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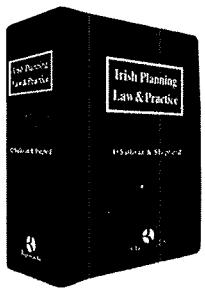

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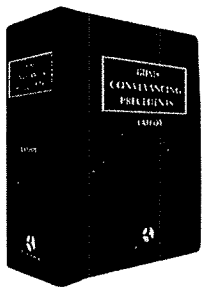

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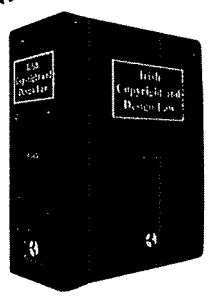

By Robert Clark BA, LLM, PhD, BL, Professor of Law, University College Dublin

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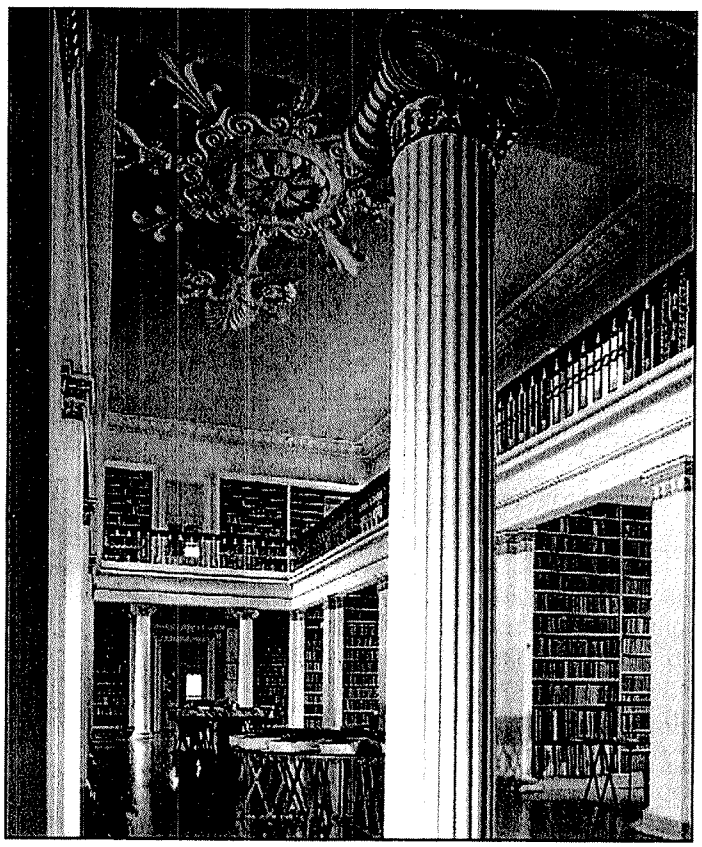
NEWS
& King's Inns News

King's Inns Library



The King's Inns Library has recently installed the Unicorn Collection Management System. This system is also in use in the Law Library, the Law Society and the office of the Attorney General. The system, which went live in February 2001, is a key element in a major automation plan that will eventually see all the King's Inns holdings of monographs and serials available on a fully searchable automated catalogue.

The Society has acquired a number of modules including Bibliographic and Inventory Control, Authority Control, Serials and Webcat. Webcat is a browser-based user interface that enables users to have access over an intranet to extended online public access catalogue facilities. For example, readers may post book requests and other suggestions.

At present the 100,000 volumes of legal and non-legal materials are catalogued in traditional guard book or card formats. Records from these two systems will be transcribed (and in many cases improved) into the new automated catalogue. The task of creating such a large quantity of computerised records has been assisted through the co-operation of two organisations: the English Short Title Catalogue project and the Bar Council (Dublin). The ESTC has supplied the library with catalogue records for its holdings of the eighteenth century, while the Law Library (Dublin) has provided a large number of modern legal records. These two collections of records are invaluable tools in cataloguing process. The automation project, which is expected to take several years to complete, has been divided into three phases.

It is hoped to have the working collection (law books published from 1980 onwards) catalogued by September 2001. Attention will then turn to the pre-1980 legal materials. The final phase will involve the non-legal collection.

Initially, the catalogue will be available to users within the library. However, at a later stage remote access to the library catalogue will be available to subscribing members of the Society and to students.

We would like to remind all members of the Law Library and our subscribing members that they are entitled to use not only the new catalogue when available but also all the other facilities that the King's Inns library has to offer. During the months of June to September the students do not use the library to any great extent. As a consequence the reading room is an ideal venue in which to study or carry out research. We are always pleased to see our members return to King's Inns.

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CRIME AND PUNISHMENT - RETRIBUTION OR REHABILITATION?

It has long been accepted that the practice of sentencing must rest upon some logical premise or policy rationale. While, as Hart has written, the general aim of punishment is the prevention of crime, the question of individual distribution of punishment is more problematic. Traditionally, four different models of distribution have been identified: desert or retribution; deterrence; incapacitation; and rehabilitation. There is also an alternative to the four traditional sentencing models; that of restorative justice, whereby the offender is expected to make reparation to the victim for harm done. The desert model is premised on the concept of the individual as a rational decision-maker, whose decision to commit crime will be influenced by the likelihood of punishment. The key concept in desert theory is that of proportionality, both cardinal and ordinal. Desert theory is essentially retributive; it posits that offenders should be punished because they deserve to be. Retributive theory, therefore, is a backward-looking way of justifying punishment.

The other approaches to sentencing differ from retributive theory in that they are forward-looking, seeking to reduce future criminal conduct. Like retributive theory, the deterrence model is premised on the view of the offender as a rational individual, and is associated with the eighteenth century penal reformers, notably Bentham, whose 'pleasure-pain calculus' was designed to set penalties at levels sufficient to outweigh the likely benefits of offending. Incapacitative sentencing, by contrast, seeks to identify offenders who are likely to do such harm in the future that special measures must be taken against them to protect society. The rehabilitation model differs from the others in that it does not see the offender as divorced from social context, but rather assumes that criminal behaviour is significantly determined by circumstances. Offenders are seen as needing help to change their behaviour through a range of different programmes such as counselling, family intervention, education and training. This approach to sentencing is particularly forward-looking, since it means that sentences are tailored to the specific needs of individuals.

Rehabilitative strategies came to the fore in many Western penal systems in the 1960s. In the US, however, support for such programmes weakened in the wake of an influential 1974 article by Robert Martinson, entitled 'What Works? Questions and Answers About Penal Reform'. Martinson analysed over 200 studies which had assessed correctional programmes, judging success by reference to re-offending rates. His blunt conclusion was that 'with few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism'. This finding was swiftly translated into the buzz phrase 'Nothing works'. This might be seen as a damning indictment of rehabilitative strategies. But Martinson's conclusions have been subjected to strong criticism, and he himself resiled from the 'nothing works' slogan. James McGuire, in an equally influential 1995 work, 'What Works; Reducing Reoffending', demonstrated that some types of rehabilitative strategy are successful, with treatment programmes in the community being about twice as effective as those within penal institutions.

Many thus argue that rehabilitative strategies were discarded prematurely in the US, and that this may have been because of an increasingly punitive political culture. Politicians began to see the adoption of 'tough on crime' policies as a way to get elected. Imprisonment rates in the West generally began to rise and have continued rising. In an Irish context, sentencing practice lacks any coherent rationale, but imprisonment rates have also been rising in recent years, as political rhetoric on crime echoes American 'get tough' sentiments. In 1996 the Law Reform Commission criticised the lack of any policy basis for sentencing, and recommended by a majority that the legislature should develop non-statutory sentencing guidelines based on just deserts. A minority agreed on the need for guidelines, but rejected the desert model, arguing that in purporting to treat all offenders alike, it would not take account of the impact of a sanction on a particular offender.

However, this recommendation was never acted upon, and in the continued absence of any sentencing policy, not alone is inconsistency likely to occur, but imprisonment has become dramatically over-used as a sanction. Expert reviews of the Irish penal system over the years have all recommended decreased use of imprisonment. Yet committal rates have continued to rise, despite the fact that the crime rate has never risen significantly above the figure of 102,387 indictable crimes recorded in 1983. Since 1995, despite a dramatic fall in crime rates, offenders are being sent to prison in increased numbers, while new prison places are being built at an alarming rate.

It is time we looked to a more structured system of punishment, with more focus on rehabilitation and less on imprisonment. The number of prison places should be frozen, and more resources should be invested in developing community-based sanctions and restorative justice initiatives. In this way, through rejecting 'get tough' political rhetoric based on a retributive prison-obsessed model, a more humane penal policy could be developed for Ireland.•

SCHOOL ATTENDANCE, THE COMMON GOOD & THE EDUCATION (WELFARE) ACT 2000

Dympa Glendenning BL *critically appraises the provisions of the Education (Welfare) Act 2000, which repeals and replaces the School Attendance Acts 1926 to 1967.*

Introduction

The right to education is a fundamental element of the right to physical and mental development. Its importance is almost universally recognised to call for and justify a measure of compulsory education. Even J.S Mill was of the view that education was an exception to the principle that governments should not interfere with individuals for their benefit. In considering compulsory education, T.H. Green, in *Principles of Political Obligation*, contends that the function of the State, acting through law, is the removal of obstacles or "the hindering of hindrances" to the development of personality. Ignorance is such a hindrance, he argues, and so its removal by law is justified. This article considers the adequacy of current provision for school attendance, the School Attendance Acts 1926-1967 (the 1926 Act),[1] the common good and the main provisions of the Education (Welfare) Act 2000 (the 2000 Act) which will repeal and replace the 1926 Act. The 2000 Act must be fully in force by 5th July 2002 at the latest.

Constitutional Provision

Whatever the philosophical arguments in favour of compulsory education, the Constitution of 1937 imposes, in addition to its role in educational provision,[2] a special duty on the State in which the common good is evoked:

"The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social."[3]

As Denham J. stated in *DPP v. Best*,[4] the common good requires that the children's right to receive a certain minimum education be given priority.[5] It does not, however, require a high standard of education, but only a mandatory minimum standard. The standard is a question of fact, which must be decided in view of actual conditions in the community and having regard *inter alia* to the differing capacities of children. The minimum education must be conducive to the child achieving intellectual and social development and not be such as to place the child in a discriminatory position.[6]

While the State is clearly entitled to legislate to define what is meant by "a certain minimum education," it is not obliged to do so and has never, in fact, done so.[7] In seeking to discharge its obligation to provide "a certain minimum education" to all children, the State has enacted the 1926 Act as amended[8] which has remained on the statute books now for three quarters of a century. Accordingly, the parent of every child, aged 6-15 years, must cause that child to attend a national school or other suitable school on every day such school is open for secular instruction unless there is a reasonable excuse for not so doing.[9]

It is a reasonable excuse under the 1926 Act *inter alia* that the child is receiving "suitable elementary education" in some manner other than by attending a national or other suitable school.[10]

The Contemporary Context

Conscious of the pivotal role education plays in their children's lives, the vast majority of parents ensure that their offspring attend school. Unfortunately, however, there are several thousand children who leave school early each year without any qualifications and prior to achieving their full potential.[11] For these children, the safety net provided by the 1926 Act, such as it is, has failed. Indeed, it appears that section 15(1) of that Act, which requires the school principal to make certain returns on absentee pupils, is no longer being implemented.[12] This could leave the State open to suit in certain circumstances, for example where parents have failed their children in regard to the minimum education standard and the State has also failed to vindicate their rights under Article 42.

Many examples of the patent inadequacy of such provision are apparent. Student exclusion, suspension and truancy figures remain unacceptably high,[13] and few alternatives exist for those students who are excluded from school. No structured appeals

procedure is yet in place. Research also indicates the important relationship between early school leaving and criminology. In his studies of Mountjoy prisoners, O'Mahony noted "a remarkably powerful and consistent tendency for early school leaving to be associated with earlier first conviction and the accumulation of a greater number of convictions."[14]

Neither have the perceived deficits in the Irish education system escaped international criticism. The OECD Economic Survey for Ireland (1995) found that the quality of the Irish education system, particularly for students at the lower end of the ability scale, was "not up to international standards."[15] The Social Fund Evaluation Report "Early School Leavers" (1996) stated that the education system had not effected a parallel shift in equality and equity across the spectrum. It further cautioned that if the system failed to change so as to accommodate the education and training needs of early school leavers, this group would, in all probability, resort to anti-social behaviour the ultimate cost of which would far outstrip pro-active investment in the shorter term.[16] Recent research on adult literacy in Ireland indicates very substantial deficits[17] which are frequently linked to poverty and poor school attendance levels.

Yet, only 36 full-time school attendance officers are employed throughout the State and these officers are deployed in the Dublin, Cork and Waterford metropolitan areas only.[18] Responsibility for school attendance in rural areas and other urban areas remains, inappropriately, with the Garda Siochana. Thus, for example, one part of Ballymun finds itself within urban provision while the remaining section is part of rural provision.

Against this general background, the considerable corpus of case law concerning the State's failure to vindicate the constitutional rights of certain children to care and education may be set to continue.[19]

The School Attendance Acts 1926 to 1967

Section 4 of the 1926 Act makes provision for attendance of children at a national, or other suitable school, on every day on which such school is open for secular instruction, but any of the following constitutes a reasonable excuse for failing to comply with this obligation:

"(a) that the child has been prevented from attending school by the sickness of the child;

(b) that the child is receiving suitable elementary education[20] in some manner other than by attending a national or other suitable school;

(c) that there is not a national or other suitable school accessible to the child which the child can attend and which the parent of the child did not object on grounds to send the child;

(d) that the child has been prevented from attending school by some other sufficient cause."[21]

The School Attendance Bill 1942

State reluctance in enacting school attendance legislation since 1926 is frequently linked to the fall of the School Attendance Bill 1942 (the Bill).[22] Although the Bill contained some worthy aims, such as improved provision for Traveller children and the prohibition of employment of children under 12 years of age, it was also perceived as a further attempt[23] by the State to "close the gap" on Irish, so to speak, by ministerial intervention.[24] The main objective of the Bill, set down in section 4, was to prescribe and define the phrase "suitable elementary education" for the purposes of the 1926 Act. If the Minister could control the content of this phrase, then he could lawfully mandate that knowledge of the Irish language was required for the purposes of school attendance under the 1926 Act. If a child's education did not receive the Minister's sanction, then it would fall outside the scope of section 4 leaving some parents open to prosecution under the amended Act for failing to ensure their children received a "suitable education." Some parents would be particularly vulnerable to such risk e.g., the 500 or so Protestant parents who sent their children across the border daily to attend schools in Northern Ireland[25] and those parents who educated their children mainly in England.[26] Given this singular background, it is small wonder that the Supreme Court ruled that section 4.1 of the Bill trespassed on parental rights in Article 42 and accordingly was unconstitutional.

Almost sixty years later, the context has altered substantially. The gross inadequacy of the existing system has been generally acknowledged and there is a consensus that the State needs to urgently address considerable school drop-out rates, pressing truancy problems, literacy problems and the discharge of its constitutional duty in regard to securing a minimum education for all children. Moreover, constitutional developments since 1942, and in particular the presumption of constitutionality,[27] now permit the Minister to prescribe a minimum education provided this does not conflict with parental rights in Article 42.

DPP v. Best

The most recent Supreme Court discussion is to be found in *DPP v. Best*, a landmark constitutional decision which has established the following points:[28]

(a) that it was open to that Court to depart from the *ratio decidendi* of judgments arising from a reference to the court under Article 26 of the Constitution where they were wrong in law;

(b) having considered the decision in *Re Article 26 and the School Attendance Bill 1942*, that the view that the State was not in any way entitled to interfere in the manner in which education was being given to children rested on an unduly strict construction of Article 42.2.3 and should not be followed.[29]

(c) that the absence of Irish in any curriculum or system of home education would not, of itself, mean that the constitutional standard had not been reached. However, its absence from a curriculum could be taken into account in determining whether the education of the child reached the constitutional standard.[30]

(d) that the phrase "suitable elementary education" was not to be interpreted so as to require the giving of an education which exceeded the "certain minimum education, moral, intellectual and social" referred to in Article 42.3.2.

(e) that the minimum education was not necessarily to be equated to the present primary school curriculum.[31]

(f) that the Oireachtas was not obliged by Article 42.3.3 to

define a "certain minimum education" in legislation. Although it was within its competence to do so, the Oireachtas could legitimately leave it to the District Court to determine in a particular case whether a suitable elementary education was being provided to children at home.

(g) that it was in each case a question of mixed law and fact to be decided on the basis of the criteria indicated and on the evidence adduced whether the education being provided was the certain minimum for that child;[32]

(h) that in each case the certain minimum was the provision of tuition in those subjects which suited the particular child and would not deprive him or her of future opportunities;[33]

(i) factors to be considered included the personality of the child, the quality of the home education being provided the response of the child to that education and whether the child would be adversely affected by the continuation of home education.[34]

(j) where parents elected to provide their children with "suitable elementary education" in their own home, then they assumed the burden of satisfying the District Judge that such education was, in fact, being provided. The onus of proof was on the accused and was to be determined on the balance of probabilities.

When the 2000 Act comes into force next year it will put in place a much more regulated system of school attendance which will next be considered.

The Education (Welfare) Act 2000

The Act acknowledges the inadequacy of prescriptive legislation alone in countering school attendance related problems and so it places a special emphasis on child welfare. The legislation aims to provide a comprehensive national system which will ensure that children of school-going age attend school or, if they fail to do so, that they will otherwise receive at least a minimum education.

Statutory duties fall on schools to adopt a more pro-active approach to the problem of truancy and non-attendance in schools. In discharging these duties, schools will be facilitated by the activities of a co-ordinated network of publicly-funded bodies nationwide which will be established under the Act. In order to address the root causes of truancy, this legislation aims to identify and assist, at the early stages, children and their families who may be at risk of school attendance-related problems. With the aim of ensuring that children educated outside the recognised school system receive at least a minimun education, the Act makes provision for the entitlement of every child in the State to a certain minimum education by providing for, *inter alia*:

(a) the compulsory attendance of certain children at recognised schools;[35]

(b) the registration of children receiving education in places otherwise than in recognised schools;

(c) the establishment of a State body to be known as the National Education Welfare Board (the Board);[36]

(d) the co-ordination and liaison of the Board's activities with those of other bodies in so far as they relate to school attendance matters;

(e) the identification of the causes of non-attendance at school and the adoption of measures for its prevention;

(f) the repeal of the School Attendance Acts 1926-1967;

(g) the supply of personal data relating to an individual's educational history to certain persons; and

(h) the amendment of the Protection of Young Persons (Employment) Act 1996.

The National Education Welfare Board

One of the main administrative changes to be effected by the Act is the establishment of the National Education Welfare Board (the Board) which will perform a wide range of functions under the Act. Chief among these will be to ensure the provision of a prescribed minimum education to each child in a recognised school, or otherwise. The Board will also assist in the formulation and implementation of governmental policies and objectives relating to the education of children. It is envisaged that the Board will promote and foster in schools an environment that encourages school attendance; that it will assist recognised schools to comply with the Act; and will commission and disseminate research relating to the prevention of truancy.[37] Further functions of the Board will include, *inter alia,*

* advising and assisting parents who experience school attendance-related problems;

* reviewing the adequacy of teacher training and guidance in regard to school attendance and behaviour in school, and advising the Minister on any matter concerning the Act; and

* advising the National Council for Curriculum and Assessment (NCCA)[38] on curricular matters which may have an effect on school attendance.

Summary proceedings for an offence under the Act may be brought and prosecuted by the Board.[39] The Board has the right to appeal as a 'parent'[40] a decision of a school's board of management under section 29 of the Education Act 1998 [41] in regard to subsections (a) and (c) only i.e., where a board permanently excludes a student or refuses to enrol a student in a school.

Assessment of Students

With the consent of the parent of the child concerned, the Board may arrange for a child to be assessed as to his or her intellectual, emotional and physical development by a person to be determined by the Board with the consent of the parent.[42] If the 'parent' refuses such consent, the Board may apply to the Circuit Court[43] for an order that the assessment be carried out, nonetheless. The Circuit Court may decide that an assessment is warranted and order that an assessment be carried out "at such time, in such manner, at such place and by such person as may be specified in the order." Regrettably, the Act is silent on whether residential assessments may be carried out without parental consent. In view of the inadequate level of existing

provision for children who are already identified as "encountering learning difficulties", there is a very significant task ahead for the State authorities if they are to comply with this requirement.

Education Welfare Officers

The Board may appoint Education Welfare Officers (EWOs) for the purposes of the Act. These officers will be furnished with warrants of their appointment which they must produce for inspection, if requested by any person affected, when exercising any powers under the Act. The board of management, principal and other staff members are required to give assistance as may be reasonably required by an EWO in the performance of his or her functions.[44] It is not clear what qualifications and training these officers will receive. Clearly, they will require considerable interpersonal skills and an understanding of children's welfare. Most likely their number will include existing school attendance officers who already have wide experience in school attendance matters.

Liaison Officers

With a view to co-ordinating the activities of the services provided by the various State agencies, in so far as they relate to the educational welfare of children, the Board will designate liaison officers who will, in turn, liase with officers designated by the "relevant authorities." The term "relevant authorities" includes, *inter alia*, the Minister for Health & Children, the Minister for Justice Equality and Law Reform, the Garda Commissioner, each Health Board, each Vocational Education Committee and other State bodies.[45]

Compulsory School Going Age

In section 2, "a child" is defined as a person resident in the State who has reached the age of 6 years and who has not reached the age of 16 years, or has not completed 3 years of post-primary education, whichever occurs later, but not including a person who has reached the age of 18 years. The effect of this provision is that the compulsory school attendance ages will normally be from 6-16 years but if a student has failed to complete 3 years of post-primary education, he or she could be within the compulsory school-going age until their 18th birthday.

For the generality of children, the raising of the compulsory school-going age will have little significance as they wish to remain in the system and complete their education. On the other hand, considerable problems are likely to be encountered with appropriate accommodation for:

a) those 15-17 year-old students who do not wish to be in school; and

b) the growing numbers of 16-17 year old students who must now be accommodated in schools after July 2002.

Curricular flexibility and innovative planning and provision for these categories of student will need to be in operation well in advance of the coming into force of the law. As yet, there is little evidence of large-scale forward planning for such provision.

"Almost sixty years after the Supreme Court decision on the 1942 Bill, the context has altered substantially. The gross inadequacy of the existing system has been generally acknowledged and there is a consensus that the State needs to urgently address considerable school drop-out rates, pressing truancy problems, literacy problems and the discharge of its constitutional duty in regard to securing a minimum education for all children."

Registration for all Students

The statutory obligation cast on parents by existing school attendance legislation is retained in the Act (section17) and, to this end, three types of registration will be put in place under the Act:

a) the registration of all children who are to be educated outside the recognised school system will take place following an assessment of the capacity to provide minimum standards of education (section14);

b) the registration of all children who attend recognised schools (section 20); and

c) the registration of young persons[46] in employment (section 29) - although, regrettably, there is no definition of employment in the Act.

Appeals

Section 15 is part of the process of registration for those children being educated outside the recognised school system. It provides a mechanism for appeal, to an appeals committee, against the decision of the Board in regard to registration related decisions affecting a child. The committee shall comprise:

(a) such judge of the District Court as shall be nominated by the President of the District Court;

(b) such inspector as may be appointed by the Minister, and:

(c) such other person as shall be appointed by the Minister.

As it includes two Ministerial nominees, this committee can scarcely be considered to be balanced or independent. No doubt, parents will in time be seeking the establishment of an independent appeals procedure.

Prescription of a Minimum Education

Possibly, fearing a repeat of the fall of the 1942 School Attendance Bill, the Minister's powers to prescribe a minimum education in the Bill have been altered in the Act (section14). While the main onus in this regard now rests with the Board, the Minister, after consultation with the NCCA and such other persons as he or she deems appropriate, may issue guidelines and make recommendations of a general nature to the Board in order to assist it in determining whether a child is receiving a

certain minimum education (section16). Despite this delegation of responsibility, it seems that the Minister still retains the ultimate authority over the Board (section 13).

General Obligation: to Attend a Recognised School

There is a duty on parents to ensure that their children attend a recognised school. However, this obligation will not apply in the following cases:

a) where the child is registered with the Board for education provided outside the recognised system (section 14);

b) where an application under section 14 has been served on the Board and a decision is pending or where a notice of appeal under section 15 has been served on the Minister but the appeal committee has not made a decision;

c) where section 14(3) applies to the child and the 3 months period has not expired;

d) where the child is temporarily attending a school outside the State and its parent has given notice to the school at which the child is registered of the reason for his/her non-attendance;

e) a child is being educated outside the State or is taking part in a programme of education, training, instruction or work experience prescribed by the Minister [section 14(19)];

f) a child is receiving a certain minimum education in accordance with subsection 27(2);

g) where another sufficient cause exists for the child's non-attendance.

Pursuant to section 10(1) of the Education Act 1998 a recognised school means a school recognised by the Minister under that section. The term "school" in the latter Act expressly excludes "a school or institution established in accordance with the Children Acts 1908-1989, or a school or institution established or maintained by a health board in accordance with the Health Acts 1947-1996, or the Child Care Act 1991." It seems, therefore, that children attending such schools or institutions do not fall within the ambit of the Education (Welfare) Act 2000. Are such children to have lesser rights than others under this new legislation? Given the history of existing State neglect in this particular sphere, this seems a critical loophole in the Act which needs to be amended.

"It seems, therefore, that children attending special schools or institutions do not fall within the ambit of the Education (Welfare) Act 2000. Are such children to have lesser rights than others under this new legislation? Given the history of existing State neglect in this particular sphere, this seems a critical loophole in the Act which needs to be amended."

Parents are required to notify the school principal of the reasons for the child's absence, in accordance with procedures set down in the school's Code of Behaviour, of their child's absence from school for part of a school day, or for one or more school days (section 18). The continuous monitoring of this provision alone will cast a heavy administrative burden on schools.

School Attendance Notice

Where the Board is of the opinion that a parent is failing or neglecting to cause his or her child to attend a recognised school in accordance with the Act, it shall serve a Notice under section 25. Persons who contravene a requirement in such notice will be committing an offence and will be liable to a fine not exceeding £500, or to imprisonment for up to one month, or to both fine and imprisonment.[47] If a person is in breach of section 25(4), and if he or she continues to contravene a requirement in that section, on each day after such conviction, he or she shall be guilty of an offence and shall be liable on summary conviction to a fine not in excess of £200 or to a term of imprisonment not exceeding one month or to both fine and imprisonment.[48]

Prior to issuing a school attendance notice, the Board is required to make all reasonable efforts to consult with the child's parents and the relevant school principal. Moreover, it is required, in specifying a recognised school, to have regard, as far as is practicable, to the preference, if any, expressed by the said parent.[49]

THE SCHOOL'S DUTIES

Boards of Management

Boards of management, with the exception of those under the vocational education committees, are corporate bodies.[50] As such, they are required to admit all children who apply for admission to the school except where a refusal accords with their admissions policy published under section15(2)(d) of the Education Act 1998.[51] Not later than 21 days after a parent has provided the necessary information required under section 19(2) of the 1998 Act, the board of management shall make a decision regarding the application and shall inform the parent in writing of that decision.

Section 7(2) of the 2000 Act provides:

> "Where an offence under the Act is committed by a body corporate and is proved to have been so committed with the consent or connivance of or to be attributable to any neglect on the part of any person being a director, manager, secretary or other officer of the body corporate, or a person who was purporting to act in any such capacity, that person, as well as the body corporate, shall be guilty of an offence and shall be liable to be proceeded against and punished as if he or she were guilty of the first-mentioned offence."

A breach of this section could, therefore, involve proceedings not only against a board of management but also against the chairperson of the board, the principal, the secretary or other officer of the board, including a teacher member of the board.

Annual Report

The board of management of a recognised school is required to make an annual report on its attendance record to the EWO concerned and to the parents' association on the levels of annual attendance at the school.[52]

Statement of Strategy

Following consultation with parents, the principal, teachers and the relevant EWO, the board of management is required to prepare and submit to the Board a statement of the strategies and measures it proposes to adopt with a view to fostering an appreciation of learning among its students and encouraging regular attendance.[53] Guidelines from the Minister on the statement of strategy will issue from the Board. The statement of strategy is to be included as part of the school plan required by section 21 of the Education Act 1998.

"Section 29 is concerned with young persons who leave school early with inadequate qualifications in order to enter employment... Employers will also have a role to play in identifying such persons, as they may lawfully employ only those young persons who have a certificate to prove that they are registered with the Board and they are required to inform the Board in writing when they employ a young person."

Code of Behaviour

Under section 23 of the 2000 Act, the board of management after consultation with the principal, teachers, parents, students and the EWO, is required to prepare a code of behaviour/discipline in respect to the students registered at the school. The Code, which is to be prepared according to guidelines issued by the Board, must specify the following:

a) the standards of behaviour that shall be observed by each student in the school;

b) the measures that may be adopted when a student fails or refuses to observe those standards;

c) the procedures to be followed prior to a student being suspended or expelled from the school;

d) the grounds for lifting a suspension;

e) the procedures to be followed relating to a child's absence from school.

Prior to registering a child as a student, the school must provide the parents with a copy of the Code, and may, as a condition of such registration, require written confirmation from the parents that the Code is acceptable to them and that they will make all reasonable efforts to ensure that their child conforms to the Code. A copy of the Code is to be provided, on request, to any student attending the school or to the student's parents.

Expulsion of Students

Where the board of management of a recognised school, or a person acting on behalf of such board, is of the opinion that a student should be expelled, they are required, prior to such expulsion, to give written notification to the relevant EWO setting out its opinion and the reasons for that opinion. As soon as may be after receiving that notification the EWO shall:

* make all reasonable efforts to ensure that provision is made for the continued education of the student to whom the notification relates;

* make all reasonable efforts to consult with the relevant school principal or his/her nominee, the student, and his or her parents and any other persons the EWO considers appropriate;

* convene a meeting of the EWO with such of the above-mentioned persons who are agreeable to attend this meeting.

Section 24(4) provides:

> "A student shall not be expelled from a school before the passage of 20 school days following the receipt of a notification under this section by an educational welfare officer."

Subsection (4) is "without prejudice to the right of a board of management to take such other reasonable measures as it considers appropriate to ensure that good order and discipline are maintained in the school concerned and that the safety of students is secured." This section of the Act does not fetter the discretion of the school authorities but takes account of the board's obligations and in particular its duties under the Safety, Health and Welfare at Work Act 1989 and regulations made thereunder. In view of the fact that one of the primary duties under this Act is to employees and in view of increasing attacks on teachers, it is most surprising that section 24(4) omits to mention the safety of school staff. This section should be amended to include the safety of all employees at the school.

School Principal's Duties

A school principal has manifold duties under the Act, chief of which are:

* to cause to be established and to maintain a register in which each child is registered on the day s/he first attends school;

* having registered the name of a child who is registered in another recognised school (school B), to give, as soon as may be, written notification to school B of such registration.[54]

* having received a section 20(3) notification, school B must remove the name of the child concerned from its register; and

* must advise any other school enrolling a pupil transferring from school B of any school attendance problems which

have arisen relating to the child concerned, as well as such other matters relating to the child's educational progress as he or she deems appropriate;

* to keep records on school attendance which indicate a child's attendance or absence and which state the reasons for a child's absence;

* to retain such records in the school in such form as the Board may specify and make such records available;

* to give written notification to an EWO:

  - when a child has been suspended for a period of not less than 6 days; or

  - the aggregate number of school days on which a student is absent from school in the year is not less than 20 days; or

  - a student's name is removed under section 20 by the principal, or

  - a student is, in the opinion of the principal, not attending school regularly.

Persistent Failure of Child to attend School

Under section 17 of the Act, the parent of a child is required to cause the child to attend a recognised school on each school day unless he or she is exempted under section 17(2). One of those exceptions pertains to, among other matters, "a child who is participating in a programme of education, training, instruction or work experience prescribed by the Minister." These programmes, such as Youthreach and others, are therefore outside the ambit of the 2000 Act. In the case of some of these programmes, attendance is practically assured by virtue of the fact that an allowance is paid out to the trainees on condition they attend the prescribed programme. However, who will ensure generally that these, often the most needy of all children, are obliged to attend such programmes?

In recognition of the fact that some parents may fail to ensure their children acquire a minimum education, sections 26 and 27 of the 2000 Act seek to vindicate the constitutional right of the child to a minimum education. Section 26 confers on the Board the right to appeal a decision of a board of management to expel or refuse to enrol a child. This section amends section 29 of the Education Act 1998 by inserting section 4A. Accordingly, a reference to "parent of the student" or "student" will be construed as including a reference to the Board which may also make representations at an appeal hearing under section 29 of the 1998 Act.

Section 27 places the Board under a duty to make reasonable efforts to ensure that those children who are permanently excluded from school or who are refused enrolment in a school receive a minimum education. Where this cannot be achieved in a recognised school, the Board is required to make alternative arrangements. This section acknowledges that special provision will be necessary for some children. What are the alternative arrangements and when will they be made? Forward plans for equipment and personnel need to be put in place for such children well in advance of the coming into force of the 2000 Act. Time is running out and it would be a singular failure on the part of the State if, in a time of plenty, such provision did not become a priority.

Section 28 provides measures which will enable the identification of children who have school attendance difficulties together with the lawful collation[55] and sharing of educational or training-related information with the relevant agencies which can assist them. Provision is also made under this section for the conducting of research into school attendance problems and into levels of educational and training attainment.

The data controller of a body prescribed by the Minister (in the school context usually the board of management) may supply certain personal data retained by it to another data controller of another prescribed body provided that such data is used solely for a "relevant purpose" i.e., the recording of a person's educational or training history or the monitoring of his or her educational or training progress or for the carrying out of related research.

Protection of Young Persons in Employment: Employment of Students

Section 29 is concerned with young persons[56] who leave school early with inadequate qualifications in order to enter employment. It puts in place a system whereby all such young persons, under 18 years, are identified and are assisted to access continuing education and training. Employers will also have a role to play in identifying such persons as they may lawfully employ only those young persons who have a certificate to prove that they are registered with the Board[57] and they are required to inform the Board in writing when they employ a young person. The employer must retain a copy of such notice for production if an EWO requires it. Section 29 (14) and (15) contain heavy fines and imprisonment for those employers who breach these sections.

Conclusion

Given the troubled background of school attendance in Ireland, the Education (Welfare) Act 2000 is a long-overdue but welcome piece of legislation. Translating its aims and objectives into real life, however, presents an enormous challenge to the State, to schools and to the network of bodies and officials who will shortly be charged with its implementation. From the State's perspective, there needs to be an acknowledgement that the constitutional guarantee of a minimum education for all children is one of its most pressing and fundamental obligations. One of the key elements in the effective implementation of this legislation is adequate resources both in terms of finance and personnel. Realistically, the Act, of itself, is unlikely to effect a major transformation in society unless it is accompanied by wider societal reforms such as achieving a more equitable distribution of wealth resulting in the narrowing of the growing gap between rich and poor. In the absence of such reforms, this writer believes the 2000 Act is merely building on sand. Apart from the discharge of the State's constitutional and statutory duties, the effective monitoring of school attendance and truancy is inextricably linked to justice and the common good of society. The warning given by the Social Fund Report cited towards the beginning of this article is even more relevant to-day than it was when it was first made. •

1. As amended by the Child Care Act 1991.
2. In Arts. 42.4 and 42.5. In Art. 42.4 the term "primary education" or bunoideachas is pivotal together with its extent or duration. In this regard the Supreme Court judgment in *Sinnott v. Minister for Education and Science and Ors* is awaited with much interest.
3. Art. 42.3.2.
4. [2000] 2 IR 17 at 49.
5. *DPP v. Best* [2000) 2 IR 17 at 49, *per* Denham J.
6. Ibid, pp. 49-51.
7. *D.P.P. v. Best* [1998] 2 ILRM 549, High Court (Mr. Justice Geoghegan). The Education (Welfare) Act 2000 contains no such definition.
8. By the School Attendance (Amendment) Act 1936, the School Attendance (Amendment) Act 1967 and the Child Care Act 1991.
9. School Attendance Act 1926, section 4.
10. Section 4(2)(b).
11. *The School Attendance/Truancy Report*, Dept. of Education, 1994: D. Stokes, *Youthreach: An Overview-Developments and Future Trends* (Dept. of Education, 1995): Dr. Paul O'Mahony, *Punishing Poverty and Personal Adversity*, in Professor Ivanna Bacik and Dr. Michael O'Connell (eds) *Crime and Poverty in Ireland*, Round Hall, Sweet and Mazwell, 1998, p. 58.
12. The *School Attendance/Truancy Report* (1994) states, at pp. 19-20; "This practice has fallen into disuse at primary level, and may be said never to have been applied in other schools."
13. See NESC Report of 1984, Rothman, 1984);Dr. Paul O'Mahony (1993) research into the characteristics of Mountjoy prisoners indicate that 89% had left school by the age of 15 years; *School Attendance/Truancy Report*, Dept. of Education, 1994; T. Kellaghan, T. Weir, O' h-Uallachain and Morgan, *Educational Disadvantage in Ireland*, Combat poverty Agency, 1995.
14. Loc. cit., pp. 61-2.
15. At p. 90 of the Report.
16. At p. 171 of the Report.
17. The *International Adult Literacy Survey: Results for Ireland* (2000) found that almost one quarter of the Irish population were at level 1 in the various literacy scales used in the survey.
18. I am grateful to Mr. Michael Doyle, Senior School Attendance Officer, for this information.
19. *MF v. Superintendant of Ballymun Garda Station* [1991] 1 IR 189: *O'Donoghue v. Minister for Health* [1996] 2 IR 20: *Comerford v. Minister for Education* [1997] 2 ILRM 134: *DB v. The Minister for Justice*, unreported, 29th July 1998: *Sinnott v. Minister for Education & Ors*, unreported, HC, 4th Oct., 2000, Barr J., W.J.S.C. 1996 1418.
20. Author's emphasis
21. Until the year 1936, certain limited exceptions were made annually for sowing purposes in Spring between 17th March and 15th May, for a child engaged in light agricultural work for his parent on his parent's land; and for reaping purposes in Autumn between 1st August and 15th October.
22. *In re Article 26 and the School Attendance Bill* 1942 [1943] IR 334.
23. See *Carberry v. Yates* (1935) 69 ILTR 86: *McEneaney v. Minister for Education* [1941] IR 430.
24. See Professor W.N. Osborough, *Education in the Irish law and Constitution* 13 Ir.Jur.(1978) 145: D. Glendenning, *Education and the Law*, Butterworths, 1999, para. 3.90 et seq.
25. *Seanad Debates*, 1942, vol 27, cols 780, 228.
26. *Dail Debates* vol. 88 cols 1558, 1559, 1569 and 1570: see also W N Osborough, loc cit, 145-180 at pp 157-58.
27. See *Loftus v. AG* [1979] IR 221: *Ryan v. AG* [1965] IR 294: *McDonald v. Bord na gCon* [1965] IR 217: *East Donegal Co-Operative v. AG* IR [1970] IR 317: *Art. 26 and the Regulation of Information Bill 1995* [1995] 2 ILRM 81: *DPP v Best* [2000] 2 IR 17 at 20, para. 5.
28. [2000] 2 IR 17 at 20.
29. Ibid, p. 19.
30. Ibid, p. 20. In the High Court, Geoghegan J. held that the inclusion of the Irish language in the curriculum was not essential to comply with the constitutional standard of minimum education.
31. *Per* Denham J.
32. *Per* Barron J.
33. Ibid.
34. Ibid.
35. Schools recognised by the Minister for Education and Science under the Education Act 1998, section 10.
36. Part 11.
37. Section 10.
38. Established under the Education Act 1998, Pt. VII.
39. Section 7(1): in giving advice or making recommendations to the Minister, the Board is required to have regard to the cost of such proposed advice or recommendations [section 10(3)].
40. The meaning of the term "parent" is the same in the Education Act 1998 and in the Education (Welfare) Act 2000. It includes a foster parent, a lawfully appointed guardian or other person acting *in loco parentis* who has a child in his or her care subject to any statutory power or order of a court and, in the case of a child who has been adopted under the Adoption Acts 1952-1988, or, where the child has been adopted outside the State, means the adopter or adopters or the surviving adopter.
41. Section 26(2) of the Education (Welfare) Act 2000 amends section 29 of the Education Act 1998 by the insertion of (4A).
42. Section 10(4).
43. In the Circuit in which the child resides
44. which are set out in section 30.
45. Section 12.
46. A "young person" here means a person other than a child who is of an age prescribed by the Minister but shall not include a person who has reached the age of 18 years.
47. Section 25(4).
48. Section 25(5).
49. Section 25 (2) and (3).
50. Education Act 1998, section 14.
51. As primary and post-primary schools are "educational establishments" under the Equal Status Act 2000, they may not discriminate, *inter alia*, in the admission or in the terms or conditions of admission of a person as a student to the school.
52. Section 21(6).
53. Section 22.
54. Section 20(3).
55. Without infringing the provisions of the Data Protection Act 1988.
56. A person, other than a child, who is of an age prescribed by the Minister but not including a person who has reached the age of 18 years [section 29(17)]
57. Section 29(6).

THE MAKING OF A LODGEMENT AT THE ELEVENTH HOUR (AND THE EFFECT, IF ANY, THAT SETTLEMENT NEGOTIATIONS MAY HAVE ON SUCH AN APPLICATION)

Damian Sheridan BL *considers the law relating to late lodgements in the light of changes to the Superior Court Rules and the recent decision in Noble v. Gleeson McGrath Baldwin.*

Introduction

Order 22 Rule 1 of the Rules of the Superior Courts governs the law in relation to lodgements. It states as follows:

> "In any action for a debt or damages (other than an action to which section 1(1) of the Courts Act, 1988 applies) or in an admiralty action the defendant may at any time after he has entered an appearance in the action and before it is set down for trial, or at any later time by leave of the Court, upon notice to the Plaintiff, pay into Court a sum of money in satisfaction of the claim or (where several causes of action are joined in one action) in satisfaction of one or more of the causes of action."[1]

This article is concerned with the making of a lodgement with the leave of the Court, the preconditions that a Court may impose in granting such an application, and whether or not disclosure of reports in prior, unsuccessful, settlement negotiations has a bearing on such an application.

The starting point on the making of such a lodgement is Barr J's decision in *Brennan v. Iarnrod Eireann.*[2] In this case two attempts were made to settle the claim, in the course of which the plaintiff made available all medical reports relating to her injuries. No settlement emerged, and the defendants sought liberty to make a late lodgement. The defendants relied on the fact that they were now represented by one solicitor, whereas the second defendant had previously had separate representation; and on the fact that liability was no longer contested.

Barr J. held, in refusing the application, that in the absence of special circumstances a defendant should not be allowed to use information obtained in unsuccessful settlement negotiations as a measure for calculating what was intended to be a tight lodgement. Barr J. did however state *obiter* that there were circumstances where, in fairness to the defendant, the court should exercise its discretion in favour of allowing a late lodgement notwithstanding a full disclosure of the plaintiff's case in the course of unsuccessful settlement negotiations. For example, one such circumstance might be where it emerged for the first time during such negotiations that the plaintiff's injuries or the sequelae thereof were more serious than pleaded.

With regard to this decision it is important to note that no cases are referred to in the judgment. Thus we do not know if, in coming to his decision, Barr J. took account of pre-existing High Court and Supreme Court decisions on the subject.

Furthermore, the issue of the provision of medical reports having been raised is now a much more debatable point. Under Order 39, Rule 46 of the Rules of the Superior Courts (as inserted by SI 391/98) medical reports are now exchanged before the hearing with the result that defendants are aware of the plaintiff's medical reports and their contents.

Case Law

In the case of *Hanley v Randles,*[3] a retrial was ordered by the Supreme Court on the issue of damages only. After the notice of trial had been served for the second hearing, an application to the High Court was made by the defendant to increase the lodgement. In that case it was submitted by counsel for the plaintiff that the motion should not be allowed because the Court should not be used as a sounding board for the defendant to test the plaintiff. Murnahan J. held that although this was an eleventh hour application, if the plaintiff could not be said to be prejudiced by being under a risk for costs already incurred, such an application was unanswerable as liability was no longer in issue.

In the case of *Ely v Dargan,*[4] a Supreme Court judgment, affirming a decision of Murnahan J. in the High Court, leave was again sought to increase a lodgement on foot of the Supreme Court's decision to direct a retrial on the basis of quantum. The application was granted upon terms that the defendants meet all the costs incurred by the plaintiff. In the course of his judgment O'Dalaigh CJ stated,

> "The rule (Order 22 Rule 1) is in the widest terms, and clearly allows of an application being made to the Court before a retrial as well as before a trial."[5]

Later he stated:

> "The defendant was right to urge that the public interest is served by allowing a defendant even at the eleventh hour to proffer to the Plaintiff under the lodgement machinery of the

Courts a sum that the defendant considers adequately meets the plaintiff's claim".[6]

The decision of Moriarty J in *Dawson and Dawson v Irish Brokers Association*[7] makes reference to both *Ely v. Dargan* and *Brennan v Iarnrod Eireann*. Again this case involved an application for a late lodgement after a case had been sent back by the Supreme Court for a retrial. Specific reference was made to the judgment of O'Dalaigh C.J. in the *Dargan* case. However, Moriarty J, in exercising his discretion to allow the application, noted that "there is no question here of a background of settlement discussions or other negotiations having enabled the Defendants to know the Plaintiff's hand to a level of potential unfairness with regard to a lodgement, such as influenced the Court to refuse leave for a late lodgement in *Brennan v Iarnrod Eireann.*"[8]

Noble v. Gleeson McGrath Baldwin

The recent case of *Noble v. Gleeson McGrath Baldwin and Others*[9] dealt with factors very similar to those in the *Brennan* case. The plaintiff's action was one for professional negligence on the part of the defendants for failure to prosecute her claim for negligence against British Airways following an alleged accident on board a British Airways flight in February 1995. Medical reports had first been exchanged in July of 1999, and the most recent medicals had been exchanged on 2 December 1999. Unsuccessful settlement negotiations had been held on 24 November 1999. The plaintiff was informed on 1 December 1999 that liability was admitted. The case had been set down for trial on 3 December 1999, but as no judge was available was not heard on that date. Subsequently the case was specially fixed for 29 February 2000.

The defendants brought a motion seeking an extension of time within which to make a late lodgement. This application was heard a mere ten days prior to the hearing of the action. In the course of his decision Mr Justice Quirke again quoted at length from the judgement of Chief Justice O'Dalaigh in the case of *Ely v Dargan*:

"Order 22 R1(1) of the Rules of the Superior Courts allows a Defendant before or at the time of delivering his defence, or at any later time by leave of the Court, upon notice to the Plaintiff to pay a sum of money into Court in satisfaction of the Plaintiff's claim. The rule is in the widest terms and it clearly allows of an application being made to the Court before a re-trial as well as before a trial. The only question, in the former case, is what conditions the Court may properly impose in granting leave. The general principle underlying the lodgement machinery of the Courts is that a Plaintiff, who accepts within the required time a lodgement in satisfaction of his claim, is entitled to have the costs he has incurred to the date of the lodgement taxed and paid by the Defendant; r.4(3) of Order 22. The Plaintiff can suffer no disadvantage unless he chooses to go to trial and fails to obtain an award of more that the amount lodged; r.6 of Order 22....

....the Defendants were right to urge that the public interest is served by allowing a Defendant, even at the eleventh hour, to proffer to the Plaintiff under the lodgement machinery of the Courts a sum that the Defendant considers adequately meets the Plaintiff's claim. But the principle of public interest does not require that a Defendant, who by leave of the Court is allowed to avail of the lodgement machinery, should do so on any more favourable conditions than he would have done if he had used that machinery in the ordinary way without the Courts leave....

.... Cases may arise in which there are circumstances that require special consideration; but, short of this, my opinion is that in the ordinary case where a Defendant wishes to increase the amount of his original lodgement he may properly be required, as a condition of obtaining liberty, to restore the Plaintiff to the position in which he would have been if the increased lodgement had been an original lodgement made under the rules without leave; that is to say, that the Defendants should undertake to recoup the Plaintiff in respect of all costs already incurred, or ordered to be paid by him, subsequent to the date of the original lodgement."[10]

He continued by saying:

"The proceedings the subject of this application have been listed for hearing ten days from the date hereof. It has been acknowledged by and on behalf of both parties to the proceedings that the matter is ready to proceed, that Counsel have been briefed to appear on behalf of both parties and that all of the costs and expenses of and associated with the trial have been already incurred by the Plaintiff.

Accordingly leave granted pursuant to Order 22 Rule 1(1) of the Rules to the defendant to pay into Court a sum of money in satisfaction of the plaintiff's claim even at this time will not affect or interfere with the right of the plaintiff herein to have all of the costs which he has incurred to date (which include all of the costs of and associated with these proceedings herein up to an including the date from which the trial is listed and including the costs of briefing Counsel and of having witnesses attend in Court) taxed and paid for by the defendant. In such circumstances, in the event that the plaintiff chooses not to accept the sum paid into Court by way of lodgement on behalf of the defendant, then he is exposed only to the risk of penalty in respect of costs incurred with effect from the second day of the trial of the proceedings herein."[11]

"In *Brennan v. Iarnrod Eireann* Barr J. refused the defendant's application on the grounds, *inter alia*, that to grant such relief might encourage some defendants or their indemnifiers to enter into spurious settlement negotiations, the actual purpose of which might be to ascertain comprehensive information about the plaintiff's case with a view to making a late lodgement based thereon."

In referring to *Brennan v Iarnrod Eireann* Quirke J stated:

> "Whilst there are factual similarities between *Brennan* and the instant case it is clear that the two are readily distinguishable from one another. In *Brennan* Barr J. referred to the need for candour by all parties during *bona fide* settlement negotiations in personal injury actions and he refused the Defendant's application on the grounds *inter alia* that to grant such relief might "encourage some Defendants or their indemnifiers to enter into spurious settlement negotiations, the actual purpose of which is to ascertain comprehensive information about the Plaintiff's case with a view to making a late lodgement based thereon". There is no such suggestion in the instant case and that is readily acknowledged on behalf of the Plaintiff. Furthermore in *Brennan* Barr J. expressly provided that "there are circumstances where, in fairness to the Defendant, the Court should exercise its discretion in favour of allowing a late lodgement notwithstanding a full disclosure of the Plaintiff's case in the course of unsuccessful settlement negotiations...." and he went on to instance one such circumstance."[12]

In the circumstances the application for the lodgement was acceded to. Costs were awarded to the Plaintiff.

In distinguishing the case of *Ely v Dargan* over the *Brennan v. Iarnrod Eireann* case Quirke J has reasserted the findings of the earlier case over the decision of Barr J, even though the earlier case makes no reference to unsuccessful settlement negotiations. On the face of it *Ely v Dargan* should be distinguishable from both the *Brennan v. Iarnrod Eireann* and *Noble v. Gleeson McGrath Baldwin* cases on this fact alone.

One must not, however, forget the circumstances of *Ely v Dargan*: it was an application for leave to increase a lodgement on foot of the Supreme Court's decision to direct a retrial on the basis of quantum. Thus the Defendants in that case were in exactly the same position as that of the Defendants in the *Brennan* and *Noble* cases in that they had full disclosure of the Plaintiff's medical evidence. It is on this net point that all these cases are so similar.

Moriarty J's decision in *Dawson* appears to allow for late lodgements subject always to a test of unfairness.

For the Courts to draw a distinction between the different manner in which Defendants procure knowledge of the Plaintiff's medical evidence seems to be somewhat unbalanced. The words of Chief Justice O'Dalaigh should be noted:

> "...the Defendants were right to urge that the public interest is served by allowing a Defendant, even at the eleventh hour, to proffer to the Plaintiff under the lodgement machinery of the Courts a sum that the Defendant considers adequately meets the Plaintiff's claim."

The manner in which this information is procured should be of little interest once the availability of the information to the defendants is accepted. The direction that practice and procedure appears to be moving, with the exchange of expert reports now a constitutuent part of the rules, would appear to reflect this principle.

Order 39 rule 46, Disclosure of Expert Reports and Statements

In *Brennan v. Iarnrod Eireann* Barr J. refused the defendant's application on the grounds, *inter alia*, that to grant such relief might encourage some defendants or their indemnifiers to enter into spurious settlement negotiations, the actual purpose of which might be to ascertain comprehensive information about the plaintiff's case with a view to making a late lodgement based thereon.

This viewpoint must fall to be considered in light of the fact that reports are now exchanged prior to the case giving comprehensive information about the Plaintiff's case anyway. Under Order 39, Rule 46, of the Rules of the Superior Courts[13] it is now possible for a defendant to have full knowledge of the plaintiff's expert reports, including medical reports, that the plaintiff intends to rely on at the trial of the action, as soon as six weeks after the service of the Notice of Trial.

It would appear that the findings of Barr J. in the *Brennan v. Iarnrod Eireann* case have been overtaken by these new provisions. There is a resonance in the new rules of: the judgment of the judgment of O'Dalaigh C.J. in *Ely v. Dargan* where he mentions the benefit to the public interest in allowing a defendant to make a late lodgement: the obvious purpose of section 45 of the Courts and Court Officers Act 1995 (the enabling provision for the new rules) is to allow for full and frank disclosure in personal injuries legislation with a view to more speedy and cost efficient resolution of claims for damages.

Conditions

In the words of O'Dalaigh C.J. in the case of *Ely v Dargan*:

> "The rule is in the widest terms and it clearly allows of an application being made to the Court before a re-trial as well as before a trial. The only question, in the former case, is what conditions the Court may properly impose in granting leave."[14]

"The decision of Quirke J in *Noble v. Gleeson McGrath Baldwin*, together with the more recent development in the rules allowing for the exchange of expert reports, may open the way for applications to make lodgements even at the eleventh hour. The only apparent precondition appears to be a requirement of an undertaking as to costs that leaves the plaintiff in the same position he would have been in had a lodgement been made in the normal course of events without leave of the Court. Furthermore, and perhaps more importantly, this course appears possible regardless of what information the defendant possesses in relation to the plaintiff, or how it was procured."

In the case of *Hanley v. Randles* Murnahan J. stated that although the application for a lodgement was an eleventh hour application, as long as the plaintiff was under no risk as to costs already incurred then the application must be allowed, as the defendants were no longer contesting liability. It would appear that these two factors, the risk as to costs and the question of liability, have a bearing on the granting of an application for a late lodgement.

In the case of *Ely v. Dargan* the situation was the same. A retrial had been directed on the basis of quantum only. On the issue of costs O'Dalaigh C.J. had this to say:

> "[M]y opinion is that in the ordinary case where a Defendant wishes to increase the amount of his original lodgement he may properly be required, as a condition of obtaining liberty, to restore the Plaintiff to the position in which he would have been if the increased lodgement had been an original lodgement made under the rules without leave; that is to say, that the Defendants should undertake to recoup the Plaintiff in respect of all costs already incurred, or ordered to be paid by him, subsequent to the date of the original lodgement."[15]

The situation in the case of *Dawson & Dawson v The Irish Brokers Association* was similar, in that the defendants accepted that they had no defence to costs being awarded to the plaintiff. The recent *Noble v. Gleeson McGrath Baldwin* decision came to the same conclusions. The defendants were ordered to meet all of the plaintiff's costs to date, which not only included the costs of the motion itself, but also counsel's brief fees, as it was conceded that these costs had at the time of the application been incurred. The advantage to the defendants, in that particular case, was that the case was listed for four to five days.

It is less clear if the absence of any dispute as to liability is a condition precedent to the granting of leave for a defendant to make a late lodgement. Barr J., in the *Brennan v. Iarnrod Eireann* decision, dismissed the defendant's reasons for seeking the late lodgement saying, *inter alia*, that the fact that the defendants no longer disputed liability, where it was not contended that any of the defendants ever thought they had a good defence, did not amount to special circumstances warranting the allowing of the lodgement. Arguments regarding the resolution of issues as between defendants that allowed for the conceding of liability were mooted in the *Noble v. Gleeson McGrath Baldwin* decision, but Quirke J appears not to make any specific reference to these factors in coming to his decision. In the case of *Ely v Dargan* the judgement makes no reference to the question of liability being a factor, or precondition, in determining whether a late lodgement should be allowed or not. The case of *Dawson and Dawson v Irish Brokers Association* concerned the question of libel, thus the provisions of Order 22 Rule 1(3) of the Rules of the Superior Courts apply, wherein liability cannot be at issue if one seeks to make a lodgement. This is obviously an obligation limited to the *Dawson* decision, yet in all the decisions discussed the question of liability was not in question.

In *Hanley v. Randles* Murnahan J. used the following phraseology:

> "Undoubtedly this is an application at the eleventh hour but, if the Plaintiff is not prejudiced by being under a risk for costs already incurred, the application is unanswerable. Liability is not now in issue: it is now a question of assessment of damages only."[16]

In light of this statement is the issue of liability just an ancillary factor, or can it always be said that the defendant will only lodge where he feels he has some liability? This article concerns itself with cases where the defendant is making a late lodgement, and going to the trouble of undertaking the costs, to both sides, of making this application to Court. This is not the type of case where a defendant makes a lodgement purely to "get rid" of the case, where the case has a nuisance value. Thus in all situations discussed here the defendant will feel that he has some liability. An admission of liability is thus not so much a precondition to an application for a late lodgement, as the natural circumstances that a defendant will find himself in when he seeks to make such an application as this.

Conclusion

Since Barr J.'s decision in *Brennan v. Iarnrod Eireann* it has generally been accepted that an application to make a lodgement after the disclosure of expert reports will require extraordinary reasons. The decision of Quirke J in *Noble v. Gleeson McGrath Baldwin*, restating the law of the Supreme Court in the case of *Ely v. Dargan*, distinguishes Barr J's decision. Together with the more recent development allowing for the exchange of expert reports, the way may now be open for applications to make lodgements, in the words of O'Dalaigh C.J., "even at the eleventh hour." The only apparent precondition appears to be a requirement of an undertaking as to costs that leaves the plaintiff in the same position he would have been in had a lodgement been made in the normal course of events without leave of the Court. Furthermore, and perhaps more importantly, this course appears possible regardless of what information the defendant possesses in relation to the plaintiff, or how it was procured.●

1 Order 22, Rule 1, Rules of the Superior Courts, 1986

2 [1993] I.L.R.M. 134

3 (1960) Ir Jur Rep 67

4 [1967] IR 89

5 Ibid p.94

6 Ibid p.95

7 Unreported, 23 June 1997

8 Ibid p.8

9 Unreported, 19 February 2000

10 Ibid p.2

11 Ibid p.4

12 Ibid p.5

13 As inserted by Rules of the Superior Courts (No. 6) (Disclosure of Reports and Statements) 1998 (S.I. No. 391 of 1998)

14 [1967] IR 89 at 94

15 Ibid p.95

16 (1960) Ir Jur Rep 67 at 68

THE OFFICIAL SECRETS ACT 1963 THE IRISH INTELLIGENCE SERVICES

Niall Neligan BL *considers whether the Irish Intelligence Services should be put on a statutory footing in the light of recommended reforms to the Official Secrets Act and recent freedom of information legislation.*

Introduction

The Official Secrets Act 1963 plays a central role in the administration of the affairs of State. Unlike its UK equivalent, the Official Secrets Acts 1911-1989, the Irish statute has not given rise to high profile prosecutions as in the cases of David Shayler, Richard Tomlinson and Peter Wright. The purpose of this article is to examine the provisions of the 1963 Act in the light of the recommendations arising out of the Select Committee on Legislation and Security, to consider the impact of the Freedom of Information Act 1997 and, finally, to address the need for equivalent legislation to the 1994 Intelligence Services Act in the United Kingdom.

The Official Secrets Act 1963

The current Act was introduced in 1963 by the then Minister for Justice, Charles Haughey. It replaced the Official Secrets Acts 1911 & 1920 which had been adopted by the United Kingdom Parliament and which remained in force in Ireland.[1] The Act takes a two pronged approach to (a) communication of official information and (b) communication of information to the prejudice of the safety of the State. The short title of the Act is "an Act to provide for the safeguarding of official information", and it is divided into four parts.

Part II of the Act: Official Information

Disclosure of official information

Section 4 deals with the Disclosure of official information, and provides that a person shall not communicate any official information to any other person unless he is duly authorised to do so or does so in the course of and in accordance with his duties as the holder of a public office or when it is his duty in the interest of the State to communicate it. This provision applies to persons who are or have been holders of a public office. Under Part II of the Act it is a criminal offence for civil servants and others to release general information which may come into their possession and which is deemed to be secret or confidential.

The term 'public office' is defined under section 2 (1) as an office or employment which is wholly remunerated out of the Central Fund or out of moneys provided by the Oireachtas, or an appointment to, or employment under, any commission, committee or tribunal set up by the Government or a Minister for the purposes of any inquiry, but does not include membership of either House of the Oireachtas.

There was much debate over the inclusion of the term 'an office or employment which is wholly remunerated out of the Central Fund,' and it was argued that this could in theory include the whole body of servants of the State, and conceivably includes the Civil Service, the Gardai and indeed the Judiciary.[2]

To whom does the Act apply?

As already mentioned section 4 not only applies to the Civil Service, but also to persons appointed to and serving under any commission, committee or Tribunal set up by the Government or by a Minister for the purpose of any inquiry. By extension, section 4 has wider application in so far as it applies to all State agencies and local authorities, but most importantly to the defence forces, the Gardai and the security services. Furthermore, under section 5 "a person who is or has been (a) a party to a contract with a Minister or State authority or with any person on behalf of a Minister or State authority, or (b) employed by such party, shall not communicate to any third party any information relating to the contract and expressed therein to be confidential."

What information is covered?

For the purpose of section 4, 'official information' is defined under section 2 (1) to mean:

> "any secret official code word or password, and any sketch, plan, model, article, note, document or information which is secret or confidential or is expressed to be either and which is or has been in the possession, custody or control of a holder of a public office, or to which he has or had access, by virtue of his office, and includes information recorded by film or magnetic tape or by any other recording medium."

It would appear therefore that three kinds of information are covered:

- Information which is objectively secret or confidential.
- Information which is expressed as secret or confidential (for example information which is classified as secret/confidential and is duly stamped to that effect.
- Information certified by a Minister to be secret/confidential

This final category, namely 'information certified by a Minister to be secret/confidential', which is set out under section 2 (3), created a lot of debate when the Act was passing through the Dail. Section 2(3) provides that a certificate given by a Minister under his seal that any official code word or password or any sketch, plan, model, article, note, document or information specified or indicated in the certificate is secret or confidential shall be conclusive evidence of the fact so certified. It was argued at the time that this removed a safeguard which existed under earlier statutes, where the courts could adjudicate whether a document was or was not secret or confidential. This point has not gone away, and in the Report on Review of the Official Secrets Act 1963,[3] the Select Committee on Security and Legislation argued "that by taking this determination out of the hands of the judicial domain, it may well be an unwarranted interference with the judicial process and may accordingly be unconstitutional."

When can Information be released?

Under section 4 of the Act, there are three circumstances in which official information can be communicated:

- Authorised Disclosure, where a person is duly authorised to do so by a Minister or State Authority or by some person authorised in that behalf by a Minister or State Authority.
- Official Leaks, where he or she discloses information in the course of and in accordance with his or her duties as the holder of a public office. This category is known as official leaks, and such leaks are not contrary to the Official Secrets Act.
- Duty Bound Disclosure, which may occur where an individual civil servant could decide that it was his or her duty in the interests of the State to release a particular piece of information even though the Government of the day did not wish it to be released.

For further consideration of this last category, and the meaning of 'duty in the interest of the State', the decisions of the English courts in *R-v-Ponting*[4] and *Chandler -v- The DPP*[5] are of some interest.

Section 6 of the Act deals with retention of documents. This is akin to the retention of documents clause found in private employment contracts. Under section 6 (3) the Taoiseach may give directions as to the return or disposal of any original documents specified or indicated in such directions which constitute or contain official information and which are in the possession or under the control of any person who formerly held office as a Minister or Parliamentary Secretary, and any such person is bound to comply with all such directions.

Section 7 outlines offences relating to official dies, seals and stamps.[6] Section 8 provides for offences regarding forgery of official documents.[7]

Part III of the Act: Prejudice to the Safety or Preservation of the State

Part III of the Act applies to a much more specific category of information, namely communications which might prejudice the safety or preservation of the State.

Under section 9(1) a person shall not, in any manner prejudicial to the safety or preservation of the State:

(a) obtain, record, communicate to any other person or publish, or

(b) have in his possession or under his control any document containing, or other record whatsoever of, information relating to-

(i) the number, description, armament, equipment, disposition, movement or condition of any of the Defence Forces or of any of the vessels or aircraft belonging to the State,

(ii) any operations or projected operations of any of the Defence Forces or of the Garda Síochána or of any of the vessels or aircraft belonging to the State,

(iii) any measures for the defence or fortification of any place on behalf of the State,

(iv) munitions of war, or

(v) any other matter whatsoever information as to which would or might be prejudicial to the safety or preservation of the State.

Under section 9(2), where a person is charged with a contravention of this section it shall be a good defence to prove that the act in respect of which he is charged was authorised by a Minister or by some person authorised in that behalf by a Minister or was done in the course of and in accordance with his duties as the holder of a public office.

Section 10 amounts to an anti-espionage provision. If a person is charged with contravening section 9, the fact that that person has been in communication with or attempted to communicate with a foreign agent or with a member of an unlawful organisation shall be evidence that the act in respect of which he is charged has been done in a manner prejudicial to the safety of the State.

Section 10 (2) is very wide in its application, and it is hard to see how it could stand up to a concerted challenge in court. Section 10 (2) provides *inter alia* as follows:

> A person shall, unless he proves the contrary, be deemed to have been in communication with a foreign agent or a member of an unlawful organisation if he has (whether within or outside the State) visited the address of a foreign agent or a member of an unlawful organisation or consorted or associated with such agent or member, or if (whether within or outside the State) the name or address of or any other information regarding a foreign agent or a member of an unlawful organisation has been found in his possession or has been supplied by him to any other person or has been obtained by him from any other person.

Quite where this section begins and ends is hard to gauge. It arguably places an evidential burden[8] on the accused to prove to the contrary that he was not in communication with a foreign agent or a member of an unlawful organisation by virtue of his visit to that person's house with the object of imparting information outlined under section 9.

Section 11 deals with harbouring offenders and failure to report offences. This section also provides that a person who becomes aware that there is or there is about to be a contravention of section 9 is obliged to report this to the Gardai or defence forces. Section 12 provides that if, in the course of a prosecution for an offence under section 9 or for an offence under Part II committed in a manner prejudicial to the safety

or preservation of the State, that part of the hearing must be in camera, and the court must make an order to that effect. However, the verdict and sentence (if any) must be published.

Part IV: Legal Proceedings and Supplementary Provisions

Part IV sets out a number of provisions in relation to legal proceedings and supplementary matters. Section 13 provides that any person who contravenes any provision of the Act is guilty of a criminal offence. If triable summarily before the District Court, a person found guilty, shall be liable to a fine not exceeding £100 or to imprisonment for a period of imprisonment not exceeding six months. A person triable on indictment for an offence under section 9 or for any offence under Part III shall be liable for a term not exceeding two years or to penal servitude for a term not exceeding seven years. Under section 14 criminal proceedings cannot be instituted except with the consent of the Director of Public Prosecutions.

Section 15 deals with arrest, and has been amended by virtue of section 4 of the 1997 Criminal Law Act. Section 16 provides that a Justice of the District Court may issue a search warrant to any member of the Garda Siochana where he has reasonable grounds for believing that there has been or there is about to be a contravention of section 9. Also, where an officer of the Garda Síochána not below the rank of chief superintendent has reasonable grounds for believing that in the interest of the State immediate action is necessary, he may issue a search warrant having the same effect as a search warrant issued by a justice of the District Court.

Finally section 17 provides where an officer of the Garda Síochána not below the rank of chief superintendent has reasonable grounds for suspecting that an offence under section 9 has been committed and for believing that any person is able to furnish information as to the offence or suspected offence, he may apply to the Minister for Justice for permission to require the person to give any information in his or her power relating to the offence and if a person fails to comply with the requirement or knowingly gives false information, that person is guilty of an offence. Section 18, which previously dealt with the power to require the production of telegrams, has been repealed.[9] However, it would appear that the decision to repeal this provision was premature, as it could have been extended to the production to the Minister of Justice of originals and transcripts of e-mail communications.

Report of the Select Committee on Legislation and Security

In 1997, the Select Committee on Legislation and Security published their report on the Review of the Official Secrets Act. The committee made a number of recommendations. The first recommendation was that the Official Secrets Act should be repealed at the earliest possible date and that criminal sanctions should only be imposed where there has been disclosure of certain narrow categories of information dealing with espionage and information whose disclosure would cause serious harm to the national interest.

The committee noted that in other jurisdictions (United Kingdom and New Zealand) the equivalent legislation drew a distinction between espionage (i.e. knowingly communicating information to a foreign country or unlawful organisation with the intent to prejudice the security or defence of the state) and wrongful communication of information or "leaks", i.e., knowingly communicating information without authority and knowing that such information is likely to prejudice the security or defence of the State. The committee recommended that a similar distinction should be drawn in Irish law, and likewise that the criminal sanctions should be more serious in relation to the more serious offence of espionage. In addition the committee recommended the inclusion of a sanction to prevent the disclosure of information which would impair the effectiveness of the criminal justice system as well as a new provision for a sanction on the disclosure of information where there is a real threat to life and safety.

One of the most important recommendations of the report was the inclusion of a provision prohibiting the disclosure of information for personal gain. It was noted that under section 105A of the New Zealand Crimes Act it is an offence to corruptly use any official information to obtain an advantage or pecuniary gain.

The Committee's Recommendations

The Committee's recommendations may be summarised as follows:

- Criminal sanctions should be confined to the unauthorised disclosure of information relating to the security or defence of the State; to crime and criminal law enforcement; to the protection of life and safety; and to the disclosure of information for personal gain.

- Where possible, civil and disciplinary sanctions should apply in relation to disclosure of certain types of information.

- Criminal liability should only apply to a person who knowingly discloses information. That the categories of civil servant and contractors to whom the legislation applies should be specified more clearly. Furthermore, consideration should be given to narrowing the category of persons for whom obtaining information is to be a criminal offence.

- The committee recommended that any future enactment should contain an explicit requirement on the prosecution to show actual harm or damage or a real threat of harm or damage before criminal liability can apply.

- The committee recommended that there should be a public interest defence in relation to all criminal sanctions created in the new legislation.

- The committee noted the extraordinary powers entrusted to the Gardaí by the legislation, and recommended that such exceptional powers should only be granted to the Gardaí when the Oireachtas is satisfied that they are clearly necessary.

- In relation to the holding of aspects of criminal proceedings *in camera* at the request of the prosecution, the committee recommended that this should in all cases be a matter for the court and not for one of the parties engaged in the criminal proceedings to decide. Accordingly, it recommended that any decision to hold proceedings *in camera* should be entirely a matter for the judiciary.

The effects of the Freedom of Information Act on Official Secrets

The Freedom of Information Act 1997 has had a profound effect on the Official Secrets Act.[10] The 1997 Act approaches the issue of the freedom of information from a different perspective to that adopted by the Official Secrets Act. The Official Secrets Act, regulates the information which civil servants are entitled to release. It does not provide any rights to members of the public. In contrast, the Freedom of Information Act gives members of the public the right to seek public information.[11] It accordingly imposes obligations on civil servants to release information covered by the legislation.

Under section 32 (1) of the Freedom of Information Act:

> "A head shall refuse to grant a request under section 7 (request for access to records) if (a) the disclosure of the information concerned is prohibited by any enactment (other than a provision specified in column 3 of the third schedule of an enactment in that schedule)."

By virtue of the third schedule of the 1997 Act, information precluded from disclosure by public servants under sections 4, 5 and 9 of the Official Secrets Act may be requested by a member of the public under section 7. However, this is countered by an exception under section 24 which in effect provides that the head of a public body may refuse to grant a request under section 7 if in his opinion access to it could reasonably be expected to adversely effect: (a) the security of the State (b) the defence of the State (c) the international relations of the State and (d) matters relating to Northern Ireland.[12] Therefore section 32 does not preclude the disclosure of information under section 9 of the Official Secrets Act, namely information that if communicated by a public servant would prejudice the safety or preservation or safety of the state. However where there is a request for information under section 7 by a member of the public, the head of a public body may refuse such a request. In other words, there is no mandatory prohibition on disclosing information covered by section 9, but there is a discretionary exemption applied by virtue of section 24.[13]

The Official Secrets Acts in England and the Security Services Acts.

Arising out of the high profile case of Peter Wright[14], the Official Secrets Acts in the United Kingdom was updated in 1989. The purpose of the amending legislation was to replace section 2 of the Official Secrets Act 1911. This provision had also applied in Ireland until it was amended by the 1963 Act. However, before the United Kingdom Parliament could enact the 1989 Official Secrets Act, they had to make legislative provision for the Security Service (MI5). Under the Official Secrets Act (UK) 1989, section 1 provides:

> "1. - (1) A person who is or has been -
>
> (a) a member of the security and intelligence services, or
>
> (b) a person notified that he is subject to the provisions of this subsection,
>
> is guilty of an offence if without lawful authority he discloses any information, document or other article relating to security or intelligence which is or has been in his possession by virtue of his position as a member of any of those services or in the course of his work while the notification is or was in force."

The English Security Service is not defined under the Security Services Act 1989, but it is commonly referred to as MI5.[15] Its function is set out under section 1 (2) of the Act:

> "The function of the Service shall be the protection of national security and, in particular, its protection against threats from espionage, terrorism and sabotage, from the activities of agents of foreign powers and from actions intended to overthrow or undermine parliamentary democracy by political, industrial or violent means".'

Section 1 (3) goes onto provide that:

> "It shall also be the function of the Service to safeguard the economic well-being of the United Kingdom against threats posed by the actions or intentions of persons outside the British Islands."

There is no Irish statutory equivalent of the Security Services Acts 1989-1996, although provision is made for the Secret Service each year as part of the Appropriation Act which gives statutory effect to the departmental Estimates for the supply of services, both current and capital, including all Supplementary Estimates which were approved by the Dáil.[16]

The existence of the Secret Service without statutory recognition is in itself not unique: there are other examples such as the Prison Sentences Review Commission. The question that then needs to be asked, is this desirable? The requirement of a secret service is essential for the security of the State, and a secret service has been in existence since the foundation of the State[17] and before. However this raises the further question, if official information under section 9 of the Official Secrets Act can be disclosed under section 32 of the Freedom of Information Act, albeit by virtue of the discretion in section 24 of the Freedom of Information Act, then who is indeed the head of the Secret Service? And to which head of what Government department does he/she answer to? A member of the public who may have an interest in requesting information under section 7 of the Freedom of Information Act but covered by section 9 of the Offences against the State Act would have great difficulty in ascertaining the nature of any information which may exist, and greater difficulty in ascertaining the precise department or Government agency in control of that information.

"There is no Irish statutory equivalent of the Security Services Acts 1989-1996, although provision is made for the Secret Service each year as part of the Appropriation Act which gives statutory effect to the departmental Estimates for the supply of services, both current and capital, including all Supplementary Estimates which were approved by the Dáil."

Further consideration must be given to the wording of section 24 (3) of the Freedom of Information Act, which states:

> "Where a request under section 7 relates to a record to which subsection (1) applies, or would, if the record

existed, apply, and the head concerned is satisfied that the disclosure of the existence or non-existence of the record would prejudice a matter referred to in that subsection, he or she shall refuse to grant the request and shall not disclose to the requester concerned whether or not the record exists."

In effect the discretion to disclose information upon request under the Freedom of Information Act can be circumnavigated by section 24 (3) although there is no mandatory exemption for such information, in the absence of an 'official department' dealing with such requests, then this amounts to a form of mandatory exemption by the back door.

In the United Kingdom, the Intelligence Services Act of 1994 placed the Intelligence Service (MI6)[18] and Government Communications Headquarters (GCHQ)[19] on a statutory footing, bringing MI6 into line with the Official Secrets Act 1989 and the Security Services Act. Under both enactments[20] the chiefs of both services are answerable to the Secretary of State. Under both Acts, the Prime Minister can appoint a Commissioner who is a member of the judiciary to review the exercise by the Secretary of State of his powers in respect of the Security and Intelligence Services.[21] Both Statutes provide an investigation of complaints procedure. Furthermore section 10 of the 1994 Intelligence Services Act provides that:

"There shall be a committee, to be known as the Intelligence and Security Committee and in this section referred to as 'the committee', to examine the expenditure, administration and policy of (a) The Security Service (b) The Intelligence Service and (c) GCHQ."

Furthermore, that committee is obliged to make an annual report on the discharge of their functions to the Prime Minister, who shall lay that report before the Houses of Parliament.

"If the Official Secrets Act is to be reformed, then it is time that the Irish Security Services are placed on a statutory footing with the power to regulate aspects of the Act dealing with the communication of information likely to prejudice the safety and security of the State."

Conclusion

Although there is a private members Bill[22] to reform the Official Secrets Act, it only goes some way to clarifying the problems outlined in this article. Clearly the 1963 Act requires a total overhaul and the impetus for that arises out of the Freedom of Information Act 1997. Furthermore, if the Official Secrets Act is to be reformed, then it is time that the Irish Security Services are placed on a statutory footing with the power to regulate aspects of the Act dealing with the communication of information likely to prejudice the safety and security of the State. Finally, given the dramatic growth of the internet and web based communications, some consideration must be given to preventing economic espionage at a public and private sector level. The incorporation of the European Convention on European Rights into Irish Law is another important development, and indeed presents a further challenge to the existing legislation.[23] •

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1. Statutory Rules and Orders. 1928.No.36.
2. Dail Debates 31st October 1962; page 246
3. The Select Committee on Security and Legislation: *Report on Review of the Official Secrets Act 1963*
4. 1985 Crim LR 318
5. 1964 AC 763
6. 7.-(1) A person shall not-
   (a) use or have in his possession or under his control, without lawful authority or excuse, any official die, seal or stamp or any die, seal or stamp so nearly resembling it as to be calculated to deceive, or
   (b) counterfeit any official die, seal or stamp, or
   (c) use or have in his possession or under his control, without lawful authority or excuse, any such counterfeit die, seal or stamp, or
   (d) manufacture or sell or have in his possession for sale, without lawful authority or excuse, any official die, seal or stamp.
   (2) In this section "official die, seal or stamp" means a die, seal or stamp of or belonging to, or used, made or provided by a Minister or State authority or any diplomatic or consular agent or other authority appointed by or acting under the authority of the Government.
7. 8.-A person shall not-
   (a) forge or, without lawful authority or excuse, alter or tamper with any official document, or
   (b) use or have in his possession or under his control, without lawful authority or excuse, any forged, altered or irregular official document.
8. For a good discussion on statute impliedly placing the legal burden of proof on an accused, see *O'Leary -v-Attorney General*, where it was held that certain provisions under the Offences Against the State Acts, can place an evidential burden on an accused.
9. Interception of Postal Packages and Telecommunications messages (Regulation) Act 1993-Section 14
10. For a good discussion on the effects of the Freedom of Information Act on the Official Secrets Act 1963, see *'Freedom of Information Law in Ireland'* by Maeve McDonagh, Roundhall-Sweet & Maxwell 1998
11. Section 7, Freedom of Information Act 1997
12. (1) A head may refuse to grant a request under section 7 in relation to a record (and, in particular, but without prejudice to the generality otherwise of this subsection, to a record to which subsection (2) applies) if, in the opinion of the head, access to it could reasonably be expected to affect adversely-
    (a) the security of the State,
    (b) the defence of the State,
    (c) the international relations of the State, or
    (d) matters relating to Northern Ireland.
    (2) This subsection applies to a record that-
    (a) contains information-
    (i) that was obtained or prepared for the purpose of intelligence in respect of the security or defence of the State, or
    (ii) that relates to-
    (I) the tactics, strategy or operations of the Defence Forces in or outside the State, or
    (II) the detection, prevention, or suppression of activities calculated or tending to undermine the public order or the authority of the State (which expression has the same meaning as in section 2 of the Offences against the State Act, 1939),
    (b) contains a communication between a Minister of the Government and a diplomatic mission or consular post in the State or a communication between the Government or a person acting on behalf of the Government and another government or a person acting on behalf of another government,
    (c) contains a communication between a Minister of the Government and a diplomatic mission or consular post of the State,
    (d) contains information communicated in confidence to any person in or outside the State from any person in or outside the State and relating to a matter referred to in subsection (1) or to the protection of human rights and expressed by the latter person to be confidential or to be communicated in confidence,
    (e) contains information communicated in confidence from, to or within an international organisation of states or a subsidiary organ of such an organisation or an institution or body of the European Union or relates to negotiations between the State and such an organisation, organ, institution or body or within or in relation to such an organisation, organ, institution or body, or
    (f) is a record of an organisation, organ, institution or body referred to in paragraph (e) containing information the disclosure of which is prohibited by the organisation, organ, institution or body.
    (3) Where a request under section 7 relates to a record to which subsection (1) applies, or would, if the record, existed, apply, and the head concerned is satisfied that the disclosure of the existence or non-existence of the record would prejudice a matter referred to in that subsection, he or she shall refuse to grant the request and shall not disclose to the requester concerned whether or not the record exists.
13. The author is of the opinion that the Freedom of Information Act was badly drafted, in particular section 32, which includes section 9 in the third schedule. Section 24 presents problems as it comes within the part of the Act which deals with exemptions
14. The Conservative Government of Margaret Thatcher tried to suppress Wright's book *'Spycatcher'* but failed.
15. It is generally believed that MI5 is responsible for internal United Kingdom Security, further information is provided on their website at www.MI5.gov.uk
16. Appropriation Bill, 2000 *(Certified Money Bill)*: Second and Subsequent Stages.
17. See 'The spy in the Castle', by David Neligan, (1968) MacGibbon & Kee Limited, London
18. MI6 would appear to have responsibility for obtaining information about actions or intentions of persons outside the UK.
19. The principle activity of GCHQ is to monitor or interfere with communications, provide cryptographical analysis and generally protect official information.
20. See section 2 of The Security Services Act 1989, and section 2 (1) of the Intelligence Services Act 1994.
21. See section 4 of The Security Services Act 1989, and section 8 of the Intelligence Services Act 1994.
22. Official Secrets Reform Bill, initiated as a private members bill by Derek McDowell.
23. See recently, *Privacy Warning across Europe*, The Guardian, 26 May 2001.

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Legal Update

The BarReview
Journal of the Bar of Ireland. Volume 6, Issue 7

A directory of legislation, articles and written judgments received in the Law Library from the 14th March 2001 to 12th April 2001.
Judgment Information compiled by the Researchers, Judges Library, Four Courts.
Edited by Desmond Mulhere, Law Library, Four Courts.

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Judicial Researchers: Aine Clancy, LL.B (Ling. Germ),Alison de Bruir,LL.B/Shane Dwyer, LL.B (Ling. Germ), LL.M/ 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

Byrne v. Tracey
High Court: **Morris P.**
07/02/2001

Administrative; judicial review; applicant was casual trader in "The Square" in Blessington; adoption by Wicklow County Council of by-law pursuant to Casual Trading Act, 1995 designating area known as "The Mart" in the town of Blessington as an area where casual trading would be permitted; applicant seeking inter alia an order quashing this decision of the respondents; whether the effect of the resolution is a breach of applicant's constitutional right to work as a casual trader; whether the adoption of the by-law was in accordance with the provisions of s.6 of the Casual Trading Act, 1995; whether the applicant's claim was an effort under the guise of judicial review proceedings to make a case which should properly have been made before the District Court; whether there was conduct on the part of the respondents which could have given rise to a legitimate expectation on the part of the applicant that the original casual trading site would be retained; whether there had been strict compliance with the provisions of the Act of 1995 in the passing of the by-law; whether there was sufficient evidence to show the existence of a market right; whether applicant had discharged the onus on him to establish the existence of a market right.
Held: Relief refused.

Motor Distributors Limited v. Revenue Commissioners
High Court: **Kearns J.**
02/02/2001

Administrative; judicial review; certiorari; applicant sole wholesale distributor of Volkswagen motor cars in the State; applicant made declarations to respondents as to the open market selling price of the Volkswagen Passat; respondents of opinion that open market selling price at which Volkswagen Passat was offered for sale was greater than price declared by applicant; respondents purported to determine open market selling price of the vehicle; whether the purported decision was ultra vires on the basis that it had been made by an individual who was not a Revenue Commissioner; s.133, Finance Act, 1992 as amended by s.9, Finance (No.2) Act, 1992.
Held: Order of certiorari granted.

O'Donnell v. Judge O'Donnell
High Court: **Morris P.**
29/11/2000

Administrative; bias; six prosecutions against applicant alleging breaches of liquor licensing laws; plea of guilty had been tendered in respect of three of the prosecutions; applicant seeks order of prohibition preventing respondent from dealing with outstanding prosecutions and order of certiorari setting aside the orders already made and the penalties imposed; whether respondent took into account matters other than the evidence before him; whether there is a clear obligation on the trial judge to not only confine his considerations to the matters actually before the court but also to ensure that no reason is given to promote a belief that matters extraneous to the actual prosecution are being taken into account in reaching his decision.
Held: Reliefs granted; orders already made by respondent will be set aside; pleas of guilty in respect of offences awaiting sentence stand.

Spin Communications v. IRTC
Supreme Court: Denham J, **Murray J.,** Geoghegan J.
02/02/2001

Administrative; judicial review; bias; pre-judgment; fair procedures; appellant seeking inter alia an order of certiorari quashing the decision of the respondents whereby it awarded a youth orientated radio licence to the notice party; member of respondent had met with members of Garda National Drugs Unit concerning issue of drugs and dance music and had raised concerns reported in the press regarding chairman of appellant; member of respondent had raised same concerns with chairman of respondent; whether conduct of member of respondent would give rise in the mind of a reasonable person to an apprehension of pre-judgment or bias.
Held: Appeal dismissed.

O'Callaghan v. The Disciplinary Tribunal
Supreme Court: Denham J., Murray J., **Geoghegan J.**
02/02/2001

Administrative; judicial review; fair procedures; appellant seeking order of certiorari quashing respondent's decision to strike appellant off the Roll

of Solicitors for misconduct; whether unfair or unlawful for a person who is involved in a decision as to whether there is a prima facie case for an inquiry to participate in inquiry itself; whether respondent itself required to serve notice of complaint on respondent and await a reply before it makes its decision as to whether there is a prima facie case for inquiry.
Held: Appeal dismissed.

Maher v. Minister for Agriculture
High Court: **Carroll J.**
15/12/2000

Administrative; judicial review; milk quotas; applicants challenging validity of regulations restructuring milk quota regime made by respondent; whether discretion in Council Regulation which is left in the Member States are within the principles and policies determined by the Council of Ministers in organisation of E.U. milk market; whether implementing measures acts necessitated by obligations of E.U. membership; whether the nature of the milk quota created by European law must bear the same meaning in domestic law as in the legal order of the E.U.; whether right to a milk quota a property right within the meaning of Article 40.3.2 and Article 43 of the Constitution; Arts. 15.2.1 & 29.4.7 of the Constitution; S.I. 94/2000.
Held: Relief refused.

Library Acquisition

Delany, Hilary
Judicial review of administrative action
Dublin Round Hall Sweet & Maxwell 2001
M306.C5

Statutory Instrument

Environment and local government (delegation of ministerial functions) order, 2001
SI 88/2001

Agriculture

Statutory Instruments

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

Diseases of animals (restriction of movement of animals) order, 2001 (amendment) order, 2001
SI 61/2001

Foot and mouth (controlled area) (no.1), order
SI 56/2001

Foot and mouth (controlled area) (no.1), order 2001
SI 58/2001

Foot and mouth (restriction on movement), order 2001
SI 59/2001

Foot and mouth (restriction on movement) (no. 2), order 2001
SI 60/2001

Foot and mouth (restriction on movement) (no.3) order, 2001
SI 62/2001

Foot and mouth (restriction on movement) (no.4) order, 2001
SI 63/2001

Foot and mouth (restriction on movement of horses) order, 2001
SI 68/2001

Foot and Mouth Disease (Restriction of Import of Vehicles, Machinery and other Equipment) (Amendment) Order, 2001
SI 69/2001

Foot and mouth disease (restriction of import of horses and greyhounds) (amendment) order, 2001
SI 70/2001

Foot-and mouth-disease (restriction of import of horses and greyhounds) (no.2) order, 2001
SI 85/2001

Air Navigation

Library Acquisition

Goldhirsch, Lawrence B
The Warsaw convention annotated: a legal handbook
2nd edition
The Netherlands Kluwer Law International 2000
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Animals

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

Diseases of animals (restriction of movement of animals) order, 2001 (amendment) order, 2001
SI 61/2001

Foot and mouth (controlled area) (no.1), order
SI 56/2001

Foot and mouth (controlled area) (no.1), order 2001
SI 58/2001

Foot and mouth (restriction on movement), order 2001
SI 59/2001

Foot and mouth (restriction on movement) (no. 2), order 2001
SI 60/2001

Foot and mouth (restriction on movement) (no.3) order, 2001
SI 62/2001

Foot and mouth (restriction on movement) (no.4) order, 2001
SI 63/2001

Foot and mouth (restriction on movement of horses) order, 2001
SI 68/2001

Foot and Mouth Disease (Restriction of Import of Vehicles, Machinery and other Equipment) (Amendment) Order, 2001
SI 69/2001

Foot and mouth disease (restriction of import of horses and greyhounds) (amendment) order, 2001
SI 70/2001

Foot-and mouth-disease (restriction of import of horses and greyhounds) (no.2) order, 2001
SI 85/2001

Wildlife (amendment) act, 2000 (commencement) order, 2001
SI 71/2001

Banking

Library Acquisition

Hedley, William
Bills of exchange and bankers documentary credits
4th edition
London Lloyds of London Press 2001
N306.2

Children

Statutory Instrument

Rules of the superior courts (no.1) (child abduction and enforcement of custody orders act, 1991), 2001
SI 94/2001

Commercial Law

Library Acquisition

Hedley, William
Bills of exchange and bankers documentary credits
4th edition
London Lloyds of London Press 2001
N306.2

Company Law

In re Squash (Ireland) Ltd.
Supreme Court: **McGuinness J.** (ex tempore), Geoghegan J., Fennelly J.
08/02/2001

Company; directors; disqualification; company provided services of a sporting and leisure nature; directors mistakenly believed that they held a valuable interest in a lease on their operating premises which they wished to realise; on foot of this mistaken belief directors entered into agreement to sell premises and subscriptions were sought as a matter of routine from members at a time when directors were becoming aware that liquidation imminent; liquidator seeking order that directors were not to be appointed or act in any way, directly or indirectly, as a director for five years; whether the director's conduct could be regarded as incompetent to such a degree as to amount to irresponsibility; whether the directors acted dishonestly; s.150, Companies Act, 1990.
Held: Appeal allowed.

Statutory Instrument

Statistics (business registers) order, 2001
SI 67/2001

Competition

Library Acquisition

Goyder, D G
EC competition law
3rd edition
Oxford University Press 1998
W110

Coroners

Article

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

Criminal Law

D.P.P. v. McCormack
Court of Criminal Appeal: **Barron J.**
10/04/2000

Sexual assault; sentencing; appellant had been convicted of aggravated sexual assault and attempted rape and had been sentenced to three years imprisonment with the last two years unconditionally suspended; appellant appealing against sentence and Director also appealing on the grounds that such sentence is unduly lenient; whether a custodial sentence is mandatory in the absence of a statutory direction to that effect; whether, having regard to the mitigating factors in the case, a custodial sentence was required in the instant case.
Held: Appeal allowed; appeal by D.P.P. refused.

Holland v. Criminal Assets Bureau
Supreme Court: **Keane C.J.**
07/04/2000

Asset forfeiture; constitutional validity; applicant seeking leave to issue proceedings by way of judicial review that Criminal Assets Bureau Act, 1996 and Proceeds of Crime Act, 1996 were invalid having regard to the provisions of the Constitution; whether the applicant has put forward arguable grounds for claiming that certain provisions of the Acts were unconstitutional; ss. 1, 2 & 3, Proceeds of Crime Act, 1996; Arts.15.5, 34, 38.1 & 40.3 of the Constitution.
Held: Appeal allowed.

D.P.P. v. Byrne
Court of Criminal Appeal: **Keane C.J.**
07/06/2000

Evidence; hearsay; handling; applicant had been convicted of handling a motor car knowing or believing it to be stolen; applicant seeking leave to appeal against conviction on the grounds inter alia that the trial judge had wrongfully admitted hearsay evidence; whether the trial judge erred in law in ruling that the prosecution in the circumstances were not obliged to produce a certificate under s. 6, Criminal Evidence Act, 1992 in order to render evidence admissible; whether the trial judge was correct in not withdrawing the case from the jury at the close of the prosecution's case; whether the trial judge was wrong in law in not recharging the jury in respect of a number of requisitions raised by counsel; whether the trial judge had made it clear to the jury that it was not enough for the prosecution to establish that the applicant had received the stolen vehicle and that the onus was on them to prove beyond a reasonable doubt that the vehicle had been received by the applicant knowing or believing it to have been stolen; s.33(1), Larceny Act, 1916; s.3, Larceny Act, 1990; ss. 5 & 6, Criminal Evidence Act, 1992.
Held: Leave to appeal refused.

D.P.P. v. Gavin
Court of Criminal Appeal:
McGuinness J.
27/07/2000

Criminal; evidence; doctrine of recent complaint; appellant had been convicted of sexual assault; appellant appealing against conviction and sentence; whether complaint evidence ought to have been admitted at the trial given that it did not meet the primary criterion of demonstrating consistency; whether, even if the trial judge was correct in admitting the complaint, his manner of dealing with it in his charge to the jury was adequate; whether the fact that the judge encouraged the jury to continue their deliberations and consider their verdict at their hotel later that night rendered the trial unsatisfactory.
Held: Appeal allowed.

Braddish v. D.P.P.
High Court: **Ó'Caoimh J.**
21/12/2000

Criminal; fair trial; judicial review; applicant seeking inter alia an order of prohibition precluding first named respondent from further prosecuting applicant; whether failure to furnish original still photographs and a video tape negated the applicant's right to a fair trial in due course of law in circumstances where the prosecution case will rest upon alleged inculpatory statement made by the applicant and not on video tape; whether applicant moved promptly in seeking relief.
Held: Relief refused.

Library Acquisitions

Law Reform Commission

Consultation paper on Homicide: the mental element in murder
Dublin The Law Reform Commission 2001
N155.3.C5

Murphy, Peter
Blackstone's criminal practice 2001
London Blackstone Press 2001
M500

Damages

Hennessey v. Fitzgerald
High Court: **McCracken J.**
13/12/2000

Assessment of damages; plaintiff had been injured in road traffic accident; plaintiff was qualified fitter who had set up his own business dismantling lorries and manufacturing skips; plaintiff physically unable to carry out pre-accident work; plaintiff determined to carry on business in managerial capacity although not viable and questionable whether business would have prospered even if accident had not occurred; probability that plaintiff would never have made as great an income from his business as he would have made had he sought employment; whether defendant should compensate plaintiff for estimated earnings or profit which he would have made and also for losses which in fact were made by the business.
Held: Defendant awarded difference between earnings which he would have made as fitter and earnings which he was capable of making had he sought employment when he was fit to return to work; as regards future loss of earnings, loss would not have been as great if plaintiff had been in employment; total damages of £300, 320.00 awarded.

Employment

McNamara v. South Western Area Health Board
High Court: **Kearns J.**
16/02/2001

Employment; judicial review; applicant seeks judicial review of suspension from her employment; applicant is a consultant orthodontist attached to St. James' Hospital, Dublin, under the respondent's administration; applicant had been suspended without pay for alleged misconduct in relation to her office; whether the applicant's suspension invoked fair procedures or not; whether the applicant was denied fair procedures regarding the decision to suspend; whether the existence of statutory procedures, and the fact that this was the first step therein, absolved the respondents from the obligation to discharge those responsibilities in a fair, responsible and reasonable manner; whether the suggestion of misconduct made by respondent meant that some statement of the applicant's position on the matters at issue should have been obtained before proceedings to suspend; ss. 22, 23 & 24, Health Act, 1970.
Held: Application granted.

Statutory Instrument

Occupational pension schemes (revaluation) regulations, 2001
SI 23/2001

Environmental Law

Statutory Instrument

Environment and local government (delegation of ministerial functions) order, 2001
SI 88/2001

Equity & Trusts

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Report on the variation of trusts
Law Reform Commission
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N210.C5

European Law

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European Community law - from the Treaty of Rome to the Treaty of Amsterdam
2nd edition

The Hague Kluwer Law International 1999
W1

Treaty of Nice white paper
Dublin Stationery Office 2001
Pn. 9544
W1

Extradition

Attorney General v. Oldridge
Supreme Court: **Keane C.J.,** Denham J., McGuinness J., Geoghegan J., Fennelly J.
19/12/2000

Extradition; respondent had been charged in the United States with wire fraud and aiding and abetting wire fraud after money had been fraudulently obtained from three banks; grant of extradition had been refused by the District Court because District Judge was not satisfied that the acts complained of amounted to a criminal offence in both jurisdictions; applicant appealed to the Supreme Court on a point of law; whether there are offences in this jurisdiction corresponding with the offences in respect of which the respondent's extradition is sought; what those corresponding offences are; whether the offence with which the respondent was charged constitutes the offence of conspiracy to defraud; ss. 8(1), 8(5) & 10(1), Extradition Act 1965; Arts. I & II, Washington Treaty.
Held: Appeal allowed.

McNally v. O'Toole
High Court: **Finnegan J.**
14/11/2000

Extradition; lapse of time; exceptional circumstances; plaintiff arrested on foot of warrant issued in Northern Ireland in 1998; order for rendition of applicant

made by District Court; plaintiff seeking order directing his release on ground that it would be unjust, oppressive or invidious to deliver him up by reason of the lapse of time since the commission of the offence specified in the warrant and other exceptional circumstances; offence the subject matter of the warrant had been committed in 1989; plaintiff arrested on date of offence and while on bail had fled Northern Ireland; plaintiff now residing in the Republic of Ireland; RUC became aware of fact that plaintiff was living in this jurisdiction in 1996; whether failure of RUC to make inquiries through the Gardaí between 1989 and 1996 to ascertain plaintiff's whereabouts was unreasonable; whether in the circumstances of the case the lapse of time was such as to encourage in the plaintiff a reasonable belief that his extradition would not be sought; whether lapse of time in seeking plaintiff's extradition by RUC up to 1996 was due to his failing to answer his bail and thereafter fleeing Northern Ireland rather than any default on the part of the Northern Ireland authority; whether lapse of time in obtaining warrant was so great as to render plaintiff's extradition unjust, oppressive or invidious; whether there were "other exceptional circumstances" within the meaning of s.50(2)(bbb), Extradition Act, 1965.
Held: Relief refused.

Family Law

McG. v. F.
Supreme Court: **Denham J.,** Murray J., Geoghegan J.
17/01/2001

Family; nullity suit; role of medical inspector; petitioner seeking a decree that marriage was null and void due to the fact that the parties lacked capacity to enter into and/or sustain a normal lifelong marital relationship; petitioner seeking directions in regard to the medical inspector; whether medical inspector has power to interview persons other than the parties for the purpose of his report to the court.
Held: Appeal dismissed.

Library Acquisition

Shannon, Geoffrey
Family law
Law Society of Ireland
N170.C5

Statutory Instrument

Rules of the superior courts (no.1) (child abduction and enforcement of custody orders act, 1991), 2001
SI 94/2001

Fisheries

Statutory Instruments

Cod (fisheries management and conservation) order, 2001
SI 114/2001

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Human Rights

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Irish human rights review 2000
Driscoll, Dennis
Furey, Yvonne
Vine, Caitriona
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Dublin Round Hall Sweet & Maxwell 2000
C200

Reid, Karen
A practitioner's guide to the European convention on human rights
London Sweet & Maxwell 1998
C200

Injunctions

Microsoft Corporation v. Brightpoint Ireland Limited
High Court: **Smyth J.**
12/07/2000

Injunctions; Anton Piller orders; plaintiff seeking interlocutory relief following upon interim relief granted at ex parte stage; defendant seeking various reliefs; plaintiff alleging that defendant had infringed its legal rights and operated without appropriate licences; whether the plaintiff's ex parte application ought to have been conducted in camera; whether there was such full and proper disclosure as the circumstances of the case warranted to seek and obtain an Anton Piller order; whether there was strong prima facie evidence of dishonest conduct by the defendants indicating that they would be likely to destroy records; whether the Anton Piller order was oppressively and excessively executed; whether conduct of plaintiff subsequent to execution of the Anton Piller order was contempt of court; whether ex parte order obtained by defendant subsequent to that obtained by the plaintiff restraining plaintiffs from making any use of information obtained by reason of the execution of the Anton Piller order save for the prosecution of the proceedings was sought to try and off-set the first ex parte order.
Held: Defendant's motion dismissed; interlocutory relief sought by plaintiff granted.

International Law

Library Acquisition

Goldhirsch, Lawrence B
The Warsaw convention annotated: a legal handbook
2nd edition

The Netherlands Kluwer Law International 2000
N327

Judicial Review

Library Acquisition

Delany, Hilary
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Dublin Round Hall Sweet & Maxwell 2001
M306.C5

Land

Library Acquisition

Law Reform Commission
Report on the rule against perpetuities and cognate rules
Dublin Law Reform Commission 2001
N64.241.C5

Legal Profession

Library Acquisition

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Committee on judicial conduct and ethics
Dublin Government Publications 2000
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L240.3.C5

Rhode, Deborah L
Ethics in practice: lawyers' roles, responsibilities, and regulation
USA Oxford University Press 2000
L82

Medical Law

Statutory Instrument

Health services regulations, 2001
SI 66/2001

Mental Health

Gooden v. St. Otteran's Hospital
High Court: **Kelly J.**
14/12/2000

Administrative; legality of detention; habeas corpus; whether in all cases where a voluntary patient in a mental hospital has given the seventy two hour notice of his discharge, as required by the mental health legislation, there is a mandatory entitlement to leave the institution at the expiration of the seventy two hour period; whether procedure for admission as an involuntary patient under s.184, Mental Treatment Act, 1945 Act could be utilised in respect of a voluntary patient either before or during the seventy two hour notice period; whether the word "received" in s.184 necessarily means physically received; whether patient entitled to benefit of s. 5(3)(a), Mental Treatment Act, 1953; ss. 184 & 194, Mental Treatment Act, 1945.
Held: Application for release refused.

Library Acquisition

Law Reform Commission

Consultation paper on Homicide: the mental element in murder
Dublin The Law Reform Commission 2001
N155.3.C5

Negligence

Geoghegan v. Harris
High Court: **Kearns J.**
21/06/2000

Medical negligence; failure to disclose a material risk; plaintiff suing defendant for alleged negligence in the carrying out of a dental operation; whether the pain suffered by the plaintiff was a "known complication"; if so, whether there was an obligation to warn the plaintiff; whether plaintiff would have opted to forego the procedure if an appropriate warning had been given; whether the resolution of the allegation of misrepresentation against the plaintiff affects the obligation of the court to consider the question of the requirement for an adequate warning and causation; whether the plaintiff was in a category of "inquisitive patient" to whom a special duty was owed.
Held: The defendant did not fail to disclose a material risk; second part of judgment to be delivered at a later date.

Pensions

Statutory Instrument

Occupational pension schemes (revaluation) regulations, 2001
SI 23/2001

Planning

Westport Urban District Council v. Golden
High Court: **Morris P.**
18/12/2000

Planning; exempted development; material change in use; premises had been used partly as restaurant and partly as take away facility with first floor residential accommodation; premises sold to respondents who converted first floor to commercial use, reduced ground floor to a single room and opened premises as fast food outlet, despite service of a warning notice by applicant; whether two air handling units installed by respondent materially effect the external appearance of the structure; whether two flues of which complaint was made are an exempted development; whether court should exercise its discretion under the Act in favour of respondents in respect of an admitted unauthorised development when to do so would lend support for uncooperative conduct; whether there has been change in use of restaurant part of premises since facility opened; whether this change of use is material; s.27(1), Local Government (Planning and Development) Act, 1976 as substituted by s.19(4)(g), Local Government (Planning and Development) Act, 1992.
Held: Circuit Court order affirmed; order stayed to enable the respondents to bring such application as they may be advised to regularise their position.

Irish Hardware Association v. South Dublin County Council
High Court: **Butler J.**
19/07/2000

Planning; judicial review; respondent had granted planning permission to notice party for a revision and alteration to a previously approved permission for a retail warehouse; applicant seeking order of certiorari quashing the decision; whether planning authority can grant permission for a development which is substantially different from that originally applied for; whether the planning authority should have exercised its discretion to require that the developer re-advertise the application for permission so as to ensure that anyone interested in the area in question was properly put on notice; whether planning authority failed to take into consideration relevant matters.
Held: Relief refused.

Henry v. Cavan County Council
High Court: **Ó'Caoimh J.**
01/02/2001

Planning; judicial review; time-limits; applicant seeking order quashing decision of respondent council to grant planning permission sought by notice party for retention of a support pole and antennae for mobile communications; respondent contending that application for judicial review was out of time; whether a distinction must be drawn between a decision of a planning authority to grant planning permission and the grant of planning permission itself; whether application was made within the two month time limit permitted by s.82, Local Government (Planning and Development) Act, 1963 as amended by s.19(3), Local Government (Planning and Development) Act, 1992.
Held: Relief refused.

Statutory Instrument

Environment and local government (delegation of ministerial functions) order, 2001
SI 88/2001

Practice & Procedure

Shannon Preservation and Development Company Limited v. Electricity Supply Board
High Court: **O'Sullivan J.**
21/07/2000

Practice and procedure; striking out; security for costs; plaintiff seeking a declaration that defendant failed to perform its statutory duty in managing, conducting and preserving the Shannon fisheries; whether plaintiff's claim discloses a reasonable cause of action; whether claim is frivolous or vexatious; whether plaintiff company has locus standi.
Held: Plaintiff's claim not dismissed; plaintiff directed to furnish security for costs; all further proceedings stayed until security furnished.

The Minister for Agriculture v. Alte Leipziger Versicherung AG
Supreme Court: **Keane C.J.,** Denham J., Murray J., McGuinness J., Hardiman J.
23/02/2001

Practice and procedure; jurisdiction; contract of insurance; plaintiff claiming in proceedings that a contract of insurance between plaintiff as insured and defendant as insurer was valid and binding; whether High Court had jurisdiction to hear the applicant's claim; whether contract could be regarded as a contract of insurance which envisaged both storage insurance and marine or air transport insurance; if so, whether this transport element was of any major significance when compared with the storage element; Arts. 2, 8 & 12, Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters; Jurisdiction of Courts and Enforcement of Judgments Act, 1998.
Held: Appeal dismissed.

Library Acquisition

Plant, Charles
Blackstone's civil practice 2001
London Blackstone Press 2001
N365

Statutory Instrument

Rules of the superior courts (no.1) (child abduction and enforcement of custody orders act, 1991), 2001
SI 94/2001

Property

Library Acquisition

Law Reform Commission
Report on the rule against perpetuities and cognate rules
Dublin Law Reform Commission 2001
N64.241.C5

Records & Statistics

Statutory Instrument

Statistics (business registers) order, 2001
SI 67/2001

Refugees

B, P & L. v. The Minister for Justice, Equality and Law Reform
High Court: **Smyth J.**
02/01/2001

Immigration; refugees; judicial review; duty to give reasons; applicants seeking leave to apply for judicial review against respondent's decision to order their deportation; whether the decisions of the respondent were unreasonable; whether the respondent had acted ultra vires; whether the letters of notice received by the applicants fulfilled the duty to give reasons; whether there was an onus on the respondent to define the expression 'common good' and 'public policy'; whether the respondent should have indicated the weight given to each factor in making his decision; whether there was an error on the face of the record; whether, in the case of B., the failure to expressly give reasons, after the coming into effect of the Immigration Act, 1999, entitled the applicant to certiorari; s.3, Immigration Act, 1999.
Held: Leave granted to B.; leave sought by P. and L. refused.

Gabrel v. Governor of Mountjoy Prison
Supreme Court: **Keane C.J.,** Murphy J., Murray J.
08/02/2001

Refugees; service of deportation order; habeas corpus; High Court judge had simply made decision on basis he could deem service of deportation order good and had made no finding as to whether Department of Justice, Equality and Law Reform received notification of applicant's change of address prior to service of order; whether there is provision for deeming service good under s.6, Immigration Act, 1999.
Held: Matter remitted to High Court so that finding can be made in relation to change of address and habeas corpus enquiry can be completed; stay previously granted to continue in force.

Library Acquisition

Crawley, Heaven
Refugees and gender: law and process
Bristol Jordan Publishing Ltd 2001
Refugees
C205

Road Traffic

Moore v. Judge Martin
High Court: **Finnegan J.**
29/05/2000

Road traffic; drunken driving; judicial review; natural and constitutional justice; alternative remedies; road traffic accident; applicant had left the scene of the accident by foot and had been interviewed by gardai shortly afterwards; applicant admitted to being driver of the car at time of collision; Garda formed requisite opinion and applicant was charged under ss.49(2) and 6(a), Road Traffic Act, 1961 as amended and was subsequently convicted by respondent; applicant seeks order of certiorari quashing conviction; whether respondent failed to comply with principles of natural and constitutional justice by failing to consider legal submissions made by applicant's counsel at close of prosecution evidence; whether prosecution discharged onus of proving the accident occurred in a public place; whether respondent failed to comply with principles of natural and constitutional justice by failing to exclude evidence which offended hearsay rule; whether the admission of driving made by the applicant ought to have been admitted in evidence in the absence of a proper caution; whether respondent acted in excess of jurisdiction by convicting the applicant in the absence of all required statutory proofs and in particular proof of time of driving; whether certiorari is the appropriate remedy where an adequate alternative remedy is available by way of appeal and the appeal is pending.
Held: No disregard of requirements of natural justice; certiorari not appropriate remedy; application dismissed.

Statutory Instruments

Road traffic (licensing of trailers and semi-trailers) (amendment) regulations, 2001
SI 75/2001

Road vehicles (registration and licensing) (amendment) regulations, 2001
SI 74/2001

Social Welfare

Minister for Social Community and Family Affairs v. Scanlon
Supreme Court: Keane C.J, Denham J., Murray J., McGuinness J., **Fennelly J.**
16/01/2001

Social welfare; recovery of social welfare overpayments; retrospective effect of legislation; appellant seeking repayment of sum of benefit "overpaid" to the respondent; respondent had received a disability benefit dependent on his being incapable of work; respondent's right to disability benefit was reviewed in 1994 as a result of further information; whether social welfare legislation has retrospective effect; whether there is any constitutional imperative that legislation should be construed only prospectively; whether the words of statute clear enough to rebut the presumption against retrospective effect; whether there was sufficient machinery for statutory recovery of the debt; whether a new demand for the repayment was necessary after the appeals officer had made his decision; s.300(5)(aa), Social Welfare Act, 1981 as inserted by s.35, Social Welfare Act, 1991; s.40, Social Welfare Act, 1992; s.31(1), Social Welfare Act, 1993; ss.278(a) & 283(b), Social Welfare (Consolidation) Act, 1993.
Held: Appeal allowed.

Statutory Instrument

Social welfare (consolidated contributions and insurability) (amendment) (no.1) (credited contributions) regulations, 2001
SI 76/2001

Solicitors

Re Burke
Supreme Court: **Keane C.J.,** Murphy J., Murray J.
09/02/2001

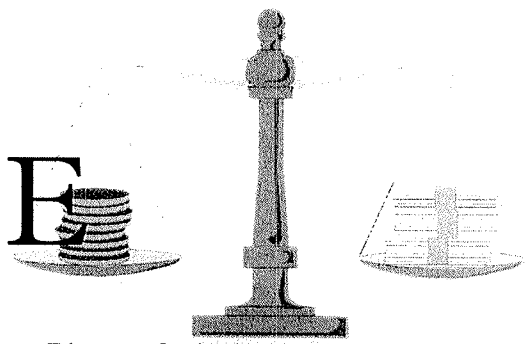
Solicitors; appellant seeking restoration to the roll of solicitors; applicant's name had been removed from roll by order of the High Court on foot of several episodes of dishonest conduct; applicant had been refused a limited certificate by the High Court that would restore his name to the roll but would not permit applicant to have control of financial matters; whether the High Court was entitled in all the circumstances of the particular case to refuse the application on the ground it was not satisfied that applicant was a fit and proper person to practise as a solicitor; s.10(4), Solicitors (Amendment) Act, 1960 as inserted by s.19, Solicitors (Amendment) Act, 1994.
Held: Appeal dismissed.

Transport

Statutory Instrument

Iarnrod Eireann (Athlone - Portarlington) (Bunnavalley level crossing) order, 2001
SI 95/2001

AT A GLANCE



European Directives implemented into Irish Law up to 12/04/01

European communities (processed animal products) regulations, 2000
SI 486/2000
DIR 2000/766/EC

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

European communities (dietary foods for special medical purposes) regulations, 2001
SI 64/2001
[DIR 89/398 AND 96/84 AND 99/41AND 99/21]

European communities (reduction of certain economic relations with the federal republic of Yugoslavia) (amendment) regulations, 2001
SI 72/2001
DIR[2488/2000]

Genetically modified organisms (contained use) regulations, 2001
SI 73/2001
DIR 98/81/EC

European communities (disposal, processing and placing on the market of animal by-products) (amendment) regulations, 2001
SI 77/2001
[DEC 2001/25]

Safety, health and welfare at work (carcinogens) regulations, 2001
SI 78/2001
[DIR 90/394 AND DIR 97/42 AND 99/38]

Diseases of animals acts, 1966 to 2001 (approval and registration of dealers and dealers' premises) order, 2001
SI 79/2001
DIR 97/12,DIR 820/97,DIR 2628/97,DIR 2630/97,DIR 494/98

Diseases of animals act, 1966 (foot-and-mouth disease)(import restrictions) order, 2001
SI 82/2001
[DEC 2001/172/EC]

Diseases of animals act, 1966 (foot-and-mouth disease) (import restrictions) (no. 2) order, 2001
SI 83/2001
[DEC 2001/208/EC]

European communities (prohibition of the sale and supply of petroleum and certain petroleum products to the Federal Republic of Yugoslavia) regulations, 2001
SI 97/2001
DIR 2228/2000

Diseases of animals act, 1966 (commencement of sections 17A and 29A) order, 2001
SI 98/2001

European Judgments received in the Law Library up to 12/04/01

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

C-52/99 & C-53/99 Office National des Pensions (ONP) v Gioconda Camarotto
Court of Justice of the European Communities
Judgment delivered 22/2/2001
(Council Regulation (EEC) No 1408/71, as amended by Regulation (EEC) No 1 248/92-Social security-Insurance relating to old age and death-Calculation of benefits-Changes to the rules governing calculation of benefits)

C-187/99 Fazenda Publica v Fabrica de Queijo Eru Portuguesa L
Court of Justice of the European Communities Judgment delivered 22/2/2001(Inward processing relief arrangements-Regulation (EEC) No 1999/85-Rate of yield of the processing operation-Authorisation issued by the competent customs authority-Power of that authority unilaterally to alter the rate of yield)

C-205/99 Asociacion Profesional de Empresas Navieras de Lineas Regulares (Analir) & Ors v Administracion General del Estado
Court of Justice of the European Communities Judgment delivered 20/2/2001 (Freedom to provide services-Maritime cabotage-Conditions for the grant and continuation of prior administrative authorisation-Concurrent application of the methods of imposing public service obligations and of concluding public service contracts)

Library Acquisitions

Information compiled by Sinead Curtin, Law Library, Four Courts.

Committee on judicial conduct and ethics report including summary Committee on judicial conduct and ethics Dublin
Government Publications 2000
Pn. 9449
L240.3.C5

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Judicial review of administrative action
Dublin Round Hall Sweet & Maxwell 2001
M306.C5

Goldhirsch, Lawrence B
The Warsaw convention annotated: a legal handbook
2nd edition
The Netherlands Kluwer Law International 2000
N327

Goyder, D G
EC competition law
3rd edition
Oxford University Press 1998
W110

Hedley, William
Bills of exchange and bankers documentary credits
4th edition London Lloyds of London Press 2001
N306.2

Irish human rights review 2000
Driscoll, Dennis
Furey, Yvonne
Vine, Caitriona
White, Peter
Dublin Round Hall Sweet & Maxwell 2000
C200

Law Reform Commission
Report on the rule against perpetuities and cognate rules
Dublin Law Reform Commission 2001
N64.241.C5

Law Reform Commission
Consultation paper on Homicide: the mental element in murder
Dublin The Law Reform Commission 2001
N155.3.C5

Mengozzi, Paolo
European Community law - from the Treaty of Rome to the Treaty of Amsterdam
2nd edition
The Hague Kluwer Law International 1999
W1

Murphy, Peter
Blackstone's criminal practice 2001
London Blackstone Press 2001
M500

Plant, Charles
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London Blackstone Press 2001
N365

Report on the variation of trusts
Law Reform Commission
Dublin Law Reform Commission 2000
N210.C5

Rhode, Deborah L
Ethics in practice: lawyers' roles, responsibilities, and regulation
USA Oxford University Press 2000
L82

Reid, Karen
A practitioner's guide to the European convention on human rights
London Sweet & Maxwell 1998
C200

Shannon, Geoffrey
Family law
Law Society of Ireland
N170.C5

Treaty of Nice white paper
Dublin Stationery Office 2001
Pn. 9544
W1

Bills in progress up to 10/04/2001

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

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

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

Carer's leave bill, 2000
Committee - 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

Courts and court officers bill, 2001
1st stage - Dail

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

Criminal justice (temporary release of prisoners) bill, 2001
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.]**

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.]**

Electoral (control of donations) bill, 2001
2nd stage - Dail

Electricity (supply) amendment bill, 2001
2nd stage - Seanad (Initiated in Dail)l

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

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

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

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

Mental health bill, 1999
Committee - Dail

Motor vehicle (duties and licences) bill, 2001
1st stage - Dail

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.]**

Ordnance survey Ireland bill, 2001
Committee - Seanad

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.]**

Prohibition of female genital mutilation bill, 2001
2nd stage - Dail

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.]**

Registration of births bill, 2000
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 bill, 2001
1st stage -Dail

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
Report - Dail

Shannon river council bill, 1998
Committee - Seanad

Social welfare bill, 2001
Report - 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 -Seanad (Initiated in 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

Transport (railway infrastructure) bill, 2001
1st stage -Seanad

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

Twentieth amendment of the Constitution bill, 1999
2nd stage - Dail **[p.m.b.]**

Twenty- first amendment of the constitution bill, 1999
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
2nd stage - Dail

Twenty- first amendment of the constitution (no.2) bill, 2001
1st stage - Dail

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

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

Twenty- fourth amendment of the constitution bill, 2001
2nd stage -Dail

Twenty- fifth amendment of the constitution bill, 2001
2nd 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
Committee - Dail

Vocational education (amendment) bill, 2000
2nd stage - Dail

Waste management (amendment) bill, 2001
Committee - Dail

Waste management (amendment) (no.2) bill, 2001
Committee - Seanad

Whistleblowers protection bill, 1999
Committee - Dail

Youth work bill, 2000
Committee - Dail

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
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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 (PAYEMENTS 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
SIGNED 06/12/2000
1. SI 396/2000
(COMMENCEMENT)
2. SI 46/2001 (S4 & S7 COMMENCEMENT)

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

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

35/2000 IRISH FILM BOARD (AMENDMENT) ACT, 2000
SIGNED 15/12/2000

36/2000 APPROPRIATION ACT
SIGNED 15/12/2000

37/2000 PROTECTION OF CHILDREN (HAGUE CONVENTION) ACT, 2000
SIGNED 16/12/2000

38/2000 WILDLIFE (AMENDMENT) ACT, 2000
SIGNED 18/12/2000
1. SI 71/2001
(COMMENCEMENT)

39/2000 NATIONAL TREASURY MANAGEMENT AGENCY (AMENDMENT) ACT, 2000
SIGNED 20/12/2000

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

41/2000 NATIONAL TRAINING FUND ACT, 2000
SIGNED 20/12/2000
1. SI 494/2000
(Commencement)

42/2000 INSURANCE ACT, 2000
SIGNED 20/12/2000
1. SI 472/2000
(Commencement)

Private Acts of 2000

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

Acts of the Oireachtas 2001

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

1/2001 AVIATION REGULATION ACT, 2001
SIGNED 21/02/2001
SI 47/2001
(ESTABLISHMENT DAY)

2/2001 CUSTOMS AND EXCISE (MUTUAL ASSISTANCE) ACT, 2001
SIGNED 09/03/2001

3/2001 DISEASES OF ANIMALS (AMENDMENT) ACT, 2001
SIGNED 09/03/2001

4/2001 BROADCASTING ACT, 2001
SIGNED 14/03/2001

6/2001 TRUSTEE SAVINGS BANKS (AMENDMENT) ACT, 2001
SIGNED 28/03/2001

(P.S) Copies of the acts/bills can be obtained free from the internet & up to date information can be downloaded from website : www.irlgov.ie

(NB) Must have "adobe acrobat reader" software which can be downloaded free of charge from internet: www.adobe.com/products/acrobat/readstep2.html/

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
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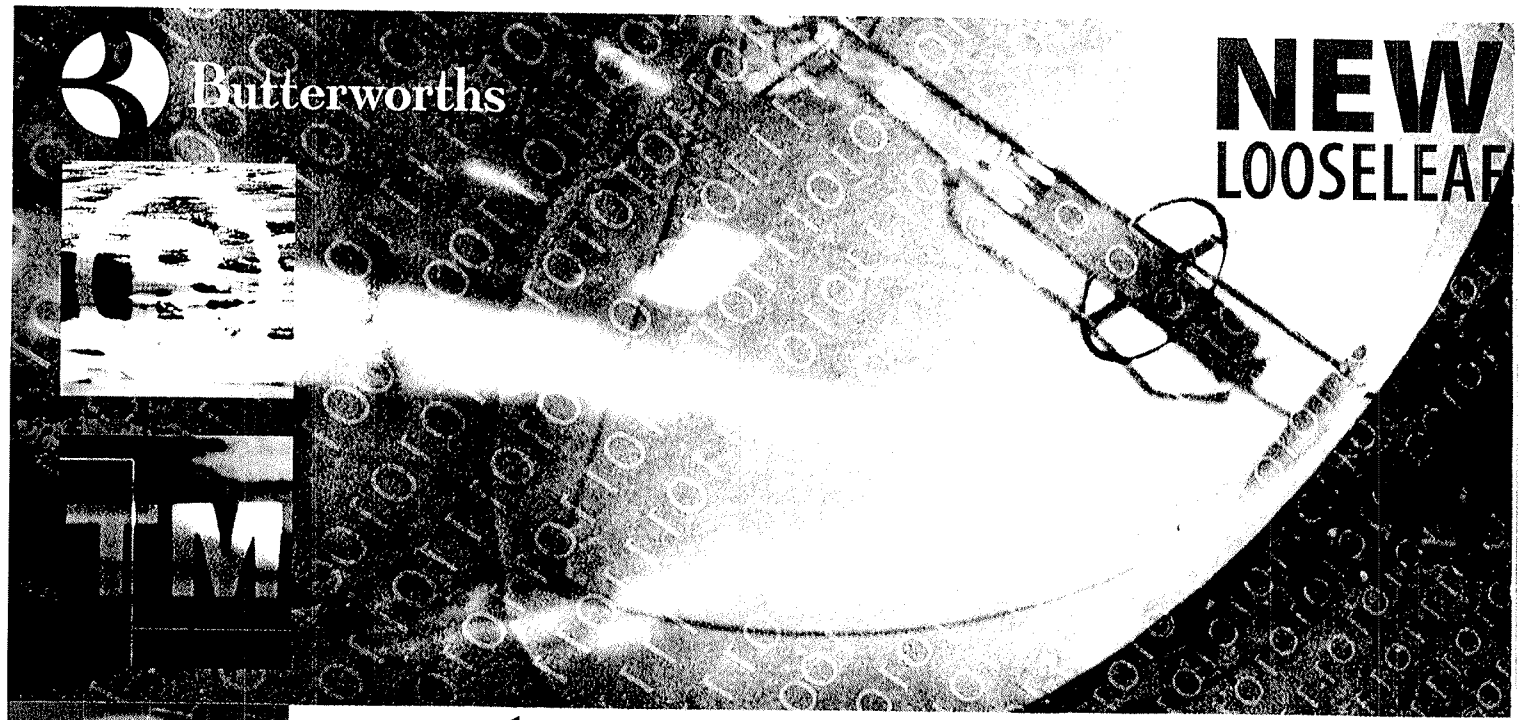

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ASSET FORFEITURE THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Claire Hamilton BL *considers whether Irish laws providing for the seizure of criminal assets are compatible with the European Convention of Human Rights in the light of differing approaches of the English and Scottish Courts.*

Introduction

The appeal from the High Court decision in *Gilligan v. Criminal Assets Bureau*[1] is currently pending before the Supreme Court.[2] While the High Court decision focused primarily on the constitutionality of the Proceeds of Crime Act 1996, it is important also to consider its compatibility with the European Convention on Human Rights which is due to be incorporated into Irish domestic law.[3] Indeed, the recent decision in *McIntosh, petitioner*[4] of the High Court of Justiciary in Scotland, declaring certain provisions of the Proceeds of Crime (Scotland) Act 1995 to be *ultra vires* on account of its incompatibility with Article 6(2) of the European Convention on Human Rights, demonstrates that any complacency with regard to such compatibility is misplaced. It is therefore the intention of this article to examine the *McIntosh* decision and the conflicting decision of the English Court of Appeal in R v. *Benjafield*[5] with a view to assessing the possible implications for Irish asset forfeiture legislation.

The McIntosh Case

The petitioner in the case, Robert McIntosh, had been convicted of an offence under the Scottish Misuse of Drugs Act 1971 and the State had subsequently applied for the making of a confiscation order to the value of his "drug trafficking" pursuant to the Proceeds of Crime (Scotland) Act 1995.

The petitioner was challenging s.3(2) of the Proceeds of Crime (Scotland) Act 1995 which provided for the making of certain "assumptions" by the court in making an assessment as to the value of the accused's proceeds of drug trafficking. Thus, in accordance with the terms of s.3(2), the following assumptions could be made (except in so far as any of them could be shown to be incorrect):

"(a) that in any property appearing to the court-(i) to have been held by him at any time since his conviction: or, as the case may be, (ii) to have been transferred to him at any time since a date six years before being indicted or being served with the complaint, was received by him, at the earliest time at which he appears to the court to have held it, as a payment or reward in connection with drug trafficking carried on by him; (b) that any expenditure of his since the date mentioned in paragraph (a)(ii) above was met out of payment received by him in connection with drug trafficking carried on by him, and (c) that, for the purpose of valuing any property received or assumed to have been received by him at any time as such a reward, he received the property free of any other interests in it."

Section 1(5) of the 1995 Act stated that the sum which the confiscation order required an accused to pay shall be an amount not exceeding what the court assesses to be the value of the proceeds of the person's drug trafficking. "Drug trafficking" was given a definition in s.49(2) of the Act as meaning activities which would constitute a contravention of a statutory provision relating to controlled drugs, although subss. 49(3) and (4) of the Act also extended the definition to non-criminal conduct.

The appellant alleged that s.3(2) of the 1995 Act was inconsistent and incompatible with the presumption of innocence embodied in Article 6(2) of the European Convention on Human Rights which provides that "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law." He therefore sought a declaration that the Crown had no power to invite the Court to make the assumptions set out in s.3(2) of the Act.

Lord Prosser, delivering the main judgment in the case,[6] decided the case on two main points of law, as follows:

* Was the application by the Crown for a confiscation order under the 1995 Act sufficient to constitute a "criminal charge" capable of attracting the presumption of innocence guaranteed in Article 6(2)?

"The decisions reached by the English and Scottish courts have implications in Ireland for two Acts which have been introduced in this jurisdiction to combat the problem of drug trafficking, namely the Criminal Justice Act 1994 and the Proceeds of Crime Act 1996."

"It is certainly arguable that the procedure falls short of a "criminal charge" in circumstances where the application is not contingent upon any prior conviction having been obtained and where any allegation of criminal activity is only implicit. The better view, it is submitted, is that the procedure under the Act does attract the protection afforded to a defendant under Article 6 of the Convention.."

* If so, then were the provisions in s.3(2) of the 1995 Act permitting such assumptions to be made within the "reasonable limits" permitted by the Article?

In relation to the first point, the judge dealt with the two questions of whether the accused had been "charged" with a "criminal offence" separately. Proceeding on the basis that "drug trafficking" as defined in the Act was criminal, Lord Prosser held that the petitioner had indeed been "charged" as the application should be seen as "*inter alia* an assertion that there has been drug trafficking, and an invitation to the court to proceed on that basis." Furthermore "the petitioner would be significantly affected." Thus the judge adopted the test expounded by the European Court of Human Rights in *Foti v. Italy*[7] that a charge "...may in some instances take the form of other measures which carry the implication of such an allegation and which likewise substantially affect the situation of the suspect." Although there was no indictment, complaint or conviction and although the allegation was nonspecific, the judge saw this as bolstering rather than detracting from the argument for a presumption of innocence. To argue otherwise, he held, would be to be "somewhat Kafkaesque, and to portray a vice as a virtue."

As regards the "criminal" nature of the confiscation order, the court held that if section 49(2) stood alone, then it would necessarily be a "criminal" allegation. On the other hand, even in the light of the "autonomous" meaning attributed by the European case-law to the word "criminal", the conduct described in sub-sections 49(3) and (4), read in isolation, could not be described as criminal. The judge concluded that "broadly speaking" there was an allegation of criminal activity and reading the subsections in the context of the whole Act, whose purpose, it must be remembered, was to confiscate the proceeds of crime, not the proceeds of non-criminal conduct, it was clear that the conduct should be characterised as "criminal."

Having decided, therefore, that the presumption of innocence applied to the confiscation process initiated under the 1995 Act, the judge went on to examine the question of whether the assumptions permitted in s.3(2) were within the permissible limits of the European Convention. The judge dealt briefly with this point:

"And I can see no basis upon which, in such a context, it could be said that an assumption of the kind permitted by the provisions of the subsection, with no foundation in suspicion or the like, falls within 'reasonable limits'."

Interestingly, however, the judge made the statement *obiter* that it is both understandable and appropriate when faced with a social scourge such as drug trafficking to incorporate into the law such reversals of the burden of proof as long as they are kept within reasonable limits.

Per Lord Prosser:

"I acknowledge without hesitation that such a burden could readily and properly be regarded as within reasonable limits, even if it means the Crown has to do much less than would be usual, and the accused has to do much more, in order to achieve or avert a verdict of guilty. *My impression is that if s.3(2) had been in only slightly different terms this might have been achieved.* If, for example, the provisions in relation to drug tafficking...had allowed rebuttable presumptions to be made once the Crown had established matters which gave rise to reasonable suspicion or justified inferences of guilt, the question would have been quite different." [emphasis added]

This passage in the judgment makes it quite clear that His Lordship's difficulty with the assumptions in the legislation was the fact that they were completely baseless in fact - there was no basis, such as the sheer amount of his property, for drawing the conclusion that he may have been involved in drug trafficking in the past. Thus, even a slight change in terminology would have brought the section within the permissible bounds of the Convention.

R v. Benjafield

The decision in *McIntosh* was received with alarm in England where similar laws were in place.[8] However, a subsequent decision of the Court of Appeal in England has affirmed the compatibility with the Convention of the equivalent English provisions under the Criminal Justice Act 1988 and the Drug Trafficking Act 1994. In *R v. Benjafield*[9] the English Court of Appeal was called upon to decide *inter alia* the identical issues of whether a person against whom a confiscation order was sought was charged with a criminal offence within the meaning of Article 6 of the Convention and, if so, whether the assumptions in the relevant sections of the legislation were compatible with the presumption of innocence.

In relation to the first point, their Lordships took a somewhat broader approach, having regard not only to the presumption laid out in Article 6(2) but the general right to a fair trial which is protected by Article 6(1) of the Convention. They also took a broad approach to the question of whether Article 6 should apply, indicating that it was the character of the process as a whole which was important. As the confiscation order was made in the context of criminal proceedings and had extremely deleterious consequences for the defendant, including the possibility of imprisonment in default of payment, the procedure should be regarded as at least part of the determination of a criminal charge. The defendant was therefore entitled to the presumption of innocence in the

interests of fairness under Article 6 as a whole, including Article 6(2).

However, the court held that the interference with the presumption provided for in the legislation - the reversal of the onus of proof- was a reasonable and proportionate response to a substantial public interest, namely that of ensuring that those who had offended should not profit from their offending and should not use their criminal conduct to fund further offending. In reaching this conclusion their Lordships were influenced by several factors such as the fact that it was only after the necessary convictions that any question of confiscation arose; that in every case the prosecution had a discretion as to whether to initiate the proceedings, which discretion was capable of being reviewed by the court; and that the court had a discretion not to make a confiscation order where there was a serious risk of injustice. If these discretions were properly exercised the court held that the statutory provisions in the 1988 and 1994 Acts would not contravene Article 6. The court, however, qualified this with a statement to the effect that it was the application of Article 6 to the facts of a particular case which was all important.

Analysis

It is notable that the Scottish and English courts, although conflicting in their conclusions as to the compatibility of the confiscation proceedings with Article 6 of the ECHR, were united in the opinion that Article 6(2) did at least apply to such proceedings. Their approach only differs in their assessment of the "reasonableness" of the assumptions which can be made by a court under the respective pieces of legislation.

The decisions reached by the English and Scottish courts have implications in Ireland for two Acts which have been introduced in this jurisdiction to combat the problem of drug trafficking, namely the Criminal Justice Act 1994 and the Proceeds of Crime Act 1996.

The vital distinction between these two statutes is that the 1994 Act, along lines similar to that of the English and Scottish legislation discussed above, permits the Director of Public Prosecutions to make an application to the Court for a confiscation order after having secured a conviction on indictment for a drug trafficking offence. Indeed, it is noteworthy that s.5(4) of our 1994 Act, which allows the court to make assumptions about the value of the proceeds of drug trafficking to be confiscated, is in more or less identical terms to s.3(2) which was struck down by the Court in the *McIntosh* decision as well as s.4 of the English Drug Trafficking Act 1994.[10] However, s.5(2) of the Irish Act goes further in that it states that the court shall not make such assumptions in so far as they are shown to be incorrect in respect of a defendant and also if "it is satisfied that there would be a serious risk of injustice in his case if the assumption were to be made." It would therefore be open to an Irish Court to decide, should the issue of compatibility with the Convention arise, that such an assumption about the value of the proceeds of crime is unreasonable and disproportionate in that no evidence must be adduced by the Director to support the assumption that the person was involved in past drug trafficking. Alternatively, an Irish Court could follow the decision of the Court of Appeal in *Benjafield* in holding such an assumption to be a reasonable one, especially in the light of the safeguard provided for in s.5(2).

The implications for the Proceeds of Crime Act 1996 are somewhat more difficult to ascertain. This is in large part due to the fact that, as mentioned above, the legislation makes provision for assets to be forfeited in the absence of any conviction. Under the 1996 Act, the Court shall make an interim or interlocutory order effectively "freezing" a person's assets if the court is satisfied that the specified property constitutes the proceeds of crime. The only evidence which is before the court in that regard is the statement of a senior Garda officer containing his belief that the impugned property is the proceeds of crime. It is therefore difficult to state definitively whether the procedure would fall within the definition of a "criminal charge" within the terms of Article 6(2) of the Convention.

It is certainly arguable that the procedure falls short of a "criminal charge" in circumstances where the application is not contingent upon any prior conviction having been obtained and where any allegation of criminal activity is only implicit. The better view, it is submitted, is that the procedure under the Act does attract the protection afforded to a defendant under Article 6 of the Convention. The absence of an indictment and the lack of any detail apart from the statement of belief of a member of the Gardai would seem to militate in favour of the application of the presumption of innocence, the need for protection being all the greater. Lord Prosser's reasoning in *McIntosh* is equally applicable to the 1996 Act - broadly speaking there is a clear allegation of criminal activity and a "charge" in so far as the defendant's situation will be substantially affected by the decision of the court. Certainly, if one adopts the wider test espoused by the Court of Appeal in *Benjafield* and looks at the character of the process as a whole, it is clear that the presumption should apply. The consequences of the orders are extremely serious for the individual concerned, often involving large sums, and the purpose of the Act is punitive. Its aim is, as the title suggests, to deprive *criminals* of their ill gotten gains as part of the State's 'war on

"It is unlikely, given the pressing social need to control drug trafficking to which McGuinness J. made reference in her judgment in the High Court in *Gilligan* and the fact that there is some basis for the belief that the property constitutes the proceeds of crime, that an Irish Court would find the legislation outside the reasonable limits of the Convention.... Nonetheless, finding by the courts that the proceedings are equivalent to a "criminal charge" for the purposes of the Convention would not sit easily with the law as it now stands under the *Gilligan* decision that the procedures under the 1996 Act were civil in nature."

crime.'[11] A degree of opprobrium will undoubtedly attach to an individual whose property is confiscated under the Act.

For all these reasons, it is submitted that it would be wrong in principle to take a formalistic approach and to distinguish between an express and a clearly implied allegation of criminal conduct in this way. To hold that crucial safeguards do not apply to "civil" proceedings in which there is a clear implication of criminal activity, is to effectively give the State *carte blanche* to bypass fundamental rights.[12]

Proceeding, therefore, on the hypothesis that the proceedings should attract the protection afforded to the individual by Article 6 of the Convention, there remains the question of whether the reversal of the burden of proof which results under the 1996 Act can be said to be a proportionate and reasonable response to the social need to curb the growth of drug trafficking.

In this regard, it should be remembered that the evidence before the court is the statement of belief of the Chief Superintendent or other officer, although the Court must be satisfied that there are reasonable grounds for such belief. Furthermore, s.4(8) stipulates that "the Court shall not make a disposal order if it is satisfied that there would be a serious risk of injustice." In considering this provision, it may therefore be appropriate to recall the words of Lord Prosser who stated in *McIntosh*:

> "If, for example, the provisions in relation to drug trafficking...had allowed rebuttable presumptions to be made once the Crown had established matters which gave rise to reasonable suspicion or justified inferences of guilt, the question would have been quite different."

It is unlikely, therefore, given the pressing social need to control drug trafficking to which McGuinness J. made reference in her judgment in the High Court in *Gilligan* and the fact that there is *some* basis for the belief that the property constitutes the proceeds of crime, that an Irish Court would find the legislation outside the reasonable limits of the Convention. This conclusion is supported by the fact that on an application of the proportionality test in the High Court decision in *Gilligan,* McGuinness J. upheld the constitutionality of the legislation.

Conclusion

The European Convention on Human Rights Bill is at the first stage of its passage through the Dail. It is hoped that the legislation will be in place before the end of the summer.[13] The Bill as it currently stands provides that the superior courts would be able to make a declaration that a statutory provision is incompatible with the State's obligations under the Convention provisions.[14] In the event of a challenge under the Human Rights Act, it will be interesting to observe the way in which the forfeiture proceedings are characterised. A finding by the courts that the proceedings are equivalent to a "criminal charge" for the purposes of the Convention would not sit easily with the law as it now stands under the Gilligan decision that the procedures under the 1996 Act were civil in nature.[15] It is to be hoped that the decisions in *McIntosh* and *Benjafield* prove instructive to Irish courts in affording the defendant in civil forfeiture proceedings the greatest protection possible.•

1. [1998] 3 IR 185
2. At the time of writing no decision in the case had been delivered.
3. At the time of writing, the European Convention on Human Rights Bill, 2001 was at the first stage of its passage through the Dail.
4. Judgment delivered 13th October 2000, reported in (2000) SLT 1280
5. Times Law Reports, 28th December, 2000 (Judgment delivered on 21st December, 2000)
6. Lord Kirkwood dissenting.
7. (1982) 5 EHRR 313
8. See The Times, 14th October 2000 , *Judges put drug profits out of Blair's reach.*
9. *Supra* at no.5
10. Section 5(4), Criminal Justice Act 1994 provides:

    "The assumptions referred to in *subsection* (2) of this section are-

    (a) that any property appearing to the court-

    (i) to have been held by the defendant at any time since his conviction, or

    (ii) to have been transferred to him at any time since the beginning of the period of 6 years ending when the proceedings were instituted against him, was received by him, at the earliest time at which he appears to the court to have held it, as a payment or reward in connection with drug trafficking carried on by him,

    (b) that any expenditure of his since the beginning of that period was met out of payments received by him in connection with drug trafficking carried on by him, and

    (c) that, for the purpose of valuing any property received or assumed to have been received by him at any time as such a reward, he received the property free of any other interests in it."
11. See Dail Debates, Vol. 467, no.7, Cols. 2405 et seq.
12. For an in-depth discussion of the presumption of innocence in the context of the Proceeds of Crime Act 1996 see Meade, *The Disguise of Civility: Civil Forfeiture of the Proceeds of Crime and the Presumption of Innocence in Irish Law* (2000) Hibernian Law Journal 1
13. The Minister for Justice, John O'Donoghue, recently expressed his hope that the legislation would be place by the end of the summer, The Irish Times, Monday 12th February 2001.
14. See s.5, European Convention on Human Rights Bill, 2001
15. *Supra* at no.1, p.224.

    Per McGuinness J.:

    "...the procedures set out under the Proceeds of Crime Act 1996 are not criminal in nature ... Accordingly in this context the protections afforded by Article 38:1 of the Constitution are not applicable."

UMAN GENETICS AND THE NEED FOR REGULATION

Stephen Dodd BL *outlines the growing number of difficult legal issues concerned with genetics and the corresponding need for regulation in Ireland of genetic research and access to and use of genetic information.*

Introduction

The publication of the first draft of the Human Genome Project represents a landmark in the pervasive influence of genetics on society.[1] The object of the Project is to map the entire sequencing of the Human DNA code. The next ongoing steps involve working out the detailed function and interactions of the genes, as well as the application of this knowledge such as in the perfection of medical techniques. These developments have given rise to both optimism and anxiety, in equal measure. The genetic makeup of human beings has implications for society's concepts of race, equality, disability, and social responsibility. A genetic profile carries vast amounts of personal information relevant over a lifetime and through the generations. Fears have been expressed that such knowledge may be the subject of misuse and misinterpretation. Human genetics opens the possibility of new forms of discrimination. Its possible use by employers and insurance companies, in particular, has caused concern. A major issue is therefore the privacy and confidentiality of such information. As the identification of genetic knowledge takes place in a medical context, an important preliminary issue is informed consent.

With reference to genetics, one of the most emotive questions has been genetics and human reproduction in the area of assisted pregnancy and cloning. Ethical questions are not confined to the use of genetic knowledge, but also embrace control of genetics through patenting law. The purpose of this article is to identify the legal issues concerned with genetics and the corresponding need for regulation under the following headings: informed consent; confidentiality; use in insurance; employment; cloning; assisted reproduction; and patenting. It will focus on the potential for genetics to create new issues in civil law rather than on the more established legal genetics issues such as evidence in criminal law and paternity questions in family law.

Human Genetics: Current State of Knowledge

The elucidation of DNA structure in the 1950s was swiftly followed by modern biotechnology involving the modification of genetic information in bacteria and fungi. By the late 1970s genes could be inserted and removed from bacteria. Compared to human genetics, there are currently few limits in the ability to modify non-human genes. The Human Genome project commenced in the 1990, with the target of completion by 2005.[2] The results have yielded approximately 120,000 genes which could aid in the treatment of around 4000 genetic diseases which may afflict humans. Up to 2 % of new born babies suffer from a perceptible genetic disorder.[3] The most common genetic disease is cystic fibrosis. Examples of diseases linked to a single gene include Tay Sachs disease, thailasaemias, and Huntingtons Chorea. However most genetic diseases are multigenic, whereby a number of genes interact to produce the condition. As regards the medical procedure, genetic screening or testing simply involves identifying the presence or otherwise of a particular gene. The purpose of genetic tests can be predictive i.e., indicating the presence of disease which has not yet occurred, or diagnostic of conditions which have already developed. The predictive value of the test will depend on the nature of the gene in question. The other major and more significant genetic technique is gene therapy. Gene therapy involves replacing defective genes with healthy copies of the gene or the modification of the existing gene. Other variations use the gene in a similar manner to a drug by providing the patient with an encapsulated gene or by inserting "suicide" genes into unwanted cells. In 1990, the first peer approved

"In Ireland, there is no legal bar or regulation to prevent an insurance company making the offer of an insurance policy conditional on taking a genetic test or requiring the disclosure of a genetic test result. ...The argument against use by insurers is that even if such information might aid in fine tuning risk, any requirement to furnish such personal data would be outweighed by the resulting invasion of privacy and human dignity. The arguments against requiring customers to take genetic tests include the strong argument that compulsory testing may infringe a person's preference not to want to know whether he or she has a disease-linked gene. Similarly, objections to a requirement to disclose results of a test to insurance companies include the strong policy objection that it might inhibit a person taking a test which he or she would otherwise freely take."

gene therapy took place to treat severe combined immune deficiency (SCID). Considerable technical problems still exist regarding gene therapy. These include identifying the correct place for insertion of the gene into the genome, carrying the required genes into appropriate cells, as well as trying to mimic the time when particular genes are turned on and off.

There are in fact two types of gene therapy; germ-line gene therapy and somatic gene therapy. Germ line gene therapy relates to sperm or egg cells and will result in the new information being passed on to succeeding generations. Somatic gene therapy, however, simply involves the insertion of a new gene into cells to counter any disease-inducing effect of the gene. The new gene is expressed only in those cells and is not passed on to succeeding generations. Germ-line gene therapy imports significantly greater ethical issues. Damage in germ line therapy will cause irretrievable damage to the cells and would extend to future generations. Whether future generations have rights relating to the inheritance of genetic materials is therefore an issue[4]. However only somatic gene therapy is technically feasible at the moment. Other applications of genetic knowledge include xeno-transplantation, where human organs grown on non-humans are transplanted to humans.

Informed Consent

In relation to genetic screening or to gene therapy, peculiar difficulties exist as to what constitutes informed consent. Uncertainty prevails as to the extent of information which must be placed before a patient, to properly consent. Consent to knowledge of a person's genetic makeup differs from most medical procedures as it is a permanent part of the essential makeup of the patient, not a transient problem or deriving from an external source. Genes are also indelibly linked to a person's reproductive function and to future generations. Other risks relate to the limited extent of knowledge of genetics such as the potential for false-positive and false-negative test results and the potential effect, that results cannot be interpreted through the present state of knowledge, or the risk that a rare mutation could be missed because a test recognises only common mutations. Social risks include the effect of the findings on self-image, family relationships, employment, and insurance coverage, as well as the physical and emotional burden of the disorder. Other incidental risks are the tests may be revelatory as regards descent or paternity. Sometimes genetic testing reveals information the patient does not want to know. A doctor will clearly need to explain in advance that pre-symptomatic tests are not diagnostic but only predictive of increased risk. Additional problems may arise in gene therapy, as the very nature of the procedure means that problems are likely to lead to long term and significant damage.

The case law on informed consent reveals two distinctive thrusts concerning the level of disclosure.[5] Both were evident in the case of Walsh v Family Planning Services,[6] in which the Supreme Court determined that the duty of disclosure in respect of the risks of a procedure or intervention is an antecedent duty of care. In his judgment, Finlay CJ stated that there is:

> "a clear obligation on a medical practitioner carrying out or arranging for the carrying out of an operation to inform the patient of any possible harmful consequences arising form the operation, so as to permit the patient to give an informed consent to subjecting himself to the operation concerned. I am also satisfied that the extent of this obligation must as a matter of common sense vary with what might be described as the elective nature of the surgery concerned."[7]

On the other hand, O'Flaherty J noted that the standard of care had to be resolved by the courts by reference to established principles of negligence. He stated "..if there is a risk - however exceptional or remote - of grave consequences involving severe pain stretching for an appreciable time into the future and involving the possibility of further operations, the exercise of the duty of care owed by the defendants requires that such possible consequences should be explained in the clearest language to the plaintiff.". Theses two differences in emphasis have been evident in subsequent case law[8].

More recently in Geoghegan v Harris, Kearns J favoured a reasonable patient test rather then the professional standard. He stated "...as a general principle , the patient has the right to know and the practitioner has a duty to advise of all material risks associated with a proposed form of treatment . The court must ultimately decide what is material. "Materiality", includes consideration of both (a) the severity of the consequences and (b) statistical frequency of the risk." Kearns J noted that each case must be considered on its own facts. He further noted that an absolute requirement of disclosure in every case was unduly onerous, stating "at times a risk may become so remote, in relation at any rate to the less than most serious consequences, that a reasonable man might regard it as material or significant." On the issue of causation between lack of informed consent and the resulting harm, Kearns J considered the primary question to be objective - "what would a reasonable person, properly informed, have done in the plaintiff's position" - although the objective standard could yield to subjective factors where there was credible evidence.

Whichever formulation of the tests is applied, certain difficulties arise in the context of genetic testing or gene therapy. Unlike harmful consequences directly related to possible adverse medical reactions, much of the risk associated with genetic testing is of a social and psychological nature. The case law has not grappled with social risks, and it is arguably entirely the responsibility of the person taking the test to know the social implications of a positive test result. In addition, The only potential "injuries" which may arise from genetic testing are psychological.

"In Ireland, discrimination based on genetic predisposition is not expressly prohibited under the Employment Equality Act 1998. Possession of a gene marking a predisposition to a disease could arguably be said to constitute a "disability", one of the exhaustive list of nine grounds for discrimination.... However it is only by torturing language that the presence of disease-linked genes could be said to come within this definition, as in no respect could a gene be said to constitute an 'organism'."

The information to be placed concerning gene therapy more easily fits the conventional model. However the limited experience of gene therapy means the exact nature of possible harmful consequences will be difficult to outline. This uncertainty in itself should be a matter which should be properly placed before the patient.

A related issue concerns the circumstances in which genetic testing is appropriate. In the United States and Britain, where a Down syndrome child has been born, doctors have been found liable for "wrongful life" or personal damages for failing to let a patient know of the availability of prenatal or other genetic tests.[9] This of course arises in a context where abortion is permitted. Nevertheless in Ireland, the question may arise as to whether a doctor should have offered genetic counseling in dealing with a particular matter in either a predictive or diagnostic setting, or was guilty of negligent genetic counseling. The reasonableness of not offering or carrying out such tests may depend on such factors as family history, whether the person was in a high-risk group for developing a genetic disorder, and the existence of symptoms associated with a genetic disorder. A further important factor may be whether there is available a therapy or treatment which may alleviate the disease associated with a gene.

Finally, it is possible that some limits may be placed on the autonomy of individuals to request a genetic test. This is the case in France, where genetic tests are not permitted except where relevant to a medical condition.

Confidentiality

Genes are permanent units of information from which humans are built. The highly personal nature of genetic information, the potential interest of other parties in such information and the risks of being stigmatised, are just some of the reasons for maintaining the privacy and confidentiality of genetic knowledge. However genetic information also has an inter-personal dimension. This is because the personal genetic makeup of an individual may be revelatory as regards genes carried by family members or relatives. Certain circumstances may present an ethical dilemma for a doctor. On the one hand, he has a duty of confidentiality under the normal doctor/patient relationship. On the other hand, the information may be relevant to the welfare of third parties such as family or relatives of the patient. It may indicate that these other parties possess a gene which predisposes them to a disease, for which corrective action may be taken. The patient's right to privacy must be balanced against the doctors and the patient's duties to others, such as relatives and the broader community. The interpersonal nature of genetics also works in the reverse direction. To properly understand a patient's genetic status, it may be necessary to contact and test members of the extended family. This also raises the privacy of the family members not to be tested.

The confidentiality of genetic predisposition from inquiry by insurance companies and employers is a particularly contentious issue. These two areas will be examined in the next two sections. Privacy issues may also arise in the context of genetics registries (storing data)[10] and forensic or population DNA banks (storing samples).[11]

"In Ireland there is no legal regulation prohibiting or controlling either types of cloning. This is in contrast to most European states which have enacted legislation banning human reproductive cloning. In certain countries such as Germany and Spain, an attempt at human cloning is a criminal offence. In Britain, cloning is regulated under the Human Fertilisation and Embryology Act 1990. Although there is no explicit ban on cloning in this legislation, it requires a licence from the Human Fertilisation and Embryology Authority which has indicated that no such licence would be granted."

Insurance

Most insurance operates on a principle of mutuality (as opposed to solidarity), whereby the level of premium paid depends on the degree of risk. With reference to genetics, the concern is that persons who inherit disease-predisposing genes will be required to pay higher premiums or, in certain cases, might be treated as uninsurable.[12] Above- or below-average genetic risk could be used to structure the costs or benefits of insurance policies. This may particularly apply to insurance for critical illness, disability, individual private medical care, long term care, and even travel insurance. The problems associated with the use of genetic knowledge by insurance companies include the resulting discriminatory social impact, possible invasion of privacy as well as the fact that the current level of genetics knowledge makes accurate predictions difficult. With the exception of tests for Huntington's, and possibly a handful of other diseases, few tests have been demonstrated to have an established predictive quality. Even in these cases, there will be variation in the date of onset of the disease and the death of the persons concerned.

Against this, it may be said that use of genetic information is no more unfairly discriminatory than the current practice of questioning medical and family history. If technical obstacles to accuracy can be overcome, such knowledge is relevant to risk and should be put before the insurance company. Insurance companies have argued that absolute protection of the confidentiality of personal genetic information in this context would give an unfair advantage to individuals over insurance companies. More positively, the open use of such information will enable a person to make decisions including the optimal level of health and life insurance, management of retirement policies, and the best ways to deal with risk factors. It is also arguably unfair to other customers who would in effect be subsidising the risks of others.

Genetic knowledge, however, arguably threatens to overthrow the very paradigm of insurance. Insurance is predicated on the fact that the incidence of harm is uncertain. If genetic knowledge advances, so that accurate predictions can be adduced, this threatens to very context of insurance, by the increasing level of certainty.[13] However, perhaps the overarching trump argument against use by insurers is that even if such information might aid in fine tuning risk, any requirement to furnish such personal data would be outweighed by the resulting invasion of privacy and human dignity. The arguments against requiring customers to take genetic tests include the strong argument that compulsory

testing may infringe a person's preference not to want to know whether he or she has a disease-linked gene. Similarly, objections to a requirement to disclose results of a test to insurance companies include the strong policy objection that it might inhibit a person taking a test which he or she would otherwise freely take.

In the United States, much of the debate has focused on the federal prohibition on the use of genetic information by insurance companies for the purposes of health insurance (which is mutuality- as opposed to solidarity-based).[14] In Ireland and Britain, the main locus of concern is on life insurance. In Ireland, there is no legal bar or regulation to prevent an insurance company making the offer of an insurance policy conditional on taking a genetic test or requiring the disclosure of a genetic test result. The Irish Insurance Federation has recently adopted a Code of Practice on Genetic Testing.[15] These minimum standards are for the guidance of member companies offering any type of life assurance policy.[16] The Code provides that applicants are not required to undergo a genetic test in order to obtain insurance, though they are obliged to disclose at application stage all material acts likely to influence the assessment of the proposal, which includes any genetic test results. This is said to be based on an applicant's existing duty of good faith. Disclosure of the result of a genetic test is not required in new applications for life cover unless the sum assured on the new application exceeds ú300,000 (euro 381,000) or the total of the sum assured on the new application and other policies, if any, taken out with any insurer between 1 April 2001 and 31 December 2005 exceeds ú300,000.[17] Only results of genetic tests which have been approved by the Genetics and Insurance Committee (GAIC) in the UK[18] should be taken into account. It states there is no need to disclose a genetic test result of a blood relative or the results of future genetic tests after the policy has been taken out.[19] The consent of the applicant must be obtained by the life assurance company before personal data, which includes a genetic test result, can be processed.[20] The GAIC has so far approved only tests for Huntington's disease in respect of life insurance, though a small number of additional tests (such as the BRCA1 and BRCA2 gene test for breast and ovarian cancer) are currently under consideration.

This is a more liberal regime than is currently being considered in England. In England, the Human Genetics Commission has recently recommended a three-year moratorium on the use of genetic information by insurers, except in respect of policies over ú500,000 in value.[21] In the case of these high-value policies, the HGC says insurers should be permitted to use only the results of tests approved by the GAIC. The reasoning behind the moratorium is to allow time for a full review of regulatory options and to afford the opportunity to collect data which is not currently available.

The adoption of this voluntary Code in Ireland is no excuse for the legislature not enacting regulations on this issue. The Code is purely voluntary and so there is no legal bar to requiring applicants to take genetic tests. Apart from this, the legislature needs to consider whether any of the arguments outlined above should outweigh any requirement at all of disclosure.

Employment

Genetic information pertaining to employees, indicative of future health, may be of interest to an employer. Employee health will be relevant to potential loss of workdays, workplace conditions, insurance and health care. Certain qualms have been voiced that employers may seek genetic information for the purpose of recruitment or even the dismissal of employees. While an employer has a legitimate interest in the health of employees, genetic information may relate to future disease which may not develop and so has no relevance to current ability to perform the work. In the United States, the US Equal Employment Opportunity Commission (EEOC) recently filed its first court action challenging genetic testing by a railway employer.[22] It sought an injunction to end genetic testing of employees who had filed claims for work-related injuries based on carpal tunnel syndrome. Employees were asked to provide blood samples to be used for a genetic DNA test for Chromosome 17 deletion, which is claimed to predict some forms of carpal tunnel syndrome. In the event, the case was settled after the employer agreed to stop the testing.

In Ireland, discrimination based on genetic predisposition is not expressly prohibited under the Employment Equality Act 1998. Possession of a gene marking a predisposition to a disease could arguably be said to constitute a "disability", one of the exhaustive list of nine grounds for discrimination. The definition of disability in section 2 of the Act lists five categories including under category (b) the presence in the body of organisms causing, or likely to cause, chronic disease or illness. Only (b) would appear to have any potential application to genetics. However it is only by torturing language that the presence of disease-linked genes could be said to come within this definition, as in no respect could a gene be said to constitute an "organism". The failure to address genetic discrimination in the 1998 Act could be said to constitute something of a lost opportunity and arguably displayed a surprising lack of vision having regard to the ongoing debate in many other countries. On the dismissal side, however, the Irish unfair dismissals legislation would appear to be flexible enough to cover dismissal based on the possession of a disease-inducing gene, though such a case has yet to be encountered.

Arguably the only circumstances in which employers may be entitled to access to results of genetic tests would be to ascertain where the employee or others may be at risk in the type of workplace. There would clearly have to be some grounds for such belief.[23] In such instances, the Health and Safety Authority could be charged with the task of policing the use of genetic material by employers.

Rather than separately dealing with genetics issues relating to employment and insurance, the preferred approach would be to enact a separate measure dealing with confidentiality of genetic information. The purpose of this will be to ensure privacy and prevent the emergence of what has been called a "genetic underclass" or "the healthily ill". Such a measure could state a general principle of privacy in genetic information and go on to deal with preventing, or limiting, employers or insurance companies requesting such information. At the international level, the Council of Europe has addressed these questions in the 1996 Bioethics Convention (European Convention on Human Rights and Biomedicine), which includes a general prohibition on genetic discrimination as stated in article 11: "Any form of discrimination against a person on ground of his or her genetic heritage is prohibited." Under Article 12, predictive genetic tests must be necessary for health reasons.

Cloning

Cloning involves the copying of genes by asexual reproduction. A clone will be genetically identical to the cloned. There are

"The situation in Ireland is that there is no legal regulation on assisted reproduction, with only minimum guidance under the Irish Medical Council Guide. Whether the constitutional right to life of the unborn under Article 40.3.3 has any relevance to the field of assisted reproduction remains to be seen. There is urgent need for the establishment of some form of regulatory authority along the lines of the British Human Fertilisation and Embryology Authority, together with the adoption of appropriate regulatory guidelines."

however two types of cloning; reproductive cloning and therapeutic cloning. Human reproductive cloning involves creating genetically identical foetuses or babies, while therapeutic cloning involves cloning human embryo cells under two weeks old for the purposes of research into diseases such as Parkinson's disease, cancers, strokes, heart disease, etc. Much of the revulsion to human cloning is based on notions of human dignity and treating human life in an instrumental manner. In addition, the current state of scientific advances is such that cloning is extremely hazardous, with a success rate of between 3 and 5 per cent. In Ireland there is no legal regulation prohibiting or controlling either types of cloning. This is in contrast to most European states which have enacted legislation banning human reproductive cloning. In certain countries such as Germany and Spain, an attempt at human cloning is a criminal offence. In Britain, cloning is regulated under the Human Fertilisation and Embryology Act 1990. Although there is no explicit ban on cloning in this legislation, it requires a licence from the Human Fertilisation and Embryology Authority which has indicated that no such licence would be granted. Various international measures have been taken to outlaw reproductive cloning. Article 11 of the Universal Declaration on the Human Genome and Human Rights states that "practices which are contrary to human dignity, such as reproductive cloning of human beings, shall not be permitted."[24] The European Parliament has also passed a resolution calling on member States and the UN to implement a legally binding universal ban on human cloning.[25]

In Britain, legislation is nearing completion which would allow therapeutic cloning of human embryo cells under two weeks old.[26] The proposed legislative change relates to the use of viable human embryos and extracted tissues. Under the existing Human Fertilisation and Embryology Act, researchers may use embryos under 14 days old for studies into fertility, contraception, miscarriage and congenital disorders. The new law allows for a much wider range of research, including cloning, while retaining the 14-day age limit on the developing embryo. It also specifically rules out the production of embryo clones as a fertility treatment or for growth to a full term baby. The changes relate to research in "stem cells", being special cells which have not yet differentiated into particular human cells, such as bone or heart cells. In this research, which is specifically designed for treatment of degenerative diseases such as Parkinson's and Alzheimer's diseases, the embryo is used as a source for undifferentiated tissue for the purpose of growing transplantable tissues and organs.

Therapeutic cloning, though less controversial than reproductive cloning, has also been subject to calls for restrictions. For example, the European Parliament adopted a declaration in 1998[27] which called for a ban on the cloning of all embryos fertilised in vitro. It also called for a ban on the use of European public funds for embryo-destroying research.

Assisted Reproduction

Genetic information has the vast potential to affect reproductive choice. Among the practices associated with genetics and reproduction are IVF programmes, embryo freezing, pre-implantation genetic diagnosis (PGD), enhancement gene therapy (designer babies) and, of course, cloning. Enhancement gene therapy, the ability to manipulate genes to influence the characteristics of a baby, has given rise to as much public disquiet as cloning. Again, in Ireland there is no legislation either prohibiting or regulating any genetics-related reproductive practices. The only regulation is under the voluntary guidelines of the Irish Medical Council, published in its Guide to Ethical Conduct Behaviour.[28] The Guide contains the general statement that gene manipulation with the aim of improvement of health may be ethical while the creation of embryos for experimental purposes would be professional misconduct.[29]

IVF programmes, artificial insemination by anonymous donors and embryo freezing are currently practised in Ireland. Advances in genetic knowledge means that IVF programmes may allow the selection of embryos before they are implanted in the womb, called pre-implantation genetic diagnosis (PGD). This raises the prospect of even fertile couples, where they risk passing on defective genes, deciding to opt for IVF in order to remove the risk. PGD also allows the possibility of selecting the sex of a foetus before it is implanted into the womb. In England, such sex selection is banned except when justified by medical reasons. Under the Guide, IVF treatment is only permitted where it is clear after thorough investigation that there is no treatable cause for infertility.[30] This would therefore impliedly prohibit PGD. While the freezing of embryos or cyro-preservation was prohibited under the 1994 Guidelines, the practice of freezing has subsequently commenced at various Irish hospitals. The new Guide states that there is no objection to the preservation of sperm or ova to be used subsequently on behalf of those from whom they were originally taken.[31] Under a decision of the Rotunda Hospital in early 1998 to freeze four-cell embryos, would-be parents are asked to sign consent forms allowing the destruction of their frozen embryos after five years.[32]

The experience in other jurisdictions illustrates the legal problems to which freezing can give rise. In the United States, in Davis v Davis,[33] a married couple stored embryos with a clinic in preparation for transfer to the wife's womb. Before this was accomplished the marriage ended in divorce. The ex-wife still wanted the embryos implanted while the husband resisted. The trial judge held the embryos were unborn children and so should be transferred to the wife for implantation. This was reversed on appeal, on the basis that the embryos were under their joint control (though it was not their property). It was considered repugnant to order a parent to bear the consequences of parenthood against their wishes. However, in

the Israeli case of Nahmani,[34] which had similar facts, the Supreme Court of Israel allowed the wife to take the frozen embryos on the basis that the wife had a more compelling interest to become a parent than the husband had in not becoming a parent.

The situation in Ireland is that there is no legal regulation on assisted reproduction, with only minimum guidance under the Irish Medical Council Guide. Whether the constitutional right to life of the unborn under Article 40.3.3 has any relevance to the field of assisted reproduction remains to be seen. There is urgent need for the establishment of some form of regulatory authority along the lines of the British Human Fertilisation and Embryology Authority, together with the adoption of appropriate regulatory guidelines.[35]

Biotechnology

A contentious area is the extent to which patents can be granted in the field of human genetics. It is arguably distasteful that commercialisation and private control should extend to the field of human genes which are the basic information units of human personality. Precise delimitation would appear to be warranted. It has however long been recognised that patents can be granted over living matter such as biological plant and animal material. In the US case of Diamond v Chakrabarty,[36] it was held that a patent for genetically engineered bacteria was valid, while in Harvard/Oncomouse[37] a patent was granted over a genetically modified mouse.

The principal legislation governing patents and biotechnology which embraces issues of genetics is the European Directive on the Legal Protection of Biotechnological Inventions.[38] The Recital notes that legal protection through patents is necessary in the field of genetic engineering, where research and development requires a considerable amount of high-risk investment.[39] In connection with genetics the Directive places limits on what is patentable, noting that patent law must "respect the fundamental principles safeguarding the dignity and integrity of the person." Article 2(1)(a) defines 'biological material' as meaning any material containing genetic information and capable of reproducing itself or being reproduced in a biological system. The Directive provides that the human body, at any stage in its formation or development, including germ cells, and the simple discovery of one of its elements or one of its products, including the sequence or partial sequence of a human gene, cannot be patented. This is reflective not only of ethical concerns but also the fact that the subject of a patent must involve an inventive step (referred to in article 3(1)), as opposed to a simple discovery. The Directive however qualifies this by providing under Article 3(2) that biological material which is isolated from its natural environment or produced by means of a technical process may be the subject of an invention even if it previously occurred in nature. It follows that while a mere DNA sequence without indication of a function does not contain any technical information is not patentable,[40] a sequence or partial sequence of a gene used to produce a protein or part of a protein can be patented where it is specified which protein or part of a protein is produced or what function it performs.[41] Article 5(2) declares that an element isolated from the human body or otherwise produced by means of a technical process, including the sequence or partial sequence of a gene, may constitute a patentable invention even if the structure of that element is identical to that of a natural element. Under Article 5(3), the industrial application of a sequence or a partial sequence of a gene must be disclosed in the patent application.

The Directive however places limits on certain types of patent which would otherwise qualify on general principles. Article 6 (1) declares that inventions shall be considered unpatentable where their commercial exploitation would be contrary to ordre public or morality. In this respect Article 6(2) outlines as unpatentable:

- processes for cloning human beings;
- processes for modifying the germ line genetic identity of human beings;
- uses of human embryos for industrial or commercial purposes;
- processes for modifying the genetic identity of animals which are likely to cause them suffering without any substantial medical benefit to man or animal, and also animals resulting from such processes.

It defines human cloning as any process, including techniques of embryo splitting, designed to create a human being with the same nuclear genetic information as another living or deceased human being.[42] It also declares that use of human embryos for industrial or commercial purposes must also be excluded from patentability. Such exclusion does not affect inventions for therapeutic or diagnostic purposes which are applied to the human embryo and are useful to it.[43]

The Directive has been criticised as violating, at least in spirit, the principle that patents are granted for inventions rather than for discoveries. In particular, the act of isolation of DNA is arguably a tenuous basis for claiming invention.[44] Nonetheles, patent applications for isolation of DNA have already been granted by the European Patent Office, prior to the Directive. In Relaxin,[45] it was argued that the isolation of DNA relaxin gene from tissue taken from a pregnant woman was immoral. This was however rejected on the grounds that the tissue had been donated consensually and that the procedure itself would yield life saving substances.

Conclusion

The Irish legislature could be said to be guilty of extraordinary complacency in failing to put in place any regulations in any of the areas concerning human genetics. Such complacency is not shared by other European states, which have in place regulations concerning most, if not all, of these issues. These include informed consent, confidentiality, insurance, employment, cloning and assisted pregnancy. While legislation is not necessarily appropriate in every case, notably the issue of informed consent, there has been a marked international trend towards regulation in other areas. In particular, a measure guaranteeing some level of privacy or confidentiality of genetic knowledge seems appropriate. While employers and insurers may not be currently using genetic information to any significant extent, the technical and scientific barriers will soon be overcome. An outright ban on human reproductive cloning and the establishment of a regulatory authority to oversee fertility and assisted reproduction matters is required. In general the absence of any regulation on human genetics issues can only but exacerbate fears about the potential impact of genetics. Indeed, one of the main benefits of regulation, once in place, will be to allow for the positive benefits of genetic research and genetic applications to be properly assessed without being viewed through a paradigm of fear. •

1 President Clinton announced the completion of the first survey of the Human Genome on 25 June 2000. A simultaneous announcement of completion was made by the publicly funded Human Genome Project and the private company Celera Genomics. Publication of Initial Working Draft Sequence of the Human Genome was on 12 February 2001 which was included in special issues of Science (16 February 2001) and Nature (15 February 2001).

2 The project is not without its critics. The project takes a "consensus" sequence of 200 persons when variation is integral to every person, see Matt Ridley, Genome (1999).

3 See Kinderlere and Longley, Human Genetics: The new Panacea, in Brownsword, Cornish and Llewelyn (Eds), Law and Human Genetics: Regulating a Revolution (1997), 11, at 17.

4 As far back as 1982, the Parliamentary Assembly of the Council of Europe recommended that there should be a "right to inherit a genetic pattern that has not been artificially changed," Council of Europe Recommendation No.934 on Genetic Engineering.

5 For a recent general survey on informed consent, see Craven, Consent to Treatment by Patients - Disclosure Revisited, (2000) 6 BR 56 and 111.

6 [1992] IR 496

7 Ibid. at 510

8 In Farrell v Varian, O'Hanlon J opined that "...the doctor's obligation does not extend to enumerating all the possible risks, however remote, which are involved."

9 See Margaret Anne McLelland (A.P.) v Greater Glasgow Health Board [1998] Scot CS 26; also Keel v. Banach 624 So.2d 1022 (Ala. 1993); Atlanta Obstetrics v. Abelson 398 S.E.2d 557 (Ga. 1990)

10 See Baird, Registeries, Record Linkage and Research in Genetics: Protecting Privacy, in Knoppers (Ed), Human DNA: Law and Policy (1997), 165.

11 See Genetics Law Monitor Vol. 1 issue 1 (2000) at 5

12 For a comprehensive look at the issues of insurance see McGleenan & Wiesing, Genetics and Insurance (1999).

13 See O'Neill, Insurance and Genetics: The Current State of Play", in Brownsword, Cornish and Llewelyn, op. cit., at 127

14 The United States federal legislation forbids insurance companies from using genetic information (both test results and family history) to exclude applicants from group health insurance.

15 This took effect on 1 May 2001. See Point 4 of the Introduction.

16 See www.iif.ie, under Codes of Practice.

17 It further states that this exemption from the normal duty of full disclosure of material facts applies until 31December 2005.

18 Ibid. Point 4 and 5

19 Ibid. Point 6 (i) and (ii)

20 Ibid. Point 8 (i)

21 1 may 2001. See http://www.hgc.gov.uk

22 On 9 February 2001, the petition was filed in the US District Court for the Northern District of Iowa in the case of EEOC v Burlington Northern Santa Fe Railroad.

23 The British Human Genetics Advisory Commission recommended in its Commission Report on Genetics and Employment P/99/609, 14 July 1999, that use of genetic testing by employers should be limited to detection of any condition that may put the employee or others at risk in the workplace and to assessment of whether a specific variation in an employee's genetic constitution affects their susceptibility to specific features of a particular type of employment, which represent no hazard to most employees.

24 UNESCO 1997

25 Adopted January 1998

26 It has been passed by both House of Commons and the House of Lords.

27 15 January 1998

28 The latest edition is the 5th ed, (1998)

29 Section F, Point 26.2

30 Section F, Point 26.4

31 Section F, Point 26.3

32 See The Irish Times, 8 May 1998

33 842 SW2d 588

34 CA 5587/93 Nahmani v. Nahmani (1995) 49 (i) PD. 485

35 A May 1999 Report of a sub-committee of the Institute of Obstetricians and Gynaecologists (IOG) recommended the establishment of a voluntary licensing authority to regulate assisted pregnancy, as well as greater protection afforded by legislation.

36 447 US 303, 65 L. Ed. 2d 144, 100 S Ct 2204 (1980)

37 T0019/90 (1990) EPOR 501

38 398L0044 Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998, Official Journal L 213 , 30/07/1998 p. 0013 - 0021

39 Recital 2

40 Article 5(1) and Recital 23

41 Recital 24

42 Recital 41

43 Recital 42

44 For a discussion of whether isolation is deemed to be an inventive step under the Directive, see Sheikh, Owning Life: New Frontiers in Patent Law, Genetics and Biotechnology (1999) Vol.5, Is. 1 Medico Legal Journal 23

45 Howard Florey/Relaxin (1995) EPOR 541

THE INTERNATIONAL CRIMINAL COURT

Siobhán Ní Chúlacháin BL* *and* ***Ercus Stewart SC**** *examine the Statute of the International Criminal Court whose ratification by Ireland was recently approved by popular referendum.*

Introduction

When he said "A single death is a tragedy, a million deaths is a statistic", Stalin summed it all up. When one person is unlawfully killed, the rigour of the law is brought to bear on the perpetrator. When a million people die, the world doesn't know how to bring the perpetrator to justice. In spite of international rules and instruments defining and outlawing war crimes, crimes against humanity and genocide, the last three decades have seen repeated incidents of mass violations of human rights – Chile, Colombia, Ecuador, Cambodia, Sudan, Iran, Burma, Indonesia, Palestine, Algeria, Chad, Congo, Rwanda, former Yugoslavia, Afghanistan, Chechnya... the list is impressive. In fact, since the end of World War II, when the international community promised "never again", some 250 international, regional and internal armed conflicts have occurred at the cost of somewhere between 70 and 170 million human lives. In the absence of international enforcement mechanisms and punishment for crimes committed during those conflicts, the result has been impunity for many.

What is the International Criminal Court?

In an attempt to provide an effective mechanism to try and punish crimes committed during armed conflicts, the U.N. has drafted a treaty creating an International Criminal Court (ICC). This will be a permanent Court with a mandate to investigate and punish individuals who violate international humanitarian law, namely by committing war crimes, crimes against humanity, genocide and, once defined, crimes of aggression. Hopefully, it will also act as a deterrent to would-be dictators and war criminals.

It will be a treaty-based institution, binding only on its state parties – it will not be a supra-national body, but an international one. The Statute establishing the Court (the Rome Statute) was adopted by the UN in July 1998, but 60 ratifications are necessary before it can come into effect and the Court can be established. As of 21 May 2001, 139 states had signed the statute and 32 states had ratified it.

Ireland signed the Statute on 7 October 1998 and a Bill ratifying the Statute is before the Oireachtas – our ratification will roughly mark the halfway point towards the establishment of the Court. However, it was decided that a constitutional referendum will be required in order to ratify the Statute. Ireland is probably the only U.N. State which requires ratification by way of popular referendum and this provides for a unique opportunity for public education and debate regarding International Criminal Justice and other mechanisms facilitating the fight against impunity. If the amendment to the Constitution is accepted, implementing legislation will then have to be enacted in order to give effect to the wishes of the people.

The Road to Rome

The concept of an international criminal court to try international war crimes was first mooted by Gustav Moynier in 1872 after the Franco-Prussian war. One hundred and thirty years and several milestones later, the statute establishing the International Criminal Court (ICC) was approved in Rome at a UN Conference.

The first step towards prosecution of international criminal offences took the form of an *ad hoc* International Court of Justice, established after the First World War in the treaty of Versailles to try the Kaiser and German war criminals. Then after World War II, the Allies established the Nuremberg and Tokyo tribunals to try Axis war criminals. The world, as it realised the scale of the Holocaust, promised "never again", and many thought the founding of the United Nations would result in the establishment of an international criminal court. Following the adoption of the UN Declaration of Human Rights, statutes for an international criminal court were drafted, but powerful states on both sides of the cold war stymied the attempt.

It was not until 1989, after the end of the cold war, when the political climate had improved and the requests for UN peacekeeping forces highlighted the extent of armed conflicts, that Trinidad and Tobago, motivated in part by the need to combat international drug trafficking, resurrected the proposals for an international criminal court and the UN General Assembly asked the International Law Commission to draft the appropriate statute.

The establishment of *ad hoc* tribunals on the former Yugoslavia (in 1993) and Rwanda (in 1994) added to the momentum in favour of an ICC by showing how necessary international mechanisms were and by illustrating how unsatisfactory *ad hoc* justice can be – similar crimes attracted no action, for example, no similar international action was taken following conflicts in Sierra Leone or Cambodia. Furthermore, valuable time can be wasted in the establishment of *ad hoc* tribunals – during the year it took to establish the *ad hoc* tribunal on Rwanda, further massacres took place while the world looked on. And then of course, there is the question of the political power of the impugned state – an international court would be completely independent of political interests.

During the negotiations leading to the adoption of the Statute, the vast majority of states fought for the establishment of a strong and independent Court and, while opposition was expected from states like Iraq, Sudan, Burma, and China, the stance of countries like France and the United States, was very disappointing. They were behind the adoption of the most restrictive and unacceptable clauses in the Statute.

On 17 July 1998, UN member states voted overwhelmingly in favour of the Rome Statute establishing the ICC. Seven states voted against the Statute in an unrecorded vote. Of those seven, China, the United States and Israel each gave reasons for voting against the Statute – China said that the pre-trial chamber's power to check the prosecutor's initiative was not sufficient and that the adoption of the Statute should have been by consensus rather than by vote, the United States objected to the jurisdiction of the ICC, and Israel objected to the inclusion in the list of war crimes of the forced movement of populations into an occupied territory.

On 2 February 1999, Senegal, often the African leader on human rights issues, became the international leader on the ICC by being the first state to ratify the Rome statute.

The Court's Jurisdiction

The Court will exercise jurisdiction over crimes committed in the territories of its state parties, crimes committed by nationals of state parties and in situations where a non-state party agrees to accept its jurisdiction over a crime committed in its territory or by one of its nationals. It will also have jurisdiction over cases referred to it by the UN Security Council whether or not the State concerned is a party to the Statute. Its jurisdiction will be based on principles of territorial criminal jurisdiction and not on theories of universality of criminal jurisdiction.

The Court will have no retroactive competence and will only be able to try crimes committed after the ICC statute enters into force or is ratified by the relevant state party. However, unlike the International Court of Justice in the Hague, the ICC will be able to indict and try individuals (as distinct from states or legal entities) for the commission of crimes "within the jurisdiction of the Court" (Article 5). The Court will have automatic jurisdiction over the core crimes defined in the Rome Statute, and criminal responsibility will be imputed to all persons without distinction as to their official capacity, whether that be Head of State, elected representative or government official. The fact that a crime is committed on the orders of a superior will not be a defence.

The Principle of Complementarity

The ICC will not be a substitute of national systems of justice – it will be complementary. It will do no more than can be done by each and every state under existing international norms. In effect, the ICC is an expression of the collective will to establish an institution that will enforce justice for certain international crimes. Therefore, the ICC is an extension of national criminal jurisdictions, as established on foot of a treaty whose ratification by a state makes it part of the national law. Part 9 of the Statute requires all requests for co-operation, including requests for arrest and surrender of an accused and the securing of evidence, to be directed to and executed by national legal systems.

Priority will be given to national criminal justice systems. The preamble of the Rome Statute states that "it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes," and Article 1 provides further that the ICC "shall be complementary to national criminal jurisdictions." The Court will only exercise its jurisdiction where a national legal system has collapsed or where it refuses or fails to carry out its international obligations to investigate and punish the core crimes.

Consequently, the ICC neither violates state sovereignty nor overrides national legal systems which are capable of and willing to carry out their obligations under international law. Instead, its existence will encourage States to investigate and prosecute crimes committed in their territories or by their nationals – if they do not, the ICC will.

The Core Crimes

The statute of the ICC does not create any new crimes – the Court will have jurisdiction over the three core crimes of genocide, war crimes and crimes against humanity, all of which are well-established in international law. In fact, the Statute draws on existing international law for many of its definitions. It will have jurisdiction to try and to sanction crimes against the administration of justice. The Statute also lists the crime of aggression, but this has not yet been defined and therefore is not yet subject to the Court's jurisdiction. More generally, each article of the Statute enumerating the crimes that fall within the ICC's jurisdiction include the elements of each crime, but these "elements" do not form part of, amend or supplement the Statute and are designed to assist the Court in proving the crimes.

Article 25 of the Statute provides the *mens rea* for the crimes falling within the jurisdiction of the Court – a person is criminally responsible for conduct which constitutes a relevant crime if that person orders, solicits, or induces the commission of the crime that either occurs or is attempted, or if that person facilitates, aids, abets, or otherwise assists in its commission or attempted commission. Responsibility also attaches where a person contributes to the commission of crimes by a group with a common purpose, once the conduct of the person is intentional and done with the aim of furthering the purpose of the group.

There is no defence of following orders, official capacity, period of limitation, or mistake of law (unless the mistake negatives the mental element). Military commanders will be held responsible for acts committed under their command when they knew of, or should have known of, or failed to stop, crimes. Their subordinates may also be held responsible. Mental illness, self-defence and duress may provide defences.

Genocide

Article 6 of the Rome Statute defines genocide in accordance with the 1948 UN Convention on the Prevention and Punishment of Genocide, which has already been ratified by 123 states (as of December 1997). Thus, genocide is any of the following acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group":– Killing members of the group, causing serious bodily or mental harm to members of the group, deliberately inflicting on the group conditions of life calculated to bring about its destruction, imposing measures intended to prevent births within the group, or forcibly transferring children of the group to another group. The definition is crafted to include initial acts in an emerging pattern, so that the international community need

not wait until a full pattern of genocide is complete before bringing the perpetrators to justice.

Crimes against Humanity

Article 7 defines crimes against humanity in keeping with the instruments which established the Nuremberg, former Yugoslavia and Rwanda tribunals. However, the Rome statute is more detailed and reflects the development of international customary law. Article 7 enumerates the following crimes against humanity: murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of liberty, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, and other forms of sexual violence of comparable gravity, persecution of an identifiable group, enforced disappearances, apartheid, and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

However, in order to qualify as a crime against humanity, the above crimes must be carried out as a result of a state policy or a policy by non-state actors to commit the specific crimes and the commission of those crimes must be "widespread" or "systematic". The 'state policy' requirement is the element which transforms crimes which would normally be national crimes into crimes against humanity: governmental inaction is not sufficient to prove this element - there must be evidence of active support or encouragement by the State.

War Crimes

Article 8 enumerates war crimes as wilful killing, torture or inhuman treatment including biological experiments, wilfully causing great suffering or serious injury to body or health, extensive destruction or appropriation of property which is not justified by military necessity and is carried out wantonly and unlawfully, compelling a prisoner of war or other protected person to serve in the forces of a hostile power, wilfully depriving a prisoner of war or other protected person to the right to a fair and regular trial, unlawful deportation or transfer or unlawful confinement, taking of hostages, and other serious violations of laws and customs applicable in international armed conflict (some of which are enumerated and include some of the crimes against humanity as enumerated in Article 7).

Victims' Rights

The ICC recognises the right of victims to participate in its proceedings and their right to demand reparation, including restitution, compensation and rehabilitation. In this respect, the Statute of the ICC is revolutionary. Victims are defined as "natural persons who have suffered harm" and as "organisations and institutions that have sustained direct harm to their property" and which are organisations working for the public benefit (in fact the definition comes close to our own definition of charitable organisations).

The Court is empowered to determine the scope and extent of any damage, loss or injury to victims and to order a convicted person to make specific reparation. Before making any order, the Court can invite representations from victims and from the offender, as well as from interested states or other interested persons. A Trust fund will be established to the benefit of direct and indirect victims. Assets of the fund may come from fines imposed or property forfeited. However, the Court can only order reparation against the individual violator. Thus, even where the perpetrator's acts are attributable to a state, or to a state policy, an order for reparation cannot be made against that state.

Penalties

The ICC can impose sentences of imprisonment, though in general sentences should not exceed 30 years. However, in cases of extreme gravity, a life sentence may be imposed. The Court also has the power to impose fines and to order forfeiture of assets or property derived from the crime. The death penalty has been excluded from the Statute, but if the state party convicts a person under a domestic jurisdiction which permits of the death penalty, the convicted person may be executed in accordance with national law.

Criticisms by NGOs

After years of lobbying, the Statute of the ICC has been generally welcomed by non-governmental organisations as a positive step towards international justice and respect for human rights. However, three clauses have attracted particular criticism. The first and most alarming clause allows a state party to the Statute to declare that it will not accept the jurisdiction of the ICC over crimes committed in its territories or by its nationals for the first seven years after it comes into force. This clause can be extended at the end of that seven year period, when the ICC Statute falls to be reviewed at a UN conference. This disposition was a last minute addition instigated by France and, perhaps not suprisingly, it has availed of that option.

The second disappointment is that the Statute is limited to principles of territorial jurisdiction rather than being based on principles of universal competence such as those operating under the 1984 UN Convention for the Prevention of Torture. NGOs had also sought a clause allowing two other state parties to invoke the jurisdiction of the ICC – the state of the victim and the state which has custody of the victim, but these proposals were rejected. Thus, without a political decision dependent on the goodwill of the UN Security Council, many states which have not ratified the Statute will continue to enjoy immunity for massive violations of human rights.

Finally, under the Statute, the UN Security Council can halt investigations for a period of 12 months, which is renewable without limit. NGOs accepted the initial 12 month halt which could allow for diplomatic negotiations designed to bring about a ceasefire or peace agreement, but an indefinite veto over the work of the Court is quite a different matter.

Conclusion

In general, the ICC must be seen as a positive step towards international justice. It will provide a speedy and effective remedy for crimes which hitherto have attracted little or no liability for the perpetrators and it may also provide a deterrent for future would-be dictators and war criminals.

If the referendum passes, it will be incumbent upon us in our new international responsibilities to introduce and promote the necessary legislation to give effect to the constitutional amendment, and, most importantly, to oppose any further watering down of the powers of the ICC in negotiations surrounding the regulations and operations of the Court. •

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-COMMERCE & PHARMACY LAW

Seamus Clarke BL concludes his examination of the compatibility of Irish laws regulating on-line pharmacy services with European rules on the right of establishment and freedom to provide services.

Articles 43 and 49 EC

The right of establishment under Article 43 EC is essentially the right to set up shop in another Member State, permanently or temporarily, either as an individual, partnership or company, for the purpose of performing a particular activity there. On the other hand, the freedom to provide services is the ability to provide services in a Member State on a temporary or permanent basis even though one is established in another Member State. The right of establishment and the freedom to provide services are generally dealt with together as they share many common features and the European Court of Justice has recently tended to analyse them by recourse to the same principles. In *Reinhard Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*[1] the Court considered Italian rules that indirectly discriminated against foreign advocates who wished to establish themselves at the Milan Bar. However, the Court stated a wider principle:

> "[N]ational measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfill four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objectives which they pursue; and they must not go beyond what is necessary in order to attain it."[2]

This pronouncement of the Court shows that there is a generally applicable framework according to which it adjudicates between market integration and those competing interests imbedded in national rules that hinder inter-state trade.[3] According to the Court's formula, national measures which do not discriminate on grounds of nationality, but place at a disadvantage those who have or wish to exercise their rights of freedom of establishment or freedom to provide services will be regarded as impeding the exercise of freedom of movement. Such measures will only be permitted if shown to be objectively justified. The Court's approach can be distilled from its decision in *Säger v. Dennemeyer.*[4] In that case, Dennemeyer was a patent renewal agent based in the U.K. and he provided patent renewal services in Germany without the necessary licence, which the German government required, for the provision of legal services. Such licences were not usually granted to patent renewal agents. A German patent agent operating in Germany challenged Dennemeyer's right to provide his services in Germany.[5] The licensing regulations did not discriminate according to nationality but they had clearly hindered Dennemeyer's access to the German market. He had broken German law in order to provide his services. The European Court of Justice held that the German regulations could only be applied against Dennemeyer where they were shown to be "justified by imperative reasons relating to the public interest"[6] and where the restrictive effect was no more severe than necessary to achieve the objective pursued. The objective of the German rules was the protection of consumers from harm that could be inflicted by inadequately qualified advisers, but the German licensing scheme went beyond what was necessary to achieve this objective since it made the pursuit of patent renewal activities subject to possession of qualifications which were quite specific and disproportionate to the needs of the recipients.[7] Indeed, the Court commented on the fact that Dennemeyer's services were "essentially of a straightforward nature."[8] The result of *Säger v. Dennemeyer* was to liberalise the market in the provision of patent renewal services. In its recent decision in *Pfeiffer Großhandel Gmbh v. Löwa Warenhandel Gmbh*[9] it may be that the European Court of Justice has again broken new ground. In that case, the Court considered a restraining order issued pursuant to national law which prevented the Austrian subsidiary of a German company, which operated a large number of discount stores in Austria, from using the trade name "Plus," a trade name which the subsidiary had begun to use to market its goods. Referring to the *Gebhard* test, the Court stated:

> "A restraining order of the type sought by the plaintiff in the main proceedings operates to the detriment of undertakings whose seat is in another Member State where they lawfully use a trade name which they would like to use beyond the boundaries of that State. Such an

"Regulation 13 was presumably 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, Regulation 13 acts as a blanket ban preventing an online pharmacy from trading in Ireland, although it may be trading in its own Member State or in other EU Member States."

order is liable to constitute an impediment to the realisation by those undertakings of a uniform advertising concept at Community level since it may force them to adjust the presentation of the business they operate according to the place of establishment."[10]

This judgment could be seen as the adumbration of a far-reaching principle that any national measure which impedes the realisation by a company of a "uniform advertising concept at Community level" is *prima facie* contrary to Article 43 EC and must accordingly be justified by imperative requirements in the public interest. The approach of the Court in *Pfeiffer Großhandel* could be monumental. It is a very different approach from that followed in the case law on the free movement of goods where selling arrangements are usually dealt with under the stricter test in *Keck and Mithouard*. That test would, therefore, appear to be peculiar to the free movement of goods case law[11] and under the test, selling arrangements which hinder the free movement of goods and which meet the conditions of equality set out in *Keck and Mithouard* fall outside Article 28 EC. Selling arrangements falling short of this will still have to be analysed under *Cassis de Dijon* principles. On the other hand, following *Pfeiffer Großhandel*, selling arrangements which hinder the right of freedom of establishment are contrary to Article 43 EC unless they are shown to be objectively justified. The approach may seem inconsistent. However, in establishment cases, prohibiting a national of one Member State or a company with its seat in one Member State from carrying out economic activities in another Member State with the aid of a selling arrangement, which it is entitled to use in the first Member State, is regarded as in principle a restriction on access to the market of the second Member State. In free movement of goods cases, most products will already have access to the second State's market and like domestic producers, foreign producers are merely deprived of another selling arrangement. If it does not have access at all, then the product is more likely not to meet the conditions of equality set out in *Keck* and *Mithouard* and it will be tested under the objective criteria set forth in *Cassis de Dijon*.

It must also be remembered that cases such as *Pfeiffer Großhandel* and *Sßger v. Dennemeyer* still leave open the possibility that Member States can justify their restrictive rules and the more extreme the harm to which a consumer may be exposed, the stronger a Member State's justification for exercising regulatory control. In *Customs and Excise Commissioners v. Schindler & Schindler*,[12] agents for a German lottery promoter were unable to provide services in the U.K. but the European Court of Justice held that such was justifiable "in the light of the specific social and cultural features of each Member State, to maintain order in society"[13] and was not disproportionate. Likewise, in *Alpine Investments BV v. Minister van Financiân*[14] a Dutch provision restricting cold calling of potential consumers of financial services was held to be justified in order to protect the reputation of Dutch firms in that sector and was not disproportionate. The Court was not persuaded by an argument that the British authorities had regulated this area in a more liberal manner than the Dutch, holding that such variation was permissible and did not mean that the stricter rule in the Netherlands failed the proportionality test.

To succeed in challenging the Irish regulatory regime and in particular, Regulation 13 of the 1996 Regulations, as an infringement of the right of establishment or the right to provide services,[15] an entrepreneur would have to show one of the following: (1) that such regulation was applied in a discriminatory manner; (2) that the regulation was not justified by imperative requirements in the general interest; (3) that the particular regulation used was not suitable for securing the attainment of the objectives which it pursues; or (4) the regulation went beyond what was necessary in order to attain its objectives. As has already been stated, Regulation 13 was presumably 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, Regulation 13 acts as a blanket ban preventing an online pharmacy from trading in Ireland, although it may be trading in its own Member State or in other EU Member States. For example, www.0800DocMorris.com, a Dutch Internet pharmacy delivers medicine, including prescription medicine throughout the EU by courier. Delivery is made to the place of residence of the purchaser or to another delivery address at which the shipment can be received. The purchaser is allowed to choose a currency of any country within the EU or the Euro and can pay by credit card, EC-cheque or bank withdrawal from a current account. In a decision of the District Court of Berlin of 7 November, 2000, the Court refused to issue an interim injunction against 0800DocMorris, which would have prohibited it from distributing pharmaceutical products over the Internet to consumers in Germany. The Court reversed a prior ruling in the District Court of Frankfurt and held that the Internet sale of pharmaceuticals by 0800DocMorris was covered by Section 73 (2) (6a) of the German Act on Pharmaceuticals (Arzneimitttelgesetz - "AMG"). The AMG permits the purchase of pharmaceuticals from other EU and EEA Member States if only the usual personal quantity is purchased and the purchase has not been commercially or professionally procured.16 The consequence of this case is that an Irish online pharmacy would not be prevented from selling pharmaceutical products to consumers in Germany but it cannot sell such goods to consumers in Ireland. Moreover, in targeting Irish consumers with the online sale of medicinal products, www.0800DocMorris.com and perhaps other EU online pharmacies would appear to be flouting Regulation 13 of the 1996 Regulations.

"The restriction in Ireland of a uniform selling concept or selling arrangement, namely e-commerce, which can be utilised in other Member States would appear to fall on all fours with *Pfeiffer Großhandel*. If that is so, Regulation 13 of the 1996 Regulations is prima facie contrary to Article 43 EC and must accordingly be objectively justified by imperative requirements in the public interest."

The restriction in Ireland of a uniform selling concept or selling arrangement, namely e-commerce, which can be utilised in other Member States would appear to fall on all fours with *Pfeiffer Großhandel*. If that is so, Regulation 13 of the 1996 Regulations is *prima facie* contrary to Article 43 EC and must accordingly be objectively justified by imperative requirements in the public interest. It might appear appealing to argue that

since other EU authorities, such as the Netherlands and Germany have regulated this area in a more liberal manner than the Irish that the Irish regulations are prima facie disproportionate. However, it is clear from the European Court's decision in *Alpine Investments BV v. Minister van Financiën* that such variation is allowed and will not automatically mean that the stricter rule will fail the proportionality test. Nonetheless, it is submitted that since the particular objective in Regulation 13 could be achieved by means less restrictive on an online pharmacy, for example by allowing goods to be delivered to "off-line" pharmacies for collection, the Regulation is overly wide and indiscriminate and so, is disproportionate to the objective, however laudable, which it seeks to achieve.

Conclusion

As the law currently stands, entrepreneurs are prevented from on-line trading in medicinal preparations, i.e. prescribed drugs, all medicines which must be sold under the supervision of a pharmacist, poisons and indeed even those medicines where no supervising pharmacist is required. This may be in contravention of the constitutional right to earn a livelihood and fundamental principles of European law since the Irish legislative regime, and particularly Regulation 13 of the 1996 Regulations, is a disproportionate barrier to entry on the pharmacy market that is not reasonably required by the exigencies of the common good. While the government waxes lyrical about positioning Ireland as a progressive, pioneering e-commerce regulatory environment, neither the Electronic Commerce Act 2000 nor Directive 2000/31/EC on a legal framework for electronic commerce provide any relief for entrepreneurs or pharmacists who may wish to trade online. The Irish Electronic Commerce Act 2000 implements a very small section of Directive 2000/31/EC in relation to the functional equivalence of transactions. The Act affords such concepts as electronic contracts and electronic documents the same legal recognition as their paper-based equivalents in that whenever the paper-based equivalent is required or permitted by "law," then the electronic version is also permitted. This does not help an entrepreneur who wishes to establish an online pharmacy in that Regulation 13 of the 1996 Regulations specifically excludes the electronic sale of medicinal products. The remainder of the Electronic Commerce Act 2000 is largely an implementation of the Electronic Signature Directive and so "Electronic Commerce" Act is somewhat of a misnomer. Directive 2000/31/EC, which is to be implemented by 17 January 2002, will also be of no assistance to an entrepreneur who wishes to establish an online pharmacy. It largely sets a framework which e-commerce service providers must comply with. Essentially, providers of e-commerce services must "render easily accessible, in a direct and permanent manner to their recipients and competent authorities" certain information. The Directive does not attempt to re-write the law governing e-commerce. While it provides clarity in the areas covered, the established principles of law will have to be applied to all other areas of e-commerce, including pharmacy law.

This article started off with the general proposition that the Internet has now become an unlimited virtual marketplace for the global propagation and sale of ideas, goods and services. However, having analysed the specific regulatory environment which pertains to the pharmacy industry in Ireland, it is clear that in that industry an unlimited marketplace does not exist. While the prohibition on the operation of online pharmacies ostensibly exists for the protection of the common good, it has been submitted that these objectives could still be pursued by means which would not altogether prevent online pharmacies from operating. However, the prohibition is not only disproportionate. Irish pharmacies are also left at a competitive disadvantage. Foreign online pharmacies still target Irish customers and there is little that the Irish regulatory authorities can do to prevent this.[17] There appears to be no desire on the part of the Irish government to change the current regime and, if that is the case, the real risk is that foreign pharmacies will steal a march on their Irish counterparts in terms of globalised economies.•

1. Case C-55/94 [1995] E.C.R. I-4165.
2. *Ibid.* at para. 37.
3. See Weatherill and Beaumont, *EU Law* (1999, London) at 682.
4. Case C-76/90 [1991] E.C.R. I-4221.
5. Under Regulation 15(1) of the 1996 Regulations, the enforcement and execution of the provisions of the Regulations may be carried out by (i) officers of the Minister for Health (ii) officers of the Pharmaceutical Society of Ireland (iii) health boards and their officers and (iv) officers of the Irish Medicines Board. Thus, all these parties could challenge a pharmaceutical entrepreneur who sets up business in contravention of the Irish regulations. Moreover, an existing pharmacy is likely to have sufficient locus standi to argue that an infringement of the Regulations is an unlawful interference with its constitutional right to earn a livelihood. In *Parsons v. Kavanagh* [1990] I.L.R.M. 560, O'Hanlon J. held that "the right to earn one's livelihood by any lawful means carries with it the entitlement to be protected against any unlawful activity on the part of another person or persons which materially impairs or infringes that right."
6. *Ibid.* at para. 15.
7. *Ibid.* at para. 17.
8. *Ibid.* at para. 18.
9. Case C-255/97 [1999] E.C.R. I-2835.
10. *Ibid.* at para. 20.
11. A strict test akin to *Keck and Mithouard* was also rejected by the European Court of Justice for cases involving the freedom to provide services in Case C- 384/93 *Alpine Investments BV v. Minister van Financiën* [1995] E.C.R. I-1141.
12. Case C-275/92 [1994] E.C.R. I-1039.
13. *Ibid.* at para. 61.
14. Case C- 384/93 [1995] E.C.R. I-1141.
15. Many online pharmacies are more than just online shops and provide healthcare tips, e-mail addresses for advice, Questions and Answers services and health forums where customers can exchange views with patients and experts in relation to health issues. See e.g., www.0800DocMorris.com, www.eirpharm.com, www.chemist.co.nz or www.cvs.com.
16. See www.bakernet.com, E-Law Alert, 22 January, 2001.
17. See, in particular, www.0800DocMorris.com.

REFUGEE LAW AND PROCEDURE

In the first of a two part article, ***Wesley Farrel BL*** *and* ***Conor Gallager BL*** *provide an overview of refugee law and procedure including a review of procedures before the refugee tribunal.*

Introduction

The Bar Council and the Legal Aid Board have recently reached agreement on the introduction of a scheme whereby barristers provide representation for legally aided asylum applicants before the Refugee Appeals Tribunal.

The scheme is administered by the Refugee Legal Service, a division of the Legal Aid Board, which was established to provide legal advice and assistance to asylum seekers at all stages of the process. The Refugee Legal Service decides whether cases are to be dealt with in-house by the Refugee Legal Service solicitors, of which there are currently 22, or by barristers or solicitors on the refugee panel. A flat fee rate for appeals applies to the panel of barristers and it is envisaged that cases will ultimately be allocated on a rota basis.

There are very brief time limitations for the return of submissions for appeal. This time pressure is extenuated by the volume of material that needs to be addressed in each application, and by the requirement to hold a prior consultation with the client and Refugee Legal Service representative.

The purpose of this article is to set out the law applicable to refugees and to set out the practice and procedure relating to applications for asylum. In 1992, there were a total of 39 applications for asylum in Ireland; by 1999, this number had risen to 7,762.[1] In response, the Government brought forward a number of Acts and Regulations. The key statutes are the Refugee Act 1996, the Immigration Act 1999 and the Illegal Immigrants (Trafficking) Act 2000. Such was the increased pace of applications over the 1990s that a number of provisions of the 1996 Act had already been amended by the time it came fully into force on 20 November 2000.[2] The Department of Justice, Equality and Law Reform has now set up a full statutory code for the processing of asylum applications from first instance to refugee status declaration or deportation.

Refugee Law

There are two main categories of non-nationals wishing to reside in Ireland; one category is that of immigrants, the other is that of asylum seekers and refugees.

Immigrants come to Ireland to live and work for reasons other than fear of persecution. The entry of immigrants is at the discretion of the State and they have no automatic right to enter Ireland except in cases where international agreements apply, such as between Ireland and the United Kingdom, and by virtue of citizenship of a Member State of the European Union. In contrast to immigrants, asylum seekers seek sanctuary or protection in a state other than their own. "Everyone has the right to seek and to enjoy asylum from persecution" according to the Universal Declaration of Human Rights[3] to which Ireland is a party. Ireland is also a party to the Geneva Convention Relating to the Status of Refugees 1951 and the Protocol Relating to the Status of Refugees 1967[4] which was incorporated into Irish law by the Refugee Act 1996 ('the 1996 Act'). [5]

Definition of Refugee

Section 2 of the 1996 Act implements Article 1A(2) of the Geneva Convention and defines a refugee as,

> "...[A] person who, owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of his or her former habitual residence, is unable or, owing to such fear, is unwilling to return to it...."[6]

An asylum seeker becomes a refugee once his or her request for asylum is formally accepted by the state which decision should be respected by other states.[7] Section 3 of the 1996 Act sets out the rights and privileges of recognised refugees.[8]

Non-Refoulement Principle

Section 5 of the 1996 Act implements Article 33 of the Geneva Convention which sets out the principle of non-refoulement. This principle is the cornerstone of international refugee law and provides that the state cannot expel a refugee to frontiers of territories where his or her life or freedom may be threatened on grounds set out in the Geneva Convention. Section 5 of the 1996 Act is even wider than Article 33 of the Geneva Convention as it applies not only to a "refugee" but also to "any person", and as it implements Article 33 without the exception set out in Article 33(2), which subsection denies the right of non-refoulement to refugees on the basis of national security or public safety concerns. Section 4(1) of the Criminal Justice (UN Convention Against Torture) Act 2000, which implements Article 3 of the UN Convention Against Torture, provides that:

"[A] person shall not be expelled or returned from the State to another state where the Minister is of the opinion that there are substantial grounds for believing that the person would be in danger of being subjected to torture".

The principle of non-refoulement is also contained in Article 3 European Convention on Human Rights:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."[9]

This provision is also wider than Article 33 of the Geneva Convention as it precludes the State from expelling or extraditing someone to a country where substantial grounds are shown for believing that the individual would face a real risk of being subjected to treatment contrary to Article 3 of the European Convention on Human Rights in the receiving country.[10]

The Dublin Convention[11]

The Dublin Convention is an agreement between members of the European Community which encompasses the "first safe country" principle: that a person in fear of persecution should seek asylum in the first safe European Community country arrived at. Therefore, if an asylum seeker enters another European Community country before Ireland, he or she may be returned to that country for the substantive examination of the application.

The Convention sets out criteria to determine the member state responsible for processing the asylum application. This is usually the state in which the asylum claim is initially lodged; however, other considerations such as family ties in another state[12] or the fact that another state has issued the person with a valid entry visa[13] may be taken into account.

Any claim to transfer a lodged asylum application to another Convention country must be made within six months of the initial application.[14] The receiving Convention country must accept responsibility for the examination of the application before it can be transferred from Ireland.[15] However, the Convention's provision is wider in providing that the receiving country is fixed with responsibility in default.[16]

The 1992 London Resolution on Host Third Countries, although not legally binding, gives guidance regarding asylum law and policy in the European Community. It resolves that the Dublin Convention scheme for attributing responsibility should come into operation only if there is no other non-EU state to which the claimant may be sent by a member state "pursuant to its national laws."[17] Also, the 1995Resolution on Minimum Guarantees for Asylum Procedures gives guidance in that "there should be no de facto or de jure grounds for granting refugee status to an asylum applicant who is a national of another member state."[18]

Practice and Procedure of Asylum Applications

There are two independent bodies set up by the 1996 Act for the processing of applications for declarations of refugee status from the Minister for Justice, the Refugee Applications Commissioner ('the Commissioner') and the Refugee Appeals Tribunal ('the Tribunal'). At first instance, the Commissioner investigates asylum claims and makes recommendations regarding their validity to the Minister.[19] An appeal may be made from the Commissioner's recommendation to the Tribunal which can affirm or set aside the Commissioner's recommendation.[20] If the recommendation is positive, the Minister may make a declaration that the asylum seeker is entitled to refugee status;[21] if negative, the Minister may make a deportation order; however, the Minister has an overriding discretion to depart from the recommendation.[22]

Dublin Convention Procedure

When an asylum application is made, the Commissioner determines whether or not the application should be transferred to another Dublin Convention country for examination.[23] Where, before or during the interview with the Immigration Officer or Authorised Officer of the Commissioner (see below for interview procedure), it appears that the application may be one which could be transferred, the officer must send notice to that effect to the applicant, where possible in a language that the applicant understands.[24] An applicant who has been so notified may make representations in writing to the Commissioner not more than five working days from the date of the sending of the notice.[25] Before making a determination, the Commissioner must take into consideration all relevant matters including any representations made.[26] The Commissioner may also make inquiries and request information for the purpose of making a determination.[27] When the Commissioner makes a determination that the applicant should be transferred to another Convention country, he or she must as soon as may be cause notice in writing of the determination and of the reasons for it to be given to the applicant.[28]

The applicant may appeal this determination to the Tribunal not more than five working days from the date of the determination.[29] The appeal, which is made on papers alone, must be made on the form set out in the Third Schedule of the Dublin Convention (Implementation) Order 2000.[30] The form has four sections: (1) Personal Details, (2) Legal Representation, (3) Grounds of Appeal, (4) Communications to the Tribunal. The Tribunal must make a written decision affirming or setting aside the determination of the Commissioner and must cause notice in writing of the decision to be given to the applicant, the Commissioner and the Minister for Justice.[31]

Where the Tribunal sets aside the determination of the Commissioner that the applicant should be transferred to another Convention country, the application must be examined in the State.[32] Where the Tribunal affirms the determination of the Commissioner, the Tribunal must notify the Minister for Justice of its decision and the reasons for that decision.[33] Likewise, where no appeal is made, the Commissioner must notify the Minister for Justice of his or her decision and the reasons for that decision.[34] On receipt of such notification that the applicant should be transferred to another Convention country, the Minister for Justice must inform the applicant, where necessary and possible in a language that the applicant understands, of the determination or decision and the reasons for that determination or decision and the Minister for Justice must arrange for the removal of the applicant to the Convention country concerned.[35]

Asylum Claims at First Instance

A person may apply to the Minister for Justice for a declaration of refugee status on arrival to Ireland with an Immigration Officer at the port of entry[36] or when already in Ireland with an Immigration Officer or an Authorised Officer of the Commissioner[37] at the Refugee Applications Centre (Dublin) or at a Garda Station.[38]

1 Figures from Department of Justice, Equality and Law Reform, The Irish Times, 6 January 2000

2 Section 11of the Immigration Act 1999 and Section 9 of the Illegal Immigrants (Trafficking) Act 2000

3 Article 14(1) of the Universal Declaration of Human Rights

4 Ireland removed the temporal and optional geographical limitations of the 1951 Convention by acceding to the 1967 Protocol.

5 The Refugee Act 1996 as amended by The Immigration Act 1999 and The Illegal Immigrants (Trafficking) Act 2000

6 There are also two other categories of person which do not strictly come within the above definition of refugee. The first category is that of programme refugee. Section 24 1996 Act defines programme refugee as,

"...[A] person to whom leave to enter and remain in the State for temporary protection or resettlement as part of a group of persons has been given by the Government... whether or not such person is a refugee within the meaning of the definition of "refugee in section 2."

The second category is that of asylum seekers whose application for asylum has been turned down but who nevertheless have been granted temporary leave to remain in the country on humanitarian grounds. They do not have the rights of refugees and may be asked to leave or be deported.

7 Article 1(1) of the UN Declaration on Territorial Asylum 1967 states that "Asylum granted by a State, in the exercise of its sovereignty, to persons entitled to invoke Article 14 of the Universal Declaration of Human Rights, including persons struggling against colonialism, shall be respected by all other states."

8 These rights and privileges include an entitlement to seek and enter employment, to have access to education, to receive medical and social welfare benefits as Irish citizens are entitled, to reside in and travel in or to or from the State, to the freedom to practice his or her religion, to have access to the courts as Irish citizens are entitled, and the right to form and be a member of trade unions as Irish citizens are entitled.

9 Article 7 of the International Covenant on Civil and Political Rights 1966 also provides, "No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment."

10 This is the case whether or not that country is a signatory to the Convention. The European Court of Human Rights decided in Chahal v. United Kingdom that any threat to national security should not of itself deny the right of a refugee to non-refoulement. See also Soering v. United Kingdom A 161 (1989), Vilvarajah v. United Kingdom A 215 (1991), Cruz Varas v. Sweden A 201 (1991)

11 The Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Community, 1990

12 Article 4, Dublin Convention

13 Article 5, Dublin Convention

14 Article 11, Dublin Convention and Section 6(5), Dublin Convention (Implementation) Order 2000 (Statutory Instrument No. 343 of 2000)

15 Section 22(5), 1996 Act and Section 8(1), Dublin Convention (Implementation) Order 2000 (Statutory Instrument No. 343 of 2000)

16 Article 10(1), Dublin Convention

17 Paragraph 3, London Resolution on Host Third Countries 1992

18 Section 20, Resolution on Minimum Guarantees for Asylum Procedures (20th June 1995) drafted within the framework of Article K.1 of the Treaty of the European Union: 5585/95 Official Journal of the European Communities No. C 274, 19/09/96, p. 13

19 Section 6, 1996 Act and First Schedule to the 1996 Act

20 Sections 14 and 15, 1996 Act and Second Schedule to the 1996 Act

21 This is the case except in circumstances where interests of public policy or national security require otherwise. See Section 17(2), 1996 Act.

22 Section 17(2)(a), 1996 Act and Sections 3(3)(b)(i) and 3(6), Immigration Act, 1999

23 Section 22(4)(a), 1996 Act and Section 3(1), Dublin Convention (Implementation) Order 2000 (Statutory Instrument No. 343 of 2000)

24 Section 3(3), Dublin Convention (Implementation) Order 2000 (Statutory Instrument No. 343 of 2000)

25 Section 3(4), Dublin Convention (Implementation) Order 2000 (Statutory Instrument No. 343 of 2000)

26 Section 3(4), Dublin Convention (Implementation) Order 2000 (Statutory Instrument No. 343 of 2000)

27 Section 4, Dublin Convention (Implementation) Order 2000 (Statutory Instrument No. 343 of 2000)

28 Section 6(1), Dublin Convention (Implementation) Order 2000 (Statutory Instrument No. 343 of 2000)

29 Section 22(4)(b), 1996 Act and Section 7, Dublin Convention (Implementation) Order 2000 (Statutory Instrument No. 343 of 2000)

30 Section 6(2), Dublin Convention (Implementation) Order 2000 (Statutory Instrument No. 343 of 2000) [This section refers to the Second Schedule whereas it should refer to the Third Schedule]

31 Section 7(1), Dublin Convention (Implementation) Order 2000 (Statutory Instrument No. 343 of 2000)

32 Section 7(8), Dublin Convention (Implementation) Order 2000 (Statutory Instrument No. 343 of 2000)

33 Section 7(9), Dublin Convention (Implementation) Order 2000 (Statutory Instrument No. 343 of 2000)

34 Section 7(10), Dublin Convention (Implementation) Order 2000 (Statutory Instrument No. 343 of 2000)

35 Section 7(11), Dublin Convention (Implementation) Order 2000 (Statutory Instrument No. 343 of 2000)

36 Section 8(1)(a), 1996 Act

37 Section 8(1)(c), 1996 Act

38 Section 8(5) of the 1996 Act provides that it is not assumed that asylum is being sought when an unaccompanied non-national minor arrives at either a port of entry or the Commissioner's offices. Rather, the minor is placed in the care of the local health board pursuant to the Child Care Act 1991 and it decides whether or not to pursue an asylum application on behalf of the minor.

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