for in the Article. Firstly, as it may be used only for applying Community competition law, there must be an inter-State element present to the breach of competition law complained of and such information cannot be used for the purposes of action by the Authority where the relevant market is defined as being the Irish one only. Secondly, subsection 2 of Article 12 provides that only financial penalties may be imposed on the basis of information provided. So no criminal penalties as are found in, for example, section 2 of the Competition Act 1996 may be imposed where a successful action is brought using such information.

As the national competition authorities will have more competence to deal with cross-border cases, there will inevitably be a degree of overlap between the efforts of two or more national authorities. Article 13(1) of the proposed Regulation attempts to address this by providing that:

> "Where competition authorities of two or more Member States have received a complaint or are acting on their own initiative under Article 81 or Article 82 of the Treaty against the same agreement, decision of an association or practice, the fact that one authority is dealing with the case shall be sufficient grounds for the others to suspend the proceedings before them or to reject the complaint. The Commission may likewise reject a complaint on the ground that the competition authority of a Member State is dealing with the case."

This provision is, however, merely an entitlement and is not mandatory. Moreover, there are no provisions for resloving a dispute as to *seisin* in the event of any disagreement over the proper authority to deal with the case.

"In the future, therefore, the Competition Authority will only be able to apply the provisions of the Competition Acts 1991-1996 to cases before it that do not involve a cross-border element."

National Courts

The Irish Courts are conferred with powers in respect of competition matters by both the provisions of domestic legislation and also deriving from the direct effect of the relevant Treaty Articles. Indeed, national courts have been obliged to apply the provisions of Article 81(1) of the Treaty since Case 127/73, BRT v. *SABAM*[21] established the direct effect of Articles 81 and 82 (previously, 85 and 86).[22]

Similar considerations as those discussed above in relation to national competition authorities, vis-à-vis the supremacy of Community law apply to national courts when faced with a conflict between it and national competition laws. In *Oscar Bronner v. Mediaprint*[23] the Court of Justice held, at paragraphs 19-20, that:

> "Under *Walt Wilhelm* it is clear that it is not impossible for the same situation to fall within the scope of both Community and national competition law, even if they consider restrictive practices from different points of view. Accordingly, the fact that a national court is dealing with a restrictive practices dispute by applying national competition law should not prevent it from making reference to the European Court on the interpretation of Article 86 EC in relation to that same situation, when it considers that a conflict between Community law and national law is capable of arising."

Article 6 of the Regulation proposes to give national courts, like national competition authorities, jurisdiction to apply Article 81(3), that is, to decide whether an agreement is valid or prohibited (and void) when a case comes before them. Thus, the criticisms outlined above in relation to the power of the Competition Authority to apply Community competition law directly apply with equal force to the proposed power to be exercised by national Courts.

Article 15 of the proposed Regulation provides for co-operation between the Commission and National Courts. Under this provision, the Commission would be able on its own initiative to make oral and written submissions to national courts on issues of EU competition law. Paragraph 2 is the only mandatory provision in Article 15. It provides that:

> "Courts of Member States shall send the Commission copies of any judgments applying Article 81 or Article 82 of the Treaty within one month of the date on which the judgement is delivered."

There is, therefore, no obligation to notify the Commission of litigation pending, merely to provide it with the judgment once the litigation is spent. It is difficult to see how this will aid the Commission joining in national proceedings as *amica curia* as provided for in Article 15(3). An obvious remedy to this would be to require any claimant bringing Community competition proceedings before a national court to notify the Commission. However, this may be more properly achieved by a revision of the Rules of the Superior Courts.

How national courts should approach the decisions of the Commission is set out in Article 16 of the proposed Regulation which provides that:

> "...national courts and the competition authorities of Member States shall use every effort to avoid any decision that conflicts with decisions adopted by the Commission."

However, the effect of this proposal has been pre-empted somewhat by the decision of the Court of Justice in *Masterfoods Ltd. v. HB Ice Cream Ltd.* C-344/98, 14/12/2000 which addressed the question of how the Commission should approach the decisions of national courts on Community competition law. The central issue in this case was the need to avoid inconsistency between the decisions of national courts and those of community bodies. The Court held that where a national court is ruling on an agreement or practice, the compatibility of which is already the subject of a Commission decision, it must follow the decision made by the Commission, even if that decision conflicts with the one given by the national court of first instance. In effect, the Court held that the Commission cannot be bound by a decision given by a national court.

Some Problematic areas

Despite the redrafting of the proposals set out in the previous White Paper following consultation with various Community bodies and third parties, the Regulation in its current form still retains some flaws. Briefly, some of the problematic areas are:

1. Firstly, the question of how the Commission/national competition authorities network should function in respect of institutional balances needs to be addressed. It is envisaged that national competition authorities will be able to apply European law and take decisions that are required, thanks to the exchange of information network provided for in Article 12 which aims to guarantee the uniformity of the criteria used to judge them (under the surveillance of the Commission which will have the ability to deal directly with certain cases). However, this does not address the issue of how coherence and uniformity of decisions between the various national competition agencies can be achieved as the obligation in the proposed article 12 is not compulsory. It merely provides that State competition authorities "*may* provide one another with ...information."
2. The removal of obligatory notification would imply that enterprises must themselves assess *a priori* the validity of the agreements in which they participate. This begs the question as to whether enterprises will need to equip themselves with specialist knowledge of European competition law.
3. The proposed new "structural remedies" in certain cases of abuse of dominant position has come in for criticism from, notably, some American business sources. Although Mr Monti has stressed that this instrument will only be used in exceptional cases and that measures of such importance are subordinate to the principle of proportionality between the noted infringement and the remedy imposed and will be exclusively taken only if no other way exists to eliminate the infringement,[24] the American Chamber of Commerce has said that "the ability to impose structural solutions on companies is totally disproportionate with the aim of European competition policy."[25]
4. Some alarm has been expressed that the plans to strengthen the Commission's powers of investigation and sanction have the potential for abuse and should be accompanied by safeguards for companies in order to preserve their rights.[26]
5. In the final analysis the perfection of uniformity in the application of the Community competition rules is unattainable no matter what measures are taken to try and ensure such uniformity.

Though the rationale behind the proposed de-centralisation of the EU competition law enforcement system is sensible and in line with the principle of subsidiarity introduced in the Maastricht Treaty, it is submitted that the above issues will need to be addressed before the Regulation, in an amended form, can be adopted by the Council, thereby becoming an operative part of EC law.•

1 In November of last year Judge John D. Cooke addressed a meeting of the Irish Society for European Law on the subject of The Reform of European Competition Law Enforcement (responded to by Mr. Michael Collins SC). The purpose of this article is to review the proposals outlined on that occasion and to make some comments on their implications for the enforcement of competition law in Ireland.
2 COM2000 (582) final.
3 Council Regulation No. 17 of 6 Feb. 1962, O.J. 1962 (First Regulation implementing Articles 85 and 86 of the Treaty), 35, p.118.
4 O.J. 1999, C 132/1.
5 Ehlermann, *The Modernisation of EC Antitrust Policy: A Legal and Cultural Revolution* [2000] CMLRev 537, 540.
6 The number of merger cases before the Commission rose 27-fold to 328 between September 1990 and November last year: Kemeny, *Too many competition rules leave Pernod Ricard reeling*, The Sunday Times, 21 January, 2001.
7 Article 9(1), Regulation 17/1962.
8 [1991] ECR I-935.
9 Ehlermann, *The Modernisation of EC Antitrust Policy: A Legal and Cultural Revolution* [2000] CMLRev 537, 540.
10 Remarks made by Mr. Michael Collins SC at the proceedings of the ISEL.
11 Scott-Wilson, *The use and abuse of power*, Kangaroo Group Newsletter, 26 January, 2001, p.1.
12 Art. 20 provides, *inter alia*,: "The officials authorised by the Commission to conduct an inspection are empowered...to enter any ...premises, including the homes of directors, managers and other members of staff of the undertakings...concerned, in so far as it may be suspected that business records are being kept there".
13 Art. 20(7) of the proposed Regulation.
14 Article 9(3), Regulation 17/1962.
15 The Court of Justice in *Wilhelm v. Budeskartellamt* [1969] CMLR 100, at paragraph 6 held that: "conflicts between the Community rule and the national rules on competition should be resolved by the application of the principle of the primacy of the Community rule".
16 Article 83(1) provides that: "... the Council shall ... on a proposal from the Commission ... adopt any regulations ... to give effect to the principles set out in Articles 85 and 86..." Article 81(2)(e) provides that: "The regulations ... referred to in paragraph 1 shall be designed, in particular ... to determine the relationship between national laws and the provisions contained in this Section or adopted pursuant to this Article."
17 Article 3 of the Regulation provides that: "... Community competition law shall apply to the exclusion of national competition laws".
18 Bulletin Quotidien Europe, No. 7908, p. 13.
19 *Dirección General de Defensa de la Competencia v. Asociación Espanola de Banca Privada (AEB) and Others*, Case C-67/91, [1992] ECR I 4785.
20 Case C-67/91, [1992] ECR I 4785, supra.
21 [1974] ECR 51, para. 15.
22 See also: *Tetra Pak v. Commission* C-333/94P [1997] ECR I-5951 (paras. 40-42).
23 [1999] 4 CMLR 112.
24 Bulletin Quotidien Europe, No. 7848, Friday, 24 November 2000, p.11.
25 Bulletin Quotidien Europe (English), No. 7908, 22 February 2001, p.13.
26 EU Committee of the American Chamber of Commerce press release of 19 February, 2001, reported in Bulletin Quotidien Europe, No. 7908, p.13.

OSTS IMPLICATIONS OF PROCEEDING AGAINST THE MIBI

Joan Kelly BL

In the case of *Caroline Riordan v The Motor Insurers Bureau of Ireland*[1] the Plaintiff was a lawful passenger in a public omnibus when it collided with a vehicle whose owner and driver remained unidentified and untraced. The Plaintiff sustained personal injury, loss and damage and took proceedings against Dublin Bus. Dublin Bus in its defence specifically pleaded that if the Plaintiff suffered the alleged or any personal injuries, loss, damage or expense, which they denied, the same was caused or contributed to by the act or omission of another party. Thus the Plaintiff found it necessary to sue the MIBI . However, the Plaintiff could not join the MIBI as a Co-Defendant due to Clause 2(2) of the MIBI Agreement[2] and the decision of Mr Justice O'Sullivan in *Nicholas Devereux v The Minister for Finance and Motor Insurers Bureau of Ireland.*[3]

In the *Devereux* case the Plaintiff brought a claim for damages against the Minister for Finance, the owner of the troop carrier in which he was a passenger which stopped abruptly thereby causing the Plaintiff to be flung violently forward and injured. The MIBI was sued as a Second Named Defendant as it was alleged that the reason the troop carrier stopped abruptly was to avoid an unidentified and untraced motorist. Counsel for the MIBI applied at the common law motions list to have the proceedings against it dismissed as being misconceived and not in accordance with Clause 2 of the MIBI Agreement. (Clause 2.2 provides that the MIBI can be sued as a sole defendant while clause 2.3 provides that it can be sued as a co-defendant except where the owner and user of the vehicle remained unidentified or untraced). As it was common case that the owner and user of the vehicle remained unidentifed, Mr Justice O'Sullivan acceded to the application stating that it was proper and correct that the Plaintiff should comply with the Agreement.

The position, therefore, is that where the owner and user of the vehicle remain unidentified or untraced the MIBI must be sued in accordance with Clause 2(3), i.e., as a sole defendant. Thus the Plaintiff in the *Riordan* Case instituted a second set of proceedings, this time against the MIBI as sole Defendant. The Plaintiff's Solicitors wrote to the MIBI citing the *Devereux* case and asking them to agree to being joined as co-defendants or to having the two sets of proceedings consolidated, but the MIBI never replied.

When the matter came before the President of the Circuit Court for hearing, the untraced driver was found to be 100% at fault and thus the Plaintiff was awarded her costs as against the MIBI. In the Plaintiff's case against Dublin Bus, Mr Justice Smyth made an order over in favour of Dublin Bus as against the MIBI in respect of their costs. The question then arose as to what was to happen with regard to the Plaintiff's costs in that case. Mr Justice Smyth was concerned that if he gave an order for the Plaintiff's costs it would essentially mean two sets of costs for the one action and he therefore put the matter back for legal submissions.

Counsel for the Plaintiff in his legal submission referred to a Counsel's Note of *Feeney v MIBI* and *Feeney v Dwane and O'Connor*[4] heard by Mr. Justice Johnson in the High Court. The Plaintiff's claim was for damages due to a road accident arising from a collision with a car which had allegedly rounded a bend in the opposite direction to the Plaintiff and on its incorrect side. It was alleged by the Defence that the collision was unavoidable due to the fact that the car skidded out of control on a patch of diesel oil on the road. The Defendant's case was that the diesel oil was deposited on the road a short time before the accident by an untraced motorist.

The Plaintiff therefore also had to take a case against the MIBI. The Plaintiff succeeded against Dwane and O'Connor and was awarded costs. The matter was put back for submissions with regard to the costs in the second action against the MIBI as Mr. Justice Johnson was concerned about the legal appropriateness of giving an order for costs against someone who was not a party to the action. After submissions Mr. Justice Johnson gave the MIBI an order for costs against the Plaintiff and gave the Plaintiff an order over against Dwane and O'Connor in respect of those costs. In addition he ordered that the Plaintiff's costs in the second action be paid by the Defendants in the first action (Dwane and O'Connor).

Having heard arguments based on that case, having been referred to the decision of Mr. Justice Barron in *Ormond v Ireland*,[5] and having heard additional submissions to the effect that where there is a multiplicity of actions and an order for costs is given, it is up to the taxing master to determine what is a fair sum taking into account the overlap in the cases, Mr Justice Smyth ordered the MIBI to pay the Plaintiff's costs in both actions.

Thus it would appear that in cases like the above where clause 2(2) of the MIBI Agreement applies and one would be forced to maintain proceedings against the MIBI and separate proceedings against another defendant or other defendants, the correct approach to be taken is to write to the MIBI citing the *Devereux* case and Clause 2(2) of the Agreement and to request it to consent to being joined as a co-defendant or to consent to the consolidation of the actions whilst informing it that if it failed so to do this letter and the decisions in *Riordan* and *Feeney* will be used to ground an application for costs against it with regard to the second set of proceedings.•

1 Dublin Circuit Court 24/01/2001and 01/02/2001

2 Clause 2 of the MIBI. Agreement 1988 states:
(The) MIBI. hereby agrees that a person claiming compensation (hereinafter referred to as the complainant) may seek to enforce the provisions of this agreement by
1. making a claim to MIBI. for compensation which may be settled with or without admission of liability
or
2. citing as co-defendants M.I.B.I. in any proceedings against the owner or user of the vehicle giving rise to the claim except where the owner and user of the vehicle unidentified or untraced
or
3. citing M.I.B.I. as sole defendant where the claimant is seeking a court order for the performance of the Agreement by the M.I.B. of I. provided the claimant has first applied for compensation to the M.I.B. of I. under sub clause (1) of this clause and has either been refused compensation by the M.I.B.I. which the claimant considers to be inadequate.

3 3 (9) Bar Review 1999

4 High Court End July 1999

5 [1988] IR 490

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Legal The BarReview Update

Journal of the Bar of Ireland. Volume 6, Issue 6

A directory of legislation, articles and written judgments received in the Law Library from the 12th February 2001 to the 13th March 2001.
Judgment Information compiled by the Researchers, Judges Library, Four Courts.
Edited by Desmond Mulhere, Law Library, Four Courts.

Senior Judicial Researcher: David L. Scannell, LL.B, LL.M (Cantab.).
Judicial Researchers: Aine Clancy, LL.B (Ling. Germ),Alison de Bruir,LL.B/Shane Dwyer, LL.B (Ling. Germ), LL.M/Claire Hamilton, LL.B (Ling. Franc.) B.L/Maria Teresa Kelly-Oroz, B.C.L., LL.M/Anthony Moore, LL.B (Ling. Germ) LL.M (Cantab.), Joelle O'Loughlin, B.C.L, LL.M (N.U.I)/Jason Stewart, LL.B, B.C.L (Oxon.)/Rory White, BCL (N.U.I), B.C.L. (Oxon.)

Administrative Law

deGortari v. Judge Smithwick
High Court: **McGuinness J.**
18/01/2000

Administrative; judicial review; applicant seeks number of reliefs arising from a proceeding before the respondent pursuant to s.51, Criminal Justice Act, 1994; applicant is former President of the Republic of Mexico; respondent appointed by Minister for Justice to take evidence from the applicant pursuant to 1994 Act; applicant refused to answer certain questions put to him by the respondent claiming right to silence; whether applicant can lawfully be compelled to answer any question in respect of which he has indicated a desire to remain silent; whether in order to exercise the right to remain silent the applicant is obliged to satisfy the respondent on oath that he is likely to incriminate himself if he were to answer the question; whether to invoke the privilege against self-incrimination it is sufficient for the applicant to satisfy the respondent on oath that he honestly believes that his answer might expose him to a risk of criminal prosecution being instituted abroad; whether the court should adopt a purposive interpretation of the 1994 Act and carry over the terms of s.13, Petty Sessions (Ireland) Act, 1851, into the 1994 Act.
Held: Reliefs refused; the procedure under s.51 of the 1994 Act is *sui generis;* the procedure set out under s.13 of the 1851 Act cannot be carried over to the provisions of the 1994 Act.

B.F. v. Director of Public Prosecutions
High Court: **Murphy J.**
21/03/2000

Administrative; judicial review; delay; applicant seeks order prohibiting his further prosecution by respondent or, alternatively, an injunction restraining further steps being taken by respondent in respect of certain charges; these charges currently pending before Central Criminal Court; whether delay in prosecution was inordinate or inexcusable.
Held: Application dismissed.

Director of Public Prosecutions v. Judge Hamill
Supreme Court: **Keane C.J.,** Denham J., Murphy J., Murray J., Hardiman J.
11/05/2000

Administrative; judicial review; error on the face; first named respondent made order for return to trial in excess of his jurisdiction; appeal from High Court decision ordering the matter to be remitted to first named respondent to reconsider the return for trial; whether High Court has jurisdiction to extend the time for serving the affidavits grounding the application even though the time period prescribed under the Rules of the Superior Courts had expired; whether High Court has jurisdiction, on the ground of the inadvertence of the applicant's solicitor as to the true legal situation, to extend the time period within which an application for leave to apply for judicial review must be made; whether applicant's solicitor verified the facts relied on in applicant's statement as required under O.84, r.20, Rules of the Superior Courts.
Held: Order of High Court affirmed; costs of appeal awarded to applicant.

Arthur v. Kerry County Council
High Court: **McGuinness J.**
09/02/2000

Administrative; judicial review; planning; applicant applied for planning permission to develop his lands; respondent granted permission; on appeal permission was refused by An Bord Pleanála; applicant served compensation claim on respondent pursuant to s.11, Local Government (Planning and Development) Act, 1990, in respect of the diminution in value of his lands following the decision of An Bord Pleanála; respondent served counter notice on applicant pursuant to s.13 of the 1990 Act; applicant applied to respondent for planning permission in accordance with the counter notice; respondent granted permission; on appeal permission was again refused by An Bord Pleanála; applicant served another compensation claim on respondent under s.11 of the 1990 Act; respondent served further counter notice on applicant under s.13 of 1990 Act; whether terms of s.13 of the 1990 Act should be interpreted literally; whether second counter notice of respondent was served outside the statutory time period; ss.13(1) and 13(5), Local Government (Planning and Development) Act, 1990.
Held: s.13(1) and (5) of the 1990 Act are to be interpreted strictly; second counter notice of the respondent is void; relief sought granted except for order of mandamus.

Maguire v. South Eastern Health Board
High Court: **Finnegan J.**
25/01/2001

Administrative; declaratory relief; moots; applicants had applied for home delivery services from respondent under relevant Health legislation in respect of birth of their sixth child; respondent had refused on the ground that applicants were unsuitable candidates; applicants had refused respondent's offer to deliver child in hospital; respondent had also offered an *ex gratia* payment of part of the cost of an independent midwife; applicants had obtained leave to apply for an order of mandamus compelling respondent to provide home birth services; before case came on, applicants' child had been born, rendering substantive relief sought moot; whether order of mandamus could issue where events had overtaken the principal relief sought; whether Court should exercise its discretion against the grant of declaratory relief where the declaration relates to future rights or depends on a contingency or where a mere academic question of no practical value is involved.
Held: Application refused.

Library Acquisition

Wade Sir Henry William Rawson
Administrative law
8th edition
Oxford University Press 2000
M300

Statutory Instruments

Courts (supplemental provisions) act, 1961 (increase of judicial remuneration) order, 2001
SI 44/2001

Education sector superannuation scheme (transfer of departmental administration and ministerial functions) order, 2001 SI 14/2001

National treasury management agency (amendment) act, 2000 (central treasury services) (delegation of functions) order, 2001 SI 16/2001

Members of the oireachtas and ministerial and parliamentary offices (allowances and salaries) order, 2001
SI 37/2001

Agriculture

Statutory Instruments

Disease of animals (bovine spongiform encephalopathy) (specified risk material) order, 2001
SI 31/2001

Diseases of animals (restriction of movement of animals) order, 2001
SI 56/2001

Foot and mouth disease (hay, straw and peat moss litter) order, 2001
SI 49/2001

Foot and mouth disease (prohibition of exhibition and sale of animals) order, 2001
SI 50/2001

Foot and mouth disease (restriction of import of vehicles, machinery and
other equipment) order, 2001
SI 51/2001

Foot and mouth disease (restriction of import of horses and greyhounds) order, 2001
SI 52/2001

Plant varieties (farm saved seed) regulations, 2000
SI 493/2000

Plant varieties (proprietary rights) (amendment) act, 1998 (commencement)
order, 2000
SI 489/2000

Plant varieties (proprietary rights) (amendment) act, 1998 (section 19(2)) order, 2000
SI 491/2000

Plant varieties (proprietary rights) (amendment) regulations,2000
SI 490/2000

Plant varieties (proprietary rights) (amendment) act, 1998 (form of certificates of plant breeders' rights) regulations, 2000
SI 492/2000

Aliens

Adam v. The Minister for Justice, Equality and Law Reform
High Court: **O'Donovan J.**
16/11/2000

Aliens; administrative law; asylum procedures; judicial review; practice and procedure; natural and constitutional justice; obligations under international law; class actions; applicants, Romanian nationals, seek order of *certiorari* quashing any deportation orders made by first named respondent on the basis that procedures employed by him in assessing their asylum applications constituted a breach of natural and constitutional justice and disregarded the State's obligations arising from its ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950; applicants also seek order of *mandamus* directing respondent to consider applicants' claim for asylum, humanitarian leave to remain in Ireland or refugee status in the light of Romania's human rights record; whether a party affected by an order granting leave to seek judicial review made on foot of an *ex parte* application can invoke the inherent jurisdiction of the High Court to set aside that order; whether second named respondent (the Irish State) is obliged to take account of the provisions, criteria and standards laid down by (*inter alia*) the European Convention in its legislation and administrative rules pertaining to refugees and asylum seekers; whether second named respondent, in the light of its duty to ensure the effectiveness of the human rights protection system established among the states of the Council of Europe, is obliged to have particular regard to breaches of the Convention in particular states when determining asylum applications, to comply with the rules of natural justice; whether the Court can review asylum procedures in the absence of any direct evidence to support the proposition that appropriate procedures were not complied with, or that relevant considerations were disregarded, when the decisions to refuse those applications were arrived at; whether current proceedings disclose a reasonable cause of action against respondents; whether a class action was appropriate in this type of case; Art. 29 and Art. 40.3, Constitution; s. 5(1), Refugee Act, 1996.
Held: Reliefs refused; Court has inherent jurisdiction to set aside an order granting leave to seek judicial review made on foot of an *ex parte* application when this jurisdiction is invoked by a party affected by same.

Statutory Instrument

Aliens (visas) order, 2001
SI 36/2001

Air Navigation

Statutory Instrument

Aviation regulation act, 2001 (establishment day) order, 2001
SI 47/2001

Banking

Statutory Instrument

ICC bank act, 2000 (sections 5 and 7) (commencement) order, 2001
SI 46/2001

Children

W.P.P. v. S.R.W.
Supreme Court: **Keane C.J.,** McGuinness J., Hardiman J.
14/04/2000

Children; international child abduction; Hague Convention on the Civil Aspects of International Child Abduction; plaintiff seeks orders restraining removal of minors from this jurisdiction and for their return forthwith to jurisdiction of the courts of the State of California in the United States of America; appeal from High Court's refusal to grant orders sought; whether removal of the minors from the United States of America was wrongful within the meaning of Articles 3 and 12 of the Convention; Child Abduction and Enforcement of Custody Orders Act, 1991.
Held: Appeal dismissed; order of High Court affirmed.

Article

The duty of care to children in care
Arthur, Raymond
2001 ILT 38

Library Acquisition

Kilkelly, Ursula
The child and the European convention on human rights
Dartmouth 1999
C200.Q11

Commercial

Lismore Buildings Limited v. Bank of Ireland Finance Limited
Supreme Court: **Hamilton C.J.,** Barrington J., Barron J.
28/01/2000

Commercial; company; taxation of costs; plaintiff insolvent; whether plaintiff's solicitor is entitled to a Charging Order so as to secure costs awarded to the plaintiff by the High Court; s.3, Legal Practitioners (Ireland) Act, 1876.
Held: Order granted.

Company

Ashclad Limited v. Harrington
High Court: **Geoghegan J.**
05/04/2000

Company; liquidation; winding up order in existence; incomplete trading accounts; applicant, Official Liquidator of the company, seeks, *inter alia,* declaration that respondents, officers of the company, be made personally liable for all debts of the company; applicant seeks order directing respondents to pay to applicant such sum as the Court might find them liable to pay, an order directing respondents either individually or collectively to deliver up to applicant any property of the company which is in the hands or under the control of such respondent, specific orders for the return of certain alleged company property and an order declaring that respondents shall not for a period of five years be appointed or act in any way whether directly or indirectly as a director or secretary or be concerned or take part in the promotion or formation of any company; whether respondents had acted honestly and responsibly in relation to the conduct of the company's affairs; whether first named respondent under a fiduciary duty to the company when making final instalment in lease-purchase agreement on foot of which he claims personal ownership of a machine primarily paid for by the company; ss. 150, 204 Companies Act, 1990; s. 230 Companies Act, 1963.
Held: Orders granted; respondents ordered to make payment of £112,000 to applicant (of which £100,000 is Court's assessment of monies wrongly withdrawn from company and £12,000 liquidator's expenses); first named respondent ordered to vest ownership of two specified machines in liquidator.

Competition

Library Acquisitions

Korah, Valentine
An introductory guide to EC competition law and practice
7th edition
Oxford Hart Publishing 2000
W110

Lee, Robert G
Human fertilisation & embryology: regulating the reproductive revolution
London Blackstone Press 2001
M608

Constitutional Law

Dalton v. Governor, Training Unit, Glengarriff Parade, Dublin
Supreme Court: **Denham J.,** McGuinness J., **Hardiman J.**
29/02/2000

Constitutional; habeas corpus; appeal by first and third named respondents; applicant convicted of seven offences contrary to Fisheries Acts, 1959 to 1980; in default of payment of fines it was ordered that the applicant be imprisoned for 45 days; applicant failed to pay the fines and warrants were issued on 20th December 1995 and 24th January 1996; petition opened on behalf of applicant with Minister for Justice; gardaí refrained from executing the warrants as a result of the petition and the practice at that time; Commissioner of An Garda Síochána issued general direction on 8th April 1998 that all outstanding warrants should be executed irrespective of the status of petitions still pending; warrants executed on 1st October 1998; in habeas corpus proceedings the trial judge ordered the release of the applicant on the ground of delay in executing the warrants; whether the division of the delay into three tranches by the trial judge is an appropriate mode of analysis; whether trial judge recited dates relating to the due date for the payment of fines which were incorrect; whether the delay in the execution of the warrants between April 1998 and October 1998 was unreasonable; whether there was evasion on the part of the applicant; Art. 40.4.2 of the Constitution.
Held: Appeal dismissed; overall delay may be considered either as a single time frame or in conjunction with an analysis of particular sections of time in issue; in relation to first tranche of time the trial judge recited incorrect dates for the payment of fines; consequently there was no unreasonable delay in the issuing of the warrants; the delay in the execution of the warrants between April 1998 and October 1998 was unreasonable in all the circumstances; applicant did not evade the execution of the warrants; reviewing the delay as a whole from January 1996 to October 1998 the warrants were not executed within a reasonable time.

In the matter of Article 26 of the Constitution and Section 5 And Section 10 of the Illegal Immigrants (Trafficking) Bill 1999
The Supreme Court: **Keane C.J.**
28/08/2000

Constitutionality; Article 26 reference; whether section 5 and section 10 of the Illegal Immigrants (Trafficking) Bill 1999 were repugnant to the Constitution; effect of section 5 is to preclude any person from questioning the validity of specified decisions or orders otherwise than by way of an application for judicial review, made within 14 days from date on which the person is notified of the decision or order, unless the High Court thinks that there is "good and sufficient reason" for extending this period; application for leave must be made on notice to the Minister and will not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision or order is invalid or ought to be quashed; no appeal lies from the decision of the High Court except with leave of High Court; section 10 extends the powers conferred on the Minister in relation to deportation orders and includes extended powers of arrest and detention of persons by immigration officers and the gardai; whether question as to whether or not a Bill referred under Article 26 enjoys a presumption of constitutionality should be reconsidered by the Court; whether Court should look at legislative history of section 5 and section 10 of the Bill including parliamentary debates; whether limitation period of 14 days for making application for judicial review in section 5 violated the constitutional rights of access to the courts and breached constitutional guarantee of equality before the law; whether restrictions on person's right to appeal to Supreme Court were unconstitutional; whether section 5 has effect of preventing a person from challenging the lawfulness of their detention by way of habeas corpus; whether extended ground of detention under section 10 results in any unfair or unconstitutional hardship on a person the subject of a deportation order; whether extended grounds for detention under section 10 conflict with Article 5 of the ECHR; whether section 10 constitutes an impermissible delegation of legisative power.
Held: Constitutionality of sections 5 and 10 of the Bill upheld.

Goodan v. Waterford Regional Hospital
Supreme Court: *McGuinness J.,* Hardiman J., **Geoghegan J.**
21/02/2001

Legality of detention; whether a voluntary patient in a mental hospital who has given the seventy two hour notice of his discharge as required by section 194 of the 1945 Act has an absolute right to be discharged at the expiry of the seventy two hour notice period; whether procedure for admission as an involuntary patient under section 184 of the 1945 Act applies to persons already admitted as voluntary patients; whether patient entitled to benefit of section 5 of the 1953 Act; Article 40 of the Constitution; Mental Treatment Act, 1945; Mental Treatment Act, 1953.
Held: Relief refused.

Contract

APH Manufacturing v. DHL Worldwide Network
High Court: **Finnegan J.**
28/06/2000

Contract; breach; contract for carriage of goods; consignment damaged; plaintiff claims for the value of the consignment and losses; whether limits on liability specified in section 22(1) of the Warsaw Convention apply; Convention limits on liability precluded if damage resulted from an act done recklessly and with knowledge that damage would probably result; moreover term included in contract of carriage that the limits on liability specified in Article 22 of the Convention should not apply where the damage resulted from the defendant's gross negligence.
Held: Plaintiff entitled to recover the amount of its loss without regard to limits on liability specified in Article 22 of the Convention.

Honiball v. McGrath
High Court: **Kearns J.**
23/03/2000

Contract; variation of terms; contractual rights of access to property; plaintiff sought *inter alia* specific performance of leasehold and care contracts entered into upon purchase of unit in retirement village scheme and declaration of entitlement to access the main house, "the centre of all village activity" as originally advertised, on foot of same and/or pre-contractual representations; defendants, who had assumed all the rights and obligations of original operators, had sought to vary terms of original care contract on basis that this was "in the interests of the village as a whole" by means of lawfully exercised variation provisions (as approved in previous High Court action); whether a party can be estopped from varying a fundamental term of a contract even where the parties have agreed in advance to variation provisions that are subsequently lawfully exercised; whether liability arising from a representation extends to purchasers for value without notice.
Held: Application refused.

Copyright, Patents & Designs

Statutory Instrument

Trade marks act, 1996 (section 66)
SI 9/2001

Coroners

Article

Aspects of the coroners system: "the public interest"
Whelehan, Harry
6 (2000) MLJI 68

Costs

Eccles (A minor) v. Minister for Education
Supreme Court: **Murphy J.,** McGuinness J., Geoghegan J. (ex tempore)
24/11/2000

Costs; High Court order; appeal; High Court judge had made no order as to costs in respect of either of the parties in the judicial review proceedings before him; whether the High Court judge was justified in the exercise of his discretion in not awarding the applicant costs.
Held: Appeal dismissed.

Criminal Law

Carlton v. D.P.P.
Supreme Court: Murphy J., Hardiman J., **Geoghegan J.**
07/04/2000

Criminal; practice and procedure; literal interpretation of court orders; Garda Siochána Complaints Board; applicants had made allegations of misconduct on the part of members of the Garda Siochána which were investigated by officer appointed by second named respondent (Garda Siochána Complaints Board); order of prohibition had been obtained in the High Court restraining first named respondent from acting on foot of four summonses brought against applicant other than by strike out in the light of improper investigative procedures; second named respondent instituted appeal seeking to set aside particular findings of trial judge relating to procedures to be followed in appointing investigators and confidentiality requirements with regard to same; in spite of earlier undertaking not to so do, first named respondent on subjective understanding of High Court order felt able to substitute fresh summonses in identical terms, thereby instituting new proceedings against applicant on the same matter; applicant, on cross-appeal, seeks unconditional order of prohibition; respondent seeks to lodge amended notice of appeal to include substantive as well as procedural elements; whether previous undertaking not to proceed with prosecution of applicant given by respondents would make it unjust to permit the amendment to the notice of appeal so as to challenge the validity of the order itself.
Held: Application to amend Notice of Appeal refused. Cross-appeal allowed to the extent that an injunction was granted against the first named respondent restraining him from proceeding with prosecutions against the applicant arising out of the events which gave rise to the complaint.

Hasset v. Director of Public Prosecutions
Supreme Court: **McGuinness J.,** Hardiman J., Geoghegan J.
30/11/2000

Judicial review; appellant had certain charges pending against him in three Circuit Court areas to which he had pleaded guilty; appellant desirous that all the matters should be dealt with in Galway Circuit Court and that he should be sentenced in that court; appellant sought leave to institute judicial review proceedings seeking certain reliefs; leave refused by the High Court; whether the applicant had raised an arguable issue as to whether it was open to a judge of one Circuit to take into account when sentencing an offender offences which were committed by the same offender in the jurisdictional area of another Circuit.
Held: Appeal allowed.

People (Director of Public Prosecutions) v. D.H.
Court of Criminal Appeal: **Denham J.,** Geoghegan J., McGuinness J.
01/02/2000

Criminal; sentencing; application for leave to appeal by applicant against severity of sentence imposed upon him; applicant had been charged with offences of incest and upon conviction was sentenced to twelve years' imprisonment in total; whether the trial judge had erred in principle in imposing sentence of twelve years' imprisonment under the Criminal Law (Incest Proceedings) Act, 1995 in respect of one of the counts on the indictment.
Held: Application granted. Sentence of twelve years' imprisonment quashed and replaced by a sentence of eight years.

S. v. D.P.P.
Supreme Court: Keane C.J., Denham J., Murphy J., Murray J., **McGuinness J.**
19/12/2000

Criminal; judicial review; delay; appellant, a consultant surgeon, had been charged with a number of counts of indecent assault alleged to have occurred between 1962 and 1982 in a provincial hospital and in private consultancy rooms; District Court had ordered that appellant be tried summarily and accepted jurisdiction in the matter; High Court had refused to grant order of prohibition and other reliefs directed towards prohibiting trial of appellant; whether time limits contained in Petty Sessions (Ireland) Act, 1851, applied to summary trial of indictable offences; whether trial could proceed given delays between complaints and issuing of summonses and between dates on which alleged offences said to have been committed and issuing of summonses; whether delay attributable to dominion exercised by appellant over complainants; whether there was a real and serious risk that appellant's trial would be unfair by reason of difficulties arising from lapse of time.
Held: Appeal dismissed.

McHugh v. Judge Brennan
High Court: **Laffoy J.** (ex tempore)
14/04/2000

Criminal; judicial review; fair procedures; natural and constitutional justice; applicant seeks various reliefs entitling him to full disclosure of all material evidence in possession of prosecution with regard to criminal proceedings being brought against him in the District Court and an order of prohibition preventing second named respondent from proceeding with, and first named respondent from hearing, charges preferred against him until the aforementioned disclosure has been made; first named respondent had held that previous order requiring prosecution to furnish applicant with all relevant material had been complied with; whether applicant's trial is being heard by first named respondent within jurisdiction and in accordance with fair procedures; whether there is a conceivable risk of prejudice to applicant if trial proceeds in manner envisaged by first named respondent.
Held: Reliefs refused.

Damages

Downing v. O'Flynn
Supreme Court: **Denham J., Murray J., Geoghegan J.**
14/04/2000

Damages; assessment of damages; public policy; plaintiff administrator of estate of individual who died intestate brought action on his own behalf and on behalf of the dependants of the deceased; deceased's death was caused by defendant's negligence; High Court ordered that plaintiff recover damages from defendant; appeal by defendant; deceased was self-employed but had no formal accounts and had not paid tax; whether a claim for loss of dependency could be successful when based on undeclared income.
Held: Appeal dismissed.

Library Acquisition

Bernstein, Robby
Economic loss
2nd edition
London Sweet & Maxwell 1998
N38.1

Defamation

Murphy v. Times Newspapers Limited
Supreme Court: Denham J., Barrington J., **Keane J.,** Murphy J., **Barron J.**
17/01/2000

Defamation; plaintiff instituted proceedings against defendants for defamation resulting from publication of a newspaper article; jury in separate proceedings taken by another plaintiff arising out of the same article found that the words complained of were true in substance and in fact in respect of that plaintiff and his claim was dismissed; defendants in present proceedings pleaded partial justification; plaintiff brought a motion seeking an order that the plea of partial justification be struck out; application was dismissed in the High Court; plaintiff appealing against the ruling on the basis that since the jury in the other proceedings found that the words complained of by the plaintiff in that action were true in substance and in fact in respect of that plaintiff, the defendants should not be allowed to maintain in the present proceedings that it was also true in substance and in fact concerning the plaintiff; whether, if two plaintiffs in successive actions could satisfy the jury that an article clearly written about one person was capable of being understood and was understood to refer to each of the plaintiffs, the defendant was entitled to rely on whatever defences were open to him at law including a defence in the present proceedings that although the defendant never intended the words to refer to the plaintiff in the proceedings they were nonetheless true concerning him; whether the defendants were required to plead matters of law which were within the knowledge of the plaintiff's legal advisers.
Held: Appeal dismissed.

Defence Forces

Statutory Instrument

Social welfare (consolidated contributions and insurability) (amendment)
(defence forces) regulations, 2001
SI 5/2001

Education

Statutory Instrument

Education sector superannuation scheme (transfer of departmental administration and ministerial functions) order, 2001
SI 14/2001

Employment

Carey v. Penn Racquet Sports Limited
High Court: **Carroll J.**
24/01/2001

Employment; *force majeure* leave; appeal from determination of Employment Appeals Tribunal on a point of law; plaintiff a single mother; plaintiff had not attended at work by reason of sickness of her child; on a consequent claim for pay for the lost day, defendant had requested a medical certificate; such certificate is not required under national law implementing Community law on *force majeure* leave; Employment Appeals Tribunal had found that plaintiff not entitled to pay in respect of the day lost; whether plaintiff's presence with her child was 'indispensable' from point of view of plaintiff at the time the decision not to go to work was made; Council Directive 96/34/EC; Parental Leave (notice of *force majeure* leave) Regulations 1998 (S.I. 454 of 1998), s. 20, Parental Leave Act, 1998.
Held: Appeal allowed.

Statutory Instruments

Adoptive leave act, 1995 (extension of periods of leave) order, 2001
SI 30/2001

Employment regulation order (aerated waters and wholesale bottling joint labour committee), 2001
SI 10/2001

Employment regulation order (security industry joint labour committee), 2001
SI 35/2001

Maternity protection act, 1994 (extension of periods of leave) order, 2001
SI 29/2001

Protection of employees (employers' insolvency) (variation of limit) regulations, 2001
SI 42/2001

Redunancy payments (lump sum) regulations, 2001
SI 41/2001

European Law

Library Acquisitions

Kilkelly, Ursula
The child and the European convention on human rights
Dartmouth 1999
C200.Q11

Korah, Valentine
An introductory guide to EC competition law and practice
7th edition
Oxford Hart Publishing 2000
W110

Lee, Robert G
Human fertilisation & embryology: regulating the reproductive revolution
London Blackstone Press 2001
M608

Evidence

Galvin v. Murray
Supreme Court: **Murphy J.,** McGuinness J., Geoghegan J.
21/12/2000

Evidence; disclosure; personal injury; reports of expert witnesses; appellant seeks disclosure of technical report drafted by engineer employed by second named respondent which it is proposed to rely on in evidence; whether fact that a witness is employed by one of the parties to a personal injury action deprives him/her of the status of an "expert" for the purposes of the relevant disclosure rules; whether report compiled by such "experts" are privileged; Order 39 Rules 45 and 46 of the Rules of the Superior Courts (as inserted by SI No. 391 of 1998), made pursuant to s. 45 of the Courts and Court Officers Act, 1995.
Held: Appeal allowed; leave granted to respondent to apply to have certain portions of the reports deleted before disclosure, in the interests of justice.

Family

C. O'R. v. M. O'R.
High Court: **O'Donovan J.**
19/09/2000.

Family; separation; financial orders; family home; best interests of children; applicant seeks decree of judicial separation from respondent together with ancillary orders; respondent's financial affairs considered to assess appropriate level of support and maintenance payments payable to applicant; whether respondent deliberately concealing extent of his property portfolio; whether family home should be sold having regard to parties' financial positions; whether applicant had unnecessarily prolonged current proceedings disentitling her to certain costs.
Held: Orders granted: order conferring on applicant right to occupy the family home to the exclusion of respondent until such time as their children have completed full-time education; order directing sale of company jointly owned by parties, proceeds thereof to be applied towards discharging mortgage currently in being in respect of family home; order that respondent make specified monthly payments towards maintenance and support of children and that he accept responsibility for payment of school fees, health insurance, medical and dental fees; order that respondent supply applicant with new car of a similar type to that which she currently drives at intervals of four years and shall be responsible for insuring and taxing same; order entitling applicant to all costs incurred by her in association with previous nullity proceedings initiated by respondent, including all reserved costs; order entitling applicant to partial costs of present proceedings on basis that she was unjustifiably responsible for unnecessarily prolonging same.

G.F. v. J.B.
High Court: **Murphy J.**
28/03/2000

Family; marriage; nullity; whether contract of marriage entered into between the parties is voidable by reason of petitioner's inability to enter into or sustain a normal marriage relationship.
Held: Decree of nullity granted.

Fisheries

Statutory Instruments

Celtic sea (prohibition on herring fishing) order, 2001
SI 45/2001

Cod (restriction on fishing) order, 2001
SI 20/2001

Hake (restriction of fishing) order, 2001
SI 19/2001

Herring (prohibition on fishing in ICES divisions VB, VIAN, VIB and VIIBC) order, 2001
SI 53/2001

Monkfish (restriction on fishing) order, 2001
SI 21/2001

Gaming & Lotteries

Statutory Instrument

Greyhound race track (racing) (amendment) regulations, 2001
SI 39/2001

Human Rights

Library Acquisition

Leach, Philip
Taking a case to the European Court of Human Rights
London Blackstone Press 2000
C200

Injunctions

Eircell Ltd. v. Bernstoff
High Court: **Barr J.**
18/02/2000

Interlocutory injunction; planning; plaintiff leased site for purpose of erecting a transmission mast; lease purported to grant right of way over a boreen in order to facilitate access to the site; the boreen also served neighbouring properties; planning permission for the mast was granted subject to two conditions which were only satisfied by the plaintiff a few days after the commencement of the erection of the mast; a large number of local residents subsequently gathered on the site and prevented the plaintiff's contractors from gaining access to the site; plaintiff seeks interlocutory injunction restraining the defendants from interfering with the plaintiff's use and enjoyment of the leased site; pursuant to s.27, Local Government (Planning and Development) Act, 1963, the defendants seek an order prohibiting the plaintiff from carrying out work on the site other than in accordance with the conditions attaching to the planning permission and a declaration that any works carried out not in conformity with such conditions constitute an unauthorised development for the purposes of the Local Government (Planning and Development) Acts, 1963-1998; interim injunction granted to the defendants was discharged on ground that any delay in complying with the conditions was minimal with

no harm resulting to the defendants; whether the matter of the plaintiff's delay in satisfying the planning conditions is *res judicata*; whether the plaintiff has a right of way over the boreen; whether the requirements for the grant of an interlocutory injunction have been satisfied.
Held: Relief sought by plaintiff granted; relief sought by defendants refused.

Ryan Air Limited v. Aer Rianta
High Court: **Kelly J.** (ex tempore)
25/01/2001

Interlocutory injunctions; judicial review; respondent had imposed certain monetary charges on the applicant relating to its activities at Dublin Airport; respondent had also promulgated 'Rules of Conduct' which applied to these activities; High Court had granted leave to applicant to apply for judicial review of each of the respondent's decisions; High Court had granted ancillary injunctive relief restraining implementation of decisions; applicant seeks to continue the injunctions until trial of judicial review proceedings; whether strength of applicant's case alone would justify grant of interlocutory injunction, without consideration of inadequacy of damages and balance of convenience; if so, whether interlocutory injunction would be granted; if not, whether injunction should be granted by applying traditional interlocutory injunction principles.
Held: Application refused; each of applicant's submissions rejected.

Insurance

Library Acquisition

Wilson, D J
Lowndes & Rudolf - general average and the York-Antwerp rules
12th edition
London Sweet & Maxwell 1997
N335.1

Statutory Instrument

Life assurance (provision of information) regulations, 2001
SI 15/2001

Judicial Review

Ryanair Limited v. Flynn
High Court: **Kearns J.**
24/03/2000

Judicial review; first and second named respondents had prepared a report for the Minister for Enterprise Trade and Employment pursuant to section 38(2) of the Industrial Relations Act, 1990 following an industrial dispute between SIPTU and the applicant which resulted in the closure of Dublin Airport; applicant seeking a declaration that the report was *ultra vires* in that there were manifest errors therein, a declaration that the first and second-named respondents failed to apply the rules of natural and constitutional justice in the preparation and finalisation thereof, and certiorari quashing the report or certain paragraphs thereof; whether the contentions and material placed before the court gave rise to any justiciable issue.
Held: Matter raised before the court was not justiciable because there was no decision susceptible to being quashed.

Legal Profession

Library Acquisitions

Greer, Desmond S
Mysteries and solutions in Irish legal history
Dublin Four Courts Press 2000
L403

Sherr, Avrom
Client care for lawyers
2nd edition
London Sweet & Maxwell 1999
L81

Statutory Instrument

Courts (supplemental provisions) act, 1961 (increase of judicial remuneration) order, 2001
SI 44/2001

Medical Law

Library Acquisition

Lee, Robert G
Human fertilisation & embryology: regulating the reproductive revolution
London Blackstone Press 2001
M608

Negligence

O'Mahony v. Tyndale
High Court: **Quirke J.**
07/04/2000

Negligence; medical negligence; plaintiff profoundly disabled and claiming that his disabilities resulted from brain damage caused by negligence and breach of duty of the defendants during his birth and aftercare; whether the system adopted by the hospital for dealing with emergencies during childbirth was defective; whether the plaintiff had proved on the balance of probabilities that his disabilities were caused or contributed to by reason of negligence or breach of duty on the part of the second-named defendant; whether the system used by the hospital in 1987 for recording the presence or absence of clinical signs and symptoms relevant to the condition of the plaintiff and his mother prior to his birth were adequate and accorded broadly with general and approved practice in maternity hospitals; whether the hospital's system for recording the condition and treatment of mothers and their new-born infants was adequate and satisfactory in respect of the period from the admission of the mother until the birth of the infant and from the admission of the infant to the post-natal unit until discharge of mother and child; whether the plaintiff had discharged the onus of proving on the balance of probabilities that his condition was caused by reason of irreversible brain damage sustained as a consequence of a hypoxic ischaemic insult during the thirty minutes or so immediately prior to his birth; whether it was likely that the plaintiff was not fed or fed inadequately during the first six hours after his birth or thereafter; whether it was likely that the plaintiff was properly monitored during the twelve hours immediately after his birth and thereafter; whether the evidence was sufficient to ground a finding that the plaintiff's disability was probably caused by reason of either hypoglycaemia or a combination of hypoglycaemia and hypoxic insult; whether the evidence of a delay in the plaintiff's delivery was longer than was reasonably possible and whether inadequate nursing records had established on the balance of probabilities that either of those departures by the hospital from the requisite standard of care had caused or contributed to the plaintiff's present disability.
Held: Plaintiff's claim dismissed.

Planning

Walsh v. Kildare County Council
High Court: **Finnegan J.**
29/07/2000

Planning application; judicial review; time limits for decisions of planning authority; material breaches of development plan; applicant seeks default planning permission on basis that respondent did not give notice to applicant of its decision within the appropriate period of two months from receipt of application; whether alleged failure of applicant to specify with sufficient accuracy his address for service of documents had frustrated respondent's attempts to request further information within appropriate time limits; whether, if the address given by an applicant for planning permission is inadequate to afford the planning authority a choice of the full range of options for giving notice, the notice is bad, notwithstanding that the applicant acted in good faith; whether grant of planning permission would involve a material breach of the county development plan, thereby disentitling applicant to a default permission.
Held: Application refused.

Part V of the Planning and Development Bill, 1999, In re
Supreme Court: **Keane C.J.**, Murphy J., Murray J., McGuinness J., Geoghegan J.
28/08/2000

Article 26 reference; constitutionality of Part V of Planning and Development Bill, 1999; property rights; Part V makes provision for planning permission being granted upon the condition that a landowner would cede up to 20% of the land for "affordable housing"; price to be paid for such land is to be calculated by reference to its existing use value or the price actually paid for the land whichever is the greater; whether Part V constitutes an unjust attack on property rights; whether a person who is compulsorily deprived of his or her property in the interests of the common good should normally be fully compensated at a level equivalent to at least the market value of the acquired property; whether there are special considerations applicable in the case of restrictions on the use of land imposed under planning legislation; whether the provisions of Part V are rationally connected to an objective of sufficient importance to warrant interference with a constitutionally protected right; whether the provisions impair those rights as little as possible and whether their effects on such rights are proportionate to the objectives sought to be attained; whether the scheme is arbitrary, unfair or based on irrational considerations; whether Part V is repugnant to Article 40 of the Constitution; whether the classifications contained in Part V were made by the Oireachtas for a legitimate legislative purpose, are relevant to that purpose and treat each class fairly; whether the provisions in the Bill left a huge area of discretion to the planning authority which

violated the provisions of Article 15:2:1 of the Constitution; Articles 40:1, 40:3:2 and 43 of the Constitution; Article 26:2:1 of the Constitution; Part V, Planning and Development Bill, 1999.
Held: None of the provisions of Part V of the Bill are repugnant to the Constitution.

Seery v. An Bord Pleanala
High Court: **Finnegan J.**
25/01/2001

Planning; undertakings as to damages; applicants had obtained leave to apply for judicial review; second and third notice parties seek undertaking as to damages pending final determination of issues raised; whether existence of application had an effect similar to the effect of an interlocutory injunction in private litigation; whether application for judicial review was of a sufficiently public nature to justify exercise of Court's discretion in favour of applicants to refuse an order requiring that an undertaking as to damages be given; O. 84, r. 20, sub-r. (6), Rules of the Superior Courts, 1986.
Held: Undertaking as to damages ordered as a condition of applicants continuing with application for judicial review.

Library Acquisition

Conference held on 24th February 2001
The planning and development act, 2000: implications for practitioners
Simons, Garrett
Butler, Nuala
Connolly, James
Galligan, Eamon
Dublin Bar Council of Ireland 2001
Changes to judicial review proceedings under section 50
Social and affordable housing: part V of the planning and development act 2000
The concept of the "unreasonable" planning authority
Enforcement under the planning and development act 2000
N96.C5.Z14

Practice & Procedure

Blehein v. Murphy
Supreme Court: **Denham J.,** Barrington J., Barron J.
17/01/2000

Practice and procedure; plaintiff appealed from judgment and order of the High Court in which he was refused leave to issue proceedings against certain individuals under section 260, Mental Treatment Act, 1945; plaintiff applying by notice of motion to amend notice of appeal in order to challenge the constitutionality of section 260; whether there existed exceptional circumstances which would enable the court to consider an issue of constitutional law which had not been fully argued and decided in the High Court; whether the validity of a law could be raised under Article 34.3.2 of the Constitution for the first time in the Supreme Court.
Held: Application to amend notice of appeal refused.

Gael Linn Teoranta v. An Coimisinéir Luachála
An Chúirt Uachtarach: Ó hUrmholtáigh P.B., Barrington B.,
Ó Catháin. B, Ó Loinseagh B.
18/05/1999

Cleachtas na gcúirteanna; *res judicata*; díolúine; bhí díolúine ag an iarrathóra ar trí áitreabh sna liostaí luachála coinnithe ag an gcóad fhreagóir ag Óirí as cinneadh na Cúirte Chuarda; rinne an cóad fhreagóir cinneadh go ndóanfaí athbhreithniú ar stádas na díolúine; rinne an triú fhreagóir iarratas le haghaidh a leithóid de athbhreithniú ach níor tugadh aon fógra don iarrathóir ina leith; chuir an t-Ard Chúirt ar neamhní cinneadh an cóad fhreagóir ach diúltaoíodh aon faoiseamh breise mar nár bhain an teagasc *res judicata* le ordaithe an Chúirt Chuarda maidir leis na h-áitribh; mír 3(1) Valuation Act, 1988; an gcoscann an teagasc *res judicata* ar an freagróir úsáid a bhaint as an gcóras reachtúil faoi mír 3(1) chun ceist na díolúine a ath-oscailt, gan a chruthú ar dtúis go bhfuil athrú in úsáid na h-áitribh nó i stádas an t-iarrathóra.
Coinníodh: Diultaíodh don achomharc.

Gael Linn v. The Valuation Commissioner
Supreme Court: Hamilton C.J., Barrington J., **Keane J.,** Lynch J.
18/05/1999

Practice and procedure; *res judicata*; licences; applicant had licences for premises in valuation lists kept by first respondent arising from Circuit Court decision; first respondent decided status of the lists would be reviewed; third respondent applied for review of licences without informing applicant; appeal from High Court decision quashing decision of first respondent but refusing further relief as principle of *res judicata* did not apply to the orders made by Circuit Court in respect of premises; s.3(1) Valuation Act, 1988; whether respondent estopped by Circuit Court decision from reviewing status of licences, without first proving change in use of premises or in applicant's status.
Held: Appeal dismissed.

O'Leary v. Minister for Transport, Energy and Communications
Supreme Court: Denham J., Barron J., **McGuinness J.**
18/05/2000

Practice and procedure; amendment of points of claim; applicant contending wrongful dismissal; appeal against judgment and order of the High Court dismissing applicant's application pursuant to O.28 r.1 RSC to amend his points of claim; applicant had sought to amend his points of claim to include a claim that first-named respondent conspired with other and unnamed parties to procure the dismissal of the applicant from his office as chairman of CIE; whether the trial judge was correct in his approach in holding that he would treat the application as though it fell to be dealt with solely under O.28 r.1 and without reference to the fact that the proceedings were judicial review proceedings; whether the trial judge had erred in determining that a claim of conspiracy had no relevance to the relief sought by the applicant and that the claim was not necessary for the purposes of determining the real questions in controversy between the parties.
Held: Appeal allowed.

Ryan v. The Minister for Justice
Supreme Court: **Murphy J.,** McGuinness J., Geoghegan J.
21/12/2000

Practice and procedure; preliminary issue of law; prisons; criteria for the temporary release of prisoners; duty of care; respondent was allegedly abducted and raped by a person who was at the time of the incident on temporary release from prison; respondent seeks to sue appellants on basis that incident was occasioned, contributed to or facilitated by acts or omissions of appellants, their servants or agents, which acts and omissions amounted to negligence and breach of duty; respondent obtained order of discovery in High Court of documents in relation to imprisonment and release of alleged assailant; appellant seeks to overturn order on basis that facts already agreed for the purposes of determining preliminary issue of law; whether the pleadings herein raise a point of law which might be properly set down for hearing and disposed of before the trial of the action.
Held: Appeal allowed.

Spin Communications t/a Storm FM v. Independent Radio and Television Commission
Supreme Court: **Keane C.J.,** McGuinness J., Geoghegan J. (ex tempore)
14/04/2000

Practice and procedure; applicants raised issue of bias on the part of the IRTC in granting a licence to the notice party; whether High Court judge was in error in declining to award security for costs in favour of the notice party.
Held: Appeal allowed.

Library Acquisition

Pyke, James
A-Z of civil litigation
London Sweet & Maxwell 2001
N350

Property

Boyle v. Connaughton
High Court: **Laffoy J.**
21/03/2000

Land; registered properties owned by the parties in the proceedings formerly part of one single holding; respondents' property carved out of the one single registered holding in 1982; dispute between parties as to boundaries of their respective properties; Land Registry map did not depict either property as it was on the ground and defined by substantial physical boundaries since mid-1982; area of land of which the respondents were in possession was shown on Land Registry map as being outside the boundaries of the lands registered on a folio and within the boundaries of lands registered on another folio; whether the source of the problem giving rise to the proceedings was the failure to depict correctly on the map lodged in the Land Registry by the respondents' predecessors in title the site the subject of agreement between them and the appellants' predecessors in title; whether having regard to the nature and location of the properties in issue the discrepancies between the Land Registry map position and the on the ground position were covered by section 85 of the Registration of Title Act, 1964; whether such rights as the respondents had in the area occupied by them within the

boundaries of the lands registered on folio from which the appellant was seeking to evict them were preserved by their actual occupation; whether the appellants' registration on another folio was subject to the rights protected by section 72 of the Act of 1964; whether the respondents had established a right in equity to have the Land Registry map rectified.
Held: Rectification ordered. Appellants' claim dismissed.

Feehan v. Leamy
High Court: **Finnegan J.**
29/05/2000

Land; adverse possession; plaintiff claims defendant wrongfully trespassed on his land; plaintiff claims damages and injunctive relief; defendant claims to have acquired title by adverse possession; onus on defendant to establish his claim that he acquired title to the land by adverse possession; whether plaintiff discontinued in his possession of the land; whether defendant dispossessed the plaintiff; whether defendant had necessary *animus possidendi* to dispossess the plaintiff.
Held: Defendant failed to establish adverse possession; injunctive relief granted to plaintiff

Refugees

Library Acquisition

Twomey, Patrick
Refugee rights and realities: evolving international concepts and regimes
Cambridge Cambridge University Press 1999
C205.008

Statutory Instrument

Aliens (visas) order, 2001
SI 36/2001

Road Traffic

Statutory Instruments

Road traffic (national car test) regulations, 2001
SI 32/2001
DIR 96/96/EC

Road traffic (public service vehicles) (amendment) regulations, 2001
SI 38/2001

Sea & Seashore

Statutory Instrument

Harbours act, 1996 (limits of Burtonport harbour) order, 2001
SI 8/2001

Harbours act 1996 (limits of greencastle harbour) order, 2001
SI 7/2001

Shipping

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Wilson, D J
Lowndes & Rudolf - general average and the York-Antwerp rules
12th edition
London Sweet & Maxwell 1997
N335.1

Social Welfare

Statutory Instrument

Social welfare (consolidated contributions and insurability) (amendment) (defence forces) regulations, 2001
SI 5/2001

Succession

Kelly v. Cahill
High Court: **Barr J.**
18/01/2001

Probate; new model constructive trusts; unjust enrichment; plaintiff, sole surviving executor of will, seeks directions from Court in relation to administration of deceased's estate; testator, since deceased, by last operative will, devised all property to first named defendant (his wife) and brother (also now deceased) as joint tenants for life with remainder to trustees in trust for second named defendant (his nephew); testator subsequently decided that entire estate should be inherited absolutely by first named defendant without any remainder provision; testator decided, on advice of solicitor, to transfer all lands into the joint names of himself and first named defendant; through inadvertence of solicitor and unknown to testator certain lands were not included in Deed of Transfer contrary to testator's express intention; whether new model constructive trust could be established in favour of first named defendant to give effect to testator's clear intention, thereby preventing unjust enrichment of second named defendant.
Held: Court established new model constructive trust for benefit of first named defendant.

Taxation

O'Connell v. Keleghan
High Court: **McCracken J.**
11/02/2000

Revenue; income tax; capital gains tax; case stated by Appeal Commissioners; respondent and others sold shares in private limited company by way of share agreement to a purchaser; purchaser issued loan note to respondent as consideration; respondent also signed a side letter with purchaser under which he received £250,000; whether the £250,000 received by respondent is liable to income tax; whether redemption of loan notes for cash gave rise to chargeable gain upon which capital gains tax is payable; whether loan note is a debt on a security; s.110, Income Tax Act, 1967; s.11(2), Capital Gains Tax Act, 1975; s.46(1), Capital Gains Tax Act, 1975.
Held: No liability to income tax; loan note was not a debt on a security within meaning of s.46(1) of 1975 Act; no chargeable gain accrued to respondent.

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Butterworths yellow tax handbook 2000-2001
Gammie Malcolm
40th ed
London Butterworths 2000
M335

Butterworths orange tax handbook 2000-01
Gammie, Malcolm
26th edition
London Butterworths 2000
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Tolley's tax guide 2000-2001
Homer, Arnold
Burrows, Rita
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M335

Statutory Instruments

Taxes consolidation act, 1997 (amendment of schedule 4) order, 2001
SI 43/2001

Value-added tax (agricultural intervention agency) order, 2001
SI 11/2001

Telecommunications

Statutory Instrument

Wireless telegraphy (teleport facility) regulations, 2001
SI 18/2001

Torts

O'Longaigh v. Minister for Finance
High Court: **Lavan J.**
14/04/2000

Tort; Garda Siochána; damages; plaintiff is member of An Garda Siochána; plaintiff in the course of his duty sustained personal injury, loss and damage; plaintiff initially refused leave to seek compensation under provisions of An Garda Siochána Compensation Acts 1941-1945; leave granted after institution of judicial review proceedings; plaintiff sustained second injury seven years later; whether second injury was caused by a weakness in his right leg which existed from the first accident sustained in the course of his duty; whether plaintiff is permanently unfit to carry out his duties; An Garda Siochána Compensation Acts, 1941-1945.
Held: Second accident not caused by pre-existing condition caused by first accident; plaintiff failed to establish permanent inability to carry out his duties; the delay in enabling the plaintiff to prosecute his claim for compensation in relation to the first accident was a major cause in precluding him from making a full recovery; damages of £20,000 awarded for pain and suffering resulting from the first accident; special damages of £57,500 agreed between the parties to compensate for matters such as loss of overtime and/or promotion.

Article

The duty of care to children in care
Arthur, Raymond
2001 ILT 38

Library Acquisition

Bernstein, Robby
Economic loss
2nd edition
London Sweet & Maxwell 1998
N38.1

Transport

Statutory Instrument

Iarnrod eireann (Dublin Connolly - Maynooth) (Barberstown level crossing) order, 2001
SI 28/2001

Iarnrod Eireann (Dublin Connolly - Maynooth) (Blakestown level crossing) order, 2001
SI 27/2001

European Directives implemented into Irish Law up to 13/03/2001.

Information compiled by Damien Grenham, Law Library, Four Courts.

European communities (pesticide residues) (cereals) (amendment) regulations, 2000
SI 459/2000
DIR 2000/24/EC (see SI for full list of Directives)

European communities (pesticide residues) (foodstuffs of animal origin) (amendment) regulations, 2000
SI 460/2000
DIR 2000/24/EC (see SI for full list of Directives)

European communities (pesticide residues) (fruit and vegetables) (amendment) regulations, 2000
SI 461/2000
(DIR 76/895 & DIR 97/41 & DIR 2000/24)

European communities (pesticide residues) (products of plant origin, including fruit and vegetables) (amendment) regulations, 2000
SI 462/2000
DIR 2000/24/EC (see SI for full list of Directives)

European communities (safety advisers for the transport of dangerous goods by road and rail) regulations, 2001
SI 6/2001
(DIR 96/35, 2000/18)

Water quality (dangerous substances) regulations, 2001
SI 12/2001
(DIR 2000/60/EC AND DIR 76/464/EEC)

Air pollution act, 1987 (sulphur content of heavy fuel oil and gas oil) regulations, 2001
SI 13/2001
DIR 93/12/EC

European communities (minimum measures for the control of certain diseases affecting bivalve molluscs) (amendment) regulations, 2001
SI 17/2001
DIR 95/70/EC

European communities (specified risk material) regulations, 2001
SI 24/2001
DIR 2001/2/EC

European communities (fresh poultry meat) (amendment) regulations, 2001
SI 25/2001
DIR 99/89/EC

European communities (live poultry and hatching eggs) (amendment) regulations, 2001
SI 26/2001
DIR 1999/90/EC

Road traffic (national car test) regulations, 2001
SI 32/2001
DIR 96/96/EC

European communities (authorisation, placing on the market, use and control of plant protection products) (amendment) regulations, 2001
33/2001
DIR 2000/66/EC, DIR 2000/67/EC, DIR 2000/68/EC

European communities (aquaculture animals and fish) (placing on the market and control of certain diseases) (amendment) regulations, 2001
SI 34/2001
DIR 2000/27/EC

European communities (slaughter of bovine animals aged over 30 months) regulations, 2001
SI 48/2001
[DIR 2777/2000]

European communities (import restrictions) (foot-and-mouth disease) regulations, 2001
SI 55/2001
[DEC 21/2001 AND 27/2001]

European communities (minimum stocks of petroleum oils) (amendment) regulations, 2001
SI 65/2001
DIR 98/93/EC

European caselaw received in the Law Library up to 13/03/2001

Information compiled by Lorraine Brien, Law Library, Four Courts.

C-41/98 Commission v Tecnologie Vetroresina SpA (TVR)
Court of Justice of the European Communities
Judgment delivered 16/1/2001
(Arbitration clause-Non-performance of contract)

C-247/98 Hellenic Republic v Commission
Court of Justice of the European Communities
Judgment delivered 11/1/2001
(EAGGF-Clearance of accounts-1994 financial year)

C-361/98 Italian Republic v Commission of the European Communities
Court of Justice of the European Communities
Judgment delivered 18/1/2001
(Council Regulation (EEC) No 2408/92-Application for annulment of Commission Decision 98/710/EC - Distribution of air traffic between the airports of Milan-'Malpensa 2000')

C-389/98 P Gevaert v Commission Court of Justice of the European Communities
Judgment delivered 11/1/2001
(Appeals-Officials-Request for review of classification in grade-Action-Expiry of time-limits-New fact-Inequality of treatment)

C-403/98 Azienda Agricola Monte Arcosn Srl v Regione Autonoma della Sardegna & Ors
Court of Justice of the European Communities
Judgment delivered 11/1/2001
(Agriculture-Farmer practising farming as his main occupation-Concept-Private limited company)

C-413/98 Directora-Geral do Departamento para os Assuntos do Fundo Social Europeu (DAFSE) v Frota Azul-Transportes e Turismo Ld.
Court of Justice of the European Communities
Judgment delivered 25/1/2001
(European Social Fund-Certification of facts and accounts-Powers of certification-Limits)

C-459/98 P Isabel Martinez del Peral Cagigal v Commission
Court of Justice of the European Communities
Judgment delivered 11/1/2001
(Appeal-Officials-Application for review of classification on grade-Action-Expiry of time-limits-New material fact-Equal treatment)

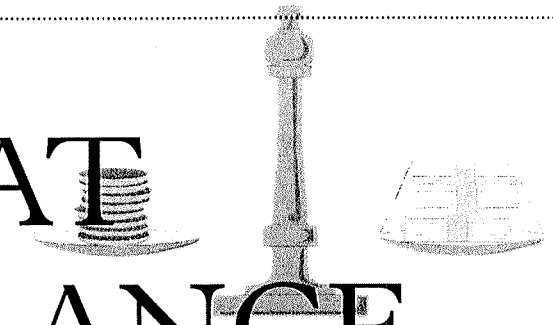
C-464/98 Westdeutsche Landesbank Girozentrale v Friedrich Stefan
Court of Justice of the European Communities
Judgment delivered 11/1/2001
(National rules prohibiting the registration of mortgages in foreign currencies-Breach of that prohibition before Community law entered into force in Austria-Interpretation of Article 73b of the EC Treaty (now Article 56 EC)-Whether Community law can operate to remedy the registration)

C-1/99 Kofisa Italia Sri v Ministero delle Finanze
Court of Justice of the European Communities
Judgment delivered 11/1/2000
(Reference for a preliminary ruling-Jurisdiction of the Court-National legislation adopting Community provision-Community Customs Code Appeal-Mandatory nature of the two stages of the appeal-Suspension of implementation of a decision of the customs authorities)

C-83/99 Commission v Kingdom of Spain
Court of Justice of the European Communities
Judgment delivered 18/1/2001
(Failure of a Member State to fulfil its obligations-Article 12(3)(a) of
the Sixth VAT Directive-Application of a reduced rate to motorway tolls)

C-162/99 Commission v Italian Republic
Court of Justice of the European Communities
Judgment delivered 18/1/2001
(Failure by a Member State to fulfil its obligations-Freedom of movement
for workers-Freedom of establishment-Dentists-Residence conditions)

C-172/99 Oy Liikenne Ab v Pekka Liskojarvi & Anor
Court of Justice of the European Justice
Judgment delivered 25/1/2001
(Directive 77/187/EEC-Safeguarding of employees' rights in the event of transfers of undertakings-Directive 92/50/EEC - Public service contracts - Non-maritime public transport services)



AT A GLANCE

C-226/99 Siples Srl v Ministero delle Finanze
Court of Justice of the European Communities
Judgment delivered 11/1/2001
(Common Customs Code-Appeals-Suspension of implementation of a decision of the customs authorities)

C-230/99 Commission v French Republic
Court of Justice of the European Communities
Judgment delivered 15/2/2001
(Failure of a Member State to fulfil its obligations-Infringement of Article 30 of the EC Treaty (now, after amendment, Article 28 EC)-National legislation concerning rubber materials and rubber articles entering into contact with foodstuffs, food products and beverages-Mutual recognition-No proper letter of formal notice-Action inadmissible)

C-237/99 Commission v French Republic
Court of Justice of the European Communities
Judgment delivered 1/2/2001
(Failure by a Member State to fulfil obligations-Directive 93/37/EEC-Public works contracts-Concept of 'contracting authority')

C-350/99 Wolfgang Lange and Georg Schunemann GmbH
Court of Justice of the European Communities
Judgment delivered 8/2/2001
(Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship-Length of normal daily or weekly work-Rules on overtime-Rules of evidence)

C-448/99 Commission v Grand Duchy of Luxembourg
Court of Justice of the European Communities
Judgment delivered 18/1/2001
(Failure by a Member State to fulfil Obligations-Directive 97/13/EC)

C-151/00 Commission v French Republic
Court of Justice of the European Communities
Opinion delivered 26/10/2000
Judgment delivered 18/1/2001
(Failure by a Member State to fulfil its obligations-Directive 97/66/EC of the European Parliament and of the Council-Processing of personal data and the protection of privacy in the telecommunications sector-Non-transposition)

Acts of the Oireachtas 2000

Information compiled by Damien Grenham, Law Library, Four Courts.

1/2000 COMHAIRLE ACT, 2000
SIGNED 02/03/2000
1. SI 167/2000 = (commencement)

2/2000 NATIONAL BEEF ASSURANCE SCHEME ACT, 2000
SIGNED 15/03/2000
1. SI 130/2000 & SI 415/2000 (commencement)

3/2000 FINANCE ACT, 2000
SIGNED 23/03/2000

4/2000 SOCIAL WELFARE ACT, 2000
SIGNED 29/03/2000

5/2000 NATIONAL MINIMUM WAGE ACT, 2000
SIGNED 31/03/2000
1. SI 95/2000 / SI 201/2000 = (rate of pay)
2. SI 96/2000 = (commencement)
3. SI 99/2000 = (courses/training)

6/2000 LOCAL GOVERNMENT (FINANCIAL PROVISIONS) ACT, 2000
SIGNED 20/04/2000

7/2000 COMMISSION TO INQUIRE INTO CHILD ABUSE ACT, 2000
SIGNED 26/04/2000
1. SI 149/2000 = (establishment day)

8/2000 EQUAL STATUS ACT, 2000
SIGNED 26/04/2000
1. SI 168/2000 (section 47 commencement)
2.SI 351/2000 (brings into operation whole of the act)

9/2000 HUMAN RIGHTS COMMISSION ACT, 2000
SIGNED 31/05/2000

10/2000 MULILATERAL INVESTMENT GUARANTEE AGENCY (AMENDMENT) ACT, 2000
SIGNED 07/06/2000

11/2000 CRIMINAL JUSTICE (UNITED NATIONS CONVENTION AGAINST TORTURE) ACT, 2000
SIGNED 14/06/2000

12/2000 INTERNATIONAL DEVELOPMENT ASSOCIATION (AMENDMENT) ACT, 2000
SIGNED 20/06/2000

13/2000 STATUTE OF LIMITATIONS (AMENDMENT) ACT, 2000
SIGNED 21/06/2000

14/2000 MERCHANT SHIPPING (INVESTIGATION OF MARINE CASUALITIES) ACT, 2000
SIGNED 27/06/2000

15/2000 COURTS (SUPPLEMENTAL PROVISIONS) (AMENDMENT) ACT, 2000
SIGNED 28/06/2000

16/2000 CRIMINAL JUSTICE (SAFETY OF UNITED NATIONS WORKERS) ACT, 2000
SIGNED 28/06/2000

17/2000 INTOXICATING LIQUOR ACT, 2000
SIGNED 30/06/2000
1. SI 207/2000
(commencement other than S's 15, 17 & 27 (S27 = 02/10/'00))

18/2000 TOWN RENEWAL ACT, 2000
SIGNED 04/07/2000
1. SI 226/2000 (commencement)

19/2000 FINANCE (NO.2) ACT, 2000
SIGNED 05/07/2000

20/2000 FIREARMS (FIREARM CERTIFICATES FOR NON-RESIDENTS) ACT, 2000
SIGNED 05/07/2000

21/2000 HARBOURS (AMENDMENT) ACT, 2000
SIGNED 05/07/2000

22/2000 EDUCATION (WELFARE) ACT, 2000
SIGNED 05/07/2000

23/2000 HOSPITALS' TRUST (1940) LIMITED (PAYMENTS TO FORMER EMPLOYEES) ACT, 2000
SIGNED 08/07/2000

24/2000 MEDICAL PRACTITIONERS (AMENDMENT) ACT, 2000
SIGNED 08/07/2000

25/2000 LOCAL GOVERNMENT ACT, 2000
SIGNED 08/07/2000

26/2000 GAS (AMENDMENT) ACT, 2000
SIGNED 10/07/2000

27/2000 ELECTRONIC COMMERCE ACT, 2000
SIGNED 10/07/2000

28/2000 COPYRIGHT AND RELATED RIGHTS ACT, 2000
SIGNED 10/07/2000
1. SI 404/2000 (COMMENCEMENT)
* See Iris Oifigiuil 02/02/01*

29/2000 ILLEGAL IMMIGRANTS (TRAFFICKING) ACT, 2000
SIGNED 28/08/2000
1. SI 266/2000 (COMMENCEMENT)

30/2000 PLANNING AND DEVELOPMENT ACT, 2000
SIGNED 28/08/2000

31/2000 CEMENT (REPEAL OF ENACTMENTS) ACT, 2000
SIGNED 24/10/2000
1. SI 361/2000 (COMMENCEMENT)

32/2000 ICC BANK ACT, 2000
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1. SI 396/2000 (COMMENCEMENT)

33/2000 NATIONAL PENSIONS RESERVE FUND ACT, 2000
SIGNED 10/12/2000

34/2000 FISHERIES (AMENDMENT) ACT, 2000
SIGNED 15/12/2000

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SIGNED 15/12/2000

36/2000 APPROPRIATION ACT
SIGNED 15/12/2000

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SIGNED 16/12/2000

38/2000 WILDLIFE (AMENDMENT) ACT, 2000
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40/2000 NATIONAL STUD (AMENDMENT) ACT, 2000
SIGNED 20/12/2000

41/2000 NATIONAL TRAINING FUND ACT, 2000
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1. SI 494/2000 (Commencement)

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SIGNED 20/12/2000
1. SI 472/2000 (Commencement)

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1/2000 THE TRINITY COLLEGE, DUBLIN (CHARTERS AND LETTERS PATENT AMENDMENT) ACT, 2000
SIGNED 06/11/2000

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Information compiled by Damien Grenham, Law Library, Four Courts.

ACC bank bill, 2001
1st stage- Dail

Activity centres (young persons' water safety) bill, 1998
2nd stage - Dail [p.m.b.]

Adventure activities standards authority bill, 2000
1st stage - Dail

Agriculture appeals bill, 2001
2nd stage - Dail (Initiated in Seanad)

Aer Lingus bill, 2000
2nd stage - Dail (Initiated in Seanad)

Aviation regulation bill, 2000
Report- Seanad (Initiated in Dail)

Broadcasting bill, 1999
Committee - Seanad (Initiated in Dail)

Carer's leave bill, 2000
2nd stage - Dail

Censorship of publications (amendment) bill, 1998
2nd stage - Dail **[p.m.b.]**

Central bank (amendment) bill, 2000
2nd stage - Seanad (Initiated in Seanad)

Children bill, 1999
Committee - Dail

Children bill, 1996
Committee - Dail

Companies (amendment) bill, 1999
2nd stage - Dail **[p.m.b.]**

Companies (amendment) (no.4) bill, 1999
2nd stage - Dail [p.m.b.]
Company law enforcement bill, 2000
Committee - Dail

Containment of nuclear weapons bill, 2000
Committee - Dail (Initiated in Seanad)

Control of wildlife hunting & shooting (non-residents
firearm certificates) bill, 1998
2nd stage - Dail **[p.m.b]**

Courts bill, 2000
2nd stage - Dail

Criminal justice (illicit traffic by sea) bill, 2000
1st stage - Dail

Criminal justice (theft and fraud offences) bill, 2000
Committee -Dail

Criminal law (rape)(sexual experience of complainant) bill, 1998
2nd stage - Dail **[p.m.b.]**

Customs & excise (mutual assistance) bill, 2000
Committee - Seanad (Initiated in Dail)

Dumping at sea (amendment) bill, 2000
2nd stage - Dail (Initiated in Seanad)

Eighteenth amendment of the Constitution bill, 1997
2nd stage - Dail **[p.m.b.]**

Electoral (amendment) bill, 2000
Committee- Seanad

Electoral (amendment) (donations to parties and candidates) bill, 2000
Committee - Dail **[p.m.b.]**

Employment rights protection bill, 1997
2nd stage - Dail **[p.m.b.]**

Energy conservation bill, 1998
2nd stage - Dail **[p.m.b.]**

Equal status bill, 1998
2nd stage - Dail **[p.m.b]**

Euro changeover (amounts) bill, 2000
1st stage - Dail

Family law bill, 1998
2nd stage - Seanad

Finance bill, 2001
Committee - Dail

Fisheries (amendment) bill, 2000
2nd stage - Dail (Initiated in Seanad)

Fisheries (amendment) (no.2) bill, 2000
2nd stage - Dail (Initiated in Seanad)

Freedom of information (amendment) bill, 2000
2nd stage - Dail

Harbours (amendment) bill, 2000
Committee - Seanad

Health (miscellaneous provisions) bill, 2000
1st stage - Dail

Health (miscellaneous provisions) (no.2) bill, 2000
2nd stage - Dail (Initiated in Seanad)

Health insurance (amendment) bill, 2000
Committee - Dail

Home purchasers (anti-gazumping) bill, 1999
1st stage - Seanad

Housing (gaeltacht) (amendment) bill, 2000
Committee - Dail

Human rights bill, 1998
2nd stage - Dail **[p.m.b.]**

Industrial designs bill, 2000
1st stage - Dail

Industrial relations (amendment) bill,2000
Report -Dail (Initiated in Seanad)

Interpretation bill, 2000
1st stage - Dail

Irish nationality and citizenship bill, 1999
Report - Dail (Initiated in Seanad)

Landlord and tenant (ground rent abolition) bill, 2000
2nd stage - Dail **[p.m.b.]**

Licensed premises (opening hours) bill, 1999
2nd stage - Dail **[p.m.b.]**

Local government (no.2) bill, 2000
2nd stage - Seanad (Initiated in Dail)

Local Government (planning and development) (amendment) bill, 1999
Committee - Dail

Local Government (planning and development) (amendment) (No.2) bill, 1999
2nd stage - Seanad

Local government (Sligo) bill, 2000
2nd stage -Dail

Mental health bill, 1999
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National stud (amendment) bill, 2000
Committee - Dail

Nitrigin eireann teoranta bill, 2000
Committee - Dail

Official secrets reform bill, 2000
2nd stage - Dail **[p.m.b.]**

Organic food and farming targets bill, 2000
2nd stage - Dail **[p.m.b]**

Partnership for peace (consultative plebiscite) bill, 1999
2nd stage - Dail **[p.m.b.]**

Patents (amendment) bill, 1999
Committee - Dail

Prevention of corruption (amendment) bill, 1999
1st stage - Dail **[p.m.b.]**

Prevention of corruption (amendment) bill, 2000
Committee - Dail

Prevention of corruption bill, 2000
2nd stage - Dail **[p.m.b.]**

Private security services bill, 1999
2nd stage- Dail **[p.m.b.]**

Private security services bill, 2001
1st stage - Dail

Proceeds of crime (amendment) bill, 1999
Committee - Dail

Prohibition of ticket touts bill, 1998
Committee - Dail **[p.m.b.]**

Protection of employees (part-time work) bill, 2000
Committee - Dail

Protection of patients and doctors in training bill, 1999
2nd stage - Dail **[p.m.b.]**

Protection of workers (shops) (no.2) bill, 1997
2nd stage - Seanad

Public representatives (provision of tax clearance certificates) bill, 2000
2nd stage - Dail **[p.m.b.]**

Radiological protection (amendment) bill, 1998
Committee- Dail (Initiated in Seanad)

Refugee (amendment) bill, 1998
2nd stage - Dail **[p.m.b.]**

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2nd stage - Dail

Registration of lobbyists bill, 1999
1st stage - Seanad

Registration of lobbyists (no.2) bill 1999
2nd stage - Dail **[p.m.b.]**

Regulation of assisted human reproduction bill, 1999
1st stage - Seanad **[p.m.b.]**

Road traffic (Joyriding) bill, 2000
2nd stage - Dail **[p.m.b.]**

Road traffic reduction bill, 1998
2nd stage - Dail [p.m.b.]

Safety health and welfare at work (amendment) bill, 1998
2nd stage - Dail **[p.m.b.]**

Safety of united nations personnel & punishment of offenders bill, 1999
2nd stage - Dail **[p.m.b.]**

Seanad electoral (higher education) bill, 1997
1st stage - Dail **[p.m.b.]**

Seanad electoral (higher education) bill, 1998
1st stage - Seanad **[p.m.b.]**

Sea pollution (amendment) bill, 1998
Committee - Dail

Sea pollution (hazardous and noxious substances) (civil liability and compensation) bill, 2000
2nd stage - Dail

Sex offenders bill, 2000
Committee - Dail

Shannon river council bill, 1998
Committee - Seanad

Social welfare bill, 2001
2nd stage - Dail

Solicitors (amendment) bill, 1998
Committee - Dail **[p.m.b.]** (Initiated in Seanad)

Standards in public office bill, 2000
1st stage - Dail

Statute law (restatement) bill, 2000
2nd stage - Dail (Initiated in Seanad)

Statute of limitations (amendment) bill, 1999
2nd stage - Dail **[p.m.b.]**

Succession bill, 2000
2nd stage - Dail **[p.m.b.]**

Teaching council bill, 2000
Committee -Dail

Telecommunications (infrastructure) bill, 1999
1st stage - Seanad

Tobacco (health promotion and protection) (amendment) bill, 1999
Committee -Dail **[p.m.b.]**

Trade union recognition bill, 1999
1st stage - Seanad

Tribunals of inquiry (evidence) (amendment) (no.2) bill, 1998
2nd stage - Dail **[p.m.b.]**

Trustee savings banks (amendment) bill, 2000
2nd stage - Seanad (Initiated in Dail)

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2nd stage - Dail **[p.m.b.]**

Twenty-first amendment of the constitution (no.2) bill, 1999
2nd stage - Dail **[p.m.b.]**

Twenty- first amendment of the constitution (no.3) bill, 1999
2nd stage - Dail **[p.m.b.]**

Twenty- first amendment of the constitution (no.4) bill, 1999
2nd stage - Dail **[p.m.b.]**

Twenty- first amendment of the constitution (no.5) bill, 1999
2nd stage - Dail **[p.m.b]**

Twenty-first amendment of the constitution bill, 2001
1st stage - Dail

Udaras na gaeltachta (amendment)(no.3) bill, 1999
Report - Dail

UNESCO national commission bill, 1999
2nd stage - Dail **[p.m.b.]**

Valuation bill, 2000
1st stage - Dail

Vocational education (amendment) bill, 2000
1st stage - Dail

Whistleblowers protection bill, 1999
Committee - Dail

Youth work bill, 2000
Committee - Dail

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(NB) Must have "adobe" software which can be downloaded free of charge from internet

Abbreviations

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

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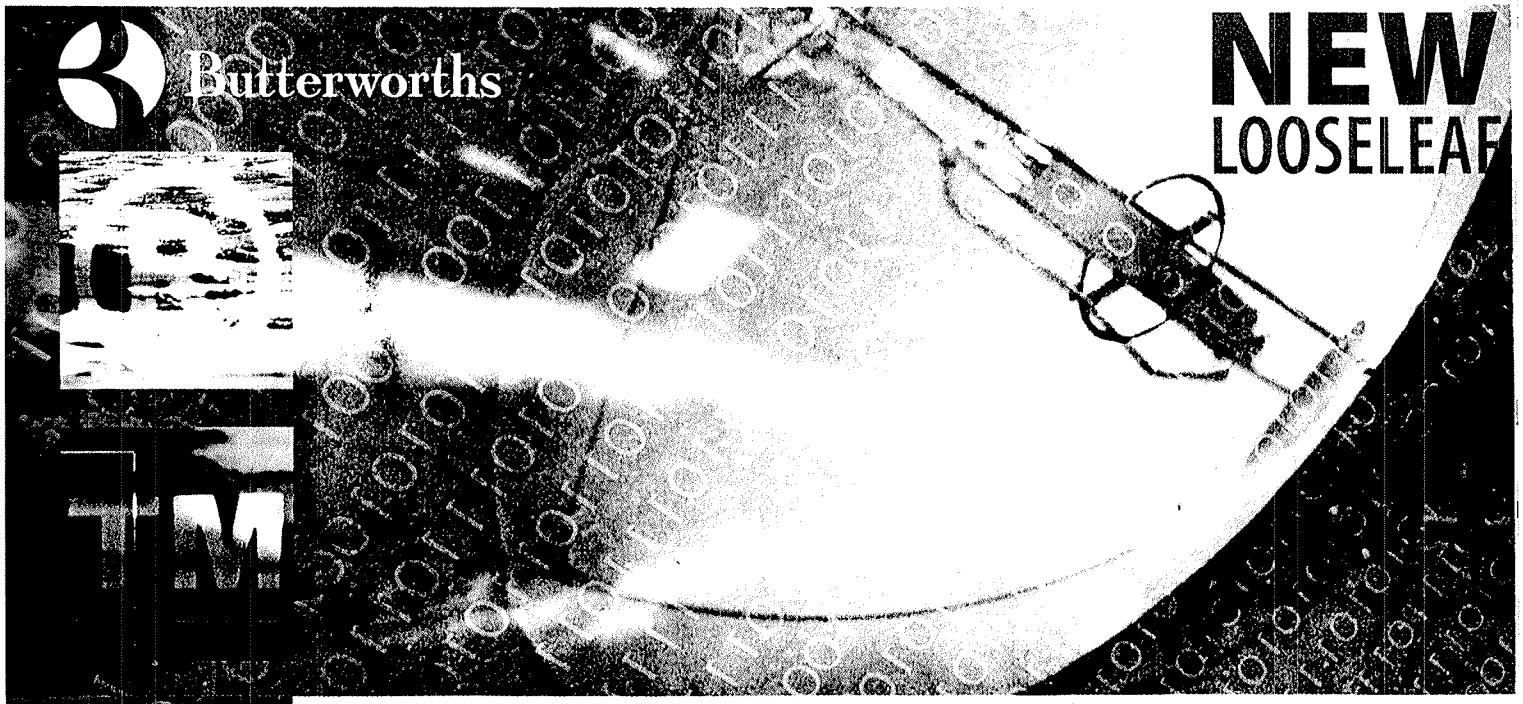

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HE SUPREME COURT DECISION IN DPP PADRAIG FINN

In its recent decision in the case of DPP v Padraig Finn, the Supreme Court has sought to impose discipline in the sentencing policy of the criminal courts. In so doing, it may also have been sending the government a coded request to introduce new legislation to ensure that judicial sentencing discretion be given statutory legitimacy. ***Mark O'Connell BL*** *considers the Supreme Court's decision.*

Background

The issue which came before the Supreme Court in *DPP v Padraig Finn*[1] was whether it was permissible for the prosecutor to appeal against the alleged undue leniency of a sentence pursuant to Section 2 of the Criminal Justice Act 1993 in circumstances where no application had been made until almost two years after the sentence was first imposed.

In the original decision of the Central Criminal Court (Lavan J) of 10 December 1996, sentences of seven years and three years were imposed in respect of separate counts of rape and assault.[2] The learned judge, having regard to mitigating factors, ordered that the case be re-listed before him for the purposes of "reviewing how I will deal with the remainder of the sentence."

The matter came before the Court again on 22 October 1998, by which time Lavan J had had the opportunity to examine a further victim impact report. Lavan J released the applicant on the undertaking that certain conditions be strictly observed.[3] He directed that the matter be listed again within three months of the decision to release the defendant. In the event, however, the hearing did not go on until 14 April 1999, when the judge heard evidence that the convicted man had been responding well to psychological treatment. The trial judge suspended the balance of the two sentences.

The DPP appealed this decision to the Court of Criminal Appeal where counsel for Mr Finn argued that the application was out of time.[4] It was not made within 28 days from the day on which the sentence was imposed as required by statute. On 14 June 1999, the Court of Criminal Appeal delivered a short *ex-tempore* judgment in which it rejected this argument and acceded to the respondent's request. A sentence of six years' imprisonment was imposed in respect of the rape conviction with no suspension. At the same time, on the application of counsel for Mr Finn, the Court certified that it was in the public interest that the Supreme Court adjudicate on whether the DPP should be allowed to appeal against undue leniency outside the 28-day statutory time limit.

Before the Supreme Court, Counsel for the Appellant[5] argued in favour of a literal interpretation of the words in the statute. An appeal could be taken "28 days from the date on which the sentence was imposed." The word "sentence" could not mean "review"; if it did, section 2 of the Criminal Justice Act 1993 would have stated as much. Therefore, the DPP's appeal should not have been heard, not to mind allowed.

Counsel for the respondent[6] believed that a broader construction was required. The words "the date on which the sentence was imposed" should include the date on which the Court of Criminal Appeal had finally disposed of the case. What happened at the review stage could be construed as part of the imposition of the sentence. The judge, after all, retained seisin of the case until the procedure was completed.

The Supreme Court decided in favour of the Appellant, holding that the statutory time limit ran for 28 days after the imposition of the sentence on 10 December 1996. It relied on section 2 (1) of the Criminal Justice Act 1993 which states that the DPP may apply to the Court of Criminal Appeal if he believes the sentence imposed by the court of first instance was unduly lenient. Section 2(2) states that an application under this section should be made on notice to the convicted person "within 28 days from the date on which the sentence was imposed."

Furthermore, the Supreme Court drew attention to section 1(1) of the Criminal Justice Act 1993 which states that the word sentence "includes a sentence of imprisonment and any other order made by a court in dealing with a convicted person other than (a) an order under section 17 of the Lunacy (Ireland) Act 1821 or section 2(2) of the Trial of Lunatics Act 1883 or (b) an order postponing sentence for the purpose of obtaining a medical or psychiatric report or a report by a probation officer..."

Implications for Sentencing Practice

However the Supreme Court did not stop there. In its decision, it proceeded to a rigorous examination of the practice associated with the imposition of sentences. In times past, members of the Supreme Court had merely alluded to the anomalies without properly resolving them, but a configuration of the present Supreme Court, comprising Keane CJ, Murphy, McGuinness, Hardiman and Fennelly JJ, went further by exploring the constitutional and statutory legitimacy for the inclusion of reviews in sentences imposed in the criminal courts.

In its decision, which was delivered by Keane CJ, the Supreme Court said that the Constitution provided that the right of pardon and the power to commute or remit punishment imposed by any court be vested in the President and also conferred by law on "other authorities." It then referred to the Criminal Justice Act 1951, which by section 23 restricted the range of "other authorities" mentioned in the Constitution. The authorities in which the statute vested the right of pardon or commutation numbered just one, namely the government which in turn could delegate the power to the Minister for Justice. No mention was made of the courts, of a parole board or of tribunals of public inquiry, and it followed that there was no constitutional or statutory basis for the practice of including review dates when sentences are imposed on persons convicted of criminal offences.

The Court noted the reservations expressed by Henchy J in the case of *The People (DPP) v Cahill*[7] when the trial judge sentenced the convicted man to seven years in jail but said he would release the prisoner after 36 months if he showed that in the intervening period, he was willing to "cooperate in preparing himself for integration into normal society." In that case Henchy J had said that the exercise of such power cut across the authority vested in the President of the High Court by section 11 of the Courts (Supplemental Provisions) Act 1961; that it affected the convicted person's right of appeal since he or she was in doubt as to the likely length of the sentence; that it interfered with the power vested in the executive in Section 23 of the Criminal Justice Act 1951; and that such a sentence was not in accordance with the correct principles of penology. He quashed the decision of the Central Criminal Court and imposed a four year term.

Such difficulties did not appear to feature in the mind of Denham J in *The People (DPP) v Philip Sheedy*.[8] While a review date was not appropriate in this case, she said that the facility allowed a judge to impose "an appropriate element of punishment" and "an element of rehabilitation" in cases where an addiction to drugs or alcohol were at the root of the criminal behaviour. In *The People (DPP) v. Aylmer*,[9] only two members[10] of the Supreme Court held that a sentence containing a review clause was valid but they expressed no opinion as to the desirability of such an element. Interestingly, the other three judges[11] said it was unnecessary to say whether such sentences were either valid or desirable.

In the *Finn* case, the Supreme Court, having noted that the issue of the validity or the desirability of such sentences had never been authoritatively resolved, proceeded to set out precisely the limits to be observed by judges when imposing sentences: the only statutory basis for the practice of reviewing sentences is included in the Criminal Justice Act 1999. Section 5 of the 1999 Act provides for the imposition of a mandatory sentence of at least ten years for certain drugs offences covered by section 15A of the Misuse of Drugs Act 1977. Section 5 inserted into section 27 (3) of the 1977 legislation a paragraph which allows for sentences to be reviewed and suspended in circumstances where the court believes that an addiction to one or more controlled drugs gave rise to the conviction of the offence in question.[12]

Referring to section 2 of the Criminal Justice Act 1993, the Supreme Court defined the word 'sentence' as meaning the sentence which is imposed after a determination of guilt of the person charged. Clearly, it does not refer to any order which may subsequently be made. An order made by the trial judge adjourning the imposition of sentence for a period of time in order to afford the convicted person an opportunity of demonstrating a *bona fide* intention of rehabilitating himself is therefore a 'sentence' for the purposes of the section.

However, in this situation there are in effect two sentences imposed and an appeal lies against both. The order deferring sentence could be appealed on the basis that such a sentence was unduly lenient, the circumstances requiring the imposition of an immediate sentence. An appeal would obviously lie from the sentence ultimately imposed. In contrast, a sentence which includes a review date is appealable from the date of its imposition and not from the date on which an order might be subsequently made. The finality of judicial decision is already encroached upon by the inclusion in section 2(2) of the 1993 legislation of the 28-day time limit on appeals being made.

> "The court is satisfied that it would not be consistent with that approach to construe section 2(2) as affording the Director two separate opportunities of applying to the Court of Criminal Appeal, the first arising on the imposition of the sentence containing the review provision and the second when the court actually reviews the sentence in accordance with the first decision. There is nothing in the statutory scheme to suggest that it was the intention of the Oireachtas to permit the DPP to intervene on two separate occasions to obtain a review from the court of what is effectively the same sentence.
>
> "The court is, accordingly, satisfied that, not having applied to the Court of Criminal Appeal within the 28 days prescribed by section 2(2) on the ground that the incorporation of the review procedure was 'unduly lenient' within the meaning of section 2(1), the prosecutor was precluded from making an application to the court in respect of the two orders subsequently made by the trial judge and that the Court of Criminal Appeal was wrong in law in substituting sentences of six years imprisonment and three years imprisonment with no suspension of either sentence for the sentence originally imposed by the trial judge."[13]

The Court recalled the doubt which hung over the inclusion of review dates in the first place. It added:

> "In a matter of such importance, it is to be expected that this court will afford clear guidance to trial judges and accordingly, while mindful of the fact that in legal terms, everything it says on this topic must be regarded as *obiter*, it is satisfied that it is desirable in the public interest that such guidance should be available to trial judges."[14]

Thus, despite the fact that some judges favoured the inclusion of review clauses when imposing sentence, the Supreme Court came down firmly against them and for two reasons. Firstly, when it came to reviewing a sentence, the courts were in effect exercising the power of commutation or remission which is vested exclusively in the Executive. To allow them to

unilaterally assume such a power would be inconsistent with section 23 of the Criminal Justice Act 1951 and would offend the separation of powers mandated by Article 13.6 of the Constitution.[15] According to the Supreme Court:

> "It would seem to follow that the remission power, despite its essentially judicial character, once vested under the Constitution in an executive organ, cannot, without further legislative intervention, be exercised by the courts. That, as has been noted, has been done in the case of certain drugs offences by the Criminal Justice Act, 1999."[16]

Secondly, the practice of reviewing sentences was at variance with the appeal structure prescribed by Order 86 Rule 3 of the Rules of the Superior Courts. This Order states: "Every application for a certificate of the judge of the court of trial that the case is a fit case for appeal shall be made at the close of the trial or within three days thereafter."

In many instances where sentences are reviewed, the convicted person's right to appeal may be seriously compromised if "the close of the trial" refers to the review date and not the date on which guilt has been determined.

Response Sought From Government

Having decided that review clauses should no longer be included by judges when handing down sentence, the Supreme Court made a number of interesting comments which could be interpreted as a polite request to the government to address the difficulty which has now been exposed.

The Court outlined the reasons why the practice of reviewing sentences came into being: the increase in crimes committed by drug addicts; the so-called revolving door syndrome; the absence of any significant legislative initiative; and the haphazard exercise of the executive power of sentence remission.[17] In a forthright passage, the Supreme Court appeared to call on the government to introduce grounding legislation which would provide a legally correct path to the achievement of the honourable motives behind sentence reviews:

> "It now appears extremely desirable, to say the least, that the question of sentence, and any review which is to precede it, should be placed on a clear and transparent basis," the court said. "The Law Reform Commission in its Report on Sentencing[18] reviewed a number of options in this regard. This is not a matter within the competence of this court. It is clearly for the Oireachtas to decide whether to retain the present system unaltered, to retain it on a clearer and more transparent basis, to devolve the function wholly or partly to a parole board or some other entity, or indeed to confer it on the courts. But as the law presently stands, the courts cannot exercise this function in individual cases by reason of the separation of powers mandated in this regard by Article 13 of the Constitution. Nor can they prescribe or advocate an alternative system because that is in the remit of the legislature."[19]

In this context, the reference to the establishment of a parole board appears to be deliberate and therefore significant. It will be interesting to see whether the government follows in the direction shown by the Supreme Court.

Following the decision in *Finn,* judges in the criminal courts are now prohibited from including review clauses when imposing sentence. Already, the new clarity of approach has been followed by the Court of Criminal Appeal. In the case of *The People (DPP) v Patrick Dreeling and Raymond Lawlor*,[20] the Court followed the Supreme Court's interpretation of Section 1(1) of the Criminal Justice Act 1993 in *Finn* and effectively quashed the trial judge's decision to postpone the imposition of sentences.

In the meantime, courts may be inclined to hand down shorter sentences or to rely to a greater degree on the practice of suspending sentences if the orders made in respect of convicted persons are to include appropriate measures of punishment and rehabilitation.•

1 Decision of the Supreme Court delivered on November 24, 2000 by Keane CJ

2 The applicant was convicted by the Central Criminal Court on a plea of guilty in respect of charges of a) rape contrary to section 48 of the Offences Against the Person Act, 1861 as amended by section 2 of the Criminal Law (Rape) Act, 1991 and b) assault occasioning actual bodily harm contrary to section 47 of the Offences Against the Person Act, 1861.

3 The applicant undertook to reside with his uncle in Longford, not to cross the River Shannon, not to go anywhere near Sligo (the home county of his victim) and that he would avail of ongoing therapy.

4 The notice of application, which was lodged on November 18, 1998, stated: "It is submitted that the sentence imposed on October 22, 1998 is unduly lenient having regard to all the circumstances of the case including the gravity of the offence, the unprovoked nature of the assault, the severity of the violence inflicted on the injured party, the Victim Impact Report submitted to the court, the oral evidence submitted to the court by a member of An Garda Siochána in 1996 and 1998, and in particular, the contents of the report prepared by Paul Murphy, clinical psychologist at the Department of Justice dated October 15, 1998, together with a transcript of the evidence tendered before the Central Criminal Court and the judgment of the Central Criminal Court."

5 Mr Blaise O'Carroll, SC.

6 Mr Peter Charleton, SC.

7 *The People (DPP) v Cahill* (1980) IR 8

8 *The People (DPP) v Philip Sheedy,* Unreported, Judgment delivered October 15, 1999.

9 *The People (DPP) v Aylmer.* This case was decided in 1986 but not reported until 1995 ILRM 624.

10 Walsh and McCarthy JJ.

11 Henchy, Griffin and Hederman JJ.

12 Section 5 of the Criminal Justice Act 1999 states: "Section 27 of the Act of 1977 is hereby amended by the insertion after subsection (3) of the following subsections:...(3G) In imposing a sentence on a person convicted of an offence under Section 15A of this Act, a court- (a) may inquire whether at the time of commission of the offence the person was addicted to one or more controlled drugs, and (b) if satisfied that the person was so addicted at the time and that the addiction was a substantial factor leading to the commission of the offence, may list the sentence for review after the expiry of not less than one-half of the period specified by the court under subsection (3B) of this section. 3(H) On reviewing a sentence listed under subsection 3(G)(b) of this section, the court- (a) may suspend the remainder of the sentence on any conditions it considers fit, and (b) in deciding whether to exercise its powers under this subsection, may have regard to any matters it considers appropriate."

13 At page 36 of the *Finn* judgment.

14 At page 37 of the *Finn* judgment.

15 Article 13.6 of the Constitution reads: "The right of pardon and the power to commute or remit punishment imposed by any court exercising criminal jurisdiction are hereby vested in the President, but such power of commutation or remission may, expect in capital cases, also be conferred by law on other authorities.

16 At page 40 of the *Finn* judgment.

17 At page 41 of the *Finn* judgment.

18 LRC [53-96]

19 At page 43 of the Finn judgment.

20 *The People (DPP) v Patrick Dreeling and Raymond Lawlor.* Unreported judgment of the Court of Criminal Appeal delivered on February 27, 2001. Record No: 12CJA/00. In this case, the trial judge convicted the two accused on May 17, 2000 of a number of serious offences but deferred the imposition of sentences until the Hilary term 2001 on condition that directions from the Probation and Welfare service be observed. On February 27, 2001, the Court of Criminal Appeal said this approach ignored the definition of "sentence" included in section 1(1) of the Criminal Justice Act 1993. This provision includes "any other order made the a court in dealing with the convicted person." The court held that this definition excluded the final order of the sentence.

E-COMMERCE PHARMACY LAW

In the first of a two-part article, ***Seamus Clarke BL*** *provides a detailed overview of the regulatory environment pertaining to the pharmacy industry in Ireland, and argues that the present inability to establish an online pharmacy undere Irish law is contrary to the right to earn a livelihood and in breach of fundamental principles of EC law.*

Introduction

It may have started as a prosaic set of wires and switches to enable connectivity between the computers of researchers and technicians but the Internet has now become an unlimited virtual marketplace for the global propagation and sale of ideas, goods and services.[1] This spread of e-commerce is scrutinised closely by national governments, each keen to steal a march on rivals in terms of globalised economies. While the Minister for Public Enterprise speaks of the Electronic Commerce Act 2000 as "landmark" legislation, aimed at "positioning Ireland as a progressive, pioneering e-commerce regulatory environment,"[2] the reality is, of course, that in many instances Ireland has no such environment. This article examines the current regulatory environment which pertains to the pharmacy industry in Ireland. Far from pioneering, it will be shown that an entrepreneur who wishes to establish an online pharmacy in Ireland is prohibited from so doing. It is submitted that this may be contrary to the right to earn a livelihood and fundamental principles of European law, namely free movement of goods, the right of establishment and the free movement of services. This is because the Irish legislation acts as a disproportionate barrier to entry on the pharmacy market that is neither reasonably required by exigencies of the common good nor the least restrictive means to trade between E.U. Member States that is available to the legislator. None of the recent legislative initiatives in relation to e-commerce, the Electronic Commerce Act 2000 or Directive 2000/31/EC on a legal framework for electronic commerce, alter the regulatory regime for Irish pharmacies. The current state of affairs continues to act as a trade barrier to entry on the pharmacy market. Moreover, it puts Irish pharmacies at a competitive disadvantage to their foreign counterparts.

Irish Regulation

Under the Pharmacy Acts 1875-1977, a pharmacy is defined as an establishment open to the public for the compounding or dispensing of medicinal preparations. The Acts also state that medicinal preparations may be dispensed only in a pharmacy where the dispensing is carried out by or under the personal supervision of a pharmacist. Section 2(1) of the Pharmacy Act, 1962 states that:

> "A person shall not keep open shop for the dispensing or compounding of medical prescriptions unless -
>
> (a) the person is an authorised person and the shop and the dispensing and compounding of medicinal prescriptions therein are personally supervised by the person or by an authorised person ..."[3]

"Far from pioneering, it will be shown that under Irish law an entrepreneur who wishes to establish an online pharmacy in Ireland is prohibited from so doing. It is submitted that this may be contrary to the right to earn a livelihood and fundamental principles of European law, namely free movement of goods, the right of establishment and the free movement of services."

Similar language is used in relation to poisons in Regulation 6(1) of the Poisons Act, 1961 (Commencement) Order, 1982. This states that a person "keeping open shop" for the dispensing and compounding of medicinal prescriptions or for the sale of poisons in accordance with the Pharmacy Acts 1875-1977 may only sell a poison provided the transaction is effected by or under the supervision of a pharmacist. Moreover, according to Regulation 6(2) a person shall not sell a poison from a travelling shop, vehicle or automatic vending machine.

The Medicinal Products (Prescription and Control of Supply) Regulations 1996 ("1996 Regulations")[4] deals with the supply of medicines and it classifies that supply into three categories. First, there are various classes of medicines, which must be prescribed on prescription and must be supplied by pharmacies.[5] The second category includes the majority of medicines, namely those medicines that are exempt from prescription control but nonetheless may only be supplied under the supervision of a pharmacist. This is referred to as pharmacist supervised sale ("PSS"). The third category includes substances that are exempt from this PSS requirement such as aspirin, paracetemol, nicotine acid, vitamins and toothpaste components. These products have been exempted from the PSS requirement and they may be supplied in non-pharmacy outlets when contained in over the counter preparations. It is not uncommon to find these products sold in supermarkets and convenience stores.

Old Words: New World

There are two main difficulties for an entrepreneur who wishes to establish an online pharmacy in Ireland. First, in order to sell medicine prescribed on prescription and via PSS, such a person would have to show that it has an establishment open to the public and for the sale of poisons, it would have to show that it is keeping open shop. In essence, one would have to persuade a Court that an online presence is an establishment open to the public and an open shop. In *Greenwood v. Whelan*,[6] the defendant was prosecuted for carrying on a pharmacy business from a stall. The case turned on the meaning of the word "shop" in the Pharmacy and Medicines Act, 1941. Lord Parker C.J. referred to the Shops Acts, 1912 and 1950 wherein the expression "shop" was defined as including any premises where any retail trade or business was carried on. The Lord Chief Justice pointed out that retail trade or business could be carried out in three different ways. These were first, from a shop as defined, secondly, from a place that is not a shop such as a stall, and thirdly, in a way where there is no fixed place such as from a barrow or travelling van. Notwithstanding the regularity of the business, the permanency of the site and the type of the structure, the Court held that the stall in that case was "a place not being a shop." His Lordship then added:

> "If that is the true meaning in the Shops Acts, then it seems to me that it is almost a *fortiori* that that must be the meaning for the purposes of the Pharmacy and Medicines Act, 1941 which is dealing, as the Act provides, with medicines and substances recommended as a medicine; it is an Act designed, amongst other things, to enhance pharmacy and it is dealing with premises which can properly be treated as registered premises."[7]

"There does not appear to be anything in any of the Pharmacy or Poisons Acts which excludes an online establishment or an online shop from the definition of "establishment" or "shop."...It would appear that the Irish courts may abandon the traditional concept of what amounts to a "shop" or "establishment" in favour of a more technologically friendly construction."

The above dictum is a strong encouragement to the courts to maintain a traditional concept of what amounts to a shop for the purposes of the Pharmacy Acts. An online presence, having a cyber as opposed to fixed place of business would seem to fit into the third category of retail trade outlined by Lord Parker C.J. and the outcome of that case offers little solace to any entrepreneur hoping to set up an online pharmacy. On the other hand, it would appear that the Irish courts are keen to interpret older legislation with modern technology in mind. In *Keane v. An Bord Pleanala*,[8] Murphy J. stated that:

> "Where terminology used in legislation is wide enough to capture a subsequent invention, there is no reason to exclude it from the ambit of the legislation. But a distinction must be made between giving an updated construction to the general scheme of legislation and altering the meaning of particular words used therein."[9]

In that particular case, both the High Court and a majority of the Supreme Court[10] held that, having regard to the current use of language, although the word "beacon" did include the Loran-C radio navigation mast, that system was not a beacon within the meaning of the Merchant Shipping Act, 1894. The reasoning of the majority of the Supreme Court is clear from the judgment of Barrington J. where he states:

> "Had the Act of 1894 simply entrusted to the Commissioners of Irish Lights the management of "aids to navigation" I would be happy to conclude that the Loran-C system of navigation was an aid to navigation within the meaning of the Act of 1894, even though the system had not been invented when the Act was passed. But the trouble is that the draftsman of the Act of 1894 appears to have used terms which tie the Act to the technology of the times ... [W]hen it came to beacons, he merely said "buoys and beacons include all other marks and signs of the sea" ... The Loran-C system of longterm navigation ... exists to enable seamen and airmen who may be out of sight of land to pinpoint their position and plot their journey. It is not necessarily concerned with approaching or leaving coastal waters or with avoiding collisions with islands or rocks. In no way could it be described, in ordinary language, as a mark or sign of the sea."[11]

In *Mandarim Records Ltd. v. Mechanical Copyright Protection Society (Ireland)*,[12] Barr J. was able to reach a different conclusion. He again stated:

"There is no doubt that the wonders of contemporary computer technology and in particular the concept of adding a visual dimension to a disc of sound recordings would not have been contemplated by the drafter of the Act or by the legislators who brought it into law. However, that is not *per se* a ban to the inclusion of new technologies within an existing statutory framework. On the contrary, it is patently desirable that, where possible advances in technology, even those which could not have been envisaged by the framers of an Act, should be accommodated in statutory interpretation by the court, but only where that can be done without straining the words used beyond their ordinary meaning and having paid due regard to the structure and intent of the statute."[13]

His Lordship then went on to hold that Power CDs on which sound, text, graphics and visual images were recorded constituted records for the purposes of the Copyright Act, 1963. He concluded:

"In my opinion there is nothing in the definition of "record" in s. 2 or elsewhere in the Act which excludes the added visual dimension which is the distinguishing feature of a Power CD. The adoption of a broad interpretation in this case does not distort the statutory definition of "record" or do violence to the wording thereof."[14]

It appears that an Irish court would only hold that an online pharmacy is both "an establishment open to the public" and an establishment that is "keeping open shop" if it considers that this is not distorting or doing violence to the statutory definitions of "establishment" or "shop." There does not appear to be anything in any of the Pharmacy or Poisons Acts which excludes an online establishment or an online shop from the definition of "establishment" or "shop." In fact, since none of the statutes offer a definition of either of those terms, it appears that there is no definition to be distorted. Therefore, despite the various dicta of Lord Parker C.J. in *Greenwood v. Whelan*, it would appear that the Irish courts may abandon the traditional concept of what amounts to a "shop" or "establishment" in favour of a more technologically friendly construction.

Regulation 13 of the 1996 Regulations

However, even if one were to overcome that hurdle, the second and most serious difficulty for an entrepreneur who wishes to establish an online pharmacy in Ireland is that Regulation 13(1) of the 1996 Regulations prohibits the "supply by mail order ... [of] any medicinal product." The term "supply by mail order" is defined as "any supply made, after solicitation of custom by the supplier, without the supplier and the customer being simultaneously present and using a means of communication at a distance, whether written or electronic to convey the custom solicitation and the order for supply." The phrase "medicinal product" is a relatively new phrase in Irish legislation[15] and it is not defined in the 1996 Regulations. However, the term is defined in Council Directive 65/65 on proprietary medicinal products and the Irish Medicines Board Act, 1995 as any substance or combination of substances either (a) presented for treating or preventing disease in human beings or animals, or (b) which may be administered to human beings or animals with a view to making a medicinal diagnosis or to restoring, correcting or modifying physiological functions in human beings or animals. If this definition is also accepted for the purposes of the 1996 Regulations, then the sweep of Regulation 13(1) is indeed wide. In effect, a pharmacist is not legally permitted to sell via mail order (including e-mail order) any medicine, whether that is prescription drugs, medicines sold via PSS or even certain non-restrictive medicines such as aspirin or paracetemol. Thus, although it is perfectly lawful for a convenience store or supermarket to supply aspirin or paracetemol, because these substances are capable of modifying physiological functions in human beings, their supply by an online pharmacy is unlawful. An online pharmacy is, therefore, limited to selling other non-medicinal products often found in pharmacies such as toothpaste, moisturisers or shampoo.[16]

Furthermore, Regulation 13(2) of the 1996 Regulations provides that an owner or occupier of any premises shall not use or permit the use of such premises for the receipt, collection or transmission of orders or correspondence in connection with the supply by mail order of medicinal products. This not only means that it is an offence for a pharmacist to operate a premises which receives e-mail orders but it is also an offence for another pharmacy to dispense the finished product on foot of such an order and it may also be an offence for any postal or messenger service to use its premises as a conduit for the delivery of the finished product to the customer.

In relation to poisons, there is no express rule in the Poisons Act or Regulations that prohibits supply by mail order of poisons. However, if a poison is construed as amounting to a substance which may modify physiological functions in human beings or animals, it also comes within the definition of medicinal product. Therefore, its sale by mail order (including e-mail order) would also be unlawful.

Constitutional law

It is submitted that the regulatory regime and specifically Regulation 13 of the 1996 Regulations may be an unjust attack on the individual's unenumerated constitutional right to earn a livelihood. However, it is clear from the case law in this area that those who seek to upset alleged statutory restrictions on their right to earn a livelihood face an uphill battle. For example, in *Cafolla v. O'Malley and Attorney General*[17], the plaintiff sought to invoke his constitutional right to earn a livelihood in an attempt to impugn certain sections of the Gaming and Lotteries Act, 1956. The plaintiff was the proprietor of an amusement arcade and he operated gaming machines as defined in the

"It is clear from the case law in this area that those who seek to upset alleged statutory restrictions on their right to earn a livelihood face an uphill battle...To succeed in challenging the Irish regulatory regime and in particular, Regulation 13 of the 1996 Regulations, an entrepreneur will have to show that such regulation is not reasonably required by the exigencies of the common good."

1956 Act. He argued that while section 14(b) and (d), which limited the stake and prize in every game to 21/2p and 50p respectively, might have been constitutional in 1956, they now infringed his constitutional right to earn a livelihood. While Costello J. in the High Court accepted that a statute which was initially valid might be rendered unconstitutional by subsequent events, the learned judge went on to state that laws which have an obvious effect on the profitability of ones business do not necessarily conflict with the Constitution:

> "Laws may, for example, with constitutional propriety prohibit fishermen from fishing at certain times and limit the nature and size of their catches, restrict the hours of trading in licensed premises, fix the price at which goods can be sold or services remunerated, all of which adversely affect the livelihood of those engaged in the activity concerned. Laws may even prohibit an existing business activity ... "[18]

Costello J. stated that in order to successfully impugn section 14(b) and (d) of the Gaming and Lotteries Act, 1956, the plaintiff would have to establish that those sections were no longer reasonably required by the exigencies of the common good. As Kenny J. stated in *Ryan v. Attorney General*:

> "None of the personal rights of the citizen are unlimited: their exercise may be regulated by the Oireachtas when the common good requires this. When dealing with controversial social, economic and medical matters on which it is notorious views change from generation to generation, the Oireachtas has to reconcile the exercise of personal rights with the claims of the common good and its decision on the reconciliation should prevail unless it was oppressive to all or some of the citizens or unless there is no reasonable proportion between the benefits which the legislation will confer on the citizens or a substantial body of them and the interference with the personal rights of the citizen."[19]

However, in *Cafolla*, the plaintiff was unable to satisfy either the High or Supreme Court that it would be unreasonable for the Oireachtas to conclude that present day social conditions required the maintenance of the 1956 stake and prize amounts. In *Hand v. Dublin Corporation*,[20] the Supreme Court again held that the right to trade and earn a livelihood was not unqualified. It was open to the Oireachtas to provide for strict control and regulation of casual trading in public places, having regard to the exigencies of the common good. Similarly, in *Shanley v. Galway Corporation*[21] the plaintiff was prohibited from trading in a particular area of Galway. McCracken J. held that if the plaintiff had been singled out and prevented from earning a living in a way in which others were permitted to, he would have a very strong case. However, the condition was imposed for the common good by the local authority who considered it undesirable that casual trading in food should be allowed in that particular area of Galway.

One of the few cases where the constitutional right to earn a livelihood was successfully invoked was *Cox v. Ireland*[22], where Section 34 of the Offences Against the State Act, 1939 was considered by the Supreme Court. That section, *inter alia*, disqualified a person convicted by the Special Criminal Court of a scheduled offence from holding an office or employment remunerated out of public monies for seven years from the conviction. The Supreme Court[23] noted that this provision constituted a major inroad both on the unenumerated constitutional right of a convicted person to earn a living and on certain property rights protected by the Constitution, such as the right to a pension, gratuity or other emolument already earned, or the right to a subsisting contract of employment.[24] The Court accepted that the State was "entitled, for the protection of public peace and order, and for the maintenance and stability of its own authority, by its laws to provide onerous and far-reaching penalties and forfeitures"[25] on convicted persons who threaten such peace and order and that it was also entitled to ensure that such persons were not involved in carrying out the functions of the State. This did not mean, however, that the Oireachtas could impose whatever laws it wished and if Section 34 constituted a "failure of such protection not warranted by the objectives which it sought to secure"[26] it would be unconstitutional.[27] Since the range of offences covered by the mandatory disqualification in Section 34 was so broad as to include offences of widely varying degrees of seriousness, it affected persons whose motive or intention in committing a scheduled offence bore no relation at all to any question of the maintenance of public peace and order or State authority. Thus, Section 34 was disproportionate. It had not "as far as practicable"[28] protected the individual's right to earn a livelihood; it was "impermissibly wide and indiscriminate"[29] and so, was unconstitutional.

To succeed in challenging the Irish regulatory regime and in particular, Regulation 13 of the 1996 Regulations, as an unconstitutional interference with the right to earn a livelihood, an entrepreneur will have to show that such regulation is not reasonably required by the exigencies of the common good. Presumably, Regulation 13 was enacted to ensure that, due to the lack of person-to-person contact in online trading, medicine and prescription drugs did not get into the wrong hands. There is no doubt that this is both a genuine and commendable motive. However, if an online pharmacy were to pass on a prescription to an established pharmacy outlet where the customer could collect the finished product, this places no stress on the standards that the Minister seeks to enforce. Also, other legislation such as the Misuse of Drugs Act states that a pharmacist may supply drugs to a messenger, if satisfied that messenger is bona fide, for example if the messenger produces something in writing from the purchaser.[30] Thus, Regulation 13 acts as a blanket ban preventing an online pharmacy from trading, although it might be in a position to comply with all other standards that the Minister is seeking to enforce. Since the particular standard in Regulation 13 could be achieved by means less restrictive on an online pharmacy, it is submitted that the Regulation is overly wide and discriminate and so, not reasonably required by the exigencies of the common good.

"Regulation 13 acts as a blanket ban preventing an online pharmacy from trading, although it might be in a position to comply with all other standards that the Minister is seeking to enforce. Since the particular standard in Regulation 13 could be achieved by means less restrictive on an online pharmacy, it is submitted that the Regulation is overly wide and discriminate and so, not reasonably required by the exigencies of the common good."

E.U. Law

It may also be argued that the Irish legislative restrictions and specifically Regulation 13 of the 1996 Regulations are inconsistent with principles of European law, whether pursuant to provisions in the EC Treaty dealing with the free movement of goods or those dealing with the right of establishment and the free movement of services. Article 28 (ex 30) of the EC Treaty deals with free movement of goods and states that "quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States." Article 43 (ex 52) of the EC Treaty deals with the right of establishment and states that "restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited." Article 49 (ex 59) of the EC Treaty deals with the freedom to provide services and states that "restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are provided."

"Even where the European Court of Justice has recognised that mandatory requirements such as the protection or health of consumers are legitimately worthy of protection, it has often concluded that those interests could be perfectly well protected by measures which are more proportionate, i.e. less restrictive of trade between Member States."

Article 28 EC

In *Procureur du Roi v. Dassonville*,[31] the European Court of Justice set out the standard definition of the scope of Article 28 EC when it stated that measures equivalent to quantitative restrictions were "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade."[32] The *Dassonville* formula appeared to be of sweeping scope and in Cassis de Dijon,[33] it became clear that not only did Article 28 EC cover distinctly applicable measures, i.e. those measures that clearly discriminate against imports, but it also covered indistinctly applicable measures, i.e. those measures that make no distinction between domestic and imported goods but which may, nonetheless, restrict trade. In *Cassis de Dijon*, the Court penned the principle of mutual recognition.[34] This principle plays a key role in opening the Single Market in all those sectors which have not been the subject of harmonisation measures at Community level or which are merely covered by marginal or optional harmonisation. It states that if a producer has complied with the requirements of his country of origin, he has the right to sell his goods in all the other Member States. This principle is subject to a further rule related to mandatory requirements:

> "Obstacles to movement in the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognised as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer."[35]

The rule related to mandatory requirements can be seen as a recognition by the European Court of Justice that, pending action at Community level, Member States may wish to enact indistinctly applicable measures to ensure that certain interests or values are guaranteed in the general interest. In that sense, the rule operates so as to accept certain indistinctly applicable measures, notwithstanding the terms of Article 28 EC, pending appropriate guarantees adopted at Community level for the interests or values concerned.[36] Therefore, the essence of *Cassis de Dijon* is that it allows goods to move freely within the E.U., while avoiding extreme harmonisation at Community level and respecting the diversity of practices, customs and regulations in the various Member States. However, a measure that a Member State seeks to justify under mandatory requirements must be proportionate[37] and necessary[38] to satisfy the need of the interest which it seeks to protect. Even where the European Court of Justice has recognised that mandatory requirements such as the protection or health of consumers are legitimately worthy of protection, it has often concluded that those interests could be perfectly well protected by measures which are more proportionate, i.e. less restrictive of trade between Member States.[39]

In *Keck and Mithouard*[40], the Court turned its attention to the increasing tendency of traders to invoke Article 28 EC in order to challenge rules which, although limiting their commercial

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freedom, were not aimed at goods from other Member States. The Court stated that, contrary to what had been previously decided:

> "the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder, directly or indirectly, actually or potentially trade between Member States within the meaning of the Dassonville judgment (Case 8/74 [1974] ECR 837) provided that those provisions apply to all affected traders operating within the national territory and provided that they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States."[41]

Therefore, once the conditions of equality are met, a selling arrangement will fall outside the scope of application of Article 28 EC. The reasoning for this is that selling arrangements do not have as their purpose the regulation of trade in goods between Member States and their impact applies equally to both domestic producers and importers alike. In *Keck and Mithouard*, the Court did not offer a definition of selling arrangement but it does appear that the Court was attempting to exempt from Article 28 scrutiny rules which affect the commercial environment generally but have no impact on the nature and characteristics of the goods themselves. Thus, in *Hünermund and Others v. Landesapothekekerkammer Baden-Württemberg*[42] the Court found that Article 28 EC did not apply to a rule prohibiting pharmacists from advertising para-pharmaceutical products outside their pharmacies. By hampering product promotion, such rules doubtlessly restricted volumes of sales, including the volume of sales of imported para- pharmaceutical products, but this was insufficient to trigger Article 28 EC. Likewise, in *Leclerc-Siplec*[43] the Court accepted that prohibition of television advertising in the distribution sector deprived traders of a particular form of advertising their goods. This restricted the volume of sales, including the sale of imports. The national rule fell on all fours with *Keck and Mithouard*; it was a selling arrangement, it applied equally to all traders and it affected the marketing of products in the same manner irrespective of origin. Thus, Article 28 EC was inapplicable.

The Court revisited the issue in *De Agostini Forlag AB*[44] which concerned the regulation in Sweden of forms of television advertising targeted at children below 12 years of age. The Court was emphatic that the measure applied to all traders, importers or otherwise, operating within the national territory. However, the Court dwelt at more length on the proviso in *Keck and Mithouard* that Article 28 EC will be applicable if the challenged rule does not ffect in the same manner, in law and in fact, the marketing of domestic and imported products. The Court accepted that an outright ban imposed on a type of promotion might have a greater impact on imports from other Member States that would otherwise have been marketed using the suppressed form of promotion and it left the decision to the referring national Court as to whether this inequality was present in the case itself.[45] However, this was not before the Court noted that the trader had "stated that television advertising was the only effective form of promotion enabling it to penetrate the Swedish market, since it had no other advertising methods for reaching children and their parents."[46] The Court's remarks in this regard cannot be underestimated. Advertising and sales techniques are often vital in the targeting of a new market and the automatic exclusion of their regulation from Article 28 EC scrutiny and the standards developed by the Court in *Cassis de Dijon* risk damaging the dynamic potential of the internal market and the realisation of economies of scale.[47]

One of the lessons from *De Agostini Forlag* AB must be that a trader has to demonstrate how the denial of a particular form of promotion or sales technique is especially damaging to an importer seeking to exploit the market. In the case of a pharmacy established in another Member State, perhaps the only realistic way it can break into the Irish market is via online trade. This is particularly so in light of the geographical constraints that are imposed on the permitted locations of pharmacy outlets in Ireland.[48] In such circumstances, the denial of a right to supply medicinal products by mail order will be particularly damaging to an importer. If it can be shown that Regulation 13 of the 1996 Regulations prevents the only effective means of promotion which is capable of securing the entry of foreign pharmacies to the Irish market, then *Keck and Mithouard* is inapplicable and Regulation 13 of the 1996 Regulations falls to be analysed under the standards developed by the European Court of Justice in *Cassis de Dijon*. While it is likely that the Irish government would succeed in justifying its regulatory regime as necessary to achieve the mandatory requirements of consumer protection or public health, it is submitted that this regime would still fall foul of the rule of proportionality. For example, if an online pharmacy were to pass on a prescription to an established pharmacy outlet in the customer's Member State where the customer could collect the finished product, such would place no stress on the standards that the Minister seeks to enforce via Regulation 13. Thus, the outright ban in Regulation 13 is contrary to Article 28 EC since it is not the least restrictive means to trade between Member States that is available to the Irish legislator.•

"While it is likely that the Irish government would succeed in justifying its regulatory regime as necessary to achieve the mandatory requirements of consumer protection or public health, it is submitted that this regime would still fall foul of the rule of proportionality. For example, if an online pharmacy were to pass on a prescription to an established pharmacy outlet in the customer's Member State where the customer could collect the finished product, such would place no stress on the standards that the Minister seeks to enforce via Regulation 13."

1. See Hafner, K. and Lyon, M., *Where Wizards Stay Up Late* (Simon & Schuster, New York, 1996); Reid, R., *Architects of the Web* (John Wiley, London, 1999); Akdeniz, Y., Walker, C. and Wall, D., *The Internet, Law and Society* (Pearson Education Limited, Harlow, 2000).
2. The Irish Times, 16 June, 2000.
3. *Per* s. 2(1)(b), the person may also be the legal personal representative of a person who at the time of his death was lawfully keeping open shop or the trustee or committee of a person lawfully keeping open shop who is adjudged a bankrupt, debtor or of unsound mind and *per* s. 2(1)(c), the person may be a body corporate.
4. The Medicinal Products (Prescription and Control of Supply) Regulations 1996 ("1996 Regulations") came into force on September 1, 1996 and replace the Medicinal Preparations (Prescription and Control of Supply) Regulations 1993, which are now revoked.
5. The classes involved are (a) all injectable medicines (b) any medicine containing a substance listed in the First Schedule, with certain exceptions, and (c) any medicine containing a new chemical molecule.
6. [1967] 1 All E.R. 294, [1967] 2 W.L.R. 289, [1967] 1 Q.B. 396. See also *Summers v. Roberts* [1943] 2 All E.R. 757 and *Manchester City Council v. Walsh* (1985) 82 L.S.G. 1716.
7. *Ibid.* at 297.
8. [1997] 1 I.R. 184.
9. *Ibid.* at 193. This section of the High Court judgment of Murphy J. was expressly approved by Hamilton C.J. in the Supreme Court at 214.
10. Hamilton C.J., Blayney and Barrington JJ., O'Flaherty and Denham JJ. dissenting.
11. [1997] 1 I.R. 184, 234-5.
12. [1999] 1 I.L.R.M. 154.
13. *Ibid.* at 159.
14. *Ibid.* at 160.
15. The phrase "medicinal preparation" was defined in the Health Act, 1947 and up until the entry in to effect of the Irish Medicines Board Act, 1995, which was 13 February, 1996, it was the Act under which Regulations relating to the manufacture, distribution, supply and classification of medicines for human use were made by the Minister for Health. Section 32 of the Irish Medicines Board Act, 1995 provided that the power of the Minister to make Regulations in these matters would, in future, be exercised pursuant to the Irish Medicines Board Act, 1995 which refers to the phrase "medicinal product." Consequently, the phrase "medical preparation" is now defunct and the official description of a medicine for human use is that of "medicinal product."
16. See, e.g. **www.eirpharm.com**, an Irish online pharmacy which sells these limited products.
17. [1985] I.R. 486.
18. *Ibid.* at 494.
19. [1965] I.R. 294, 312-313.
20. [1991] 1 I.R. 409.
21. [1995] 1 I.R. 396.
22. [1992] 2 I.R. 503. The right to earn a livelihood was also alluded to in *Barry v. South Eastern Health Board*, unreported, High Court, December 18, 1986 when McKenzie J. quickly killed the suggestion that a doctor in the General Medical Services Scheme must obtain the consent of the relevant Health Board before he could also operate a private surgery. He stated at p. 7:
    "A doctor has a constitutional right to earn his living, and I see here an attempt by the hand of the State to squeeze the freedom of the medical profession."
23. Finlay C.J., Hederman, McCarthy, O'Flaherty and Egan JJ. concurring.
24. The Court stated that having regard to the number of employed persons funded by public monies, such a provision was "a major curtailment of ... [ones] earning capacity" and was a major invasion of those property rights that the Court had noted. *Ibid.* at 523.
25. *Ibid.* at 522-3.
26. *Ibid.* at 523.
27. See, also the similar remarks of the Supreme Court in the recent case, *In the matter of Article 26 of the Constitution and in the matter of the Employment Equality Bill*, 1996 [1997] 2 I.R. 321, 367. The Court held, *inter alia*, that the obligation on an employer to provide special treatment and facilities for disabled employees infringed an employer's constitutional right to earn a livelihood and his constitutional right to property. The Court praised "the totally laudable aim of making provision for such of our fellow citizens as are disabled" but stated that "what is or is not required by the principles of social justice or by the exigencies of the common good is primarily a matter for the Oireachtas and this Court will be slow to interfere with the decision of the Oireachtas in this area. But it is not exclusively a matter for the Oireachtas. Otherwise ... [the concept of the common good and] the section of the Constitution devoted to the directive principles of social policy the application of which by the Oireachtas in the making of laws is withdrawn from the consideration of the courts."
28. [1992] 2 I.R. 503, 524.
29. *Ibid.* at 524.
30. Section 17(1)(f) of the Misuse of Drugs Regulations, 1988 (S.I. No. 328 of 1988).
31. Case 8/74 [1974] E.C.R. 837.
32. *Ibid.* at para. 5.
33. Though more commonly referred to by the name of the product with which the litigation was concerned, the correct name of the case is Case 120/78 *Rewe-Zentrale v. Bundesmonopolverwaltung für Branntwein* [1979] E.C.R. 649.
34. Ibid. at para. 14.
35. Ibid. at para. 8.
36. See L.W. Gormley, Prohibiting Restrictions on Trade within the EEC (1985) at 53.
37. See e.g. Case 261/81 *Walter Rau Lebensmittelwerke v. De Smedt PvbA* [1982] E.C.R. 3961 at 3973-4.
38. While, technically, the question whether a measure is necessary for a particular purpose is separate from the question whether it is proportionate, which is really a question of testing to see whether there is a less restrictive alternative, the European Court of Justice has often treated both questions as running in tandem. See e.g., Case 159/78 EC Commission v. Italy [1979] E.C.R. 3247 at 3258-9; Case 42/82 *EC Commission v. France* [1983] E.C.R. 1013 at 1047-8; Case 72/83 *Campus Oil Ltd. v. Minister for Industry & Energy* [1984] E.C.R. 2727 at 2753-5.
39. See e.g. Case 120/78 *Rewe-Zentrale v. Bundesmonopolverwaltung für Branntwein* [1979] E.C.R. 649 at 664; Case 193/80 EC *Commission v. Italy* [1981] E.C.R. 3019 at 3036; Case 261/81 *Walter Rau Lebensmittelwerke v. De Smedt PvbA* [1982] E.C.R. 3961 at 3974.
40. Joined Cases C-267 and C-268/91 [1993] E.C.R. I-6097, [1995] 1 C.M.L.R. 101.
41. Ibid. at para. 16.
42. Case C-292/92 [1993] E.C.R. I-6787.
43. Case C-412/93 [1995] E.C.R. I-179.
44. Joined Cases C-34-36/95 [1997] E.C.R. I-3843.
45. *Ibid.* at para. 42-3.
46. *Ibid.* at para. 43.
47. See Weatherill and Beaumont, EU Law (1999, London) at 616-7.
48. See Health (Community Pharmacy Contractor Agreement) Regulations 1996 (S.I. No. 152 of 1996) and Anne Marie O'Connor, *Pharmacies and Neighbourhood Planning*, 1997 4(2) I.P.E.L.J. at 57-8.

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VERVIEW OF THE INTOXICATING LIQUOR ACT 2000

Constance Cassidy SC *outlines the principal changes introduced by the Intoxicating Liquor Act 2000 and reminds practitioners, in particular, that the time limit for upgrading restricted publican's licences expires on 5 July 2001.*

Introduction and Overview

The main provisions of the Intoxicating Liquor Act 2000 came into force on 6 July 2000 pursuant to Statutory Instrument No. 207 of 2000. The Act amends and extends the existing law relating to licensed premises and registered clubs in the following principal ways:

(a) **Amendment of Prohibited Hours**
The amendment to permitted hours applies in respect of all licensed premises, clubs and premises to which there is attached a special restaurant licence.

(b) **Mixed Trading**
The concept of mixed trading has been abolished.

(c) **Special Exemption Orders**
(i) The Court has a discretion to grant a special exemption order up until 2.30am (on weekdays) unless for stated reasons it considers it expedient to grant the order for a shorter period.
(ii) All holders of licences can now apply for special exemption orders and there is no need to prove that the premises in respect of which the order is sought are an hotel or a restaurant.

(d) **Drinking Up Time**
This is permitted after the expiry of the time during which the special exemption order is granted.

(e) **Temporary Closure Order**
The Court must impose a temporary closure order in respect of licensed premises where there has been a conviction relating to under age persons.

(f) **Offences**
The defence of reasonable belief that an under age person was over the age of 18 years has been abolished in relation certain under age offences.

(g) **Grant of New Licences**
A number of the jurisdictional exceptions to the general prohibition on the grant of new on and off licences have been repealed. In their stead, an application can be made for an on or off licence and the following provisions apply:
(i) the licence to be proffered for extinguishment can be a licence attached to any premises within the State;
(ii) this licence can be a licence of the same character as the licence being sought or it can be a full licence i.e. a full seven day publican's licence.
(iii) The Applicant must prove that the premises, the subject of the application, was never previously licensed.

(h) **Hotel Licence - Upgrade**
(i) There is now provision for upgrading the conditional licence known as a hotel licence to the unconditional publican's licence.
(ii) Further the hotel licence, namely the licence granted pursuant to the provisions of Section 2 Paragraph 2 of the Licensing (Ireland) Act, 1902, which has no public bar facilities (i.e. where there is no order pursuant to the provisions of Section 19 of the Intoxicating Liquor Act 1960) can, following a successful application under Section 20 (1) of the Act of 2000, be deemed to be a hotel licence in respect of which an order under the said Section 19 was made.

(i) **Ad Interim Transfer**
In an application for an Ad Interim Transfer the Applicant must now establish to the satisfaction of the Court that he is a fit person.

(j) **Wine Retailer's Licence**
The holder of a wine retailer's on licence can offer beer for sale and consumption on his premises where he satisfies certain conditions contained in Section 26 of the Act.

(k) **Special Restaurant Licence**
An Applicant for a special restaurant licence does not now have to prove to the Court that the premises are registered with Bord Fáilte.

(l) **Wine Retailer's Off Licence**
A wine retailer's off licence can be granted without the necessity of proving that the Applicant is a chemist or holds a spirit or beer retailer's off licence.

(m) **Application to Revenue Commissioners for Licence**
An application by a limited liability company or a person carrying on business under a name that is not that of the beneficial owner of the business must produce certain documentation to the Revenue Commissioners when applying for grant, transfer or renewal of a licence.

Restricted Licences

Practitioners should be alert to the entitlement of publican clients who hold a restricted licence to upgrade the restricted licence to an ordinary publican's licence and to the fact that the time limit for doing this expires one year from the 6th of July 2000.

Definition of Restricted Licence

"Restricted licence" is defined by Section 19 of the Intoxicating Liquor Act 2000 as :

(i) "a publican's licence which is not a full licence; or
(ii) a beer house licence within the meaning of Part II of the Finance (1909-10) Act 1910.

A restricted licence is one of the following:

(i) A six day licence.
(ii) An early closing licence; and
(iii) A beer house licence. A beer house licence is also known as a beer retailer's on licence. It is rarely applied for as a spirit retailer's on licence which is also known as a publican's licence, authorises the sale of any liquor.

Section 19 of the Intoxicating Liquor Act 2000 provides for the grant by the Revenue Commissioners to the holder of a restricted licence of a full seven day publican's on licence once certain conditions (set out hereunder) have been satisfied.

Time Limit

Section 19 becomes redundant on the 5th of July 2001 as Section 19(2) specifically provides that an application to upgrade a restricted licence to a full licence must be made within one year after the commencement of the section. It is therefore imperative that the practitioner alert his publican clients who hold a restricted licence that the application for a full licence in its stead must be made before the 5th of July 2001.

Application

The application is made to the Revenue Commissioners.

Role of the District Court Clerk

The appropriate District Court Clerk must enter a statement where an ordinary licence has been issued in respect of the premises to the effect that the premises may not be disposed of, or the licence transferred, or consent given to its extinguishment for reward, within the period of five years after the date of the first issue of the full licence.

Role of the District Court

The District Court may waive or modify compliance with the prohibition not to dispose of or transfer or give consent to the extinguishment for reward of the full licence within the said five year period.

Conditions

The Revenue Commissioners will grant a full seven day publican's on licence subject to the following conditions:

1. That the sum of £2,500 is paid.

2. That the Applicant has satisfied the Revenue Commissioners that he or she held the restricted licence for the whole of a period of five years immediately preceding the 6th of July 2000.

3. If the Applicant cannot establish Condition 2 then he or she must prove that within the period of five years immediately preceding the 6th of July 2000 that he or she :
   (a) inherited the premises; or
   (b) was given the premises by a relative (the expression of "relative" is defined in Section 19(1) of the Act of 2000); or
   (c) was a tenant of the premises; or
   (d) purchased the premises as a going concern within that period.

4. The final condition is contained in Section 19(4)(c) of the Intoxicating Liquor Act 2000 and this is where the Applicant must undertake not to dispose of the premises as a licensed premises, or transfer the full licence, or consent to its extinguishment within a period of five years after the date of the first issue of the full licence. However, as can be seen above the District Court has a discretion to waive or modify compliance with these conditions where the licensee can prove hardship.

Conclusion

An application under Section 19 cannot be brought after the 5th of July 2001. Practitioners therefore would be prudent to ensure that they advise their clients that the opportunity to upgrade their licences must be availed of prior to the date referred to.

THE RIGHT TO BODILY INTEGRITY AND THE EVOLUTION OF A RIGHT TO A HEALTHY ENVIRONMENT

In the second part of a three part article, ***Maria J. Colbert BL*** *considers developments under the European Convention on Human Rights.*

Introduction

Lack of sufficiently detailed information on the risks to human health posed by certain technological dangers, including nuclear establishments and the treatment of nuclear waste, means that the effects of exposure to radionuclides accidentally released into the atmosphere, particularly in small amounts, is difficult to quantify. While the risk of nuclear accidents has declined as older nuclear plants have been taken out of service and fewer new plants built, the increasing deterioration of older plants in Eastern Europe has nonetheless increased the overall risk of nuclear incident.[1] Some older reactors typical in Eastern Europe are considered to have serious design deficiencies.[2] Even in Western Europe, evidence of very considerable levels of pollution exists. A study of the soil pollution caused by the Sellafield reprocessing plant concluded that levels of radioactive pollution 11km from Sellafield were many times higher than 800m from the damaged nuclear reactor in Chernobyl. For instance, per kilogram of soil near Sellafield, the levels of the radioactive isotopes Americum-241 were twenty times as high, of Cobalt-60 four times as high, and of Caesium-137 one fifth more than at the Chernobyl reactor. Until the 1970s, much of the cooling water used in the reactors - and large amounts of other radioactive waste - was simply emptied into the Irish Sea. By an unusual phenomenon, the sea spray in the Irish Sea contains levels of radioactive substances, like plutonium, up to one hundred times higher than in the sea itself. Sellafield is the source of more than four-fifths of the levels of radioactivity to which an average European is exposed to in the course of a year.[3] Yet, independent advisory groups which have investigated the causes of the abnormally high number of children suffering from leukaemia in the area around the nuclear reactor at Sellafield, have not been able to determine the reason. On foot of a later study indicating a statistical association between the incidence of leukaemia and relatively high rcorded doses of radiation received by their fathers employed at the plant prior to their conception, two actions were brought against the authority responsible for the Sellafield reactor by plaintiffs suffering from cancer. Both were unsuccessful; the Court held that the plaintiffs had not discharged the burden of proof that paternal preconception radiation was a cause of their diseases.[4] The judicial interpretation of the scientific evidence in that litigation has been relied on by the European Court of Human Rights in assessing whether childhood leukaemia was to be attributed to paternal preconception radiation.[5]

Calls for the recognition of human rights violations caused by the human impact of environmental pollution have grown louder. Few Constitutions contain an express right to a healthy environment and those which do have a poor record of observance of the right. In order to mount an individual rights challenge to actions which have caused environmental damage and consequent damage to health, an injured person must be able to demonstrate that to the right to bodily or physical integrity, protected under instruments such as the Irish Constitution, the German Grundgesetz, and the European Convention on Human Rights, has been violated. This article examines the development of the right to respect for physical integrity under the European Convention on Human Rights. Part III, forthcoming, will analyse comparable developments under the Irish Constitution.

Physical Integrity under the European Convention on Human Rights

Although neither the Convention nor its protocols include any specific guarantee of the right to a safe environment, the existing rights of individuals have proven to be of assistance to those seeking to challenge activities which have damaged their environment and threatened their physical integrity. The right to life under Article 2 is an absolute right and not generally subject to exception on the grounds of justified interference. Article 2 has been interpreted not merely as a bar to state action endangering life, but also as imposing an obligation to take steps to safeguard life, and probably includes a duty to

"The right to life has not always been relied upon by applicants in cases involving physical integrity and the environment, and even where it has been raised, the Court has often regarded it as unnecessary to examine claims under Article 2...In cases involving damage to health caused by environmental pollution, particular judicial attention has been paid to the right to respect for private and family life and home under Article 8."

protect the general public from life-threatening hazards present in the environment, where such hazards can be attributed to state action or inaction, although the Court has been silent on this point.[6] The right to life has not always been relied upon by applicants in cases involving physical integrity and the environment, and even where it has been raised, the Court has often regarded it as unnecessary to examine claims under Article 2.[7] Exceptional circumstances apart, it is likely that causation will be difficult to prove, and a high degree of discretion will be afforded to state action taken to regulate hazards in the light of known risks.[8]

In cases involving damage to health caused by environmental pollution, particular judicial attention has been paid to the right to respect for private and family life and home under Article 8. Article 8(2) permits interference with those rights by a public authority where it is in accordance with law and necessary in a democratic society for specified purposes. Major environmental incidents, such as Chernobyl, occurring in countries bound by the Convention, could give rise to claims by victims against the authorities for failure to protect their rights under Articles 2 and 8.

Decisions on plant emissions

In the leading case of *Lopez Ostra v. Spain*,[9] the European Court of Human Rights considered an application involving a plant for the treatment of liquid and solid tannery waste, built with a state subsidy and operating without the requisite licence. From the start, the plant caused health problems and nuisance to the people of the locality who had to be evacuated. While the plant had eventually been partially shut down, the Court accepted evidence that certain nuisances continued and might endanger the health of those living nearby. In particular, there was medical evidence that the applicant's daughter presented a clinical picture of nausea, vomiting, allergic reactions, and anorexia, which could only be explained by the fact that she was living in a highly polluted area. Relying on Articles 8 and 3 of the ECHR, the applicant asserted that because of the smells, noise and pollution fumes caused by the plant, which was situated a few metres away from her home, she was the victim of a violation of the right to respect for her home that made her private and family life impossible and that she was also the victim of degrading treatment.[10] The applicant maintained that despite its partial shutdown on the 9th September, 1988, the plant continued to emit fumes, repetitive noises and strong smells, which made her family's living conditions unbearable and caused both her and them serious health problems, and that this was an infringement of her right to respect for her home, protected under Article 8 of the ECHR.[11]

The Spanish Government argued that while the applicant had been caused serious nuisance by the plant until the 9th September, 1988, when part of its activities ceased, she had in the meantime ceased to be a victim. From February, 1992, the applicant's family were re-housed in a flat in the town centre at the municipality's expense, and in February, 1993, they moved into a house they had purchased. In any case, the closure of the plant in October, 1993, brought all nuisance to an end, with the result that neither the applicant nor her family had suffered the alleged undesirable effects of its operation.[12] However, the Court held that someone who had been forced by environmental conditions to abandon her home and subsequently to buy another house did not cease to be a victim.[13] The Court held:

> "Naturally, severe environmental pollution may affect individuals' well-being and prevent them from enjoying themselves in such a way as to affect their private and family life adversely, without, however, seriously endangering their health. [...] Whether the question is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicant's rights under paragraph 1 of Article 8 ... or in terms of an interference by a public authority to be justified in accordance with paragraph 2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in any case the State enjoys a certain margin of appreciation."

The Court continued that even in relation to the positive obligations flowing from the first paragraph of Article 8, in striking the required balance the aims mentioned in the second paragraph might be relevant.[14] The Court held that the evidence showed that the waste treatment plant was built to solve a serious pollution problem caused by the concentration of tanneries in a particular town. Yet, as soon as it had started up, the plant caused nuisance and health problems to many local people. Although the Spanish authorities were theoretically not directly responsible for the emissions in question, the town had in fact allowed the plant to be built on its land and the State subsidised the plant's construction. The council members could not have been unaware that the environmental problems continued even after the partial shutdown of the plant.[15]

The Court pointed out that not only had the municipality in which the applicant lived failed to take the measures necessary for protecting her right to respect for her home, private life and family life under Article 8, but had also resisted judicial decisions to that effect. Although the town had borne the expense of renting a flat for the applicant and her family for a year, the Court noted "... that the family had had to bear the nuisance caused by the plant for over three years before moving house, with all the attendant inconveniences. They moved only when it became apparent that the situation could continue indefinitely and when [the applicant's] daughter's paediatrician recommended that they do so..."[16] The Court continued:

"Having regard to the foregoing and despite the margin of appreciation left to the respondent State, the Court considers that the State did not succeed in striking a fair balance between the interest of the town's economic well-being - that of having a waste treatment plant - and the applicant's effective enjoyment of her right to respect for her home and her private and family life."

The Court unanimously concluded that there had been a violation of Article 8, but no breach of Article 3. *Lopez-Ostra* marks a widening of Article 8 to include environmental blighting and pollution, and it is unsurprising that the invidious effects of pollution would be difficult to subsume under Article 3, the primary purpose of which is to protect the individual from torture, inhuman treatment or punishment.[17]

In *Guerra and Others v. Italy*[18], the applicants lived in the town of Manfredonia, approximately 1 km. away from a chemical factory. In 1998, the factory was classified as high risk under the Italian law transposing the EC Seveso Directive, which related to the major-accident hazards of certain industrial activities dangerous to the environment and the well-being of the local population.[19] In the course of its production cycle the factory released large quantities of inflammable gas; a process which could have led to explosive chemical reactions, releasing highly toxic substances, above all arsenic trioxide. Accidents due to malfunctioning had already occurred in the past, the most serious in 1976, when an explosion caused several tonnes of potassium carbonate and bicarbonate solution, containing arsenic trioxide, to escape. One hundred and fifty people were admitted to hospital with acute arsenic poisoning. In a report of the 8th December, 1988, a committee of technical experts appointed by the District Council found that because of the factory's geographical position, emissions from it into the atmosphere were often channelled towards Manfredonia. The committee's report noted that the factory had refused to allow the committee to carry out an inspection and the results of a study by the factory itself showed that the emission treatment equipment was incomplete, as was the environmental impact assessment. In 1989 the factory restricted its operations to the production of fertilisers, and in 1994 this activity also ceased, although a thermonuclear plant and a plant for the treatment of waste water and feed continued to operate.[20]

The applicants relied on Articles 8 and 2 of the Convention, contending that the failure to provide them with information on the state of the environment had infringed their right to respect for their private and family life and their right to life. The Court held that although the object of Article 8 was essentially that of protecting the individual against arbitrary interference by the public authorities, it did not merely compel the State to abstain from such interference; in addition to this primarily negative undertaking, there might be positive obligations inherent in effective respect for private or family life.[21] Examining the steps taken by the State, the Court emphasised that severe environmental pollution might affect individuals well-being and prevent them from enjoying their homes in such a way as to affect their private and family lives adversely. In the instant case, the applicants had waited, right up until the production of fertilisers ceased in 1994, for essential information that would have enabled them to assess the risks they and their family might run if they continued to live in Manfredonia, a town particularly exposed to danger in the event of an accident at the factory. The Court unanimously held that the State had not fulfilled its obligation to secure the applicant's right to respect for their private and family life, in violation of Article 8.[22]

Referring to the cancer-related deaths of workers from the factory, the applicants contended that the failure to provide the information in issue had infringed their right to life as guaranteed by Article 2 of the Convention. In view of its conclusion that there had been a violation of Article 8, the Court considered it unnecessary to consider the case under Article 2.[23] However, in a concurring opinion Judge Walsh was of the opinion that Article 2 had also been violated. In his view, Article 2 also guaranteed the protection of the bodily integrity of the applicants. The wording of Article 3 also clearly indicated that the Convention extended to the protection of bodily integrity. In his opinion there was a violation of Article 2 in the present case and it was not necessary to go beyond this Article in finding a violation. In a second concurring opinion on the applicability of Article 2, Judge Jambrek observed that the protection of health and physical integrity was as closely associated with the right to life under Article 2 as with the respect for private and family life under Article 8. If information was withheld by a government about circumstances which, foreseeably and on substantial grounds, presented a real risk of danger to health and physical integrity, then such a situation might also be protected by Article 2 of the Convention.

"It may therefore be time for the Court's case law on Article 2 (the right to life) to start evolving, to develop the respective implied rights, articulate situations of real and serious risk to life, or different aspects of the right to life."[24]

Article 2, Judge Jambrek pointed out, appeared relevant and applicable to the facts of the instant case in that 150 people were taken to hospital with severe arsenic poisoning. Through the release of harmful substances into the atmosphere, the factory's operation constituted a major accident hazard to the environment.[25]

"Although the Spanish authorities were theoretically not directly responsible for the emissions in question, the town had in fact allowed the plant to be built on its land and the State subsidised the plant's construction. The council members could not have been unaware that the environmental problems continued even after the partial shutdown of the plant....The Court unanimously concluded that there had been a violation of Article 8, but no breach of Article 3."

Decisions on Exposure to Radiation

In *Balmer-Schafroth & Others v. Switzerland*[26], at issue was the danger that might arise if the safety measures provided for in the specifications of a public-works contract extending an operating licence for a nuclear power station were not properly checked. The applicants claimed the right to have their physical integrity protected from risks entailed by the use of nuclear energy. By twelve members to eight, the Court held that although there was no doubt that the dispute had been genuine and serious, the applicants had not established a direct link between the operating conditions of the power station which was the alleged source of the risk, and their right to protection of their physical integrity, as they had failed to show that they were personally exposed to a serious, specific and imminent danger.

In a dissenting opinion, seven members of the Court, including Judge Walsh, pointed out that: "Nuclear power is a domain in which the dangers, uncontained by national borders, are both major and enduring; it need only be remembered that in 1997 western Europe continues to be affected by fallout from the Chernobyl accident."[27] The dissenting members of the Court emphasised that the applicants' application had not impugned the "prerogative act" by which the Federal Council of the Swiss Federation had chosen a nuclear power strategy, but the lack of any means of securing a review of the safety of the operating conditions when the operating licence was renewed. The majority had not drawn any distinction between the original political decision to use nuclear energy, and the decisions relating to licences, public-works contracts, and specifications, which were not sovereign attributes of the State and could not escape judicial scrutiny. They went on to say:

> "If there is a field in which blind trust cannot be placed in the executive, it is nuclear power, because reasons of State, the demands of government, the interests concerned and pressure from lobbyists are more pressing than in other spheres. George Washington said that governments, like fire, are dangerous servants and fearsome masters. In the past (1939-45), as in the present, we have been only too aware of the shortcomings of which authorities and operators have been capable, regardless of peoples rights. That is why, in order to protect democracy, it was sought through the European Convention to establish machinery to review any administrative acts capable of causing injustice to the individual."[28]

Pointing out that the governments of several countries had issued untrue statements following incidents at certain power stations, which played down the seriousness of the incidents and the risk of contamination harmful to health, the minority concluded that the Court's assessment of the tenuousness of the connection and the absence of imminent danger was unfounded, and queried whether the local population first had to be irradiated before being entitled to exercise a remedy.[29]

Atmospheric testing of nuclear weapons resulted in by far the largest release of artificial radionuclides into the environment and the largest collective effective dose[30], and was the subject of the Court's attention in *McGinley and Egan v. The United Kingdom* (9th June, 1998). Here, the applicants were in doubt as to whether they had been exposed to dangerous levels of radiation. Between 1952 and 1967, the United Kingdom had carried out a number of atmospheric tests of nuclear weapons in the Pacific Ocean involving over 20,000 servicemen. Among these tests were a series of six detonations, between November, 1957 and September, 1958, at Christmas Island, of weapons many times more powerful that those discharged at Hiroshima and Nagasaki. Mr. McGinley was serving as a plant operator on Christmas Island at the time of the United Kingdom's nuclear test programme there, at a distance of some 25 miles from five detonations. Mr. Egan was serving on a ship which, according to the Ministry of Defence, was positioned 60 miles from one of the test detonations. In the absence of any individual monitoring, they were left in doubt as to whether or not they had been exposed to radiation at levels engendering risk to their health.

During the Christmas Island tests, service personnel had been ordered to line up in the open and to face away from the explosions with their eyes closed. The applicants alleged that the purpose of this procedure was deliberately to expose servicemen to radiation for experimental purposes. The Government denied this and stated that it was believed at the time of the tests that personnel were sufficiently far from the centre of the detonations not to be exposed to radiation at any harmful level, and that experience of earlier tests had shown that personnel with duties such as the applicants' were not exposed to measurable levels of radiation. Because the tests were conducted before the UK had accepted the right of individual petition under the Convention, the applicants could not successfully challenge the exposure to radiation, contending instead that the state had failed to provide them with information regarding the exposure and its possible detrimental effect on their health.[31] No record existed of the degree of radiation, if any, to which servicemen such as the applicants had been exposed. The applicants contended that this was a conscious decision, taken to avoid future liability for radiation-induced harm, that the State had engaged in a process of cover-up, misinformation and obstruction to avoid liability, and that their rights under Article 6 (1) to a fair hearing, and Article 8 to respect for their private and family lives, had been violated by the withholding of documents which would have assisted them in ascertaining whether there was any link between their health problems and exposure to radiation.

The Court held that where a proceeding was provided for the disclosure of documents which the applicants failed to utilise, it could not be said that the State prevented the applicants from gaining access to or falsely denied the existence of any relevant evidence, or that the applicants were thereby denied access to a fair hearing. Accordingly, there had been no violation of Article 6(1). The applicants also contended that in breach of Article 8, they were denied access to documents which would have enabled them to ascertain whether or not they were exposed to dangerous levels of radiation on Christmas Island, so that they would assess the possible consequences of the tests for their health.

The Court referred to the object of Article 8, that of protecting the individual against arbitrary interference by the public authorities. It did not merely compel the State to abstain from such interference; in addition to this there might be positive obligations inherent in effective respect for private or family life, the existence of which would be determined having regard to the fair balance that had to be struck between the general interest of the community and that competing interests of the individual. Given the fact the exposure to high levels of radiation was known to have possible serious and long-lasting effects on health, the Court thought that it was not unnatural that the applicants' uncertainty as to whether or not they had been put at risk in this way caused them substantial anxiety and distress. Considering that the Government had asserted that

there were no national security grounds to retain the information sought by the applicants, the Court held that given the applicants' interest in obtaining access to the material in question and the apparent absence of any countervailing public interest in retaining it, the Court held that a positive obligation under Article 8 arose:

> "Where a Government engages in hazardous activities ... which might have hidden adverse consequences on the health of those involved in such activities, respect for private and family life under Article 8 required that an effective and accessible procedure be established which enabled such persons to seek all relevant and appropriate information."

However, the Court concluded that the applicants had not utilised available procedures to request production of the documents concerned, and there had been no violation of Article 8. In a dissenting opinion, three of the nine member court declared that from the outset, it was known that not only were nuclear weapons capable of causing the immediate deaths of large numbers of people, but also that they could, in the long term, have serious effects on the physical integrity and health of those exposed to them. The British Government, in carrying out tests on weapons of this type, were, according to contemporaneous documentary evidence, particularly interested in the effects of nuclear explosions on personnel and equipment, with and without various types of protection. The minority opinion further pointed out that on the day before the tests in issue, the Government stated in an internal note that the danger was insidious because the effects were not felt immediately and the damage might only become apparent after several years:

> "They accordingly had the duty to assume their responsibilities towards the people present in the test areas when the explosions took place. They should have taken steps to ensure that those people were able to apprise themselves of their situation and to have available all the information necessary to enable them effectively to assert their rights."

According to the minority, the Government should have established and monitored the state of health of the applicants before and after the tests, and informed them of any relevant information thereby obtained. The medical records of the applicants contained hardly any of that information, which the Government contended did not exist. That would mean that the authorities had been grossly negligent in not gathering it. Even more serious was the possibility that such information existed and that it had been deemed necessary to keep it secret or to destroy it. The existence of a procedure for disclosure of such information could not suffice to satisfy the positive obligations that were incumbent on the State under Articles 6 and 8 of the Convention. The applicants had the right to be informed of all the consequences that their presence in the test area could have for them, without having to ask. The minority concluded that there had been a violation of the rights recognised by Articles 6 and 8 of the Convention. On the grounds that evidence had emerged that the state had refused to disclose to others similarly placed the information sought by the applicants, they subsequently sought review of the Courts decision That argument was rejected by the Court, which reasoned that the proposed new evidence had been available to the applicants at the time of the original hearing.

LCB v. UK[32] concerned facts similar to those in *McGinley and Egan*. While the applicant's father was serving as a catering assistant in the Royal Air Force, he was present at Christmas Island during four nuclear tests in 1957 and 1958. He also participated in the clean-programme following the tests. The applicant was born in 1966. In or about 1970, she was diagnosed as suffering from leukaemia. Her records of admission to hospital stated, under the heading "Summary of possible causative factors" Father - radiation exposure. The applicant received chemotherapy treatment which lasted until she was 10 years old. In December, 1992, the applicant became aware to the contents of a report prepared by the British Nuclear Tests Veterans Association, indicating a high incidence of cancers, including leukaemia, in the children of Christmas Island veterans. The applicant still had regular medical check-ups and was apprehensive that any children she might have would be born with a genetic predisposition to leukaemia. The applicant experienced the same difficulty as *McGinley and Egan*: since the tests were conducted before the UK had accepted the right of individual petition under the Convention, she could not successfully challenge the exposure to radiation itself.[33]

Instead, she claimed that both the State's failure to warn her parents of the possible risk to her health caused by her father's participation in the nuclear tests, and its earlier failure to monitor her father's radiation dose levels, were in violation of Article 2(1) of the Convention, guaranteeing the right to life. She maintained that the State had deliberately exposed servicemen to radiation for experimental purposes, and referred both to official documentation and to scientific papers which demonstrated that the long term and genetic effects of radiation were well-known at the time of the tests. She alleged that, "...despite, or because of this evidence, in order to avoid liability for any subsequent health problems caused by the Christmas Island tests, the military authorities had decided not to monitor the servicemen's individual radiation dose levels or to provide them with any information as to the possible health consequences for themselves and their future offspring." She felt that her father's unmonitored exposure to radiation was the probable cause of her childhood leukaemia, and adduced expert evidence in support of this contention and in rebuttal of evidence doubting the link, produced by the Government.

The Government submitted that it had had no reason to give advice or information to the applicant's parents, since there was no reason to believe that her father had been exposed to dangerous levels of radiation. The detonation at Christmas Island had taken place under conditions which would have caused any fall-out to pass rapidly into the upper atmosphere to be distributed over a number of months as global fall-out. There had been no intention to expose the servicemen to radiation. Scientific evidence did not support the existence of any causative link between the exposure of parents to radiation and the onset of leukaemia in their children. Finally, the Government adduced medical evidence indicating that in view of the form of leukaemia from which the applicant suffered, an earlier diagnosis could not have been made nor would it have made any difference to the outcome.

The Court held that because the applicant's complaint about the failure of the respondent State to monitor the extent of her father's exposure to radiation on Christmas Island had not been raised before the Commission, the Court had no jurisdiction to consider it. Regarding the complaint that the respondent State's failure to warn and advise the applicant's parents or monitor her health prior to her diagnosis with leukaemia was a violation of Article 2 of the Convention, the Court considered that Article 2 (1) enjoined the State not only to refrain from the intentional and unlawful taking of life, but also to take

appropriate steps to safeguard the lives of those within its jurisdiction. The question was whether the State had done all that could have been required of it to prevent the applicant's life from being avoidably put at risk. The Court held that the State could only have been required to provide advice to the applicant's parents and to monitor her health if it had appeared likely at that time that any such exposure of her father to radiation might have engendered a real risk to her health. The Court was not satisfied that it had been established that there was a causal link between the exposure of a father to radiation and leukaemia in a child subsequently conceived, and stated that could not reasonably hold that the U.K. authorities could or should, on the basis of that unsubstantiated link, have taken action in respect of the applicant. The Court pointed out that it was in any case uncertain whether monitoring of the applicant's health would have led to earlier diagnosis and medical intervention such as to diminish the severity of the disease.

The Court concluded that it had not been established that, given the information available to the State during the 1960s concerning the likelihood of the applicant's father having been exposed to dangerous levels of radiation and of this having created a risk to her health, it could have been expected to act of its own motion to notify her parents of these matters or to take any other special action in relation to her. On this basis, the Court unanimously held that there was no violation of Articles 2, 3 or 8 of the Convention.

The Court's judgment in *LCB* confirms that the State could have been required to take steps to warn and advise if it had appeared likely that the irradiation of the father would endanger the health of children not yet conceived[34]

In *Athanassoglou & Others v. Switzerland* (6th April, 2000), the applicants lived in villages in the vicinity of a nuclear power plant situated about 5 km. from the German border. In 1991, the private company which had operated the plant since 1971 applied to the Swiss Government for an extension of its operating licence for an indefinite period. The Court observed that the applicants appeared to accept that they were alleging not so much a specific and imminent danger to them personally, as a general danger from all nuclear power plants. The applicants sought to derive from Article 6(1) of the Convention a remedy to contest the very principle of the use of nuclear energy, or at least a means for transferring from the government to the courts the responsibility for taking, on the basis of technical evidence, the ultimate decision on the operation of individual nuclear power stations. How best to regulate the use of nuclear power was, the Court held, a policy decision for each contracting state to take according to its democratic principles. Article 6 (1), which requires that individuals be granted access to a court whenever they had an arguable claim that there had been an unlawful interference with the exercise of their civil rights recognised under domestic law, could not be read as dictating any one scheme rather than another. Swiss law empowered the applicants to object to the extension of the operating licence of the power station, but did not give them any rights as regards the subsequent extension of the licence and the operation of the station beyond existing remedies for nuisance and compulsory purchase. The Court held that Article 6 (1) was not applicable in the present case.

Airport and Industrial Noise Decisions

In *Arrondelle v. United Kingdom*[35], the applicant lived one mile from the Gatwick runway and close to the M23. An environmental inspector found that the applicant and her late husband suffered intolerable stress because of the intensity, duration and frequency of noise, primarily from low flying aircraft passing almost overhead. She claimed that her health was badly affected by the noise. Her complaint in respect of the noise generated was held to be admissible, but the case was settled before it proceeded to hearing before the Court, presumably with a view to closing the floodgates on similar claims. But the later decision *Powell and Rayner v. United Kingdom*[36] illuminated the limitations of Article 8. The applicants contended that the permitted levels of noise from Heathrow Airport, and the government measures aimed at ameliorating the situation, were in violation of their rights under Article 8. The Court held that although the air noise from Heathrow interfered with the applicant's rights under Article 8, maintaining large international airports, even in densely populated areas, was necessary for economic well-being and justified the state's policy. In consequence of the noise abatement measures which had been put in place, the interference with the applicant's rights was not disproportionate. The Court accorded the State a wide discretion, commenting that it was not for it to substitute its view of what was the best policy for that of the State. Despite the negative result for the applicant, the United Kingdom has chosen to settle claims based on similar facts.[37]

In *S v. France*[38], the applicant owned an 18th century chateau in a rural area. A nuclear power station was constructed and commenced operation about 300m away, along a 2km area up- and downstream on the opposite bank of the Loire, creating noise and glaring lights at night and interfering with the microclimate. These conditions were considered by the Commission to be an interference with the applicant's rights under Article 8. However, taking into account the economic benefits of the energy generated by the power station, the interference was regarded as justifiable and proportionate.[39]

Conclusion

While the Court has demonstrated some inclination to find violations of the European Convention caused by

"Analysis under Article 8 has allowed the Court to afford States a wide discretion to take account of economic and public interest factors in determining whether to proceed with developments which will affect the health and well-being of those living nearby. However, the decision in *Guerra* is authority for the principle that states are under a duty to provide essential information that would enable those whose health and well-being affected by environmental pollution to assess the risks they might run if they remain living near the source of the pollution."

"The Court's decision in *Lopez-Ostra* has made plain that despite this margin of appreciation, a state which has not struck a fair balance between the public interest in economic well-being and the physical integrity of individuals will be found in violation of Article 8...Proving causation of damage to health and well being by environmental factors seems still to be an insuperable obstacle for potential claimants."

environment-related damage to health and well being, it has confined its consideration to Article 8, neglecting Article 2. It may be speculated that the Court has preferred not to analyse such cases in terms of Article 2 because Article 2 is couched in far more absolute terms than Article 8. Analysis under Article 8 has allowed the Court to afford States a wide discretion to take account of economic and public interest factors in determining whether to proceed with developments which will affect the health and well-being of those living nearby. However, the Court's decision in *Lopez-Ostra* has made plain that despite this margin of appreciation, a state which has not struck a fair balance between the public interest in economic well-being and the physical integrity of individuals will be found in violation of Article 8. The decision in *Guerra* is authority for the principle that states are under a duty to provide essential information that would enable those whose health and well-being affected by environmental pollution to assess the risks they might run if they remain living near the source of the pollution.

From the Court's reasoning in *McGinley and Egan*, the limitations of this principle are evident. While a state obligation arose to disclose available information regarding exposure to radiation, the applicants were obliged to exhaust available domestic procedures to gain access to that information. Similarly, in *LCB*, the Court concluded that if the State were aware of a risk to the applicant's health caused by her father's exposure to radiation, it would have a duty to advise her parents and to monitor her health, but that in the instant case, no such causal link had been established. *Athanassoglou* and *Balmer* demonstrate the difficulty of challenging administrative decisions related to the operation of nuclear installations. Airport noise has not been regarded by the Convention institutions as damaging physical integrity such as to outweigh the public and economic interest in the operation of airports.

To infuse environmental values into the content of protected rights, the Court should establish a minimum standard of environmental quality to which individuals are entitled, taking into account the negative effects of environmental degradation on health in its wider sense.[40] Environmental degradation may cause damage to the physical integrity of individuals not only in the obvious and immediate cases of poisoning or terminal disease, but also with more subtle and insidious long-term effects, and it is not clear that the Court has recognised this. Medical science is as yet unable to conclusively establish that particular substances cause particular illnesses, and unable to isolate one certain catalyst for many serious diseases. Proving causation of damage to health and well being by environmental factors seems still to be an insuperable obstacle for potential claimants. •

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