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REVIEW
Journal of The Bar of Ireland

THE BAR OF IRELAND
The Law Library

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November 2018

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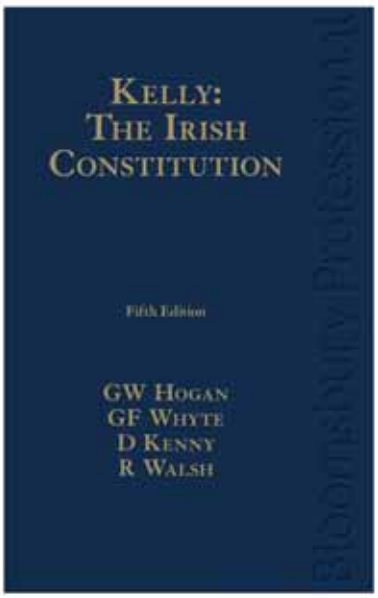

NEW EDITION

Kelly: The Irish Constitution

5TH EDITION
By Gerard Hogan, Gerry Whyte, David Kenny, Rachael Walsh

This seminal work, recognised as the definitive commentary on Ireland's fundamental law, provides a detailed guide to the structure of the Irish Constitution. The book is entirely up to date up to and including the 36th Referendum and covers all relevant case law, including *Kerins v PAC* and *O'Brien v Clerk of Dáil Éireann*.

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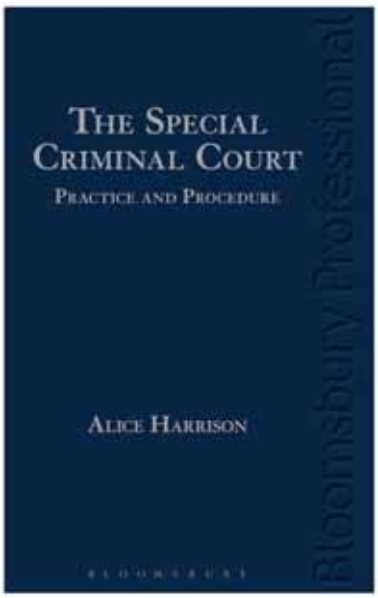

NEW TITLE

The Special Criminal Court: Practice and Procedure

By Alice Harrison
Editors: Úna Ní Raifeartaigh SC, Michael Bowman SC

The Special Criminal Court: Practice and Procedure is a comprehensive and detailed review of the Court's rulings, procedural and evidential rules, and legislative developments. This book provides practitioners with all relevant material on the practical considerations, procedural requirements, and evidential issues specific to the Special Criminal Court.

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Challenges and opportunities in the year ahead

As the new legal year begins, a new Chairman takes the reins.

"I see you're giving it another year" used to be the mischievous observation from the late Maurice Gaffney SC at the start of each new legal year. In this, my first Chairman's column, I wish to extend a warm welcome back to all colleagues. I hope the break has brought rest and renewal for members and I wish each of you every success for the coming year. A special welcome to our new members, 86 in total, whom I had the pleasure of addressing on their orientation day at the end of September.

Key objectives

The new Council held its first meeting in September, and the new Chairs of Committee have been selected. I have asked each Committee Chair to identify their key objectives for the year ahead and to pinpoint new initiatives for the achievement of Council objectives. I am honoured to lead a committed cohort of 24 Council members, 20 of whom are elected and four of whom are co-opted. These volunteers devote considerable time and effort to advance the objectives of The Bar of Ireland for the benefit of all members of the Law Library.

The year ahead is set to be very busy, with challenges and opportunities on the horizon. In deciding on the key objectives of my Chairmanship I have focused on what I believe to be realistic and achievable measures. We will do our best to improve working conditions for members of the Law Library. We will do our best to guide the excellent and dedicated staff of the Law Library in implementing Council policy. I firmly believe there is a significant and largely untapped reservoir of good will and expertise in the Bar. Many colleagues, without expectation of reward, take on projects on behalf of the membership or step in to help out a colleague who finds themselves in difficulty. The spirit of collegiality that is the hallmark of our profession often operates off radar. The work of the Council is dependent on the valuable input and support of members. If you think you could help by addressing an issue or if there is any particular matter that you want addressed, please contact our CEO, Ciara Murphy, at Ciara.Murphy@lawlibrary.ie.

With your help, we will address the following objectives in the year ahead:

- the maintenance of high ethical standards among colleagues in professional practice;
- promotion of the Bar's voluntary and *pro bono* work, including a number of new initiatives of the Voluntary Assistance Scheme (VAS);
- a review of our education and training offering for members of the Law Library;
- direct engagement with State agencies to improve terms and conditions relating to criminal legal aid and civil legal aid work;
- advancement of the Bar's equality and diversity agenda through the newly established Equality and Diversity Committee (which will now incorporate and advance the work of the Women at the Bar Working Group);
- promotion of opportunities for junior members to access work;
- promotion of the Bar on Circuit and improvement in the facilities provided by the Courts Service; and,
- improved communication between the Council and members of The Bar of Ireland, and improved communication with the Circuits.

Turning our focus to the wider political landscape, unwelcome as the prospect of Brexit may be, it presents an opportunity to promote Ireland as a leading centre globally for international legal services. Tremendous work has already been done under this heading by the previous Council, with the Government set to launch The Bar of Ireland and the Law Society's Brexit Initiative over the next few months. More about this shortly. Secondly, the Council intends to assist members of the Law Library to position themselves to tender for large-scale work projects on the public procurement side. For too long, this area of work has been beyond the reach of the

Bar. We see no reason why suitably qualified and expert barristers should not be eligible for this very valuable source of work.

Capitalising on physical facilities and space for the benefit of all members

Many members will by now be aware of the works carried out during the long vacation to refurbish the Blue Room and the New Library in the Four Courts, which has been welcomed by members seated in that area. Our new strategic plan includes a ten-year investment plan for the Law Library in the Four Courts to enhance and maximise the use of space, and this process will shortly get underway under the aegis of the Finance Committee.

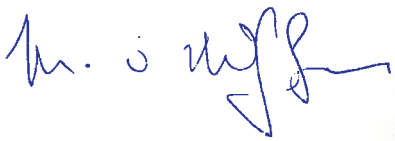
Roll of Practising Barristers – LSRA

As you may be aware, the Legal Services Regulatory Authority (LSRA) is required under Part 9 of the Legal Services Regulation Act, 2015, to establish and maintain the Roll of Practising Barristers. The provisions in Part 9 of the Act relating to the establishment and maintenance of the Roll were commenced on June 29, 2018. Each practising barrister is required to have their name entered on the Roll. To assist members in complying with this provision, all members were provided with a pre-populated application form, which should be verified, signed and returned to the LSRA. It is imperative that every member ensures that they complete this process in advance of December 29, 2018, as under section 136 of the Act, it will be an offence for a qualified barrister to provide legal services as a barrister when his or her name is not on the Roll of Practising Barristers. Representatives of the Council continue to engage with the LSRA, responding to consultations on a range of matters. It is anticipated that the primary function of the LSRA in complaints and disciplinary hearings in respect of legal practitioners will be up and running at some stage in 2019.

The work of previous Council members

I wish to pay tribute to previous Chairmen and Council members who have toiled on behalf of the profession in previous years, often with little or no acknowledgement. I wish in particular to pay tribute to my predecessor, Paul McGarry SC, who ably steered the business of the Council over the last two years. Paul remains on the Council to serve his final year as an elected member and I am grateful for his continued guidance and support. I encourage all members to keep abreast of important updates and events through our weekly e-zine, *In Brief*. In my capacity as Chairman, I remain available to speak with any member on any issue of concern, along with my colleagues on Council. Our contact details are accessible on our website.

Best wishes for the year ahead.



Micheál P. O'Higgins
Chairman,
Council of The Bar of Ireland

Discovery and trust

With the new legal term well underway, practitioners will be well advised to look carefully at the recent Court of Appeal judgment in *Tobin v Minister for Defence*. That judgment exhorts litigants to exhaust all reasonable avenues to obtain information before resorting to extensive discovery requests. The Court in that case refused to order discovery as it held that the information sought could otherwise be elicited through interrogatories or a notice to admit facts. The judgment notes that litigants can best avoid the expense of extensive trawling demands if both sides adopt a "co-operative approach". Our writer examines the implications of the judgment pending the Review of the Administration of Civil Justice, which is currently analysing court procedures regarding discovery.

At a time of great upheaval in the European Union, it is apt to recall the principles of mutuality and trust that have underpinned EU law. We are very privileged to have a contribution from a judge of the European Court of Justice, Eugene Regan, which traces the development of such principles and explains how they have played a key role in certain areas. Our interview in this edition is with the Chief Commissioner of the Irish Human Rights and Equality Commission, Emily Logan. She describes the Commission's work to advocate for human rights and equality, and identifies the primary areas of focus at present.

We hope you enjoy this edition.

Eilis Brennan SC
Editor
ebrennan@lawlibrary.ie

First Executive Director

Arbitration Ireland has appointed Rose Fisher (pictured left) as its first Executive Director. Rose brings over 17 years' experience working for The Bar of Ireland and will bring a particular focus to the strategic vision of the association to have Dublin recognised as an established venue for international commercial arbitration. Arbitration Ireland also launched a London Chapter in 2017 and, more recently, a New York Chapter in September 2018. Gavin Woods, President of Arbitration Ireland, stated: "Our Executive Committee is delighted to have appointed Rose as our first Executive Director. This is an important step for the association to enable us to be part of the developments that are taking place in international arbitration at the moment". Rose is looking forward to meeting the wider international arbitration community at the annual Dublin International Arbitration Day, which takes place at the Dublin Dispute Resolution Centre on Friday, November 16, 2018. For further information, log on to www.arbitrationconference.com.

Communications workshop

A communications workshop aimed at increasing confidence and personal branding for women at the Bar was held in the last week of vacation. An initiative of the Women's Working Group, the workshop sought to equip participants with the tools to increase confidence, which is essential in all aspects of our lives, particularly at work. It also provided an introduction to the concept of personal branding, which is about influencing what people think, know and feel about you to build your practice. This workshop was held in response to an identified need for this type of training at the Bar. A feedback survey from attendees was overwhelmingly positive, with 88% saying they would recommend the training to a colleague. In light of this, further workshops will be considered by the newly established Equality and Diversity Committee, which will incorporate the work of the Women's Working Group.

Speaking for Ourselves 2018

The Irish Cancer Society, the Dublin Rape Crisis Centre, the Irish Refugee Council, Citizens Information and the Irish Hospice Foundation were among 50 charities, NGOs and civic society groups that attended a recent advocacy training workshop for charities. 'Speaking for Ourselves' was hosted by the Voluntary Assistance Scheme (VAS) of The Bar of Ireland in September.

Addressing the workshop were Michael Cush SC, Mr Justice Donal O'Donnell, Maurice Collins SC, Cian Ferriter SC, Michelle Grant, Committee Secretariat–EU and Intl Relations, Houses of the Oireachtas Service, Thomas Ryan, Environment and Infrastructure Executive, Irish Farmers' Association, and Orla O'Donnell, RTÉ.

Providing guidance on law reform and the legislative process is just one aspect of the *pro bono* assistance provided to groups from the voluntary sector by barristers through VAS. It also provides assistance to charities on a wide range of legal areas including debt and housing, landlord and tenant issues, social welfare appeals, and employment and equality law. For more information on VAS, please see www.lawlibrary.ie.

Pictured at 'Speaking for Ourselves' were (from left): Mr Justice Donal O'Donnell; Sonja O'Connor BL, VAS Co-ordinator; Cian Ferriter SC; Thomas Ryan, Environment and Infrastructure Executive, Irish Farmers' Association; Michael Cush SC; Michelle Grant, Committee Secretariat–EU and Intl Relations, Houses of the Oireachtas Service; and, Maurice Collins SC.

Advocacy skills

Three days' intensive advocacy training took place in the Four Courts in late September involving 14 training facilitators, two visiting facilitators, 27 participants (seven years and up), nine engineers, seven incoming second years, two comprehensive case files, ten courtrooms, eight laptops, four webcams, plus numerous Courts Service and IT staff.

All participants on advocacy courses are experienced barristers who wish to further hone their advocacy skills. The bonus of this course is that the facilitators and volunteers, as well as the participants, all benefit from the learning experience. Participants are recorded onto their own USB conducting their examination and cross-examination, and video review takes place on a one-to-one basis, as well as each participant being individually critiqued during small groups by the facilitators.

The third day's content was a new initiative by the Committee, which involved an expert witness additional day. A brand new case file was developed in consultation with an experienced engineer. It was then used for role-play purposes to examine and cross-examine forensic engineers, allowing them to benefit from acting as an expert witness in a collaborative learning context. The engineers were all consulting forensic engineers who regularly give evidence before the courts.

The senior course takes place each year towards the end of the summer vacation and the junior course takes place during Easter vacation, with other shorter advocacy courses planned over the coming legal year. The overwhelming sentiment in the feedback was that the course is an excellent way of further honing advocacy skills, and although an exhausting three days, is a thoroughly enjoyable and beneficial experience. For more information, email advocacy@lawlibrary.ie.

Back row (from left): Judge Susan Ryan; Noeline Blackwell, Dublin Rape Crisis Centre; Judge Karen Fergus; Cathy Smith BL; Judge Sarah Berkeley; DPP Claire Loftus; Aislng Mulligan BL; Aoife McNicholl, solicitor; Fiona McNulty, solicitor; and, Jane McGowan BL. Middle row (from left): Judge Sinéad Ní Chualacháin; Justice Bronagh O'Hanlon; Justice Aileen Donnelly; Chief State Solicitor Maria Browne; Judge Petria McDonnell; and, Aoife McNickle BL. Front row (from left): Mary-Rose Gearty SC; Maeve Delargy, solicitor; Justice Catherine McGuinness; Justice Mary-Ellen Ring; Maura Butler, The Law Society; and, Aisling Gannon, Eversheds Sutherland.

Justice Ring honoured

Last month the Irish Women Lawyers Association (IWLA) honoured Ms Justice Mary Ellen Ring by awarding her the Woman Lawyer of the Year award in recognition of her long-term commitment to social justice.

The award was presented at the IWLA 2018 gala dinner, which was held in the Presidents' Hall at the Law Society, Blackhall Place, with the support of The Bar of Ireland and The Law Society, together with Eversheds Sutherland, who sponsored the pre-dinner reception. Following a presentation speech by Ms Justice Catherine McGuinness, Honorary President of the IWLA, an inspiring and uplifting acceptance speech was made by Justice Ring, who received a standing ovation from a capacity gathering. In attendance at the Gala were senior members of the judiciary, including Ms Justice Marie Baker, Ms Justice Bronagh O'Hanlon, Ms Justice Aileen Donnelly, Director of Public Prosecutions Claire Loftus, and Chief State Solicitor Maria Browne. Also in attendance were Circuit Court Judges Petria McDonnell, Susan Ryan, Sinéad Ní Chulachain, Karen Fergus and Sarah Berkeley. Further presentations were made to 2017 Chairperson Aoife McNickle BL and to Maura Butler, solicitor and Course Manager at The Law Society, who recently stepped down from the IWLA committee after 16 years. A warm tribute was paid to Maura by Noeline Blackwell, Chief Executive, The Dublin Rape Crisis Centre.

Advice on pensions

October 31 marks this year's self-employed tax return deadline, with those using the Revenue Online Service (ROS) enjoying a slightly extended deadline of November 14, 2018.

Self-employed barristers are able to claim tax relief against pension contributions paid before these deadlines. It is not possible to defer the contribution payment to a later date and qualify for the relief available.

The maximum tax relief available is set by Revenue and determined by an age-related scale, and is subject to an overall earnings cap (**Table 1**).

TABLE 1: Maximum tax relief available on a pension contribution.

Up to age 29	15%	30 to 39	20%	40 to 49	25%
50 to 54	30%	55 to 59	35%	60 and over	40%

**As a % of earnings – subject to an earnings cap of €115,000.*

JLT Financial Planning operates The Bar of Ireland Retirement Trust Scheme and, as in previous years, as we approach the tax deadline, your dedicated JLT Bar pension team will be present in barrister workplaces to process pension contribution payments and to give advice. There will be two rounds of meeting opportunities before the October and November deadlines. Meetings will be held on a first come, first served basis; for full details see **Tables 2** and **3**.

There is a wide range of investment funds available under The Bar of Ireland Retirement Trust Scheme, including: managed; absolute return; multi-asset; equity; bond; and, cash funds. The on-site JLT team will have detailed information on all the funds available, and existing members can also use the online facility to access information.

If you plan on making a pension contribution, your cheque must be made payable to "The Bar of Ireland Retirement Trust Scheme" and a completed Contribution Top-Up Form must be included, which your JLT team can provide on the day.

JLT points out that if members do not take this opportunity now, they will not get another chance to substantially reduce their 2017 income tax liability. The company firmly believes that pensions remain the most tax-efficient way to save for retirement. By contributing now, you will not only benefit from a better retirement fund but also from the immediate tax relief (of up to 40% of the contribution paid for those on the higher rate) still currently available

Donal Coyne,
Director of Pensions,
JLT Financial Planning Limited.

Anyone making a pension contribution no longer needs to submit pension documentation with their tax return; however, Revenue may request this at any stage in the future. JLT will issue the appropriate certification in respect of all contributions processed.

Over the next month or so all self-employed barristers must file their tax return for 2017, pay any outstanding income tax from 2017 and pay preliminary income tax for 2018. Contributing to The Bar of Ireland Retirement Trust Scheme allows you to reduce your tax bill.

TABLE 2: **October 31 – tax deadline** meeting dates.

DATE	LOCATION	
Tues 30 • 12.30-2pm	CCJ, Parkgate Street	Staff Office (7th floor)
Tues 30 • 2pm-5pm	Church Street Building	Room C
Wed 31 • 10am-1pm	Distillery Building	Consultation Room 12 (3rd floor)
Wed 31 • 2pm-5pm	Law Library, Four Courts	Director of L.I.S. Office (2nd floor)

TABLE 3: **November 14 – tax deadline** meeting dates.

DATE	LOCATION	
Mon 12 • 10am-1pm	Law Library, Four Courts	Director of L.I.S. Office (2nd floor)
Mon 12 • 2pm-5pm	Church Street Building	Room C
Tues 13 • 10am-1pm	Church Street Building	Room C
	Law Library, Four Courts	Director of L.I.S. Office (2nd floor)
Tues 13 • 12.30-2pm	CCJ, Parkgate Street	Staff Office (7th floor)
Tues 13 • 2pm-5pm	Distillery Building	Consultation Room 12 (3rd floor)
Wed 14 • 10am-1pm	Distillery Building	Consultation Room 12 (3rd floor)
	Law Library, Four Courts	Director of L.I.S. Office (2nd floor)
Wed 14 • 2pm-5pm	Church Street Building	Room C
	Law Library, Four Courts	Director of L.I.S. Office (2nd floor)

Kelly: The Irish Constitution

With referendums on such socially emotive issues as same-sex marriage and abortion, the amendments to the Irish Constitution made in the last decade have not only made significant changes to Irish law and culture, but have also made headline news around the world.

In light of this, the new edition of *Kelly: The Irish Constitution* has come at a crucial moment. From its first publication in 1980 it has proved a seminal work recognised as the authoritative and definitive commentary on Ireland's fundamental law. Its layout has remained consistent, providing each Article in full, in English and Irish, and examined in detail with reference to all the leading Irish and international case law.

In the 15 years since its previous edition, there have been no fewer than eight amendments to the Constitution, each of which is examined here in detail. The authorship of the book has also expanded from two to four: Mr Justice Gerard Hogan and Professor Gerry Whyte are joined by two of the leading constitutional scholars of their generation, Professor David Kenny and Professor Rachael Walsh. Each brings their wealth of expertise and experience to this painstakingly revised edition.

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Changing the system

Chief Commissioner of the Irish Human Rights and Equality Commission, EMILY LOGAN, spoke to *The Bar Review* about the Commission's work to advocate for human rights and equality.

Emily Logan's interest in human rights began early in her career when, as a paediatric nurse in Dublin's Temple Street Children's Hospital in the early 1980s, she witnessed evidence of child neglect and abuse at first hand: "I saw very severe poverty and neglect. One of my earliest memories was of a child that was brought into the accident and emergency department with what was called an NIA (non-accidental injury). The infant had been burnt on a cooker to stop it crying. That was very formative for me in terms of my concept of social justice".

A move to the NHS in the UK followed, and she spent 10 years in Great Ormond Street Hospital in London. On her return to Ireland, Emily became the youngest ever Director of Nursing at Crumlin Children's Hospital, and followed this by taking the same position in Tallaght Hospital. In 2004, the opportunity arose to apply to be Ireland's first Ombudsman for Children, a post she held until taking up her current role in 2014.

During Emily's time as Ombudsman, she dealt with a number of high-profile cases, most notably investigations into the deaths of children in care. She says that this issue was initially brought to her attention by a solicitor, the first of many positive interactions she has had with legal professionals: "There are a number of legal scholars and legal practitioners who were extremely good to me when I began – it was a small office but I had plenty of people who were willing to meet me and give me advice".

The legal side of human rights and equality

The Irish Human Rights and Equality Commission (IHREC) was established in November 2014 after the amalgamation of the Equality Authority and the Irish Human Rights Commission. An independent Commission, with 15 members appointed by the President of Ireland and accountable to the Oireachtas, its stated role is to "protect and promote human rights and equality in Ireland and build a culture of respect for human rights, equality and intercultural understanding in the State". Within this wide remit, the Commission engages in a long list of activities, including a sizeable, and significant, legal element.

The Commission can intervene as *amicus curiae* in the superior courts in Ireland: "We are a neutral party bringing in information that may be of assistance to the court, such as international jurisprudence, either from the

European Court of Human Rights or commentary and standards that apply in international human rights law".

A recent and significant case where the Commission took this role was *NHV v Minister for Justice and Equality*, regarding the right to work of people in direct provision (see panel): "The International Protection Bill was going through the Oireachtas and the Commission has a statutory power to give its views on draft legislation, and the implications for human rights and equality. We had recommended that people in direct provision should be given the right to work

because we were one of only two countries in Europe where that didn't happen, so that's why we intervened as *amicus* in this case".

Under Section 40 of the Commission's enabling legislation – the Irish Human Rights and Equality Commission Act 2014 – the Commission can also offer legal assistance or representation to individuals or groups who contact it directly for assistance. Emily says that these generally refer to cases before the Workplace Relations Commission (WRC) or the courts (see panel): "We are guided by the legislation and our team must decide if the matter raises a question of principle or if it would be unreasonable to expect a person to deal with the matter without some kind of assistance".

By the very nature of the Commission's work, many of the people who contact it are among the most marginalised and vulnerable in society, so this is a crucial concern.

Emily raises some concerns about recent changes to the legislation governing the WRC and discrimination cases: "There is no statutory requirement that decisions of the Workplace Relations Commission, arising from complaints of discrimination, are published in anonymised form, and we would like to see more visibility on that. It would allow the Commission to communicate with people about what discrimination is, what kind of cases arise, and they would know to come to us. It would also allow us to generate greater public debate about discrimination".

Emily draws particular attention to what are known as 'Section 6' cases, which deal with declarations of incompatibility with the European Court of Human Rights: "When legal practitioners are undertaking a case that is incompatible with the European Convention on Human Rights, they're obliged to inform the Commission. I would strongly encourage them to please do so because that's one of the mechanisms by which we can identify high-impact *amicus curiae* cases, and is a critical mechanism for the Commission".

The Commission also has own volition powers of enquiry under Section 35 of the legislation, but these come with an onerous threshold: "There has to be a serious violation of human rights or equality of treatment; a systemic failure to comply with human rights or equality of treatment; the matter is of grave public concern; and, in the circumstances [it is] necessary and appropriate to do so. We have to meet all four criteria".

The Commission has yet to invoke such an inquiry, but Emily says it has concerns about a number of "egregious issues", from human trafficking to Traveller accommodation, and constantly monitors to see if its intervention would be appropriate.

Changing the system

Aside from these very visible examples of its advocacy, the Commission also develops policies to help change cultures of inequality and discrimination both in the private sector and in public and semi-State bodies. It is developing a number of codes of practice in areas such as sexual harassment, family-friendly work environments, and equal pay for like work: "These will serve as formal guidance to employers for how they should interpret employment and equality law". The Commission has also partnered with the ESRI over the last two years in a number of research projects to help develop an evidence base for its policy recommendations. A number of these have already been published, covering areas such as discrimination and equality in housing, attitudes to diversity, and research into who exactly is experiencing discrimination in Ireland.

The joy of work

Emily holds an MSc in psychology, an MBA from the Smurfit Business School in UCD, and an LLM from Queen's University: "I've always studied while I worked".

She's part of a book club, and a "culture club" ("We take trips to interesting places, and are planning a trip to Berlin"), and enjoys walking, hiking and travel. For Emily though, the line between work and home is a thin one. "I'm a person who gets a lot from my work. For some people if you enjoy your work it can really contribute to your identity and sense of self. I've been very lucky in all of the jobs I've had that I've found them really fulfilling".

Of course, carrying out research, and writing reports and guidelines, while laudable, bring no guarantees of change. For public bodies at least, this is where the Public Sector Equality and Human Rights Duty comes in. The Duty is also part of the Commission's founding legislation, and sets out the responsibilities of public bodies in Ireland to promote equality, eliminate discrimination and protect the human rights of employees, customers, service users, and everyone affected by their policies and plans. The Commission is engaged in pilots with six organisations – Monaghan County Council, Cork City Council, University College Cork, The Probation Service, the Irish Prison Service, and the Community Action Network – to develop systems that will help them to achieve these aims. Says Emily: "We have to have two relationships. We have the monitoring, or oversight, of human rights and equality, and that's a more difficult and formal role, and then there are occasions like this where you're working with public bodies to try and set up exemplars of good practice".

Current issues

The Commission's next major project will focus on discrimination against people with disabilities. The Irish State ratified the United Nations Convention on the Rights of Persons with Disabilities earlier this year, and will report to the UN in two years' time. The Commission is setting up a Disability Advisory Committee this autumn, and aims to have at least half of its membership comprised of people with disabilities.

Older issues are ongoing too. Emily says that discrimination on the basis of race and gender remain huge concerns. Housing also remains a priority. The Commission is particularly concerned with two aspects of the housing crisis: increasing reports of people being discriminated against in the rental sector because they are in receipt of Housing Assistance Payment (HAP); and, ongoing issues around Traveller accommodation.

Another area of concern is the human rights and equality implications of Brexit: "There is a Joint Committee as part of the Good Friday Agreement made up of the Northern Ireland Human Rights Commission and the Irish Human Rights and Equality Commission. Up to now, the Brexit debate has been dominated by trade issues, but we're working in the background on human rights and equality across the island of Ireland. What's called the equality acquis, the case law on equality, is protected, but we are concerned about human rights mechanisms such as access to the Court of Justice of the European Union for individuals living in Northern Ireland".

Making human rights and equality Government policy

While the Commission is answerable to the Oireachtas, the relationship is a two-way street: "We can comment on draft legislation – we interact at heads of bill stage to comment on the human rights and equality implications. We can also circulate commentary to members of the Oireachtas ahead of presentation of legislation to see if we can influence through the legislature if there's something that we think could be stronger".

In the past the Commission has been invited to give its views to the Committee on the Eighth Amendment of the Constitution, and has been very active in the transposition into law of the judgment on the right to work for those in direct provision. Most recently, it has made a submission on the proposed changes to Article 41.2 (the place of women in the home). Asked if she feels the views of the Commission are listened to, Emily answers in the affirmative: "Our credibility is growing. In the case of Article 41.2, we didn't ask the Oireachtas to go in, we were invited. We have very good access to Government ministers, to all members of the Oireachtas, and to senior officials who are drafting legislation".

Moving forward

The Commission is currently in a consultation process for its second strategy statement for 2019-2021. Emily says that the new strategy will refine its strategic priorities: "I think we weren't far wrong in terms of some of the areas that we prioritised [in our first strategy]: we prioritised socioeconomic rights, so housing has dominated most of our case work, and also the right to work". Emily's five-year term as Commissioner will be up next year, and she plans to reapply for a second term: "When you're creating an organisation like this the first two years are taken up by internal organisational issues. While it's very exciting to be able to mould that, I sometimes feel impatient to move to a point where we're getting results, having an impact".

A new Ireland

Emily says that in comparison to many other jurisdictions, Ireland has strong legislation to protect human rights and equality: "But where we're weak is in implementation". In the week in which our interview took place, the Scally Report into issues around cervical screening was published. Claims of misinformation, withholding of information and misogyny are all very serious, and strike to the heart of the Commission's work in trying to change institutional cultures and their approach to human rights and equality. One could be forgiven for thinking that these systemic issues will be difficult, if not impossible, to resolve, but Emily believes that real change can happen: "I'm an inveterate optimist, and we in the Commission are a group of determined people. Changing culture is a long-term project but we can be encouraged by incremental changes, not least that Ireland at the moment seems to be bucking the trend in parts of Europe and the US, where human rights are being rolled back". Recent years have indeed seen extraordinary social change in Ireland, with referendums on marriage equality and abortion leading to much discussion on Ireland's move from being perceived as one of the most conservative societies in Europe to seemingly one of the most socially liberal: "There has been a shift in terms of awareness of social justice. We see ourselves as compassionate. There has been no negative political discourse here – no movement to take away rights – and I am very encouraged by that".

Sample cases where the IHREC has had a role

***NHV* – Proposals on the right to work of people in direct provision**

The Commission exercised its function as *amicus curiae* in the landmark Supreme Court case on the right of an individual living in direct provision to earn a livelihood. As *amicus curiae* the Commission's core submission to the Supreme Court was that non-citizens, including those seeking asylum or subsidiary protection, are entitled to invoke the right to work or earn a livelihood guaranteed under article 40.3.1 of the Constitution. The case was also significant as, by the time of the hearing, the person at the centre of the case had been granted refugee status; however, the Supreme Court decided to proceed stating that: "this case is plainly a test case supported as it is by the Irish Human Rights and Equality Commission, and therefore, the circumstances will recur. It is probably desirable that it should be dealt with now rather than to wait for another case to make its way through the legal system".

The 'P Case' – Protection for victims of human trafficking

The Commission appeared before the High Court as *amicus curiae* in the judicial review proceedings entitled *P. v Chief Superintendent of the Garda National Immigration Bureau and ors*. The case concerned a Vietnamese woman who was discovered by the Gardaí locked in a cannabis "grow house" and who was charged with drugs offences. The woman claimed she was a victim of trafficking and that the failure of the Garda to recognise this deprived her of her right to avail of the protection regime for such victims. The Commission's submissions questioned the adequacy of the protection regime for persons who claim to be victims of human trafficking and, in particular, the administrative scheme for the identification of such victims, and whether it met relevant human rights standards. The Court found that the State's administrative scheme for the recognition and protection of victims of human trafficking was inadequate to meet its obligations under EU law aimed at combatting trafficking in human beings.

A Family v Donegal County Council

The Commission provided legal representation to a Traveller family in judicial review proceedings against Donegal County Council. The legal challenge focused on the Council's decision to defer the family's housing application, with an emphasis on the decision-making process, including the fact that the decision was taken without any opportunity for input from the family concerned.

An Applicant v A Limited Company

The Commission provided legal representation to a woman in her successful challenge of discrimination under the Equal Status Act (ESA)'s housing assistance ground. The WRC determined that the woman had been directly discriminated against on the housing assistance ground, and ordered compensation to be paid. The WRC also instructed that employees acting as the company's estate agents be provided with appropriate training in relation to all provisions of the ESA.

Jane Ann Rothwell BL

Tributes were paid in courts across Munster to the late Jane Anne Rothwell BL, a much-loved member of the Cork and Munster Circuit.

Jane Anne graduated with a law degree from UCC in 1997. Following her call to the Bar in 1999, she worked mainly on the Cork and Southwestern Circuit and was a tenacious and committed advocate. She lectured and tutored in company and tort law in UCC and Griffith College from 2000 to 2005, and was an internal and external examiner in media law for the Irish Academy of Public Relations. She represented the Cork Bar for many years on the UCC Law Faculty Liaison Committee. She was the honorary secretary of the Munster Bar, having been appointed in 2004 by the late James O'Driscoll SC. She organised the inaugural Cork Bar Conference to Barcelona in 2004, and used her boundless energy to ensure that it continued every year thereafter. She was an integral part of the Circuit. She has been described as a "tireless champion of the arts" in Cork and was the Chair of the Cork Midsummer Festival for the last five years. Members of the Cork Bar, the Southern Law Association and the courthouse staff gathered on the steps of the Courthouse on Washington Street, Cork, to pay tribute as her funeral cortege passed on her final journey. Jane Anne died peacefully, surrounded by her family, at Cork University Hospital on October 7, 2018.

Photograph: Billy McGill

She is greatly missed by her husband Steven O'Neill, her parents John and Parfrey, her brothers Jonathan and Karl, her parents-in-law Michael O'Neill and Mary O'Shea O'Neill, sisters-in-law Clare and Beth, aunts, uncles, adored nieces and nephew Olive, Auden and Ebby, relatives, friends and colleagues. Ní bheidh a leithéid ann arís.

(A full obituary will be published in the December edition of *The Bar Review*.)

A question of trust

The principles of mutual trust and mutual recognition have long been integral to EU law.

Mutual recognition and mutual trust: a brief history

The notion of mutual trust is not mentioned in the EU Treaties but, as with any treaty or indeed any contract, each party expects the other to adhere to what is agreed; otherwise, they would not enter into it. Mutual trust is, therefore, implied.

As with any treaty or contract, there are safeguards in the event of any party not complying with their obligations. In the case of the Treaty of Rome, the Commission, as guardian of the Treaty, could take infringement proceedings against member states for non-compliance and the Court could adjudicate on disputes as regards the fulfilment by member states of their Treaty obligations in actions brought by either the Commission or member states themselves.

Eugene Regan
Judge at the Court of Justice of the European Union, President of the Fifth Chamber*

Over time, as the Communities became the Union, such safeguards had to be strengthened. Examples include: the Copenhagen Principles on democracy, the rule of law and fundamental rights as conditions of entry to the EU (now reflected in Articles 2 and 49 of the Treaty of the European Union [TEU]); the Article 7 TEU procedure penalising a member state that breaches the values on which the Union is founded, as set out in Article 2 TEU; and, the introduction of financial penalties for non-respect of the Court's judgments (Article 260 TFEU).

While there is a presumption that all member states comply with their obligations to implement EU law correctly, all of the above safeguards attest to the recognition by the Union of the potential for non-compliance by member states with their obligations under the EU Treaties. While the EU legal system was implicitly founded on trust between member states, it took a number of years for the Court to articulate this expressly in its case law. Interestingly, the first such reference to be found arises in the context of a judgment from 1963, in which the Italian Government relied on the necessary trust between member states in support of its argumentation.[1] It was not until 1975 that the Court itself made express reference to the mutual trust on which the Community was based, stating that:

"[t]o accept that the contrary were true would amount to recognising

> that, in relations with third countries, member states may adopt positions which differ from those which the Community intends to adopt, and would thereby distort the institutional framework, call into question the mutual trust within the Community and prevent the latter from fulfilling its task in the defence of the common interest".[2]

In 1977, the Court made reference to mutual trust in relation to co-operation between domestic authorities in the veterinary field in the case of *Bauhuis*, thereby at least implicitly linking the concepts of mutual trust and mutual recognition.[3]

As with mutual trust, the principle of mutual recognition does not feature in the original Treaty of Rome. While the *Bauhuis* case in essence concerned mutual recognition, that principle was given more definitive articulation in *Cassis de Dijon*.[4] It, then, became the basis of the European Commission's 1985 White Paper on the completion of the Internal Market, which also makes reference to mutual trust: "[g]iven the essential equivalence of the objectives of national legislation, mutual recognition could be an effective strategy for bringing about a common market in a trading sense".[5]

While the Treaty of Amsterdam makes reference to the principle of mutual recognition in the civil law area, it was the extension of these principles by the Tampere European Council in 1999 that laid the basis for the creation of the area of freedom, security and justice. In particular, mutual recognition was henceforth to be "the cornerstone of judicial co-operation".[6]

If mutual trust is seen as an essential prerequisite to mutual recognition in the area of freedom, security and justice, it was accepted that such trust must be bolstered and enhanced by flanking measures in terms of the approximation of rules in all member states and greater protection for the accused in criminal proceedings.

The need for such measures is best reflected in the current Article 82(2) TEU, which specifically provides that flanking measures will be adopted "to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross border dimension". Safeguards in the criminal sphere now include: the right to interpretation and translation;[7] the right to information;[8] the right to access a lawyer;[9] the strengthening of certain aspects of the presumption of innocence and the right to be present at the trial;[10] procedural safeguards for children;[11] and, the right to legal aid for suspects and accused persons in criminal proceedings and for requested persons in European Arrest Warrant (EAW) proceedings.[12]

Areas where the principles of mutual trust and mutual recognition have played a key role

Five areas in which the principles of mutual trust and mutual recognition have played an important role can be singled out, namely criminal matters, civil matters, asylum, taxation and the area of posted workers.

Criminal matters: the European Arrest Warrant

The EAW[13] is arguably the best example of the operation of the principles of mutual trust and mutual recognition. As stated in recital 6 of EAW Framework Decision (hereinafter, the "FD") 2002/584: "[t]he European arrest warrant provided for in this Framework Decision is the first concrete measure in the field of criminal law implementing the principle of mutual recognition which the European Council referred to as the 'cornerstone' of judicial cooperation".

That principle is, in turn, founded on the mutual trust between the member states that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognised at EU level, particularly in the Charter of Fundamental Rights of the European Union (hereinafter, the "Charter"). As the Court recognised,[14] both principles are of fundamental importance, in EU law, in allowing the creation and maintenance of an area of freedom, security and justice without internal borders.

The Court's decision in *Aranyosi and Căldăraru*[15] is considered a landmark judgment in the area, insofar as it represents a turning point in relation to the operation of mutual recognition and mutual trust in the context of the EAW FD. In many cases, prior to and following *Aranyosi and Căldăraru*, the Court has given guidance on the circumstances in which the surrender of a requested person may be refused on the basis of the interpretation of the conditions required by the FD as well as the exceptions explicitly provided for by this instrument.[16] However, in *Aranyosi and Căldăraru*, the Court went beyond the express exceptions of the FD to ensure full protection for fundamental rights. Indeed, there is no general opt-out clause in the FD or clause justifying refusal to execute for reasons such as national public policy, as can be found in other areas of EU law.[17] Despite this, the Court in *Aranyosi and Căldăraru* relied on the more general clause of Article 1(3) FD,[18] which states that the FD is not to have the effect of modifying the obligation in Article 6 TEU to respect fundamental rights, a respect that participates in the mutual trust between member states and the mutual recognition it enables as regards judicial co-operation in criminal matters.[19]

Civil matters

Brussels I Regulation

Unlike the EAW FD or other regulations in the criminal sphere, the Brussels I Regulation[20] contains a public policy clause, at Articles 45(1)(a) and 46, which can be relied on to refuse recognition and enforcement of a foreign judgment. However, the Court has made clear that it controls the limits of the use of such clauses.[21] It follows that, even though such clauses are to be applied only in exceptional circumstances, their very existence demonstrates that mutual trust cannot always be deemed to exist and that mutual recognition cannot be automatic, as there would otherwise be a risk that these principles would operate to the detriment of fundamental rights.[22]

Brussels IIa Regulation

The Brussels IIa Regulation,[23] which concerns jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, also contains a public policy clause in its Article 23(a). This is an area where the creation of exceptions to the principle of mutual recognition can significantly affect the efficiency of the system. Although many cases tend to focus more on the best interests of the child than on fundamental rights *per se*, the question as to where such interests lie is, by nature, inextricably linked to the fundamental rights of the child and his or her parents.[24]

Asylum

While the principles of mutual trust and mutual recognition were not referred to in the text of the Dublin II Regulation itself,[25] in the case of *N.S. and others*,[26] the Court based its reasoning, in large part, on the principle of mutual trust implicit in the system set up by that Regulation, in effect reflecting the implicit trust on which the Treaty itself was originally based. This later found express articulation in the Court's case law and elements of secondary legislation. In relation to this principle, the Court specifically emphasised that "the raison d'être of the EU and the creation of an area of freedom, security and justice [...] [are] based on mutual confidence and a presumption of compliance, by other member states, with EU law and, in particular, fundamental rights."[27]

> *In the recent case of* Donnellan,[32] *the Court affirmed that, while coming within the area of the internal market, and not that of freedom, security and justice, Directive 2010/24 is also based on the principle of mutual trust.*[33] *It also recalled that this principle requires each member state, save in exceptional circumstances, to consider all the other member states to be complying with EU law and particularly with the fundamental rights recognised by EU law.*[34]

This judgment has been described as: "a turning point in the evolution of interstate cooperation in the [AFSJ], as it brings about the end of automaticity for the system of mutual trust on which the Dublin II Regulation is implicitly based".[28] It was held that "to ensure compliance by the European Union and its member states with their obligations concerning the protection of the fundamental rights of asylum seekers, the member states, including the national courts, may not transfer an asylum seeker to the 'member state responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that member state amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter".[29]

The suspension of mutual recognition in exceptional circumstances in order to protect fundamental rights may be considered necessary to preserve and foster the mutual trust between member states in this area.

Interestingly, Article 3(2) of the Dublin III Regulation[30] codifies the *N.S.* judgment insofar as it introduces the criterion of "systemic flaws" into the Regulation as a reason justifying refusal to transfer an applicant to the member state responsible. Furthermore, the *N.S.* case paved the way for the Court to take a similar approach in the area of the EAW in the case of *Aranyosi and Căldăraru* outlined above.

Taxation

The jurisprudence of the Court in the area of taxation illustrates that the logic of mutual trust pervades the relationships between national authorities as framed by EU law. Directive 2010/24 provides for the mutual assistance between member states for the recovery of each others' claims with respect to certain taxes.[31] In the recent case of *Donnellan*,[32] the Court affirmed that, while coming within the area of the internal market, and not that of freedom, security and justice, Directive 2010/24 is also based on the principle of mutual trust.[33] It also recalled that this principle requires each member state, save in exceptional circumstances, to consider all the other member states to be complying with EU law and particularly with the fundamental rights recognised by EU law.[34] In particular, it was held that Directive 2010/24, read in light of the right to an effective remedy protected by Article 47 of the Charter, did not preclude, in circumstances such as that in the main proceedings, an authority of a member state from refusing to enforce a request for recovery.[35]

Posted workers

A recent case of the Court in a different sphere, that of posted workers, is a further example of the Court recognising the existence of exceptional circumstances that justify an exception to the principles of mutual trust and mutual recognition.

The Grand Chamber judgment in *Altun and others* marked, in a sense, a turning point in the Court's dicta in the area to date.[36] The Court departed from previous judgments affirming the binding nature of E 101 certificates even where it was found that the conditions under which the worker concerned carries out his or her activities clearly do not fall within the material scope of the relevant provisions of the social security regulations.[37] In this case, the Court held that E 101 certificates could be disregarded by the host member state, even though they had not been withdrawn by the issuing member state, where the national court of that state finds that the certificates were fraudulently obtained or relied on. This finding was based on the general EU law principle that EU law cannot be used for fraudulent purposes or where there is an abuse of rights ("*abus de droit*").[38]

Mutual recognition and mutual trust from the point of view of national courts

Mutual recognition and the Strasbourg Court

National courts have an eye to Strasbourg, not only as courts of parties to the Convention but also in light of the importance given by the Court of Justice to the European Court of Human Rights (ECtHR) case law when interpreting EU law provisions. As provided in Article 52(3) of the Charter, insofar as the

Charter contains rights that correspond to those in the Convention, the meaning and scope of those rights shall be the same, without prejudice for the possibility for EU law to provide more extensive protection. This Court fully recognises that there must be coherence between its approach and that taken by the Strasbourg Court.

The Strasbourg Court is also mindful of the particularities of EU law and of the effective system of protection of fundamental rights it provides. In *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland*, the ECtHR recognised that, in principle, the EU legal order is presumed to offer equivalent protection for fundamental rights as that provided by the Convention and the case law of the Strasbourg Court.[39] In *Avotinš v. Latvia*,[40] the Grand Chamber of the ECtHR reaffirmed the *Bosphorus* principle and expressly stated that it is "mindful of the importance of the mutual recognition mechanisms for the construction of the AFSJ". However, it emphasised that it "would verify that [the principle] is not applied automatically and mechanically…to the detriment of fundamental rights".[41]

The *M.S.S* case and the *N.S.* case illustrate this cross-fertilisation between ECtHR case law and that of the Court of Justice. In the *M.S.S. v. Belgium & Greece* case, the ECtHR applied a systemic deficiencies criterion in the assessment of infringements to fundamental rights.[42] This test was endorsed by the Court of Justice in the *N.S. and M.E.* case where the *M.S.S.* judgment is specifically referred to.[43] As President Lenaerts has observed: "[T]hat openness, on the part of the ECJ, to the views of national courts and the ECtHR, not only makes possible cross-fertilisation of ideas between those judicial actors, but also serves to prevent normative conflicts from arising".[44]

Role of national courts in practice in the operation of the principles of mutual trust and mutual recognition

The general importance of national courts for the EU judicial system as a whole was emphasised in cases such as *Opinion 1/09*,[45] *Opinion 2/13*[46] and in the judgment of last March, *Achmea*.[47] Indeed, the principle of effective judicial protection enshrined in Article 19(1) TEU includes a requirement for national judges to be independent, as was made clear in the recent Grand Chamber judgment of *Associação Sindical dos Juízes Portugueses*.[48] The dialogue and co-operation between national courts and this Court is very much a two-way process, whereby guidance is provided but national courts ultimately apply the tests formulated by the Court of Justice to the facts before them.

For instance, some of the most interesting references relating to the EAW FD have come from the Irish courts. Yet it is a relatively recent phenomenon because the Irish courts themselves were not in a position to refer questions for a certain period as Ireland had chosen not to accept the jurisdiction of the Court during the transitional period of five years, from the entry into force of the Lisbon Treaty on December 1, 2009, until December 1, 2014, as provided for under Protocol 36 to the Treaties.[49] Therefore, Irish courts often had to decide issues without having the possibility to make a reference.

Accordingly, in cases such as *Lanigan*,[50] relating to information sought as to the prison conditions in Northern Ireland, and *Rettinger*,[51] concerning a transfer to Poland, the Irish courts largely anticipated the approach subsequently taken by the Court of Justice in the landmark decision of *Aranyosi and Căldăraru* in terms of seeking information from the issuing member state before making a decision on surrender. Indeed, the test formulated by the High Court in *Rettinger*, relating to the existence of a "real risk" of inhuman and degrading treatment, bears an uncanny resemblance to the test subsequently formulated by the Court of Justice in *Aranyosi and Căldăraru*. One might say that this is not so surprising given that both the Irish court and the Court of Justice rightly referred to the approach taken by the Strasbourg Court.

Concluding remarks

While the principles of mutual trust and mutual recognition did not appear in the original Treaty, both have, however, been recognised and further developed in secondary legislation and the Court has not hesitated in making explicit how important those principles are to European integration.

The Court has had to rely on general principles to ensure the protection of fundamental rights in the context of secondary legislation. In doing so, the challenge is to ensure that in crafting exceptions to existing secondary law instruments, the basic principle of mutual recognition and the effectiveness of the system as a whole are not undermined.

It can be argued that the testing of the system and the questioning of national standards (through, in particular, exchanges of information), whereby national courts enquire into compliance by other member states with fundamental rights, can ultimately enhance mutual trust rather than take from it, in that it furthers knowledge, awareness and understanding of each other's national systems, assuming, of course, that all parties act in a reasonable and fair manner as well as in a spirit of loyal co-operation.

*All opinions expressed herein are personal to the author.

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2. *Opinion 1/75* (OECD Understanding on a Local Cost Standard) of November 11, 1975, EU:C:1975:145.
3. Judgment of January 25, 1977, 46/76, EU:C:1977:6, para. 22. See also judgment of May 23, 1996, *Hedley Lomas*, C-5/94, EU:C:1996:205, para. 19, concerning UK export licence to export sheep to Spain.
4. Judgment of February 20, 1979, *Rewe-Zentral*, 120/78, EU:C:1979:42, para. 15.
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8. Directive 2012/13/EU of the European Parliament and of the Council, of May 22, 2012, on the right to information in criminal proceedings (OJ 2012, L 142, p. 1).
9. Directive 2013/48/EU of the European Parliament and of the Council, of October 22,

2013, on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (OJ 2013, L 294, p. 1).

10. Directive (EU) 2016/343 of the European Parliament and of the Council, of March 9, 2016, on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (OJ 2016, L 65, p. 1).
11. Directive (EU) 2016/800 of the European Parliament and of the Council, of May 11, 2016, on procedural safeguards for children who are suspects or accused persons in criminal proceedings (OJ 2016, L 132, p. 1).
12. Directive (EU) 2016/1919 of the European Parliament and of the Council, of October 26, 2016, on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings (OJ 2016, L 297, p. 1).
13. The various related framework decisions include Council Framework Decision 2002/584/JHA, of June 13, 2002, on the European Arrest Warrant (EAW) and surrender procedures between Member States (OJ 2002, L 190, p. 1); and Council Framework Decision 2009/299/JHA, of February 26, 2009, amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (OJ 2009, L 81, p. 24).
14. For instance, judgments of June 28, 2012, *West*, C-192/12 PPU, EU:C:2012:404, paragraph 77 and of May 3, 2007, *Advocaten voor de Wereld,* C-303/05, EU:C:2007:261, paragraph 57.
15. Judgment of April 5, 2016, C-404/15 and C-659/15 PPU, EU:C:2016:198.
16. See, for instance, judgments of May 24, 2016, *Dworzecki*, C-108/16 PPU, EU:C:2016:346; of June 1, 2016, *Bob-Dogi*, C-241/15, EU:C:2016:385; of June 29, 2017, *Popławski,* C-579/15, EU:C:2017:503; of August 10, 2017, *Tupikas,* C-270/17 PPU, EU:C:2017:628' and, of August 10, 2017, *Zdziaszek*, C-271/17 PPU, EU:C:2017:629.
17. See, for example, Article 36 TFEU on the free movement of goods.
18. Council Framework Decision 2002/584/JHA, of June 13, 2002, on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of February 26, 2009 (OJ 2002, L 190, p. 1).
19. For recent developments regarding the notion of "exceptional circumstances" and its extent, in cases pertaining to the independence of the judiciary in Poland, detention conditions in Hungary as well as Brexit, see judgment of July 25, 2018, *Minister for Justice and Equality* (Deficiencies in the system of justice), C-216/18 PPU, EU:C:2018:586, judgment of July 25, 2018, *ML* (Conditions of detention in Hungary), C-220/18 PPU, EU:C:2018:589 and judgment of September 19, 2018, *RO*, C-327/18 PPU, EU:C:2018:733.
20. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of December 12, 2012, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012, L 351, p. 1).
21. Judgment of March 28, 2000, *Krombach*, C-7/98, EU:C:2000:164, para. 37.
22. Indeed, it could be said that the inclusion of such clauses mirrors the approach taken previously at the level of primary law, where, as mentioned previously, the Treaty drafters considered necessary, from an early stage, to include safeguards such as the infringement procedure for violations by Member States of EU law.
23. Council Regulation (EC) No 2201/2003, of November 27, 2003, concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ 2003, L 338, p. 1).
24. See Art. 7 of the Charter and Art. 8 of the ECHR on the right to family life.
25. Council Regulation (EC) No 343/2003 of February 18, 2003, establishing the criteria and mechanisms for determining the member state responsible for examining an asylum application lodged in one of the member states by a third-country national (OJ 2003, L 50, p. 1).
26. Judgment of December 21, 2011, C-411/10 and C-493/10, EU:C:2011:865.
27. Ibid., para. 83.
28. See K. Lenaerts, 'La vie après l'avis: Exploring the principle of mutual (yet not blind) trust', (2017) 54 *Common Market Law Review*, 829.
29. Judgment of December 21, 2011, *N.S. and others,* C-411/10 and C-493/10, EU:C:2011:865, para. 94.
30. Regulation (EU) No 604/2013 of the European Parliament and of the Council, of June 26, 2013, establishing the criteria and mechanisms for determining the member state responsible for examining an application for international protection lodged in one of the member states by a third-country national or a stateless person (OJ 2013, L 180, p. 31).
31. Council Directive 2010/24/EU of March 16, 2010, concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures (OJ 2010, L 84, p. 1).
32. Judgment of April 26, 2018, C-34/17, EU:C:2018:282.
33. Ibid., para. 41.
34. Ibid., para. 40.
35. Ibid., para. 62.
36. Judgment of February 6, 2018, C-359/16, EU:C:2018:63.
37. See judgment of January 26, 2006, *Herbosch Kiere,* C-2/05, EU:C:2006:69 and of April 27, 2017, *A-Rosa Flussschiff,* C-620/15, EU:C:2017:309.
38. Ibid., para. 49.
39. ECtHR, judgment of June 30, 2005, para. 165.
40. ECtHR, judgment of May 23, 2016.
41. ECtHR, judgment of May 23, 2016, para. 116.
42. Para. 89.
43. Judgment of December 21, 2011, C-411/10 and C-493/10, EU:C:2011:865, para. 90.
44. K. Lenaerts, 'La vie après l'avis: Exploring the principle of mutual (yet not blind) trust', (2017) 54 *Common Market Law Review*, 840.
45. *Opinion 1/09* (Agreement creating a Unified Patent Litigation System) of March 8, 2011, EU:C:2011:123, para. 66.
46. *Opinion 2/13*, Accession of the European Union to the ECHR, of December 18, 2014, EU:C:2014:2454, para. 175.
47. Judgment of March 6, 2018, C-284/16, EU:C:2018:158, para. 36.
48. Judgment of February 27, 2018, *Associação Sindical dos Juízes Portugueses*, C-64/16, EU:C:2018:117.
49. The other countries availing of this possibility were the UK, Denmark, Poland, Bulgaria, Estonia, Malta and Slovakia.
50. *Minister for Justice and Equality v. Francis Lanigan* [2014] IEHC 702. A vast amount of litigation came before the superior courts in Ireland relating to the extradition of Mr Lanigan to Northern Ireland, including proceedings in the context of which the High Court made a preliminary reference, which led to the judgment of July 16, 2015, *Lanigan*, C-237/15 PPU, EU:C:2015:474.
51. *Minister for Justice v. Rettinger* [2010] IESC 45.

LEGAL UPDATE

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Point of general public importance – Inference provisions – Criminal Justice Act 1984 s. 19 – Appellant seeking to raise a point of general public importance as to the proper interpretation of s. 19 of the Criminal Justice Act 1984 – Whether s. 19 may be utilised in a trial for an offence other than the offence about which the accused was questioned when the section was invoked – [2017] IESC 53 – 13/07/2017

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Crime and sentencing – Road traffic – Driving while disqualified and without insurance – Period of disqualification – [2018] IECA 199 – 11/06/2018

O'Brien v DPP

Conviction – Driving while under the influence of an intoxicant – Bias – Appellant seeking to appeal against conviction – Whether the appellant's case met the threshold for the granting of relief – [2018] IECA 264 – 30/07/2018

O'Mahoney v District Judge Hughes

Habeas corpus – Unlawful detention – Aggravated sexual assault – Applicant seeking an order of habeas corpus – Whether the applicant's detention was illegal – [2018] IEHC 466 – 31/07/2018
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Statutory instruments
Commission of investigation (response to complaints or allegations of child sexual abuse made against Bill Kenneally and related matters) order 2018 – SI 311/2018
Criminal justice (corruption offences) act 2018 (commencement) order 2018 – SI 298/2018
Criminal justice (terrorist offences) act 2005 (section 42) (restrictive measures concerning certain persons and entities with a view to combating terrorism) regulations (no. 2) 2018 – SI 342/2018

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Appellant seeking damages for alleged breach of confidence, breach of trust and breach of his rights to privacy – Whether the appellant's claim was bound to fail – [2018] IECA 224 – 05/07/2018
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Appellant seeking damages for trespass – Whether the respondents had reasonable cause to effect forcible entry – [2018] IECA 289 – 17/08/2018
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Damages – Breach of duty – Abuse of court process – Defendants seeking dismissal of proceedings – Whether proceedings were an abuse of court process – [2018] IEHC 479 – 16/07/2018
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Damages – Discovery – Residential Institutions Redress Act 2002 – Appellant seeking damages – Whether the trial judge ought to have ordered discovery – [2018] IECA 146 – 17/05/2018
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Plaintiff seeking damages – Whether the proceedings ought to be dismissed for want of prosecution and on the grounds of inordinate delay – [2018] IEHC 383 – 15/06/2018
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Respondent seeking damages for defamation – Whether the Circuit Court judge's assessment of damages was appropriate – [2018] IEHC 352 – 08/06/2018
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Litigation – Damages – Discovery application – Discovery of all documents in possession, power or procurement – Relevance – Privilege – Waiver – Fair disposal of action – Non-party discovery – [2018] IEHC 481 – 31/07/2018
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Tracey v Minister for Justice, Equality and Law Reform
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Data Protection Act 2018 (section 36(2)) (health research) regulations 2018 – SI 314/2018

DEFAMATION

Media – Defamation – Damages – Assessment – Whether entitlement to assessment by jury – S 23 Defamation Act 2009 – [2018] IESC 29 – 10/07/2018
Higgins v Irish Aviation Authority; White v Sunday Newspapers Ltd
Plaintiff seeking damages for defamation – Whether the provisions of Civil Liability Act 1961 s. 35(1)(i) apply to the tort of defamation – [2018] IEHC 340 – 21/06/2018
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DISCOVERY

Appellant seeking an order setting aside a notice of discontinuance – Whether the High Court erred in law in refusing to set aside a notice of discontinuance – [2018] IECA 268 – 31/07/2018
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Defendant seeking discovery and particulars – Whether the affidavit of discovery of the plaintiff was incorrect – [2018] IEHC 433 – 16/07/2018
Dully v Athlone Town Stadium Ltd No. 4
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Emovis Operations Ireland Ltd v National Roads Authority
Applicant seeking discovery – Whether the discovery sought was necessary – [2018] IEHC 359 – 18/06/2018
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Defendants seeking discovery – Whether the High Court could order discovery in relation to the proceedings as sought by the defendants – [2018] IEHC 418 – 22/06/2018
Launceston Property Finance Ltd v Burke
Appellants seeking discovery – Whether the State was entitled to plead litigation privilege – [2018] IECA 222 – 22/06/2018
Ryanair Ltd v The Revenue Commissioners; Aer Lingus plc v The Minister for Finance
Discovery – Privilege – Redactions – Plaintiff seeking discovery – Whether defendants were entitled to claim privilege – [2018] IEHC 384 – 22/06/2018
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DIVORCE

Family – Divorce – Settlement – Order made by way of settlement – Honouring of terms – Financial non-disclosure – [2018] IEHC 411 – 28/03/2018
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EASEMENTS

Easement – Rights of way – Injunction – Plaintiff seeking an injunction prohibiting and restraining the defendants from trespassing upon Victoria Lane – Whether an easement arose in equity – [2018] IEHC 401 – 01/06/2018
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EDUCATION

Statutory instruments
Employment equality act 1998 (section 12) (reservation of vocational training places) order 2018 – SI 260/2018
Education support centres (appointment and secondment of directors) (amendment) regulations 2018 – SI 281/2018

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Petition – Referendum – Onus of proof – Applicant seeking leave to present a petition – Whether the respondents committed electoral irregularities – [2018] IEHC 437 – 20/07/2018
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Jordan v Ireland
Referendum – Constitutional change – Electoral Register – Appellant seeking leave to present a petition – Whether the Government and individual Ministers acted unconstitutionally – [2018] IECA 291 – 27/08/2018
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Referendum petition – Substitution as petitioner – Referendum Act 1994 – Appellant seeking to be substituted as the applicant/intended petitioner in the proceedings – Whether the appellant had a statutory right to be substituted – [2018] IECA 266 – 31/07/2018
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Appellant seeking to appeal against the finding of the Employment Appeals Tribunal that it unfairly dismissed the respondent – Whether the investigative/disciplinary meeting which resulted in the dismissal of the respondent was fundamentally flawed and contrary to the principals of natural justice to which the appellant expressly committed itself by the policies which it had adopted – [2018] IEHC 425 – 16/07/2018
Towerbrook Ltd t/a Castle Durrow Country House Hotel v Young

Statutory instruments
Safety, health and welfare at work (diving) regulations 2018 – SI 254/2018
Employment permits (amendment) (no. 3) regulations 2018 – SI 318/2018

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ENVIRONMENTAL LAW

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DPP v T.N.

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European Union habitats (Ballinskelligs Bay and Inny Estuary special area of

conservation 000335) regulations 2018 – SI 287/2018
European Union habitats (Brown Bog Special Area of Conservation 002346) regulations 2018 – SI 288/2018
European Union habitats (Carlingford Shore special area of conservation 002306) regulations 2018 – SI 289/2018
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European Union habitats (Scragh Bog special area of conservation 000692) regulations 2018 – SI 291/2018
European Union (planning and development) (environmental impact assessment) regulations 2018 – SI 296/2018

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Plaintiff seeking unpaid rates – Whether the defendant's defence was doomed to fail – [2018] IEHC 363 – 20/06/2018
Fingal County Council v ILG Ltd
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Minister for Justice and Equality v Lisauskas
Appellant seeking to certify a question for the Court of Appeal – When a requested person has been tried in absentia, but his/her situation does not come within one of the exceptions set out in the Table to the European Arrest Warrant Act 2003, may the High Court order surrender provided it can be assured that his/her surrender does not mean a breach of the rights of defence? – [2018] IECA 204 – 27/06/2018
Minister for Justice and Equality v Skwierczynski
European Union citizenship – Applicants seeking temporary permission to reside in the State – Whether the respondent's decision deprived the second applicant of his Union law rights under the Charter of Fundamental Rights of the European Union – [2018] IEHC 403 – 04/07/2018
Muraview v The Minister for Justice and Equality
Access to information on the environment – Certiorari – EU law – Applicant seeking certiorari of the first respondent's review decision – Whether the challenge to the review decision had been made out – [2018] IEHC 372 – 01/06/2018
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European Union (insurance distribution) regulations 2018 – SI 229/2018
European Communities (reception conditions) regulations 2018 – SI 230/2018
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European Union (undertakings for collective investment in transferable securities) (amendment) regulations 2018 – SI 241/2018
European Union (plastics and other materials) (contact with food) (amendment) regulations 2018 – SI 257/2018
European Union (water policy) (abstractions registration) regulations 2018 – SI 261/2018
European Communities (road vehicles: entry into service) (amendment) regulations 2018 – SI 264/2018
European Union (occupation of road transport operator) regulations 2018 – SI 265/2018
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European Union (licensing of drivers) regulations 2018 – SI 270/2018
European Communities (establishing an infrastructure for spatial information in the European community (INSPIRE)) (amendment) regulations 2018 – SI 280/2018
European Union (safety of toys) (amendment) regulations, 2018 – SI 295/2018
European Union (planning and development) (environmental impact assessment) regulations 2018 – SI 296/2018
Protection of cultural property in the event of armed conflict (Hague Convention) act 2017 (commencement) order 2018 – SI 299/2018
Extradition (protocol to The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict) order 2018 – SI 301/2018
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European Union (marine equipment) (amendment) regulations 2018 – SI 312/2018
European Communities (extraterritorial application of legislation adopted by a third country) (amendment) regulations, 2018 – SI 319/2018
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European Union (temporary suspension of imports from Bangladesh of foodstuffs containing or consisting of betel leaves) (amendment) regulations 2018 – SI 328/2018
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European Union (organic farming) (amendment) regulations 2018 – SI 331/2018
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EXTRADITION LAW

Appellant seeking to oppose his extradition – Whether pre-trial and/or post-conviction incarceration in the United States of America could foreseeably put the appellant's life at risk – [2018] IESC 27 – 27/06/2018
Attorney General v Davis

FINANCE

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Finance Act 2017 (section 68) (commencement) order 2018 – SI 238/2018
Prospectus (Directive 2003/71/EC) (amendment) regulations 2018 – SI 317/2018

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Oireachtas (allowances) (chairpersons of Oireachtas committees and holders of certain parliamentary offices) order 2018 – SI 216/2018
Appointment of special adviser (Minister for Rural and Community Development) order 2018 – SI 305/2018
Presidential elections (forms) (amendment) regulations 2018 – SI 329/2018
National cultural institutions act 1997 (amendment of first schedule) order 2018 – SI 335/2018
Appointment of special adviser (Minister for Public Expenditure and Reform) order 2018 – SI 346/2018
Appointment of special adviser (Minister for Finance) order 2018 – SI 359/2018

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Plaintiff seeking payment on foot of a guarantee – Whether defendant demonstrated that he had a fair or reasonable probability of having a bona fide defence – [2018] IEHC 381 – 06/06/2018
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Nurses and midwives act 2011 (commencement) order 2018 – SI 213/2018
Nurses and midwives (candidate register) rules 2018 – SI 217/2018
Nurses and midwives (education and training) rules 2018 – SI 218/2018
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Nurses and midwives (recognition of professional qualifications) rules 2018 – SI 220/2018
Nurses and midwives (registration) rules 2018 – SI 221/2018
Health insurance act 1994 (determination of relevant increase under section 7A and provision of information under section 7B) (amendment) regulations 2018 – SI

224/2018
Podiatrists registration board (establishment day) order 2018 – SI 239/2018
Health (general practitioner service) act 2018 (commencement) order 2018 – SI 320/2018

HUMAN RIGHTS

High Court seeking further information as to the prison conditions in which the respondent may be held should he be surrendered to the UK and thereafter remanded in custody – Whether the response of the Northern Ireland Prison Service addressed the specific issues which the High Court had asked to be considered – [2018] IEHC 312 – 26/02/2018
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Applicant seeking partial certiorari of the decision of the respondent in relation to subsidiary protection – Whether the respondent failed to apply the correct test – [2018] IEHC 497 – 31/07/2018
A.A. (Pakistan) v The International Protection Appeals Tribunal
Asylum and immigration – Freedom of movement – Visa – Application for visa for brother of EU national – [2018] IEHC 489 – 23/07/2018
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Applicant seeking certiorari of respondent's decision – Whether a persecutory deprivation of nationality should be disregarded where statelessness derives from that deprivation – [2018] IEHC 461 – 17/07/2018
B.D. (Bhutan and Nepal) v Minister for Justice and Equality
Deportation – Revocation – Public interest – Applicants seeking leave to appeal – Whether the authorities should be required to prosecute relevant applicable offences under the Immigration Act 1999 to prove lack of co-operation with the deportation process – [2018] IEHC 424 – 05/06/2018
C.M. v Minister for Justice and Equality No.2
Immigration and asylum – International protection – Interview – Applicant seeking mandamus, certiorari, declarations and injunctions – Whether the applicant was entitled to be furnished with notes of an interview prepared by the IPAT – [2018] IEHC 410 – 10/05/2018
C.M. (Zimbabwe) v The Chief International Protection Officer
Immigration and asylum – Judicial review – Refugee status – Applicant seeking judicial review of a decision of the respondent – Whether the respondent failed to consider all of the material that had been submitted to it – [2018] IEHC 375 – 27/06/2018
E.Q. v International Protection Appeals Tribunal
Applicant seeking a stay on the hearing before the International Protection Appeals Tribunal pending an appeal to the Court of Appeal against the High Court's refusal of a stay pending the determination of the test cases – Whether the High Court's findings were incorrect – [2018] IEHC 509 – 17/09/2018
I.G. (Albania) v Chief International Protection Officer
Applicants seeking certiorari of International Protection Appeals Tribunal decisions in relation to subsidiary protection – Whether there was no proper regard to medico-legal documentation – [2018] IEHC 512 – 17/09/2018 *R.S. (Ukraine) v The International Protection Appeals Tribunal I.H. (Ukraine) v International Protection Appeals Tribunal*
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Stay – Injunction – Public interest – Applicants seeking orders preventing the International Protection Appeals Tribunal from processing their appeals further – Whether the balance of convenience and justice leaned against a stay – [2018] IEHC 499 – 10/09/2018
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INSURANCE

Insurance contract – Appellant seeking the reversal of the strike out of the plenary proceedings and the reinstatement of those proceedings – Whether the judge failed to consider whether on the facts the appellant's claim fell into the category of special circumstances as acknowledged by the High Court in *O'Hara v ACC Bank* [2011] IEHC 367 – [2018] IECA 250 – 25/07/2018
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Insurance (amendment) Act, 2018

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Insurance (amendment) act 2018 (commencement) (part 4) order 2018 – SI 353/2018

INTELLECTUAL PROPERTY

Patentee seeking an order staying patent revocation proceedings – Whether the balance of justice favoured the refusal of a stay – [2018] IEHC 467 – 31/07/2018
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A.A.D. (Somalia) v Chief International Protection Officer
Respondent seeking security for costs of judicial review proceedings – Whether the balance of discretion or justice applied in this case – [2018] IEHC 434 – 25/06/2018
A.K. (Somalia) v Minister for Justice and Equality
Applicant seeking an order of certiorari by way of judicial review quashing the decision of the respondent – Whether substitute consent had been granted in accordance with European Union law – [2018] IEHC *315 – 17/05/2018*
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Appellant seeking judicial review of the decision of the respondent – Whether the appellant had an entitlement in law to be involved in the process at the earlier stage of the consideration by the respondent of whether the application for permission should go down the strategic infrastructure development route – [2018] IESC 39 – 31/07/2018
Callaghan v An Bord Pleaánla
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E.E. v Child and Family Agency
Applicant seeking an order of certiorari by way of judicial review quashing his conviction and sentence – Whether the Circuit Court breached fair procedures – [2018] IEHC 373 – 07/06/2018
Feeney v National Transport Authority
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Forum Connemara Ltd v Galway County Local Community Development Committee
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Judicial review – Legitimus contradictor – Procedural complexity – Applicant seeking judicial review – Whether a basis for correcting an error in an order had been made out – [2018] IEHC 393 – 05/07/2018
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Judicial Review – Order of certiorari – Order of mandamus – Housing – Tenancy – Disability – Housing (Miscellaneous Provisions) Act 2009 – [2018] IECA 206 – 02/07/2018
Mulhare (a person of unsound mind not so found on inquiry) v Cork County Council
Judicial Review – Free movement – Deportation – Marriage of convenience –

Entitlement to remain within the State – Review of a removal order – Extension of time – Stay on deportation pending decision – European Communities (Free Movement of Persons) Regulations 2015 – [2018] IEHC 394 – 08/05/2018
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Judicial review – Planning permission – Environmental impact assessment – Planning and Development Regulations 2000 – Point of law – Public interest – Exceptional public importance – [2018] IEHC 389 – 27/06/2018
O'Brien v An Bord Pleanála
Judicial review – Care orders – Prima facie arguable case – Applicant seeking judicial review – Whether care orders were erroneous – [2018] IEHC 469 – 31/08/2018
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Judicial review – Charge of assault – Prosecution – Delay – Whether prejudicial to applicant – [2018] IEHC 364 – 20/06/2018
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Judicial review – Residence card – Family member – Applicants seeking judicial review of a decision by the respondent – Whether the respondent erred in law in her interpretation of the term 'member of the household of the Union citizen having the primary right of residence' – [2018] IEHC 458 – 25/07/2018
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JURISDICTION

Appellant seeking to set aside a judgment of the High Court and the subsequent judgment of the Supreme Court on appeal on the grounds that they were obtained by fraud – Whether a judgment may be set aside for a breach of fair procedures by another party to the proceedings – [2018] IESC 34 – 27/07/2018
Desmond v Moriarty
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Brussels II bis Regulation – Jurisdiction – Extension of time – Appellants seeking to appeal against an order of the High Court – Whether there was jurisdiction to extend time – [2018] IECA 154 – 17/05/2018
Hampshire County Council v C.E.
Petitioner seeking liberty to take decisions on behalf of the company as may be necessary to conduct a hearing in the High Court in relation to the assessment of damages due to the company in proceedings against the company's former solicitors – Whether the court had jurisdiction to entertain the motion – [2017] IEHC 341 – 09/02/2017
Morey v Emerald Isle Assurances and Investments Ltd

LICENSING

Statutory instruments
Intoxicating liquor (breweries and distilleries) act 2018 (commencement) order 2018 – SI 344/2018
Private security (licensing and standards) (cash in transit) (amendment) regulations 2018 – SI 322/2018

MEDICAL LAW

Statutory instruments
Health (general practitioner service) act 2018 (commencement) order 2018 – SI 320/2018
Medical Council (evidence of indemnity) rules 2018 – SI 222/2018

MISREPRESENTATION

Settlement agreement – Fraudulent representation – Civil Liability Act 1961 s. 17 – Plaintiff seeking to claim an alleged misrepresentation – Whether there was a misrepresentation by the defendant which induced the plaintiff to enter a settlement agreement – [2018] IEHC 361 – 20/06/2018
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MORTGAGE

Respondent seeking order for possession – Whether the obligation in the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 to provide a contract in plain and intelligible language extends to a deed of mortgage which is completed pursuant to the requirements of the loan agreement itself – [2018] IEHC 455 – 15/06/2018
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NEGLIGENCE

Appellant seeking damages for negligence, breach of duty and other misconduct against the respondents – Whether the trial judge ought to have recused himself during the proceedings by reason of actual bias – [2018] IECA 229 – 06/07/2018
Adigun v McEvoy
Negligence – Liability – Damages – Plaintiff seeking damages – Whether the defendants were guilty of negligence – [2018] IEHC 454 – 27/07/2018
Cloonan v Health Service Executive
Appellant seeking to institute proceedings against the defendants for negligence and other civil wrongs arising from their stewardship of investments – Whether the High Court erred in failing to apply the appropriate standard and burden of proof in an application to dismiss the proceedings – [2018] IESC 44
SPV Osus Ltd v HSBC Institutional Trust Services (Ireland) Ltd

PENSIONS

Personal capacity – Pension scheme – Duty of care – Appellant seeking recovery of damages – Whether the appellant could claim as a disappointed beneficiary – [2018] IECA 288 – 13/08/2018
Kelly v Governor and Company of the Bank of Ireland and Boucher; Kelly v The Governor and Company of the Bank of Ireland and Cotter

PERSONAL INJURIES

Personal injuries – Negligence – Appellant seeking to appeal against the dismissal of her personal injuries claim by the High Court – Whether the trial judge erred by failing to deal with the claim on the basis of a failure by the respondent to provide a safe place of work – [2018] IECA 287 – 13/08/2018
McCarthy v ISS Ireland Ltd (Trading as ISS Facility Services)

PERSONAL INJURIES ASSESSMENT BOARD

Compensation – Book of Quantum – Applicant seeking compensation in respect of a soft tissue injury – Whether the High Court was obliged to follow the binding principles for the assessment of damages for personal injuries enunciated by the Court of Appeal and the Supreme Court – [2018] IEHC 371 – 25/06/2018
Kampff v Minister for Public Expenditure and Reform

PERSONAL INSOLVENCY AND BANKRUPTCY

Defendant seeking an order striking out the claim of the plaintiff pursuant to the inherent jurisdiction of the High Court on the grounds of forum non conveniens and abuse of process – Whether the plaintiff had any standing to prosecute the proceedings – [2018] IEHC 367 – 22/06/2018
Dunne (A Bankrupt) v Dunne
Defendant seeking the dismissal of bankruptcy summons – Whether an issue of European law was engaged in the proceedings – [2018] IEHC 429 – 16/07/2018
Ennis Property Finance DAC v Carney
Appellant seeking to appeal against Circuit Court order – Whether a second document sent by the PIP was an amended PIA – [2018] IEHC 314 – 31/05/2018
Re: Enright (a debtor)
Pecuniary loss – Applicant seeking damages for personal injury – Whether an assault was the substantial cause of the applicant's continuing injuries and loss – [2018] IEHC 435 – 18/07/2018
Flanagan v Minister for Public Expenditure and Reform
Bankruptcy – Pension – Loss – Defendants seeking orders dismissing proceedings on grounds that they were unsustainable, frivolous, vexatious and bound to fail – Whether the plaintiff had a cause of action – [2018] IEHC 483 – 25/07/2018
Healy v Irish Life Staff Benefits Scheme No.2
Personal insolvency arrangement – Debtor – Eligibility criteria – Objecting creditor seeking to raise a procedural objection – Whether the debtor satisfied the eligibility criteria – [2018] IEHC 313 - 31/05/2018
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Personal injuries – Damages – Statute barred – Defendants seeking the dismissal of the plaintiff's claim on the grounds that it was statute barred – Whether the proceedings were statute barred – [2018] IEHC 486 – 24/07/2018
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Gaeltacht act 2012 (designation of Gaeltacht language planning areas) (no. 2) order 2018 – SI 258/2018
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Gaeltacht act 2012 (designation of Gaeltacht language planning areas) (no.3) order 2018 – SI 332/2018
Gaeltacht act 2012 (designation of Gaeltacht language planning areas) (no.4) order 2018 – SI 347/2018
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Bills initiated in Dáil Éireann during the period June 22, 2018, to October 3, 2018

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

Affordable Housing and Fair Mortgage Bill 2018 – Bill 77/2018 [pmb] – Deputy John McGuinness
African Development (Bank and Fund) Bill 2018 – Bill 101/2018
Assaults on Older Persons Bill 2018 – Bill 83/2018 [pmb] – Deputy Mary Butler
Central Bank (National Claims Information Database) Bill 2018 – Bill 81/2018
Child and Family Agency (Foster Care Oversight) Bill 2018 – Bill 79/2018
Children and Family Relationships (Amendment) Bill 2018 – Bill 75/2018 [pmb] – Deputy Pearse Doherty and Deputy Denise Mitchell
Climate Action and Low Carbon Development (Climate Change Reporting) Bill 2018 – Bill 82/2018 [pmb] – Deputy Timmy Dooley
Climate Action and Low Carbon Development (Emissions Targets) 2018 – Bill 100/2018 [pmb] – Deputy Timmy Dooley
Coroners (Amendment) Bill 2018 – Bill 94/2018
Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Bill 2018 – Bill 67/2018
Criminal Justice (Mutual Recognition of Probation Judgments and Decisions) Bill 2018 – Bill 92/2018
Criminal Law (Sexual Offences) (Amendment) Bill 2018 – Bill 93/2018
Dublin (North Inner-City) Development Authority Bill 2018 – Bill 84/2018 [pmb] – John Lahart
Forestry (Planning Permission) (Amendment) Bill 2018 – Bill 78/2018 [pmb] – Deputy Martin Kelly
Health and Social Care Professionals (Amendment) Bill 2018 – Bill 106/2018
Health (Regulation of Termination of Pregnancy) Bill 2018 – Bill 105/2018
Industrial and Provident Societies (Amendment) Bill 2018 – Bill 70/2018 [pmb] – Deputy Thomas P. Broughan, Deputy Mick Wallace, Deputy Thomas Pringle, Deputy Catherine Connolly, Deputy Maureen O'Sullivan, Deputy Joan Collins and Deputy Clare Daly
Industrial Relations (Amendment) Bill 2018 – Bill 89/2018
Local Government Bill 2018 – Bill 91/2018
Local Government (Rates) Bill 2018 – Bill 96/2018
Local Government (Restoration of Town Councils) Bill 2018 – Bill 74/2018 [pmb] – Deputy Brendan Howlin
Local Government (Water Pollution)

(Amendment) Bill 2018 – Bill 104/2018 [pmb] – Deputy Martin Kenny
Maternity Shared Leave and Benefit Bill 2018 – Bill 103/2016 [pmb] – Deputy Fiona O'Loughlin and Deputy Lisa Chambers
National Lottery (Protection of Central Fund) Bill 2018 – Bill 103/2018 [pmb] – Deputy Jim O'Callaghan
Personal Injuries Assessment Board (Amendment) Bill 2018 – Bill 73/2018 [pmb] – Deputy Michael McGrath
Property Services (Regulation) (Amendment) (Management Company Regulation) Bill 2018 – Bill 72/2018 [pmb] – Deputy Darragh O'Brien
Road Traffic (Regulation of Rickshaws) (Amendment) Bill 2018 – Bill 86/2018 [pmb] – Deputy Robert Troy
Statute Of Limitations (Amendment) Bill 2018 – Bill 102/2018 [pmb] – Deputy Jack Chambers
Tax Law Reform and Codification Advisory Committee Bill 2018 – Bill 69/2018 [pmb] – Deputy Joan Burton
Thirty-Seventh Amendment of the Constitution (Repeal of Offence of Publication or Utterance of Blasphemous Matter) Bill 2018 – Bill 87/2018
Thirty-Seventh Amendment of the Constitution (Economic, Social and Cultural Rights) Bill 2018 – Bill 99/2018 [pmb] – Deputy Thomas Pringle
Urban Regeneration and Housing (Amendment) Bill 2018 – Bill 63/2018 [pmb] – Deputy Mick Wallace
Prohibition of Fur Farming Bill 2018 – Bill 107/2018 [pmb] – Deputy Paul Murphy, Deputy Mick Barry and Deputy Ruth Coppinger

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Charities (Human Rights) Bill 2018 – Bill 88/2018 [pmb] – Senator Máire Devine, Senator Fintan Warfield and Senator Paul Gavan
Children's Health Bill 2018 – Bill 80/2018
Civil Liability (Amendment) (No. 3) Bill 2018 – Bill 68/2018 [pmb] – Senator Máire Devine [Defeated Bill]
Education (Digital Devices in Schools) Bill 2018 – Bill 65/2018 [pmb] – Senator Billy Lawless, Senator Victor Boyhan and Senator Gerard P. Craughwell
Health (General Practitioner Service) Bill 2018 – Bill 66/2018
Health Service Executive (Governance) Bill 2018 – Bill 90/2018
Mental Health (Renewal Orders) Bill 2018 – Bill 98/2018
Qualifications and Quality Assurance (Education and Training) (Amendment) Bill 2018 – Bill 95/2018
Public Service Superannuation (Age of Retirement) Bill 2018 – Bill 76/2018
Traveller Culture and History in Education Bill 2018 – Bill 71/2018 [pmb] – Senator Colette Kelleher

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Children and Family Relationships (Amendment) Bill 2018 – Bill 75/2018 – Committee Stage
Companies (Statutory Audits) Bill 2017 – Bill 123/2017 – Report Stage
Consumer Protection (Regulation of Credit Servicing Firms) (Amendment) Bill 2017 – Bill 21/2018 – Committee Stage
Copyright and Other Intellectual Property Law Provisions Bill 2018 – Bill 31/2018 – Report Stage – Passed by Dáil Éireann
Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Bill 2018 – Bill 40/2018 – Committee Stage – Report Stage – Passed by Dáil Éireann
Employment (Miscellaneous Provisions) Bill 2017 – Bill 147/2018 – Passed by Dáil Éireann
Fossil Fuel Divestment Bill 2016 – Bill 103/2016 – Report Stage – Passed by Dáil Éireann
Health (General Practitioner Service) Bill 2018 – Bill 66/2018 – Committee Stage
Heritage Bill 2016 – Bill 2/2016 – Report Stage – Passed by Dáil Éireann
Home Building Finance Ireland Bill 2018 – Bill 58/2018 – Committee Stage – Report Stage
Industrial Development (Amendment) Bill 2018 – Bill 1/2018 – Report Stage
Intoxicating Liquor (Breweries and Distilleries) Bill 2016 – Bill 104/2016 – Passed by Dáil Éireann
Public Health (Alcohol) Bill 2015 – Bill 120/2015 – Committee Stage – Report Stage
Road Traffic (Amendment) Bill 2017 – Bill 108/2017 – Passed by Dáil Éireann

Progress of Bills and Bills amended in Seanad Éireann during the period June 22, 2018, to October 3, 2018

Children's Health Bill 2018 – Bill 80/2018 – Committee Stage
Civil Law (Presumption of Death) Bill 2016 changed from – Civil Law (Missing Persons) Bill 2016 – Bill 67/2016 – Report Stage – Passed by Seanad Éireann
Data Sharing and Governance Bill 2018 – Bill 55/2018 – Committee Stage
Education (Admission to Schools) Bill 2016 – Bill 58/2018 – Committee Stage – Report Stage
Education (Welfare) (Amendment) Bill 2017 – Bill 109/2017 – Report Stage – Passed by Seanad Éireann
Health (General Practitioner Service) Bill 2018 – Bill 66/2018 – Committee Stage – Passed by Seanad Éireann
Judicial Appointments Commission Bill 2017 – Bill 71/2017 – Committee Stage
National Archives (Amendment) Bill 2017 – Bill 110/2017 – Committee Stage – Report Stage
Road Traffic (Amendment) Bill 2017 – Bill 108/2017 – Committee Stage

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Bills and Legislation – http://www.oireachtas.ie/parliament/
Government Legislation Programme updated September 27, 2016 – http://www.taoiseach.gov.ie/eng/Taoiseach_and_Government/Government_Legislation_Programme/

Supreme Court Determinations – Leave to appeal granted – Published on Courts.ie – June 22, 2018, to October 3, 2018

North East Pylon Pressure Campaign Limited and anor v An Bord Pleanála and ors [2018] IESCDET 82 – Leave to appeal from the High Court granted on 25/06/2018 – (O'Donnell J., O'Malley J., Finlay Geoghegan J.)
Simpson v Governor of Mountjoy Prison and ors [2018] IESCDET 84 – Leave to appeal from the High Court granted on 27/06/2018 – (Clarke C.J., MacMenamin J., O'Malley J
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Director of Public Prosecutions v Casey [2018] IESCDET 87 – Leave to appeal from the Court of Appeal granted on 29/06/2018 – (Clarke C.J., MacMenamin J., O'Malley J)
Ahearne v Tuohey [2018] IESCDET 90 – Leave to appeal from the Court of Appeal granted on 29/06/2018 – (Clarke C.J., MacMenamin J., O'Malley J.)
Zalewski v Adjudication Officer and ors [2018] IESCDET 94 – Leave to appeal from the High Court granted on 03/07/2018 – (O'Donnell J., O'Malley J., Finlay Geoghegan J.
Mohan v Ireland and the Attorney General [2018] IESCDET 98 – Leave to appeal from the Court of Appeal granted on 04/07/2018 – (O'Donnell J., Dunne J., O'Malley J.)
Nano Nagle School v Daly [2018] IESCDET 103 – Leave to appeal from the Court of Appeal granted on 06/07/2018 – (O'Donnell J., Dunne J., O'Malley J.)
W. L. Construction Limited v Chawke and anor [2018] IESCDET 106 – Leave to appeal from the Court of Appeal granted on 10/07/2018 – (Clarke C.J., MacMenamin J., Charleton J.)
Director of Public Prosecutions v Mahon [2018] IESCDET 104 – Leave to appeal from the Court of Appeal granted on 10/07/2018 – (Clarke C.J., MacMenamin J., and Charleton J.)
Ulster Bank Limited v Hannon [2018] IESCDET 107 – Leave to appeal from the Court of Appeal granted on 12/07/2018 – (Clarke C.J., MacMenamin J., Charleton J.)
O'Leary v Mercy University Hospital Cork Limited and anor [2018] IESCDET 113 – Leave to appeal from the Court of Appeal granted on 27/07/2018 – (Clarke C.J., MacMenamin J., Charleton J.)
Marques v Minister for Justice and Equality [2018] IESCDET 116 – Leave to appeal from the Court of Appeal granted on 30/07/2018 – (Clarke C.J., Charleton J., Finlay Geoghegan J.)
Director of Public Prosecutions v Gruchacz [2018] IESCDET 118 – Leave to appeal from the Court of Appeal granted on 30/07/2018 – (O'Donnell J., MacMenamin J., O'Malley J.)

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A new approach to discovery

The decision in *Tobin v Minister for Defence* to refuse to order discovery has significant implications for future cases.

Andrew Fitzpatrick SC

At the recent discussion workshop organised by the Review of the Administration of Civil Justice,[1] the Chairman of the Review Group, the President of the High Court, Mr Justice Kelly, made clear that one of its priorities was to comprehensively change the rules and procedures that apply to the discovery process. Referring to the significant problems that the costs of and time taken in making discovery have caused in the administration of justice, President Kelly suggested that the issue "may require a radical

solution".[2] By way of illustration of the potential breadth of the reforms that the Review Group is apparently considering, he posited: "You could start with the very dramatic proposition that perhaps we shouldn't have any discovery at all".[3]

Discovery will continue to exist, at least in its present form, until the Review Group completes its work, and in its recent decision in *Tobin v Minister for Defence and others*,[4] the Court of Appeal used the existing format of the rules to fashion what has the potential to be a quite significant change in the law relating to discovery. In the judgment, delivered by Hogan J., the Court held that before a litigant may seek discovery of a category of documents "which is likely to be extensive",[5] the information which it is hoped will be elicited from the category must "in the first instance [be sought] by means of interrogatories or, as the case might be, a notice to admit facts".[6] The judgment, if litigants adhere to the Court's exhortations that parties adopt a "co-operative approach" in dealing with these requests for information, could lead to a narrowing of the scope of discovery requests. However, if litigants and practitioners simply continue with what has hitherto been the common, albeit not universal, practice of providing generalised and sometimes evasive replies to pre-trial requests for information, then the changes referred to in *Tobin* could have the undesired effect of actually increasing the time and cost of litigation.

Legal context

The suggestion that a litigant who has an alternative means of obtaining the information that he or she seeks would not be entitled to an order for discovery is by no means new. The point was first made in this jurisdiction by Kelly J. in *Cooper Flynn v Raidió Teilifís Éireann*,[7] traditionally regarded as the first Irish judgment to give substantive consideration to the requirement that disclosure of documents[8] must be "necessary for disposing fairly of the cause or matter or for saving costs".[9] Quoting from the judgment of the English Court of Appeal in *Wallace Smith Trust Co v Deloitte*,[10] Kelly J. agreed with the following statement:

> "Disclosure will be necessary if: (a) it will give 'litigious advantage' to the party seeking inspection (*Taylor v Anderton*) and (b) the information sought is not otherwise available to that party by, for example, admissions, or some other form of proceeding (e.g., interrogatories) or from some other source (see, e.g., *Dolling-Baker v Merrett*) and (c) such order for disclosure would not be oppressive, perhaps because of the sheer volume of the documents (see, e.g., *Science Research Council v Nassé* per Lord Edmund-Davies)".[11]

Kelly J. repeated these sentiments several years later in *Anglo Irish Bank Corporation Ltd v Browne*,[12] a case that was in the Commercial List, where the court emphasised that it would in many cases be more convenient and less expensive for litigants to seek the information which they hoped would be obtained by way of discovery through the alternative means of raising interrogatories:

> "Discovery ought not to be ordered where the information sought to be gleaned by it is capable of being obtained by an alternative less expensive and less time consuming method. In this regard, I have in mind the use of interrogatories. In the Commercial List, interrogatories may be delivered as of right. No recourse to the court is necessary and they are capable of being administered in every case".[13]

Similar comments were made by the Court of Appeal in *McCabe v Irish Life Assurance plc*,[14] where it was stated: "Often the delivery of interrogatories can obviate the necessity for expensive and time consuming discovery…"[15]

Up until recently, there had been few if any cases in which a court had formally declined to order discovery because the information which it was hoped to obtain could more conveniently be obtained by delivering interrogatories.

However, while the courts have for almost two decades emphasised that parties should avail of interrogatories to elicit specific information from their opponents rather than by presenting broad requests for discovery, a general practice of using interrogatories in this way has not developed. While there have been some instances where interrogatories have been employed judiciously to elicit admissions from opponents, or to obtain information regarding their case, which have reduced the scope of the discovery sought, practitioners do not habitually tend to raise interrogatories. An obvious reason for this is that in cases that have not been admitted to the Commercial List, a litigant must first obtain leave under Order 31, Rule 1 RSC to deliver interrogatories to his opponent. However, even in Commercial proceedings, using interrogatories as a substitute for seeking discovery tends to be the exception rather than the norm. It is difficult to be certain as to why this is so, but anecdotal evidence suggests that it may be because it can often take a great deal of time to actually obtain replies to interrogatories from one's opponent, and that when the replies do arrive they are frequently worded in quite general or evasive terms such that they do not convey much useful information. Because practitioners apprehend that irrespective of what information is contained in the replies to interrogatories, there will be a need to seek discovery on at least some issues in the case, there is a tendency to proceed directly to discovery once the pleadings have closed, and to use that process to obtain the information needed to advance the case.

It is also notable that up until recently, there had been few if any cases in which a court had formally declined to order discovery because the information which it was hoped to obtain could more conveniently be obtained by delivering interrogatories. Prior to the decision in *Tobin v Minister for Defence*, the principal example of a litigant being denied an order for discovery on the basis that they could seek the information in question through interrogatories was in the judgment of Barniville J. in *Dunnes Stores v McCann*,[16] which was delivered only four months before the judgment in *Tobin*. In *McCann*, Barniville J. cited with approval the *dicta* of Kelly J. in *Anglo Irish Bank Corporation Ltd v Browne*[17] and *McCabe v Irish Life Assurance plc*,[18] which are cited above, and accepted "as a matter of principle that, where appropriate, the adroit use of interrogatories is appropriate and can obviate the requirement for voluminous discovery".[19] Barniville J. then went on to refuse to order discovery of two categories of documents because, *inter alia*, the information the plaintiff sought to obtain through the documents could more conveniently be obtained by delivering interrogatories.[20]

Tobin v Minister for Defence and others

In *Tobin*, the plaintiff was a former member of the Air Corps and claimed that during his time working as an aircraft mechanic at Casement Aerodrome, Baldonnell, he had been exposed to chemical fumes, principally for a three-year period beginning in the early 1990s. The plaintiff claimed that as a consequence of this alleged chemical exposure, he had been caused to suffer pain-related symptoms, anxiety and a general feeling of unwellness. The plaintiff's solicitors sought discovery of 15 categories of documents, all of which were to cover a period of nine years running from 1990 to 1999. In one particular category, category 2, the plaintiff sought all documents listing or identifying any chemicals that were utilised by the plaintiff between 1990 and 1999, together with any documents that would identify the quantities and dates for each individual consignment of chemicals purchased by the defendants. The reason given for the request was that the plaintiff wanted to confirm what chemicals had been used at Casement Aerodrome and in what quantities.

One of the most significant parts of Hogan J.'s judgment is where he urged the lawyers in the case to adopt a "co-operative approach" seeking and responding to the interrogatories.

The defendants offered to discover more limited categories of documents and averred on affidavit that it would take 10 members of staff, all of whom would have to be diverted from their existing duties, 220 man hours to review, locate and categorises the documents that the plaintiff had sought. With regard to category 2, the defendants argued that to make discovery of this category would require a detailed manual review of large quantities of purchase orders and invoices for a nine-year period starting almost 30 years ago. The defendants argued that instead of seeking discovery of documents of this volume for the purposes of identifying what chemicals had been in use at the facility, it would be quicker, and less expensive, to simply ask the defendants by way of interrogatories to confirm what chemicals had been in use.

In delivering the judgment, Hogan J. discussed the burdens that modern discovery practice now placed on the legal system and gave the following stark description:

> "In its own way, this appeal serves to illustrate the crisis – and there really is no other word for it – now facing the courts regarding the extent of burdens, costs and delays imposed on litigants and the wider legal system by the discovery process as it presently operates".[21]

Hogan J. stated that this state of affairs had come about as a consequence both of the huge increase in the amount of documentary material that society now generates in its day-to-day affairs, and also because of the failure of the court rules and legal practice to adequately respond to these changes:

> "One way or another, the burdens now imposed by the process contribute significantly to legal costs and to delays within the legal system to the point where a process designed to assist the fair administration of justice now at times threatens to overwhelm it by imposing disproportionately onerous demands upon litigants".[22]

Hogan J. noted that changes to the rules in 1999[23] had prohibited requests for general discovery and the judiciary had in several cases, such as *CRH plc v Framus*,[24] emphasised the need for proportionality between the quantity of documents to be discovered and the likely advantage that the documents would, when discovered, assist the party who had sought them. However, these efforts had proved insufficient and Hogan J. stated that it now fell to the judiciary to make a further intervention:

> "Such is the extent of the crisis facing our legal system by reason of the burdens imposed by discovery requests, that it now behoves the judiciary to re-calibrate and adjust that practice by insisting that in cases where the discovery sought is likely to be extensive, no such order should be made unless all other avenues are exhausted and these have been shown to be inadequate".[25]

In this particular case, the avenue that ought to be pursued before discovery was for the plaintiff to obtain the information that it was hoped the documents would elicit by way of interrogatories or a notice to admit facts:

> "In these circumstances the Court should not now make an order for discovery unless all other available options have been properly explored. It should be recalled that the plaintiff already knows – or, at least, seems to know – the chemicals and solvents which were used by him, since a list of these chemicals is listed by him at reply no. 9(b) and 9(d) in his reply to particulars. This would seem to be an obvious instance of where the plaintiff might be permitted to serve interrogatories on the Minister requesting him to state whether these particular chemicals were in fact used during the course of the plaintiff's employment at the ERF and, if so, to estimate the amount of the quantities that were so utilised in the ERF during the relevant period of the plaintiff's employment there".[26]

In total, Hogan J. declined to order discovery of six categories of discovery. He explained the reason for refusal as follows:

> "… on the ground that the application for discovery in respect of these categories of documents is premature. The plaintiff should rather in the first instance seek the information sought by means of interrogatories or, as the case might be, a notice to admit facts. A co-operative approach by parties in respect of these requests might well have the effect of not only reducing considerably the factual issues in dispute but also obviate the need for any wide-ranging or extensive discovery".[27]

Conclusion

The decision in *Tobin* represents what has the potential to be a quite significant change in the law and practice relating to discovery, and it is apparent from Hogan J's comments that it was the Court's intention that the judgment would have this effect. It has for some time been the law that a party should be refused an order for discovery where they had alternative means of proof available to them. However, a requirement that in cases where discovery is likely to be extensive a litigant must, before even seeking discovery, request his opponent to provide the information by interrogatories or some other means is new, and may significantly reduce the scope of discovery requests in the future.

However, while the Court of Appeal's objective in *Tobin* was to reform discovery practice by making it a requirement that a party seeking discovery must first seek the information concerned from their opponent, the court could obviously

make no change to the rules or the practice in responding to those requests. If litigants in non-Commercial List cases require that a court order permitting interrogatories should be made before they will reply to them, or provide vague or unhelpful information when they do reply, the exercise will not lead to a narrowing of the discovery and will instead only have added an additional layer of costs and delay to the litigation. One of the most significant parts of Hogan J.'s judgment is where he urged the lawyers in the case to adopt a "co-operative approach" seeking and responding to the interrogatories. Unless practitioners as a whole adopt that co-operative approach, there is a significant risk that the litigation process will continue to be burdened by extensive requests for discovery until the Review of the Administration of Civil Justice concludes its work.

References

1. Review of the Administration of Civil Justice Discussion Workshop, Distillery Building, Dublin 7, Thursday, April 26, 2018.
2. *Irish Independent*, May 8, 2018.
3. *Ibid.*
4. [2018] IECA 230; unreported, Court of Appeal, July 9, 2018. The author appeared for the defendants with Sarah Corcoran BL, instructed by Hayes Solicitors.
5. *Ibid*., at para. 50.
6. *Ibid*., at para. 51.
7. [2000] 3 I.R. 344.
8. *Cooper Flynn* was concerned with an application for an order for inspection of documents under Order 31, Rule 18 RSC. That provision is worded similarly to Order 31, Rule 12 RSC, which deals with discovery, and both provide that an order should not be made unless inspection or discovery (as the case may be) is "necessary for disposing fairly of the cause or matter or for saving costs". In *Ryanair plc v Aer Rianta cpt* [2003] 4 I.R. 264, the Supreme Court held that the test that Kelly J. espoused in *Cooper Flynn* could be applied to discovery as well as to inspection applications.
9. Order 31, Rule 12(5) RSC; Order 31, Rule 18(2) RSC.
10. [1997] 1 W.L.R. 257.
11. [2000] 3 I.R. 344; at p. 353.
12. [2011] IEHC 140; unreported, High Court, Kelly J., April 14, 2011.
13. *Ibid*., at p. 3.
14. [2015] 1 I.R. 346.
15. *Ibid*., at p. 348.
16. [2018] IEHC 123; unreported, High Court, Barniville J., March 14, 2018.
17. [2011] IEHC 140; unreported, High Court, Kelly J., April 14, 2011.
18. [2015] 1 I.R. 346.
19. [2018] IEHC 123; at para. 35.
20. *Ibid*., at paras. 84, 85 and 100.
21. *Ibid*. at para. 12.
22. *Ibid*., at para. 15.
23. Rules of the Superior Court (No. 2) (Discovery) 1999 – S.I. 233 of 1999.
24. [2004] 2 I.R. 20.
25. [2018] IEHC 123; at para. 50.
26. *Ibid*., at para. 31.
27. *Ibid*., at para. 51.

Halting a criminal trial: applications to the trial court

Recent case law offers guidance on what grounds a trial court will accept for stopping a trial due to a claim that delay has prejudiced the proceedings.

Since the mid 1990s the courts in this jurisdiction have grappled with the considerable challenge of how to deal with the issue of very significant periods of delay in bringing historical sexual abuse cases to trial. This article will focus on applications for prohibition made to the trial court to stop a trial on the grounds that the delay has caused irremediable prejudice to the accused.

Initially, the superior courts considered that the appropriate forum for applications to prohibit a trial due to delay was by way of judicial review in the High Court; in that regard, Denham J. was quite specific in the case of *PO'C v DPP*[1] from 2006. However, in her judgment, Denham J. also emphasised the duty of the trial judge to safeguard the fairness of the trial. Subsequent case law, however, has clearly established that the superior courts now have a clear preference for the issue of delay and prejudice to be dealt with by the trial judge on the "run of the evidence", and it is now only in very exceptional circumstances that the High Court will grant prohibition of a criminal trial.[2]

Donal O'Sullivan BL

The test applied in prohibition applications

The test in terms of prohibiting a trial for delay has been determined very clearly as essentially relating to issues of prejudice arising from the delay. There are two separate lines of case law, one dealing with complainant delay (i.e., a delay in the complaint being made at all),[3] which emphasises prejudice, and another concerning culpable prosecutorial delay (i.e., delay between the date of the complaint being made and the matter coming on for trial), in which prejudice is also emphasised, but with regard also being had to a balancing exercise between the community's entitlement to see crimes prosecuted and the applicant's right to an expeditious trial. However, it is clear from the case law that a significant delay is required and prejudice must generally be established.[4] Consequently, while the tests applied by the superior courts are not identical, there are similarities in that the issue of prejudice in terms of the fairness of the trial is the key element of both tests.

The test for prohibition on the grounds of delay can be summarised as follows. The trial will only be stopped if it is established that there is a real risk of an unfair trial, which cannot be ameliorated by appropriate rulings or directions, and this is best determined by the trial judge who has heard the relevant evidence in the course of the trial itself. Therefore, such applications to stop

the trial should generally be made to the trial judge at either the close of the prosecution case, or at the close of the evidence in a trial. However, the shift from judicial review to the trial court brings with it a number of issues that must be clarified:

- who bears the burden of proof in such an application at trial?;
- what procedure is to be adopted at the trial for such an application?;
- what test should a trial court apply – is it the same as the test applied in prohibition applications by way of judicial review?;
- how have trial courts dealt with these applications in practice?; and,
- what order should a trial court make if the trial judge feels that the application to stop the trial ought to be granted?

There have been a number of recent decisions of the Court of Appeal that deal with such so-called *PO'C* applications, and which offer some guidance on these issues.

Recent case law on delay stopping a trial in the trial itself

The first of the recent cases is the judgment of Sheehan J. in *DPP v BO'R*[5] in 2016. The Court of Appeal considered the issue of a refusal by a trial judge to withdraw a case from the jury on the basis of the alleged prejudice due to delay. This case concerned a count of indecent assault alleged to have occurred sometime between September 1986 and October 1987, when the injured party was at the home of the appellant receiving music lessons. The delay from the date of the offence to the date of complaint and trial was upwards of 25 years. Prejudice was alleged to have been suffered by BO'R on the basis that the Gardaí did not interview the parents of any other children that he was teaching at the time. Neither did they investigate whether BO'R was driving a red or a blue van. No enquiry was made of BO'R as to whether he kept records regarding the classes he gave, and the Gardaí had also failed to establish whether or not the appellant travelled with the complainant and others by coach to an event in Dublin at one of the relevant times.[6]

Mr Justice Sheehan noted at paragraph 29 of his judgment that the Gardaí had in fact interviewed a number of relevant witnesses. He also held that the colour of the appellant's van was immaterial, as both the complainant and BO'R had accepted that the vehicle was involved on more than one occasion. Mr Justice Sheehan felt that the Gardaí could not be criticised for interviewing other parents and also noted that there was nothing to prevent the appellant making his own enquiries about the colour of the van he drove, nor was there anything to prevent him interviewing parents or taking photographs of the various locations. The judge concluded that these were not matters that could have advanced BO'R's defence, and consequently was of the view that there was sufficient evidence before the jury to reasonably convict and that any prejudice relied upon by the appellant was minimal.[7]

The next case is that of *DPP v KK*,[8] a judgment of the Court of Appeal delivered on May 10, 2018, by Mr Justice Birmingham (as he then was). This case concerned allegations of sexual offences between May 2004 and December 2010, where the complaint to the Gardaí was made in April 2013.

A *PO'C* application was made to stop the trial and arguments were made in relation to delay and its impact on a fair trial.

One issue related to a specific allegation of sexual assault that occurred when the victim's mother was baking and ran out of flour, and her mother sent her to a Topaz petrol station to buy the flour. KK drove her to the petrol station, and on the way back from the petrol station it was alleged that KK stopped at an industrial estate and had the victim masturbate him. KK at interview did recollect an occasion of going to buy flour, but recollected that they went to a different store. When he was advised by the Gardaí that the flour was alleged to have been purchased at a petrol station, he expressed disbelief, commenting that he did not know what petrol station would sell flour. It was argued that this was an issue that could undermine the credibility of the victim.

The Gardaí were criticised for not making enquiries of whether or not the petrol station sold flour, and by the time KK made his own enquiries, it was established that the petrol station did not sell flour when the enquiries were made, but could not say whether flour was sold at the relevant time. Adding to the confusion was the evidence given at trial by the victim's mother, where she stated that she had sent KK and the victim to get some flour but when they returned they had none, so she thought the shop was closed and the nearest shop had no flour. In her statement, however, she had stated that they had brought flour back.

In the Court of Appeal, Birmingham J. agreed with the trial judge's decision that this was a peripheral issue, in the circumstances of the evidence given in the trial whereby all agreed that there was an occasion when the victim's mother ran out of flour and sent the victim with KK to get some.[9] As it happened, KK was acquitted of this count.

A further issue concerned a specific allegation of sexual assault by the victim, which occurred while a football match was on TV. The victim gave evidence that Brazil were playing because she was wearing her Brazilian shirt, and that it was a World Cup match in the summer of 2006. It was elicited in cross-examination that it occurred on a weekday.

When interviewed, KK essentially sought to set up a defence of alibi, by telling the Gardaí that he was working in a warehouse at the time on a 2.00pm to 10.00pm shift. It was argued that there was a potential prejudice caused by delay, as obtaining employment records years after the fact would have been very difficult.

This issue was dealt with again, however, on the basis of the evidence at the trial. KK's wife gave evidence that at that time he was working, and the jury was directly instructed by the trial judge to accept her evidence in that regard. The jury returned a verdict of guilty on this count.

Birmingham J. held that[10] the absence of the work records and Dept. of Social Protection records was not prejudicial, as not only was what KK had to say on the matter placed before the jury by the evidence of his wife, but the jury was told by the trial judge that it should accept this. There was therefore no prejudice arising to him due to the absence of these records.

The last and most recent case on this issue that will be considered in this article is that of *DPP v MD*,[11] a judgment of the Court of Appeal delivered by Mr Justice Edwards on June 7, 2018.

MD faced 36 counts on the indictment against him of rape and indecent/sexual assault, which were alleged to have occurred from May 1988 up to April 1991. The victim was a nephew of MD, and at that time both resided in the same house. The evidence was that the offences occurred while the parties were living in a particular house, but the victim's mother was unsure as to when the family had moved into the house.

In terms of delay, this was the only issue that appears to have been specifically identified to the trial judge on the *PO'C* application. The trial judge refused the application, essentially on the basis that he felt that: "this is a classic case of the application of the common sense of 12 people",[12] and the Court of Appeal was in full agreement with his finding.[13]

Analysis and conclusions

As set forth above, it appears clear that the preference of the superior courts now is to have the issue of delay in the criminal trial resolved by the trial judge in the arena of the trial itself. It is also clear that this issue is not to be considered in the context of a preliminary application at trial, which would be made in the absence of the jury. Rather, it is a decision that is to be made by the trial judge either of his/her own motion or on application made to him/her by the accused, following the hearing of the evidence in the trial (see for instance *MS v DPP*).[14]

The test for a *PO'C* application at trial is the test from *SH v DPP* from 2006, which has been set out above and which emphasises the concept of "prejudice". While *SH* itself also allowed for what it described as other "exceptional" factors to permit a trial to be prohibited, other than prejudice alone, no case has yet come before the Court of Appeal in this context whereby application was made at trial to stop the trial on the basis of, for example, extreme age, or ill health or cognitive impairment short of a finding of inability to plead or some other type of exceptional factor. It would appear to the writer that any such arguments are unlikely to succeed as a *PO'C* application at a trial court that is concerned primarily with the fairness of the trial, and such issues as old age do not affect the fairness of the trial itself. Cognitive issues are essentially fitness to plead issues, which in terms of a trial will be dealt with under the Criminal Law (Insanity) Act, 2006 rather than a *PO'C* application.

The question then arises: what is the test to be applied at trial for both complainant and prosecutorial delay cases?

The cases so far deal with factual scenarios of complainant delay rather than prosecutorial delay. Consequently, the argument can be made that the line of case law discussed above, from *BO'R* in 2016 to *KK* and *MD* in 2018, can be distinguished in cases involving prosecutorial delay. However, when one considers what appears to be the starting point for these applications, the judgment of Denham J. in the case of *PO'C*, no differentiation is made between the two types of delay.[15]

None of the three recent judgments of the Court of Appeal, while all dealing with issues of complainant delay, differentiated between types of delay. In the High Court case of *JH v DPP*,[16] White J. in the High Court said that it was the duty of the trial judge to withdraw the case from the jury by taking into account both "general and specific prejudice to the accused, which may have arisen because of substantial delay in bringing the prosecution".[17]

In the *JH* case, Mr Justice White did find that there was a period of about eight months that he considered to be a culpable prosecutorial delay, but he could not see how this would have caused any prejudice to the accused in that case.[18] Consequently, it would seem that the test to be applied at trial at present is the same in both cases of complainant delay and prosecutorial delay, and relies exclusively on ensuring the fairness of the trial. Having the same test for both complainant and culpable prosecutorial delay would seem reasonable, as it is the delay that is the issue for the fairness of the trial, not the cause of the delay. However, the constitutional right to an expeditious trial is also engaged and this right would consequently appear to be an appropriate matter to be taken into account by a trial judge in determining whether or not to stop a trial in a delay situation. This has not occurred as yet, and it remains to be seen if the Court of Appeal will offer further guidance on this matter when an appropriate case falls to be decided.

Trial courts require that there must be an engagement with the facts of each case, to ascertain if something is actually central, and not peripheral, and to ascertain if there has actually been a prejudice. Further, there may be instances where an accused could have taken steps to remedy the prejudice complained of (such as in *BO'R* where Sheehan J. outlined that the accused could have made his own enquiries as to the colour of the van he drove). If the issue relied upon as being prejudicial is one which is "speculative", in that there are no real grounds to show that the evidence could have been of import during the trial, then the trial courts appear to be unimpressed with such arguments, preferring to leave matters to the "common sense" of the jury, with the appropriate delay warning in the judge's charge.

It would seem that all of these applications are very much fact specific and it is vital for an accused to ensure that, during the trial, questions are asked and submissions made that not only set out the prejudice, but make it central to the commission of at least one of the counts on the indictment. Otherwise, the case law would appear to indicate that the case should go to the jury.

In terms of what order a trial judge should make if he or she decides to stop a trial on foot of a *PO'C* application (or indeed on foot of his or her own motion), it would appear that the trial judge should direct the jury to find the accused not guilty (see the *MD* case in which the ground of appeal related to a refusal to direct a not guilty verdict was not the subject of any comment by the Court of Appeal).

The last issue the writer wishes to consider is the burden of proof in *PO'C* applications. While in an application to prohibit a trial via judicial review in the High Court, the burden is on the applicant, the burden of proof in a criminal trial is on the prosecution. This would appear to have the result that the trial judge must be satisfied beyond a reasonable doubt that the matter is safe to go to the jury, and if he or she has a doubt on that, then the benefit of that doubt should be given to the accused.

However, in the *MD* case, the Court of Appeal (Edwards J.) appears to place the burden in a *PO'C* application upon the accused, and stated:

> "We are in agreement with counsel for the respondent that the appellant has failed to satisfy the test in *S.H. v The Director of Public Prosecutions* [2006] 3 IR 575. He has not established prejudice based on delay sufficient to give rise to a concern that such delay created a real risk of an unfair trial".[19]

This would not appear to sit comfortably with the rules applicable in a criminal trial as to the burden of proof. Nor does it sit with the principles set forth in *PO'C* itself, and subsequent case law such as *JH* and *MS.* These cases indicate that withdrawing the case from the jury is a duty on the trial judge, depending upon the trial judge's view of the "run of the evidence", and is not dependent upon an application being made to the trial judge, but rather appears to be an aspect of the constitutional guarantee of a fair trial in due course of law.

This dictum of Edwards J., however, is one that is made very much in the context of the particular facts of the *MD* case, where the refusal to grant a *PO'C* application was one of the grounds of appeal. Indeed no arguments or submissions are referred to in the *MD* judgment, which indicated that the burden of proof on a *PO'C* application was an issue raised in the case. Consequently, this writer suggests that the better view would be that while applications of this nature are generally raised by an accused, the trial judge must be satisfied that the trial is fair, and if there is a doubt on this issue, then the benefit of that doubt should be given to the accused. It is submitted that the burden of establishing the fairness of the trial should be placed upon the prosecution, to the same standard as is applicable to all criminal trials. This matter may, of course, be clarified by the Court of Appeal in due course.

Recent anecdotal evidence suggests that *PO'C* applications are made more frequently in both the Circuit and Central Criminal Court. In June 2018, Murphy J. withdrew a case from the jury in the Central Criminal Court on grounds of prejudice caused by delay. Consequently, there should be further case law from the Court of Appeal to clarify these matters over the coming years.

References

1. *PO'C v DPP* [2006] 3 I.R. 238, and especially the dictum of Denham J. at page 248, paragraph 23 thereof.
2. See: *PB v DPP* [2013] IEHC 401 (O'Malley J.) and in particular paragraphs 49 and 59 thereof; *JH v DPP* [2016] IEHC 509 (White J.) and in particular paragraph 33 thereof; and, *MS v DPP* [2015] IECA 309, (Hogan J.), and in particular paragraphs 25 and 49 thereof.
3. For a very useful summary of the principles applicable in complainant delay cases see *K v DPP* [2010] IEHC 23 (Charleton J.), and in particular paragraph 9 of his judgment.
4. See *McFarlane v DPP* (No. 2) [2008] 4 I.R. 117 and *Devoy v DPP* [2008] 4 I.R. 235.
5. [2016] IECA 157.
6. Ibid, paragraph 24 of the judgment.
7. Ibid, paragraphs 29-32 inclusive of the judgment.
8. [2018] IECA 138.
9. Ibid at paragraph 18 of the judgment.
10. Ibid at paragraph 24 of the judgment.
11. [2018] I.E.C.A. 277.
12. Ibid at paragraph 27 of the judgment.
13. Ibid at paragraph 51 of the judgment.
14. See footnote 4 above.
15. [2006] 3 I.R. 238,247, paragraph 21 of the judgment.
16. See footnote 4 above.
17. Op. Cit footnote 8 above.
18. Paragraph 14 of the judgment in *JH v DPP*.
19. Op. cit footnote 19 above.

Bittersweet cake

Aoife McMahon BL

Lee v Ashers Baking Co. Ltd. (the 'gay cake case') has given rise to much debate and anger, which in some instances has stemmed from a misunderstanding of what the UK Supreme Court actually decided. My first reaction was utter disappointment; however, on a close reading it appears that the court endeavours to reach a fair balance between competing rights and recalls the importance of freedom in a pluralistic and democratic society.

Mr Lee ordered a cake with the message "support gay marriage" from Ashers bakery. The McArthurs, owners of the bakery, initially took his order, but subsequently cancelled it, citing their religious beliefs, and gave him a refund. Mr Lee brought an action in damages against the McArthurs for discrimination. The district judge found in his favour and, on appeal, the Northern Ireland Court of Appeal held that there had been direct discrimination on grounds of sexual orientation and that it was not necessary to interpret the legislation in a different manner in order to take account of the bakery owners' beliefs.

The McArthurs appealed to the UK Supreme Court, which considered three issues: (i) did the McArthurs' action in refusing to make a cake with this message amount to unlawful discrimination on grounds of sexual orientation? (ii) did it amount to unlawful discrimination on grounds of political opinion? (iii) if the answer to either of these was yes, what was the impact on the McArthurs' rights to freedom of thought, conscience and religion, and freedom of expression?

On the facts of this case, the McArthurs had made cakes for Mr Lee in the past and would have supplied him with a cake without the message "support gay marriage". They would also have refused to supply a cake with that message to a heterosexual customer. As such, there was no direct discrimination against Mr Lee personally on the grounds of his sexual orientation, as they would have treated all customers in the same way.

Distinguishing the recent US Supreme Court 'Masterpiece Bakery case', the UK Supreme Court found that there was a clear distinction between refusing to produce a cake conveying a particular message, for any customer who wanted such a cake, and refusing to produce a cake for the particular customer who wanted it because of that customer's characteristics (a wedding cake for a gay marriage in that case).

The court went on to consider whether there was another form of discrimination: direct discrimination by way of association. This required a finding that the reason for refusing to supply the cake was that Mr Lee was likely to associate with the gay community of which the McArthurs disapproved. Again, the facts did not support such a finding. The evidence was that the McArthurs employed and served gay people and treated them in a non-discriminatory way. There was no evidence that the reason for refusing to supply the cake was that Mr Lee was thought to associate with gay people. The reason was their religious objection to gay marriage.

Lady Hale stressed that: "It is deeply humiliating, and an affront to human dignity, to deny someone a service because of that person's race, gender, disability, sexual orientation or any of the other protected personal characteristics. But that is not what happened in this case and it does the project of equal treatment no favours to seek to extend it beyond its proper scope".

Considering the political opinion ground, the context was of some relevance. A motion in support of enabling same sex couples to get married in Northern Ireland had been narrowly rejected by the Northern Ireland Assembly in April 2014. There was ongoing debate and strongly held views on both sides of this campaign. The court found that while there was again no less favourable treatment on this ground, there was a much closer association between the political opinions of the man and the message that he wished to promote, such that it could be argued that they were "indissociable". How then was the court to balance Mr Lee's right to non-discrimination against the McArthurs' rights to freedom of thought, conscience and religion, and freedom of expression?

The right to hold a religious belief encompasses the right not to hold such a belief. The right to freedom of expression comes with the right to refuse to express any particular views. The court recalled that these freedoms are at the core of a pluralistic, democratic society.

The court emphasised that the bakery could not have refused to provide a product to Mr Lee because he was a gay man or because he supported gay marriage. But that fact did not amount to a justification for something completely different – obliging them to supply a cake with a message with which they profoundly disagreed.

Considering for a moment the implications of having decided otherwise – this would have meant that in a potential future scenario, a publishing company, for example, run by individuals with strong views in favour of gay marriage, would be obliged to print leaflets with the message "stop gay marriage" on request. This judgment protects their right to refuse to do so.

Even given the considerably different context of a constitutionally protected right to gay marriage in the Republic of Ireland, it is hard to see how courts in this jurisdiction, with the same facts before them, could reach a different conclusion in terms of what is required by discrimination law and how the various rights involved should be balanced.

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Tax relief is available on 15-40% of your income up to €115,000, depending on your age.

URGENT: Contact your JLT Bar of Ireland Pension Team NOW on 01 636 2700 or dcoyne@jlt.ie to avail of this tax relief.

Director of Pensions, Donal Coyne, wrote to all members in October listing the pension clinics being held in various Law Library locations from October 30 to November 14 to give advice and facilitate payment.

*Where both the tax return and the payment of tax due is done through the Revenue On-Line Service (ROS), the deadline will be extended from October 31 to November 14 for a barrister to pay a pension contribution and claim income tax relief for 2017.

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