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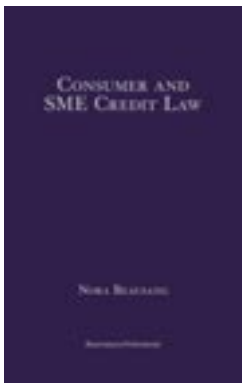

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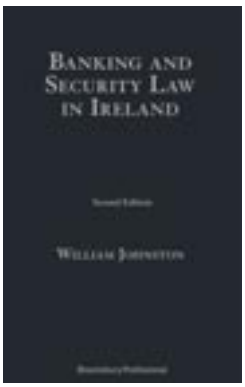

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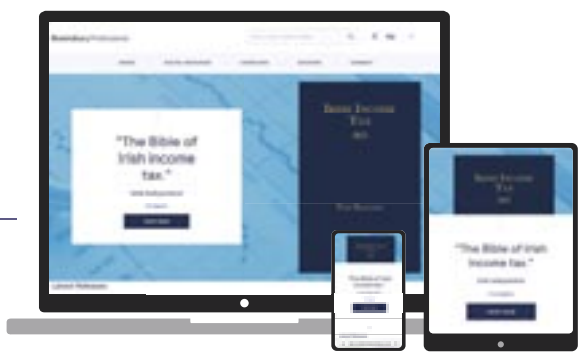

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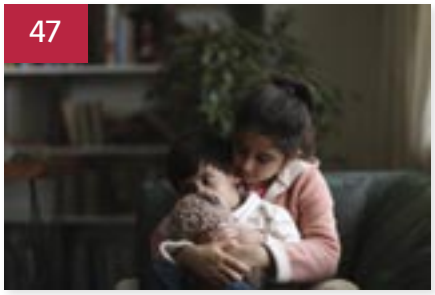
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Legal community responds to the war in Ukraine

The Bar of Ireland is working with colleagues locally and internationally to assist in the response to the Russian invasion of Ukraine.

Russia's unprovoked and unjustifiable military aggression against Ukraine has unfolded before our eyes in a disturbing and horrifying fashion. It has displaced millions of innocent people, and has caused the international community to rally and respond as a collective to assist the Ukrainian people as they flee their homeland in search of refuge, protection and safety.

The Irish Government decided on February 25, 2022, to immediately lift visa requirements between Ukraine and Ireland as an emergency measure to facilitate those Ukrainians seeking refuge here.

The Irish people in various communities and sectors have initiated their own mechanisms aimed at providing assistance. The Council of The Bar of Ireland has also undertaken a series of actions that continue to develop and evolve.

Following Russia's invasion of Ukraine, a joint statement was issued by the Four Bars' leadership in Ireland and across the UK:

"The Bar Council of England and Wales, the Bar of Northern Ireland, the Faculty of Advocates and The Bar of Ireland unequivocally condemn the invasion of Ukraine by Russia. Ukraine is a sovereign state entitled to self-determination. International law requires the Russian Federation to respect Ukraine's independence and sovereignty. This act of war is a gross violation of international law as set out in the UN Charter".

The Bar of Ireland also joined the condemnation by way of public statements made on behalf of the Council of Bars and Law Societies of Europe (CCBE). Further, in conjunction with our own Specialist Bar Association, the Immigration, Asylum and Citizenship Bar Association (IACBA), The Bar of Ireland has issued a call to immigration lawyers to participate in a panel to assist refugees who arrive in Ireland. Further information on that initiative is available on our website: https://www.lawlibrary.ie/immigrationassistance/. A series of viewpoints and CPDs were organised and delivered throughout March, which focused on various aspects of the crisis in Ukraine, including:

- publication of a viewpoint authored by members of the Human Rights Committee on bringing Russia's war criminals to justice at the International Criminal Court (ICC);
- publication of a viewpoint authored by a number of IACBA members in relation to the Temporary Protection Directive that provides minimum standards of temporary protection for those fleeing harm;
- publication of a viewpoint authored by a number of EU Bar Association members in relation to Ukraine's application to join the EU;
- publication of a viewpoint authored by a member of the Sports Law Bar Association on sporting bodies and boycotts, and the law of expelling countries from sport;
- publication of a viewpoint authored by a number of members of the IACBA on understanding the options available to refugees arriving from Ukraine in Ireland;
- in conjunction with the EU Bar Association, a public seminar on the legal ramifications of the invasion, as well as the issue of rule of law in the European Union; and,
- in conjunction with the IACBA, a webinar on the Temporary Protection Directive, international protection and related immigration issues arising from the current conflict in Ukraine.

We are working closely with our lawyer colleagues throughout Europe via the CCBE, which has also been proactive in ensuring a co-ordinated approach across the member states. A new CCBE webpage dedicated to relevant issues on Ukraine is gathering information and initiatives in reaction to the current situation from the CCBE and its members – https://www.ccbe.eu/actions/ukraine/. Some of the additional ideas being explored at CCBE level include:

- the creation of a database on remote working possibilities for lawyers from Ukraine and/or for lawyers who have left Ukraine;
- establishing a database on available accommodation for Ukrainian lawyers and their families in different countries; and,
- creating legal checkpoints to ensure practical advice for those in need.

Further discussion on these ideas is planned over the coming weeks. The CCBE is also monitoring a proposal at the European Commission DG GROW that is assessing the possibility of fast-tracking the recognition of qualifications and diplomas of Ukrainians, aimed at assisting EU businesses to find additional solutions to manpower shortages.

The Bar of Ireland also circulated important information to members on guidance issued by the Department of Finance on the most recent sanctions and measures imposed against Russia. Members are urged to keep up to date with information in relation to sanctions through the websites of the Central Bank of Ireland and the Department of Foreign Affairs.

The Council will continue to develop and advance ideas and assistance in support of the humanitarian effort to our Ukrainian friends.

Maura McNally SC
Senior Counsel, Barrister
– Member of the Inner Bar
Chair of the Council of
The Bar of Ireland

Protection and vindication

This edition looks at legislation that affects some of society's most vulnerable, and informs practitioners on what they need to know to vindicate their clients' rights.

Recent events in Ukraine and the mass exodus of so many of its citizens have brought the plight of refugees into sharp focus for neighbouring countries and for Europe as a whole. Those seeking protection and security often find themselves split up from family members in the fall-out of war. Emily Farrell SC examines family reunification for international protection beneficiaries and explains the different avenues open to those who have been granted international protection in Ireland.

Much-awaited and important elements of the Assisted Decision Making (Capacity) Act 2015 are expected to be commenced in June of this year. Aisling Mulligan BL explores the ramifications of the Act, and presents the history and background to the legislation. The statutory condition that must be satisfied prior to issuing legal proceedings against a charity is explored by Felix McEnroy SC. This article is essential reading for all practitioners instructed to draft proceedings involving a charitable organisation. Not only does our colleague explain the legislative requirements involved, he also sets out a draft precedent for practitioners.

The Government's review of the Defamation Act 2009 and the subsequent recommendations for change come under scrutiny in our Closing Argument. The proposal to remove juries from defamation trials could have a significant impact on outcomes and ultimately on the willingness of potential plaintiffs to initiate proceedings. The Minister for Justice states that the legislation must balance the right to the protection of a good name and the freedom to express and inform. Mark Harty SC ruminates on whether the proposed changes can really achieve this aim.

Helen Murray BL
Editor
The Bar Review

Inaugural 2022 In Plain Sight commission announced

The Bar of Ireland, along with The Honorable Society of King's Inns, are delighted to announce Emma Stroude as the 2022 In Plain Sight recipient. Emma has been commissioned to undertake a portrait of Frances Kyle BL and Averil Deverell BL, the first women to be called to the Irish Bar.

Emma was chosen following a selection process and in consultation with the Director of the Royal Hibernian Academy (RHA). Among her various exhibitions both here and abroad, Emma was the 2021 Winner of the Irish Arts Review Ireland-U.S. Council Portraiture Award.

Speaking at the announcement, Chair of the Council of The Bar of Ireland, Maura McNally SC, said: "This is a first of many commissions. In Plain Sight seeks to celebrate the achievements and enhance the visibility of women in the field of law, women who have demonstrated significant leadership, influence and contribution to legal practice and education. As the King's Inns is the centre for the formation and training of barristers, the need for a more representative and contemporary reflection of the profession has been identified so that those passing through have a fairer understanding of the potential of all".

Hugh Mohan SC, Chair, The Honorable Society of King's Inns, said: "This exciting visual arts initiative is a welcome collaboration and one that King's Inns is committed to building on. We are very proud of having played our role in admitting the first two women to The Bar of Ireland, and look forward to seeing their images on the walls of King's Inns".

Emma Stroude said: "I am truly grateful and honoured to have been awarded this opportunity to highlight the achievements of Frances Kyle and Averil Deverell. They blazed a trail for women against a backdrop of the struggle for women's rights and during a volatile period of Irish history. I hope that bringing a new focus to their lives and legacy will encourage the women of today interested in pursuing a career in law".

The final commission is due to be unveiled in July 2022.

In Plain Sight

The In Plain Sight bursary, from The Bar of Ireland, with the support of The Honorable Society of King's Inns, seeks to appoint an artist to research and deliver a fitting portrait of a prominent female barrister or member of the bench. This is intended to be a multi-annual initiative. A core value of this initiative is that the commissioned portraits are supported and championed by all our members, colleagues, collaborators, and stakeholders. As such, donations from our respective memberships have been sought.

The portrait, owned by The Bar of Ireland, will be provided on loan to The Honorable Society of King's Inns, as well as temporary loans to other institutions where appropriate, thus expanding the impact and prominence of our female role models.

For further information or to donate, please visit: https://www.lawlibrary.ie/inplainsight/.

Specialist Bar Association news

The Employment Bar Association (EBA) held a breakfast briefing on February 9. France Meehan SC presented on 'Illegality and the Contract of Employment'. The session was chaired by Alex White SC.

On February 16, Michael Judge BL gave a detailed **Construction Bar Association** (CBA) tech talk on 'Updates from the TCC – a year in review'. James Burke BL chaired the session.

The Young Bar Committee and the **Employment Bar Association** organised the first of a series of events called 'Building your Practice' on February 17. Chaired by Cathy Smith SC, Jason Murray BL and Emma Davey BL gave insights into practice and procedure at the Workplace Relations Commission.

Derek Shortall SC examined claims by the Department of Social Protection against the estates of deceased persons for alleged overpayment of pension or other State benefits during the lifetime of the deceased person, and the appeals process in relation thereto, at the **Probate Bar Association** breakfast briefing on February 22. Vinog Faughnan SC chaired the event.

The Immigration, Asylum and Citizenship Bar Association (IACBA) held its first hybrid event on February 24, with attendees both in person in the Gaffney Room and online. David Conlan Smyth SC chaired the event, with Prof. Tobias Lock from Maynooth University delivering a presentation on the EU's accession to the European Convention on Human Rights (ECHR), and Mr Justice Donald Binchy, Court of Appeal, speaking on the Citizenship Directive and the issue of dependency.

On March 3, the **EU Bar Association** (EUBA), Ireland for Law, and The Bar of Ireland hosted a seminar at the Embassy of Ireland in London, entitled 'The importance of the common law in the post-Brexit world'. Mrs Justice Maura McGowan DBE, High Court of England and Wales, and Master Treasurer, Middle Temple, moderated the event and had a very lively discussion with Mr Justice Gerard Hogan, Judge of the Supreme Court, and Former Advocate General at the Court of Justice of the European Union (CJEU). The event was supported by the London Irish Lawyers Association.

Stephen Dodd SC chaired the **Planning, Environment and Local Government Bar Association** (PELGBA) webinar on March 7, where Suzanne Murray SC presented on 'Recent Developments in Section 5 References'.

On March 9, Gavin Wilson, Civil Engineer with Belfast Harbour Commissioners and winner of the CBA's Sanfey Essay Competition, gave an impressive tech talk on his paper 'Will Judicial Review spoil the Adjudication Party?'. James Burke BL chaired this session.

Eoghan O'Sullivan BL provided an update on the recent decision of the Court of Appeal in *Law Society of Ireland v Katherine Doocey* 2022 IECA 2 at the **Professional, Regulatory and Disciplinary Bar Association** (PRDBA) breakfast briefing on March 10. The event was chaired by Frank Beatty SC.

Ar 12 Márta, reáchtáil **Cumann Barra na Gaeilge** forbairt ghairmiúil leanúnach san Áras Pobail Ráth Chairn, Ráth Chairn, Gaeltacht na Mí. Cainteoirí agus topaicí san áireamh: Micheál Ó Scannail SC ar 'Suaitheadh Néarógach & An Chúirt Achomhairc'; Aoife McNickle BL ar 'Ceachtanna Eitice'; Cormac Breatnach ar 'Costais Dlí'; Siobhán Ní Chúlacháin BL ar 'Treoirlínte maidir le Gearradh Pianbhreithe'; Martin Canny BL ar 'Reacht na dTréimhsí'; agus Clíona Kimber SC ar 'Oibrithe – Ag Obair ón mBaile'.

David Conlan Smyth SC chaired the EUBA webinar on March 15. In light of recent developments involving the Polish Constitutional Court and the CJEU, where a new judgment from the CJEU was delivered in February 2022, Dean Mikołaj Pietrzak discussed the recent judgment, its impact on Poland and the rule of law, and judicial independence, and also briefly discussed the ECHR rulings, and how these affect extradition and other mutual recognition-based instruments. Asst. Prof. David Fennelly BL spoke on 'War Crimes: International Courts and the Invasion of Ukraine', while Anna Bazarchina BL, originally from Ukraine, gave a personal insight into this harrowing situation.

On March 24, the IACBA held a very important and topical event, which focused on the Ukraine crisis, entitled 'The Temporary Protection Directive, International Protection, and related immigration issues arising from the current conflict in Ukraine'.

Speakers and topics included: Tim O'Connor BL on 'International Protection and War Zones: The Background'; Cillian Bracken BL on 'A Primer on the Temporary Protection Directive'; Denise Brett SC on 'Temporary Protection or International Protection – which to choose and why'; Anna Bazarchina BL on 'Personal insights and updates on the current situation'; and, Oonagh Buckley, Deputy Secretary General, Department of Justice, on 'An update from the Department of Justice'.

Health and safety event for lawyers

The Health and Safety Lawyers' Association of Ireland will hold a virtual event on Thursday, April 7, at 8.30am.

The event will take the form of a question and answer session with Mark Cullen, Assistant CEO of the Health and Safety Authority and former senior inspector, sharing his insights on Health and Safety Authority inspections.

The event will be chaired by Mr Justice Dara Hayes. This is an unmissable event for all those with an interest in health and safety law in Ireland.

Register for this event at: https://williamfry.zoom.us/webinar/register/WN_pQG0fIJgQo6NsBzDmDb2yA.

International Women's Day

Female members of the Bar of Ireland walked in the footsteps of Frances Kyle BL and Averil Deverell BL on International Women's Day.

On March 8, The Bar of Ireland celebrated International Women's Day with several activities throughout the day. The day began with a walk from King's Inns to The Four Courts. Several female members walked the path of Averil Deverell BL and many other luminary practitioners in celebration of the strides they took to lay the foundations for female barristers today. After the walk, a coffee morning was held at the Distillery Building, where female members could meet and network. The day concluded with a thought-provoking event with Prof. Louise Richardson, Vice-Chancellor of the University of Oxford, in conversation with Emer Woodfull BL.

Justice Week 2022

Back row (from left): Melissa Ferris, University College Cork; Anne Spillane, Trinity College Dublin; Muhammad Awan, Technological University Dublin; and, Hira Khan, Maynooth University. Front row (from left): Adam Connolly, NUI Galway; Katherine Ahern, University of Limerick; Emma May, Dublin City University; and, Emer Nolan, University College Dublin. Standing (from left): Dr Tom Clonan; Ms Justice Nuala Butler; Maura McNally SC, Chair of the Council of The Bar of Ireland; and, Mark de Blacam SC.

Justice Week is an annual joint awareness campaign of the legal professions across the four jurisdictions (Scotland, Northern Ireland, Ireland, and England and Wales), which aims to promote an understanding and awareness of access to justice and the rule of law, particularly among young people.

The theme of #JusticeWeek2022 was 'Law & Technology'. The main event of the week was the Intervarsity Debate, where students from eight of Ireland's main university law schools debated the motion: 'This House believes that international human rights law and international humanitarian law provide adequate protections in respect of the use of autonomous weapons and systems in warfare'.

For the proposition were: Anne Spillane, Trinity College Dublin; Muhammad Awan, Technological University Dublin; Hira Khan, Maynooth University; and, Melissa Ferris, University College Cork. Speaking for the opposition were: Adam Connolly, NUI Galway; Emer Nolan, University College Dublin; Emma May, Dublin City University; and, Katherine Ahern, University of Limerick.

On the day, the opposition were the victors, with the judging panel commending both teams on their compelling arguments and hard work. Our esteemed panel of judges included: Ms Justice Nuala Butler; Maura McNally SC, Chair of the Council of The Bar of Ireland; Mark de Blacam SC, Member of the Inner Bar; and, Dr Tom Clonan, columnist and security analyst.

In addition to the debate, three podcasts were released:

- Darren Lehane SC speaks with Zeldine Niamh O'Brian BL, a specialist in the law of outer space, and Edmund Sweetman BL, President of the Irish Maritime Law Association, to get an understanding of the current legal landscape of sea and space. Listen at: https://soundcloud.com/user-878781524/seaandspace.
- How does artificial intelligence intersect with justice? From how AI can be used in the administration of justice, to the laws governing the use of AI in the private sector, barrister Aoife McNickle BL explores these topics with Gerard Groarke BL and Michael O'Flaherty, Director of the EU Agency for Fundamental Rights. Listen at: https://soundcloud.com/user-878781524/criminal-justice-and-ai-justiceweek2022.
- Michael O'Doherty BL speaks to Olga Cronin and Dr Kris Shrishak from the Irish Council for Civil Liberties on recent developments in online advertising cookie consent notices and artificial intelligence legislation. Listen at: https://soundcloud.com/user-878781524/bigdata.

The winning team (from left): Emma May, Dublin City University; Adam Connolly, NUI Galway; Emer Nolan, University College Dublin; and, Katherine Ahern, University of Limerick.

Prof. Conor O'Mahony

Speaking for children

The Bar Review spoke to Prof. Conor O'Mahony, Special Rapporteur on Child Protection, about the significant and challenging issues he deals with in his role, and the frustrating pace of change.

Ann-Marie Hardiman
Managing Editor, Think Media Ltd.

Prof. Conor O'Mahony came to child law by way of constitutional law. Having graduated from University College Cork (UCC), he completed an LLM on case law concerning special educational needs. This work led to a PhD at the University of Aberystwyth in Wales, before coming back to UCC, where he is Deputy Dean of the School of Law and Vice-Dean for Student Welfare and Student Affairs, as well as Director of the Child Law Clinic. With his background and interests, the role of Special Rapporteur on Child Protection might seem like a natural fit, but Conor only found out that a successor to Prof. Geoffrey Shannon was being sought when he was asked to be on the selection panel. He decided that he would rather be on the other side of the interview table, and applied for the role. He was appointed in 2019, and his three-year term will come to an end later this year.

Independent expertise

Conor explains that the Special Rapporteur is an independent expert who reports to the Government on matters affecting child protection law and policy. The role is quite broadly defined as anything that impacts on the safety, welfare and well-being of children: "That strays into lots of areas, from preventing children from experiencing harm, to responding to that harm when it does arise. The role involves producing an annual report, which provides a snapshot of the state of play in child protection law and policy in Ireland, and looks at developments of interest both domestically and internationally".

The Special Rapporteur can also be tasked with producing thematic reports on specific issues, and Conor has produced two during his term: a report on proposed reforms to surrogacy law, completed in December 2020; and, the 'Proposal for a State Response to Illegal Birth Registrations in Ireland', which was published on March 14 last. The role also involves participating in consultations on ongoing matters of law or policy reform. Conor has used the opportunity to initiate projects, and has included chapters in his Annual Reports on issues such as section three of the Child Care Act and investigations into child sexual abuse, the voluntary care system, guardian *ad litem* legislation, and the Final Report of the Commission of Investigation into Mother and Baby Homes. It's a part-time post with a significant workload, and Conor is grateful for the support of a part-time postdoctoral researcher, Dr Elaine O'Callaghan.

The Special Rapporteur can and does make a range of recommendations arising from national and international evidence and best practice. However, whether Government will choose to accept, and indeed act on, these recommendations is another matter, and accepting the often glacial pace of reform is part of the job: "During the pandemic, we were always hearing that catchphrase about how 'NPHET advises and Government decides'. My job is to lay out evidence-based recommendations for what I feel is the best way forward, and so, by its nature, you wouldn't expect everything to be taken on board. Some recommendations I've made have been adopted and some have not, but an awful lot of stuff is still hanging in the air, undecided. One of the main things I've learned in the role is just how slowly things move".

While this is understandable, it's also frustrating: "The work of Government is

The pandemic and children

In his 2021 Annual Report, Conor addresses what he calls the "extremely negative" impact of the Covid-19 pandemic on the lives of children in Ireland. While he feels that it's impossible to fully grasp that impact as yet, he says we need to use the evidence base built up during the last two years to put systems in place that can deal with those impacts, foreseen and unforeseen: "What we do have now, which we wouldn't have had in the first half of 2020, is a large evidence base from Ireland and around the world about the ways in which Covid has impacted on young people. That allows us to make more informed decisions. What we can do is try and predict demand on services. CAMHS is already under pressure, and we have enough evidence to confidently say it will be under more pressure in years to come. We need to get ahead of that. But even with our best efforts, there will probably still be some surprises down the line".

slow, and sometimes that's for good reasons, but I can't shake the feeling that it could move more quickly than it does, particularly on some of the issues affecting children, where a year or two might not be very long in Government, but it's a very long time in the life of a child".

The response to his most recent report into illegal birth registrations, however, perhaps points to a more constructive approach: "The report was published alongside a detailed response by the Government where they broke down the recommendations and said, for each recommendation: this is what we're going to do. You could see that clear sense of the impact – how much of this was taken on board and how much of it wasn't. Whether people like or don't like the particular set of proposals that were announced, I think the format of accompanying the report with a specific action plan was a useful way of making it more concrete".

The challenge of prioritising

The range of issues that come within the Special Rapporteur's remit is enormous, and while he emphasises that each issue is important ("There's nothing you can afford to do badly in child protection"), he points to some areas that that he would particularly like to see urgent action on: "One would be CAMHS, Child and Adolescent Mental Health Services, and not just the issue involving Kerry that broke in January. The story in Kerry was symptomatic of a broader issue that's been bubbling under the surface for a long time around child and adolescent mental health services, around under-resourcing, very restrictive criteria for who qualifies for a service, lengthy waiting lists. When you read, for example, the National Review Panel reports, which are conducted when you have children in care who die, or where there are serious incidents in care, the lack of availability of adequate mental health services for those very troubled young people is a recurring theme. Obviously then, that ripples through to the less extreme cases. For me, that's definitely one issue that really needs to be looked at".

Child homelessness is another: "In my 2020 report, I was determined to make

The work of Government is slow, and sometimes that's for good reasons, but I can't shake the feeling that it could move more quickly than it does.

a strong statement about that. In 2021, it was nice to be able to report that there had been a significant improvement, even though there was a long way to go. Unfortunately, in the time since then, things have started to regress again. We have a longstanding problem where far too many children are experiencing homelessness, and that impacts on all sorts of aspects of children's lives".

He also mentions a third issue, which holds particular interest for him: "I think we need to look pretty carefully at voluntary care. Between our work in UCC and Carol Coulter's work with the Childcare Law Reporting Project, we now know a lot about the court end of things. We know a lot less about voluntary care, but it actually accounts for a larger number of children coming into care than court orders. The research shows that the children in care under voluntary care agreements receive less attention than the children in care under court orders. We made a wide range of recommendations on how we could try to close that gap and ensure that all children in care have equity of care, rather than a system that depends on which pathway they came into care under".

This opens a wider discussion about how the political process, and public opinion, can play into which issues are dealt with, and which are neglected. Conor agrees that voluntary care is not a 'media friendly' topic in the way that, for example, child homelessness might be. It's also an example of a problem that exists right across the child protection arena: lack of resources and lack of focus on prevention and early intervention: "No matter what you look at in child protection, everything's under pressure. Child protection is not a vote getter. When push comes to shove, if a town needs a ring road, or if it needs more court time in its district court for child and family cases, the ring road is always going to get there first. Ireland is not unique in that, but it means that the whole system is always in firefighting mode. And the evidence would say that if we can try and get out ahead of an issue before it becomes too serious, we'll have better outcomes for everyone. But because we don't ever seem to get to a point where services are resourced to do that, they remain in firefighting mode, mostly addressing the most serious cases and then the other cases, of course, become serious as they wait for help".

That lack of a long-term political view is a real challenge, but Conor feels that we have one very important weapon in our arsenal against it: "There's real scope for that more long-term perspective to reap benefits, but the nature of annualised budgeting in Government and of five-year electoral cycles often works against that. That's why I come back to where I started in my career, that issue of constitutional rights and the special education litigation. I've always been a big believer in the value of the Constitution in that respect, because if you set down the core principles in the Constitution around what

people can expect from the State, you limit the extent to which they can be kicked down the road by the political system. Special education was something where there was no investment whatsoever until those cases were litigated in the late 1990s. All of a sudden, it became a constitutional right and not just a matter of political discretion, and investment followed. That really gave me that sense that if you want to get past that short-term perspective, good strategic litigation using constitutional rights can have a really important impact".

Family court

One area that has been of great interest to the legal profession in particular is the plan to overhaul the family court system in Ireland, via the Family Courts Bill, including the provision of a new family court building in Hammond Lane in Dublin. This is an issue on which The Bar of Ireland has campaigned strongly, along with other stakeholders. Conor joins the voices welcoming these developments: "The family court project is really welcome. It could have a significant impact on the families that go through the court system, but also for professionals, giving them a much better working environment. You often hear lawyers who work in child and family law talking about it being a very challenging space and hard to sustain over a long period of time. If you can make a better environment for everyone in the system, that's going to benefit all of those actors".

However, as he states in his most recent Annual Report, it takes more than a building to effect change: "Just because the Act says something doesn't mean that's how it's going to work. You need to do what is in some ways the harder thing to get done politically, the less visible, messier and more difficult work of implementation. What does that new building look like? Is it really family friendly? Who do we put in there? How do we train those people? How do we bring different types of services together so that you're not dragging people around five different places to get everything they need? There's lots of evidence from around the world of how this can be done, and it's great to see that there's a big effort being made here to really try to absorb these lessons. The other challenge you have is that you can have a gold standard facility in Hammond Lane, but what about Letterkenny or Tralee? That balance between accessibility versus the quality of the service and the facility is a very tricky one, and there will need to be a lot of thought put into how best to manage that".

Accentuating the positives

Conor does point out that much good work has also been done in recent years: "I try to make a point of flagging some of the good practice because there are an awful lot of people working in the system, working very hard and very good people, and they get enough criticism. We're in a very different space now to where we were at the turn of the Millennium. We've established an Ombudsman for Children. We've established a full cabinet Minister for Children, and we've had HIQA come on to the scene. The Special Rapporteur for Children obviously has been added to the mix, and now you have things in the pipeline like the family courts project. One of the best things that's happening in the system at the moment is the Barnahus, Onehouse project, which is the one-stop shop for children who experience sexual abuse. Rather than being dragged around to police interview, medical examination, forensic examination, you put all of that in one place, and minimise the number of times that they have to engage with a service and the traumatisation associated with that. That's internationally recognised as best practice. We've now got a pilot up and running in Galway, and we're introducing new ones in Dublin and Cork".

Climb every mountain

Conor has two children, a son aged eight and a daughter who is five, so there's not much time for outside activities: "I still self-identify as a mountain climber, but since the children arrived, I have done very little of that. I do like to hill walk and hike. I'm also a big sports fan, Cork hurling and Munster Rugby in particular. So climbing mountains and going to matches, I guess, are my two big interests".

With so many of his recommendations still "in the pipeline" as he comes towards the end of his tenure, it can be hard to think in terms of concrete successes, but Conor is hopeful that change will come, even if this doesn't happen until after he has moved on: "There were some recommendations in the 2020 Annual Report on section three and the investigation of child sexual abuse, and Government has indicated that the recommendations are the direction they're going to go; if that were to work out, that's something I would be very proud of".

The report on illegal birth registrations, however, shows that while Government action is important, there are other measures of success: "That was a really challenging piece of work. You had an issue, which, short of having a time machine, you could never fully fix, and dealing with people who were very understandably hurt and traumatised by their experience of that. I felt a real weight of responsibility and was very anxious about how it would be received. The fact that that it has now come out and has received a fairly good reception from the people who were directly affected by it, I am very happy about that. I'm happy to think that having been given that responsibility to do that work for those people, they were content with how I dealt with it and I didn't let them down".

He admits to sometimes feeling overwhelmed by the challenging nature of his work: "I'd be lying if I said that it doesn't weigh on me sometimes. At the same time, I'm not the one directly experiencing any of these issues. Neither am I a frontline practitioner. It has been a challenging job, but a really good experience".

He gets angry too, as we all do when reading about serious abuse, but he's quick to point out that the majority of cases require a more nuanced and compassionate response: "The much bigger issue in child protection is neglect, and neglect cases very often come from a place of people who are really struggling and can't cope, people with mental health issues, cognitive issues, addiction issues, living in poverty, with no family support. You want to just try and give everybody a fighting chance. I think it was Desmond Tutu who coined the famous phrase about rather than pulling all these people out of the river, maybe we should have a look upstream and see why are they falling in".

The days of 'best interests' are over

Key points for practitioners on the commencement of the Assisted Decision-Making (Capacity) Act 2015.

Aisling Mulligan BL

Introduction

The Assisted Decision-Making (Capacity) Act 2015 (the Act) has been a long time in the making, having taken the scenic route in becoming the legislation it is today. Despite being enacted in 2016, the substantive provisions of the Act are due to be commenced in June 2022. The first iteration came in 1996, when a Government white paper proposed legislation to give "powers to intervene to protect mentally disordered persons who were abused, exploited or neglected or were at risk of abuse or exploitation and to make provision for their care".[1]

Part of the proposals included Orders for adults akin to Orders found under the Childcare Act 1991. These Adult Care Orders would have allowed any relevant interested party to apply for such an Order. There was no threshold test proposed, nor was there any requirement to engage with the subject adult. It is worth remembering the origins of this Act, as it may serve to explain why the final legislation, which spans more than 145 sections, is so person centred, detailed and defensive in its protections for the vulnerable adult who needs support to vindicate their autonomous rights. The legislation is expansive and detailed to provide as much clarity as possible to its reader. It is designed to be user friendly to support accessibility and avoid uncertainty.

This article takes practitioners on a whistle-stop tour of most of the relevant provisions of supported decision-making and substituted decision-making in the Act.

The lack of legislative guidance on decision-making for incapacitated and vulnerable people has often forced courts to determine individual cases without a clear framework for determining their approach.

The expansive nature of the Act

The Act creates an entirely new public service, in the form of the Decision Support Service (DSS), which operates alongside the Mental Health Commission to support the successful implementation of the Act and to act as a regulator of certain parts of the Act. Fourteen draft codes of practice have also been published and have undergone public consultation. These codes have not yet been finalised, but practitioners should be aware that they are likely to inform any advice on the workings of the Act. There is also a code for legal advisors,[2] which all practitioners should acquaint themselves with once it is available. In addition, the General Scheme of the Assisted Decision-Making (Capacity) (Amendment) Bill 2021 (the General Scheme) also proposed almost 90 amendments to the Act.[3] While many of these amendments are procedural, there are some substantive changes proposed. Practitioners should be aware that the General Scheme has not been enacted, and there will likely be a number of amendments prior to commencement in June 2022. The Act proposes a number of changes to powers of attorney, but the General Scheme proposes to revise some of these provisions. Similarly, there was no proposal to amend the provisions for Advance Healthcare Directives since the repeal of the eighth amendment. This article has not commented on the provisions for Advance Healthcare Directives, powers of attorney, or wardship due to these outstanding issues and the limits of this article.

The guiding principles

The lack of legislative guidance on decision-making for incapacitated and vulnerable people has often forced courts to determine individual cases without a clear framework for determining their approach. In 2006, the Law Reform Commission, commenting on the difficulty with this approach, recommended composite guiding principles as the best approach to ensure continuity and clarity of decision-making.[4] The Act encapsulated that view, with guiding principles that are composite in nature. Section 8 confirms that the capacity of a person is to be presumed and, unless all practical steps have been taken to establish otherwise, a person shall not be considered unable to make decisions.[5] The Act expressly protects persons from being considered unable to make a decision merely because the decision made appears to be a bad decision. There is a presumption that there will be no intervention with a person, unless necessary. Perhaps most importantly, there shall be due regard to the person's right to dignity, bodily integrity, privacy, autonomy, and control over his or her financial affairs and property. Where there is to be intervention in an individual's decision-making, that intervention must take account of the urgency of the matter and should be as limited in duration as is practicable. The intervener must permit, encourage, facilitate, and promote the person's ability to participate in that intervention. If the past will and preferences of the person are known, effect should be given to these insofar as is practicable. Any intervener must consider the values and beliefs of the person where those views are ascertainable. There is a presumption in favour of considering the views of any party named by the person unless inappropriate. The views of any party who is engaged in caring for the person can be considered. There is an obligation to act at all times in good faith and for the benefit of the person. Regard shall be had to the likelihood of recovery and the urgency of the intervention prior to the recovery in determining the necessity of any intervention. Practitioners should consider each individual aspect of the guiding principles if/when advising on whether intervention is necessary. The standard of proof to interfere with an individual's decision-making authority is very high and any intervention will need to be well documented.

Decision-making assistants

A person, known under the Act as the Appointer, may enter a "decision-making assistance agreement" for the purposes of providing for their personal welfare, property, and affairs.[6] Decision-making agreements (DMAs) are the most informal mechanisms of supporting vulnerable adults who, with help, will be able to come to their own decisions. This agreement can be entered into while a person has capacity and allows for the support of one or more persons, referred to as the decision-making assistant(s) (the assistant(s)), to enter into such an agreement. Any decisions made with the support of the assistant are deemed to be the decision of the Appointer and not those of the assistant. The purpose of this section of the Act is to promote the relevant person's autonomy, through support, for as long as possible. The exact parameters of these agreements remain to be seen as they are to be subject to regulation by the Minister. Decisions relating to personal welfare have been defined as including: decisions relating to accommodation; participation in education, training, and social activities; and, decisions relating to the provision of social services, healthcare and other matters relating to a person's well-being.[7]

What is the assistant's role?

The role of the assistant is to support and advise the Appointer in relation to a decision. The assistant shall ascertain the will and preferences of the Appointer on matters that are subject to the DMA, so that they may assist the Appointer in communicating those preferences. The assistant must support the Appointer in making and expressing relevant decisions, as well as endeavouring to ensure that the Appointer's decisions are implemented. The purpose of DMAs being enshrined in statute is to support, from a legislative footing, what often happens in practice. The Act also has several built-in safeguards to limit, insofar as is possible, the possibility that those who may have more

nefarious intentions are deemed ineligible to become assistants. These include, but are not limited to, where the proposed assistant has been convicted of an offence against the Appointer, been the subject of a barring order, has been bankrupt or subject to an insolvency agreement, and where the proposed assistant is the provider of a designated centre/mental health facility where the Appointer resides or intends to reside. DMAs are likely to be common among the elderly as they are informal and give effect to a recognised practice of relational support in multiple settings. Practitioners in family and criminal law may find these particularly useful.

Co-decision-making agreements

If appointing an assistant were to be described as the starting point in supporting the vulnerable person, then co-decision-making might be the graduated form of support. A person (the Appointer) may appoint a person to enter into a co-decision-making agreement (CDMA) with them, whereby that person becomes a co-decision-maker (CDM) with the Appointer.[8] Decisions that form part of the CDMA are made jointly with the Appointer and the CDM, and reasonable efforts must be made to ensure that the decision is implemented. In acting as a CDM, one must ascertain the will and preferences of the Appointer on matters that are the subject of the CDMA, advise the Appointer, assist the Appointer in obtaining information, and discuss with the Appointer the known alternatives to and/or likely outcomes of a relevant decision. The CDMA has significantly greater formality, which is reflective of the more active role of responsibility that a CDM will have.

What a co-decision-making agreement looks like

While an assistant will support the Appointer, the CDM has a series of obligations for the implementation of the CDMA. The persons deemed suitable for entering a CDMA are restricted to that of a relative or a person where there is a "sufficient relationship of trust" between the Appointer and the CDM. For there to be an agreement, there are several requirements.The agreement must:

- be in writing;
- be signed;
- be witnessed;
- include the contact details of the CDM; and,
- include only one CDM per agreement.

As with the appointment of the assistant, exclusionary criteria for the appointment of CDMs are applied to limit parties where a potential conflict of interest might arise. The role of the CDM does not usurp the role of the Appointer, and they must defer to the decision-making role of the Appointer, unless that acquiescence would reasonably, foreseeably result in serious harm to the Appointer. A registered medical practitioner must certify that the Appointer has the capacity to enter into a CDMA, and that the Appointer requires assistance in exercising his or her

If appointing an assistant were to be described as the starting point in supporting the vulnerable person, then co-decision-making might be the graduated form of support.

decision-making in the context of the CDMA. For the agreement to be enforceable, it must be registered with the DSS. Both the Appointer and the CDM must jointly give notice of the CDMA to the Appointer's spouse, cohabitant, children, and any other person who has made an agreement with the Appointer under the Act. Any objections can be raised with the Director of the DSS, appointed by the Mental Health Commission pursuant to Section 94 of the 2015 Act. The Director then has the power to review the objection and, if there is a concern that the agreement should not be registered, then an application may be brought to court for a determination as to whether the agreement should be registered. Registration also requires a statement that the Appointer and CDM understand the implications of entering a CDMA.

The role of the co-decision-maker

The CDM must agree to adhere to and act in accordance with the guiding principles. The CDM also has obligations to prepare reports to the Director regarding the performance of their functions pursuant to the agreement. The CDM must state that they understand that they are aware of their obligation to submit a report. The Act requires that reports be submitted in intervals at a maximum of 12 months. Each report submitted must be approved by the Appointer and must include details of all financial transactions that took place over the interval period. If a report is not completed, the Director shall notify the Appointer and the CDM of that failure, and allow for a report to be submitted. Failure to comply with a notification from the Director may result in the Director bringing an application to court to determine whether the CDM should be allowed to continue in their role. The CDM must also make a statement outlining why the less intrusive mechanism of a DMA was not chosen in all the circumstances.

The role of the DSS in co-decision-making agreements

An additional safeguard put in place by the legislation is the complaints procedure. Any person can make a complaint in writing to the Director claiming that the CDM is not suitable, including:

- that the past, present or intended actions of a CDM fall outside the scope of the CDMA;
- that they are not acting in accordance with the Appointer's will and

preferences;
- that the Appointer did not have capacity at the time of entering the agreement;
- that there is or was a fraud, coercion, undue pressure, or that the Appointer was induced into entering the agreement; and,
- that the Appointer no longer has capacity to make the decisions relevant to the CDMA.

The Director, upon receipt of the complaint, becomes statutorily obliged to investigate the complaint and, where the complaint is found to be well founded by the Director, make an application to the court to make a determination. If the Director is of the view that the complaint is not well founded, the complainant must be notified, and reasons must be given. The court may, if satisfied that it is appropriate to do so, set aside a CDM.

Decisions by courts and court-appointed representatives

The Act gives the court powers to make orders and appoint decision-making representatives (DMRs).[9] Any person may make an application to court who has a bona fide interest in the welfare of a person. The application must seek a declaration that the person lacks capacity and identify what intervention is proposed, if such a finding is made. The Act allows for any relevant person who has a bona fide interest in the welfare of a person to make an application to the court, but it prioritises family members or those who are already involved in the person's care process in seeking directions from a court. If you do not fall within this category of people, then you must seek the leave of the court to make your application.

Declarations from the court

Subject to the court being satisfied with the applicant's standing to make an application, the court may then make a declaration as to whether the relevant person lacks capacity. Before the court makes that declaration, the court must consider whether that person would have capacity if they had the assistance of a CDM. If the court is satisfied that there is an alternative mechanism for decision support, the court can appoint a suitable person to be a DMR for the incapacitated person for the purposes of making the decision on behalf of the relevant person.

The role of the decision-making representative

Any decision can pertain to the incapacitated person's personal welfare and/or property and affairs. The DMR shall have regard to the terms of any advanced healthcare directive and/or enduring power of attorney, and ensure that no actions are taken that are inconsistent with either the directive or the power of attorney. In appointing a DMR, the court should have regard to:

- the known will and preferences of the person;
- the desirability of preserving existing relationships within the family;[10]
- the relationships between the proposed representative and the person;
- any conflict of interest; and,
- the complexity of the task.

If no suitable person can be identified, then a person may be appointed from the panel maintained by the DSS. The court has the power to set the parameters of the appointment, such as limiting the period for which the order has effect.

Conclusion

Decision-making for vulnerable adults permeates most areas of practice. The absence of a clear legislative framework has been the source of criticism too extensive to traverse within the confines of this article. The Act provides a clear mechanism to ensure consistent decision-making across the State. Where issues of dispute and uncertainty arise, the courts are available to provide a clear mechanism to determine matters. Legal aid provision will also support persons obtaining suitable legal advice and support where necessary, and it will likely be necessary. Practitioners should keep the will and preference of the person to whom the decision pertains at the centre of their advice to ensure compliance with the Act. The days of 'best interests' are over, and the Act places significant obstacles in the way of that approach being maintained within the new systems. It is inevitable that there will be disputes between interested parties about a vulnerable person's will and preference, and practitioners will be faced with the difficult task of advising clients on the issues in their case. If in doubt, consider the proofs you have of a person's will and preference, and focus on the direct accounts of the relevant person where possible.

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5. Assisted Decision Making (Capacity) Act 2015, section 8.
6. Assisted Decision Making (Capacity) Act 2015, part 3 (see Sections 9-15 inclusive). Practitioners should note that the General Scheme has made proposals for informal dispute resolution through the DSS.
7. Assisted Decision Making (Capacity) Act 2015, section 2.
8. See Part 4, and Sections 16-34, of the Assisted Decision-Making Capacity Act 2015.
9. See part 5 (Sections 37 to 51) of the Assisted Decision Making (Capacity) Act 2015.
10. Practitioners may wish to review the recent judgment of Hyland J., who considered the appointment of committees in wardship in *Re Mr M.* [2022] IEHC 21.

LEGAL UPDATE

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Competition (amendment) bill 2022 – Bill 12/2022

Consumer credit (amendment) bill 2022 – Bill 27/2022

Criminal law (human trafficking) (amendment) bill 2022 – Bill 11/2022 [pmb] – Deputy Patrick Costello

Education (inspection of individual education plans for children with special needs) bill 2022 – Bill 8/2022 [pmb] – Deputy Pauline Tully, Deputy Donnchadh Ó Laoghaire and Deputy Johnny Guirke

Electricity costs (domestic electricity accounts) emergency measures bill 2022 – Bill 10/2022

European arrest warrant (amendment) bill 2022 – Bill 30/2022

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Family reunification for international protection beneficiaries

The importance of family reunification for those who have fled persecution is recognised by Irish and international law.

Emily Farrell SC

The importance of family reunification has been recognised by the European Court of Human Rights in *Tanda-Muzinga v France* (App. No. 2260/10, July 10, 2014). The Court stated:

"75. The Court reiterates that family unity is an essential right of refugees and that family reunion is an essential element in enabling persons who have fled persecution to resume a normal life …. obtaining such international protection constitutes evidence of the vulnerability of the parties concerned …. it notes that there exists a consensus at international and European level on the need for refugees to benefit from a family reunification procedure that is more favourable than that foreseen for other aliens, as evidenced by the remit and the activities of the UNHCR and the standards set out in Directive 2003/86 EC of the European Union ….."

In *A, S and S and I v Minister for Justice* [2020] IESC 70, the Supreme Court held that this passage "neatly encapsulates the importance of allowing those who have fled persecution to resume normal life with family members" and that "the legislature in this jurisdiction has sought to give effect to that consensus by means of the provisions of s. 56 of the Act of 2015".[1] In *Hamza v Minister for Justice, Equality and Law Reform* [2010] IEHC 427, Cooke J. held that it was "reasonable to assume that s. 18[2] has been incorporated into the Act in the interests of facilitating the reception of refugees and ensuring their personal well-being while in the State".[3]

The Minister for Justice also recognises the importance of family reunification for foreign nationals. In the Policy Document on Non-EEA Family Reunification, it is stated that "family reunification contributes towards the integration of foreign nationals in the State".[4]

The importance of family reunification is also recognised by the EU, although it is not a right recognised by the Charter of Fundamental Rights of the EU. A right to family reunification for protection beneficiaries is provided for by Article 23 of the Asylum Qualification Directive (2004/83/EC). Ireland has not opted in to the Family Reunification Directive (2003/86/EC), which applies to all third country nationals, not only protection beneficiaries. Recital 4 of that Directive provides:

"Family reunification is a necessary way of making family life possible. It helps to create sociocultural stability facilitating the integration of third country nationals in the member state, which also serves to promote economic and social cohesion, a fundamental Community objective stated in the Treaty".

The High Court has confirmed that an application for family reunification is not governed by EU Law (*VB v Minister for Justice and Equality* [2019] IEHC 55 and Hamza). In *V.B.*, Keane J. also noted that it does not arise under the Geneva Convention. Neither the Geneva Convention nor the European Convention on Human Rights (ECHR) include a right to family reunification of refugees. As Humphreys J. held in *I.I. (Nigeria) v Minister* [2019] IEHC 729,[5] which was endorsed by Dunne J. on appeal:

"for the purposes of the Geneva Convention, family reunification is encouraged by interested agencies but is not a legal obligation. It is hard to see how it can be said to be a matter of fundamental human rights such that it must be viewed as an implied constitutional right. In the absence of a substantive constitutional entitlement to family reunification, the Act is not a breach of Article 40.3 or 41".[6]

The International Protection Act, 2015

The statutory right to family reunification for protection beneficiaries is provided in sections 56 and 57 of the International Protection Act, 2015. These provisions are narrower in their application than section 18 of the Refugee Act, 1996 and Regulation 25 of the European Communities (Eligibility for Protection) Regulations, 2013, which were repealed by the 2015 Act. The main changes introduced by the 2015 Act are the more limited category of family members in respect of whom an application can be made and the introduction of a time limit.

In *Hamza*, Cooke J. held that, while section 18 of the Refugee Act, 1996 was not enacted in discharge of any binding obligation of international law, it was desirable that its provisions should be construed and applied in a manner consistent with these policies and the consensus apparent among the member states in the objectives of the Council Directive, so far as statutory interpretation permits.

In *A, S and S and I*,[7] it was held that sections 56 and 57 were the means by which the State had made provision for family reunification. Dunne J. considered it important that they were not the sole means by which family reunification can take place and referred to the Policy Document on Non-EEA Family Reunification. She also noted that the extent of family reunification is not unlimited, and stated that the State is entitled to have regard to the requirements of immigration control in making such provision.

The argument that protection beneficiaries had vested rights to family reunification under the 1996 Act and 2013 Regulations, which survived the coming into force of the 2015 Act, was rejected in *V.B. v Minister* and *X. v Minister for Justice and Equality* [2019] IEHC 284. In *A, S and S and I*, the Supreme Court found that Ms I did not have a vested right to apply for family reunification that was unlimited by time.[8]

The application

The application process is set out on the Minister's website – www.irishimmigration.ie. An application under section 56 is made where the family member is outside the State and under section 57 if they are in the State. Section 56 provides that an application may be made by a "qualified person" or "sponsor" in respect of a "member of the family" within the meaning of section 56(9).

Where an application is eligible, i.e., made within time and apparently in respect of a "member of the family" as defined by section 56(9), the sponsor completes a Family Reunification Questionnaire, and submits relevant supporting documents. The grounds on which the Minister may refuse to give permission (or revoke permission) are set out in sections 56(7) and 57(6), and include the interests of national security or public policy (*ordre public*), where the person would be excluded from being a refugee or eligible for subsidiary protection, where the entitlement of the sponsor to remain in the State ceases, and misrepresentation or omission of facts.

Permission granted under section 56 or 57 entitles the family member to the same rights as are conferred on the sponsor under section 53. If the family member is a visa-required national, a visa must be obtained prior to travelling to the State. Permission granted to a spouse or civil partner ceases to be in force if the marriage or civil partnership ends (section 56(6)).

Time limit

A 12-month time limit applies from the grant of the declaration (section 56(8)). This time limit, which may not be extended, was found to be constitutional and compatible with the ECHR in *A, S and S and I*. The applicant in *I* was a minor.

Dunne J. adopted the finding of Humphreys J. that the concept of limitation periods running from the age of majority in personal injuries cases is not a constitutional requirement. She also endorsed the finding that, even if it were found that there is an implied constitutional right to family reunification, a 12-month time limit is not disproportionate, did not breach any substantive right, and is well within the margin of appreciation of the Oireachtas.[9] Dunne J. stated:

"Ultimately, however, the fact that the legislation may be viewed as harsh when viewed through the prism of its application to minors, it is at the end of the day a matter of policy for the legislature and is not an issue for the courts".[10]

Applications for family reunification for children born or adopted more than 12 months after the grant of the declaration should be made under the Policy Document.

"Member of the family"

A "member of the family" is defined at section 56(9), which provides:

"'member of the family' means, in relation to the sponsor—

(a) [and (b) where the sponsor is married [or a civil partner], his or her spouse [or civil partner] (provided that the marriage [civil partnership] is subsisting on the date the sponsor made an application for international protection in the State),

…

(c) where the sponsor is, on the date of the application under subsection (1) under the age of 18 years and is not married, his or her parents and their children who, on the date of the application under subsection (1), are under the age of 18 years and are not married, or

(d) a child of the sponsor who, on the date of the application under subsection (1), is under the age of 18 years and is not married".

In *X v Minister* [2020] IESC 30, the Supreme Court found section 56(9) a limiting provision that must be interpreted restrictively, noting that it provides ""member of the family" means," rather than "includes".[11]

Spouses

In *A, S and S and I*, the Supreme Court held that the difference in treatment between spouses who married before application for international protection and those who married subsequently was constitutional and compatible with the ECHR.

Child of the sponsor

Under section 56(9)(d), a child must be a "child of the sponsor", which the Supreme Court has found can "only mean a biological or adopted child" (*X v Minister*).[12] Section 18(d) of the Interpretation Act, 2005 provides that a reference to "child of a person" includes children adopted under the Adoption Acts 1952 to 1998, and a child whose foreign adoption was recognised under the laws of the State. The finding of the High Court that "child" could include a "non-biological child", as it was not defined in the 2015 Act,[13] was overturned.

Dunne J. held that the natural and ordinary meaning of the words "child of the sponsor" could only mean a biological child and that this interpretation of section 56(9)(d) was confirmed by the legislative history. She found it "particularly illuminating" that section 56 "no longer included in the definition of member of the family, grandparents or wards or guardians".

Although anomalous situations may be created by the Oireachtas, Dunne J. stated that this did not affect the interpretation of the statute.[14] These are clearly cases in which it would be appropriate to make an application under the Non-EEA Policy Document.

In *A v Minister for Justice* [2021] IEHC 774, Ferriter J. quashed the refusal to grant family reunification for the applicant's niece and nephew; the applicant had relied upon a "declaration of responsibility" from her country of origin but had not contended that the children had been adopted by her prior to the refusal of the application under section 56. Ferriter J. found that the Minister had erred in failing to consider the declaration of responsibility and submission made by the applicant in the impugned decision. While he stated that the applicant may face "very difficult if not insurmountable problems" demonstrating that her niece and nephew are her children for the purposes of section 56, he declined to decide whether or not it was possible for them to come within section 56(9)(d).[15] The Minister argued by reference to *X v Minister* and section 18(d) of the Interpretation Act, 2005 that it would be futile to grant relief. This judgment is under appeal.

Another child of the protection beneficiary's parent under section 56(9)(c) would be interpreted in the same way.

Minors

The question whether a child was a "minor child" of the sponsor was considered by the CJEU in Joined Cases C-133/19, C 136/19 and C-137/19 *BIMM*, *BS*, *BM* and *BMO*. The Court held that the relevant date for determining whether a child was a "minor child" of the sponsor was the date of the application for family reunification under the Family Reunification Directive.

There are a number of applications before the High Court challenging section 56(9)(d) and refusals made thereunder.

In Case C-550/16 *A and S*, the CJEU held that unaccompanied minors were a special case: an unaccompanied minor who was granted refugee status must continue to be treated as an unaccompanied minor for the purposes of an application for family reunification under the Family Reunification Directive, even where they attained the age of majority before the latter application is made.

Cessation of permission

Sections 56(5), 56(6) and 57(5) provide for the cessation of permission granted under sections 56 and 57. Permission may be revoked under sections 56(7) or 57(6) for the reasons that could also justify a refusal of permission.

Vulnerable persons

Section 58(1) provides that "in the application of sections 53 to 57 due regard shall be had to the specific situation of vulnerable persons" and subsection 2 provides that the best interests of a child shall be a primary consideration in considering such an application. In *A, S and S and I*, Dunne J. held that section 58(2) does not oblige or enable the Minister to disregard or disapply the time limit in section 56(8).[16] It is unlikely that the courts would accept that section 58 can broaden the definition of "member of the family".

The Policy Document on Non-EEA Family Reunification

The Policy Document clearly indicates that applications may be made by protection beneficiaries whose applications do not come within the terms of section 56 or 57.[17] However, as the right under section 56 or 57 does not involve discretion in the true sense, or a proportionality assessment, that application is preferable.

The stated purpose of the Policy Document "is to set out a comprehensive statement of Irish national immigration policy in the area of family reunification". It does not create rights.[18] At page 1 it is also stated that: "The ultimate decision will depend both on the immigration status of the person with an entitlement to reside in Ireland (the sponsor) and the closeness of the relationship with the family member".

While there are periods during which certain categories of sponsors may not sponsor a family member, exceptions may be granted on humanitarian grounds.[19] Paragraph 1.12 states:

"While this document sets down guidelines for the processing of cases, it is intended that decision makers will retain the discretion to grant family reunification in cases that on the face of it do not appear to meet the requirements of the policy. This is to allow the system to deal with those rare cases that present an exceptional set of circumstances, normally humanitarian, that would suggest that the appropriate and proportionate decision should be positive".

That the determination of such an application by the Minister is subject to the Constitution, the Convention and statute law is emphasised at §3.1. The Minister is required to consider the facts of each individual case, and fair procedures require the Minister to consider submissions and representations made in support of an application.

Factors identified in the Policy Document with particular relevance to protection beneficiaries include the relationship between the people,[20] the circumstances of any family separation, whether it occurred by choice,[21] and the sponsor's immigration status.[22] Economic factors are clearly an important consideration, but: "It is not proposed that family reunification determinations should become purely financial assessments".[23]

In *A, S and S and I*, Dunne J. considered the Policy Document, stating:

"As is clear, it is also possible to pursue family reunification through the Policy

Document referred to previously. The extent of family reunification is not unlimited and the State is entitled to have regard to the requirements of immigration control in making such provision".[24]

She concluded by stating:

"142. Finally, it should be borne in mind that the door is not closed to Mr A and Mr S and Ms I. It is open to all of them to make an application to the Minister through the Policy Document and no doubt, the Minister will exercise his discretion appropriately having regard to the particular circumstances of each of the individuals concerned".[25]

Similarly, in *M.A.M. (Somalia) v Minister* [2019] IECA 116 (which was overturned on a different issue),[26] Baker J. noted that the Minister must have regard to the constitutional and Convention rights of an applicant in determining an application under the Policy Document. She stated that an applicant "may, in a suitable case, make an argument that the separation of the family was not voluntary and was never intended to be permanent, and that that is a particular factor to which the Minister must have regard in considering an application that a family member be permitted to enter and remain in the State".[27]

In VB, Keane J. held that there was:

"no reason to suppose, much less conclude, that the relevant discretion would be exercised in disregard of the applicant's status as a refugee or of her rights under the Constitution, the ECHR or the Charter".[28]

The *dictum* of Dunne J. at §142 in *A, S and S and I* is to similar effect.
The Supreme Court left open the question as to whether the challenge to section 56 and the refusal of permission was premature in *A, S and S and I*. That argument had been rejected in the Court below by Barrett J. in *A and S* and *S v Minister* [2019] IEHC 547, but was accepted by Humphreys J. in *RC (Afghanistan) v Minister* [2019] IEHC 65 and Keane J. in VB.

Specific humanitarian admission programmes

The Minister for Justice has introduced a number of discretionary schemes under which family reunification was granted in respect of specific categories of protection beneficiary. These include the Humanitarian Admission Programmes, IHAP and IHAP 2, which were available for limited periods in 2018 and 2019, respectively. Unlike an application for family reunification under section 56, a person granted permission under IHAP is granted programme refugee status. The Afghan Admission Programme was opened on December 16, 2021, and is due to close on March 11, 2022. This Programme is not limited to protection beneficiaries and entitles people who were originally from Afghanistan to make an application in respect of up to four specified close family members. This scheme is similar to the Syrian Admission Programme, which was opened in 2014.

Conclusion

Family reunification can be instrumental in the integration of a protection beneficiary into the State. Unlike most other immigrants, the option of reuniting with family members in their countries of origin is rarely open to protection beneficiaries. The sole right of a protection beneficiary to family reunification is provided by sections 56 and 57 of the 2015 Act. However, applications may be made in respect of a wider category of family members and without any time limit under the Policy Document on Non-EEA Family Reunification.

A previous version of this article was delivered at the Immigration, Asylum and Citizenship Bar Association (IACBA) 2021 Annual Conference on November 26, 2021. The views expressed herein are purely my own.

References

1. §99, per Dunne J.
2. Section 18, Refugee Act, 1996. Section 56 of the 2015 Act replaces section 18, which only applied to refugees.
3. §31.
4. Page 5 and §1.8.
5. §25.
6. [2020] IESC 70 §124.
7. §99 and 124.
8. §139.
9. §124.
10. §124.
11. §34, 41, 107.
12. [2020] IESC 30, §107.
13. [2019] IEHC 284.
14. *Ibid*.
15. §44.
16. §123.
17. Pages 8-9.
18. Page 1.
19. §16.5.
20. §4.3.
21. §6.1-2.
22. §5.2.
23. §8.3.
24. §124.
25. §142.
26. The Supreme Court held that persons who had become naturalised Irish citizens after being granted refugee status retained the right to apply for family reunification under section 18 of the Refugee Act, 1996 ([2020] IESC 32). Since the coming into force of the International Protection Act, 2015, a declaration of refugee status or subsidiary protection ceases to have force upon naturalisation (section 47(9)). As applications must be made within 12 months of the grant, or the coming into force of the 2015 Act, no further family reunification applications can be made by naturalised Irish citizens.
27. §140.
28. §60.

A hidden jurisdiction trap

Practitioners should be aware of the requirement to provide written notice to the Charities Regulatory Authority of an intention to commence any legal proceedings in relation to a charity.

Felix McEnroy SC

"…justiciable controversies may be decided only in the courts when the courts have jurisdiction to do so and when their jurisdiction is invoked." per Walsh J. in *The State (McEldowney) v Kelleher* [1983] I.R. 289 at 304.

The recent judgment of the President of the High Court in *M.O'B. v Western Health Board* [2021] IEHC 398 is an important and timely reminder of the requirement, where it arises, to satisfy in advance of issuing any legal proceedings, a statutory condition precedent to a court having jurisdiction to hear and determine a case. In particular instances a statutory consent is necessary; in others, a statutory notice is required to be given to a specified person, prior to the commencement of any proceedings. In the case concerning M.O'B, a ward of court, the consent of the President of the High Court had not been obtained prior to pursuing an appeal on his behalf before the Supreme Court against an order of the High Court refusing to set aside or vacate a settlement of a personal injuries claim concerning him. The absence of this consent had the result that the Supreme Court had no jurisdiction to hear and determine the appeal.[1]

The increasing ambit of registered charities

In any legal proceedings in relation to a charity, there is a statutory condition precedent that prior to commencing those proceedings a person must have given notice in writing to the Charities Regulatory Authority (CRA) of their intention to commence those proceedings, together with "such information as may be requisite or proper or may be required from time to time by the [Charities Regulatory Authority], for explaining the nature and objects thereof".[2] Registered charities are increasingly involved in a wide variety of business activities and are frequently a party in a wide range of civil claims, statutory proceedings or criminal prosecutions. The range of legal entities that currently enjoy charitable status includes charitable trusts, unincorporated associations, companies, and statutory authorities. It appears that the incidence of statutory authorities being granted charitable status is steadily increasing. It is a feature of the discharge of statutory functions and duties, and the exercise of discretionary powers by many statutory authorities with charitable status, that they are continuously involved in civil and criminal proceedings. Many litigants in proceedings involving statutory authorities are unaware that such public authorities have been granted charitable status and that the statutory regulation requirements of any legal proceedings involving a charity must be complied with before a court has jurisdiction to hear and determine those proceedings.

By way of example, a surprising fact concerning the Health Service Executive (HSE) is that this statutory authority is a charity.[3] Accessing the CRA's online database of charities discloses that the HSE is registered as a charity with Registered Charity Number (RCN) 20059064. Similarly, the Revenue Commissioners online database of the 'List of bodies who have been granted Charitable Tax Exemption' discloses that the HSE has charitable tax exemption with CHY (Revenue) Number 16412.

Section 53(1) of the Charities Act 1961 and the requirement to serve notice

The fact that a statutory authority has been granted the privilege of

charitable status has the legal effect that the provisions of section 53(1) of the Charities Act 1961 (the Act) apply to any legal proceedings where that statutory authority is to be named as a party. Section 53(1), as amended by section 11 and Schedule 2 of the Charities Act 2009, provides:

"53.-(1) Before any legal proceedings (except legal proceedings instituted with the authority of or by the direction of the [Charities Regulatory Authority] under section 25) in relation to any charity are commenced by any person … that person shall transmit to the [Charities Regulatory Authority] notice in writing of the proposed legal proceedings and such information as may be requisite or proper or may be required from time to time by the [Charities Regulatory Authority], for explaining the nature and objects thereof".

Section 53(1) as amended requires a person intending to commence any legal proceedings in relation to[4] a statutory authority that has been granted charitable status to provide written notice of their intention to commence such proceedings to the CRA prior to commencing those proceedings.[5]
The CRA has not published statutory guidance[6] as to either the form or content of the written statutory notice required to be provided to it by a person intending to commence proceedings in relation to a charity. In these circumstances, a person intending to commence proceedings in relation to a charity must ensure, as best they can, that the notice in writing sets out "… such information as may be requisite or proper … for explaining the nature and objects thereof".
There is no reported judgment that provides a definitive statutory interpretation of section 53(1) as amended.[7] It appears that the wording "any legal proceedings" in section 53(1) applies to all types of civil or criminal proceedings. Furthermore, there is no definition in the Act of the term "legal proceedings". It is suggested that a court required to consider the correct statutory interpretation of these words could have regard to the statutory definitions of a "Cause", a "Suit" and an "Action" in section 3 of the Supreme Court of Judicature Act (Ireland) 1877 as amended, which provides:

"'Cause' shall include any action, suit or other original proceeding between a plaintiff and a defendant, and any criminal proceeding …
'Suit' shall include action.[8]
'Action' shall mean a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of Court, and shall not include a criminal proceeding …"

The definition of the term 'Cause' appears to support the view that the statutory requirement contained in section 53(1) as amended to give notice in writing to the CRA of an intention to commence legal proceedings is applicable to both civil and criminal proceedings.[9] In *Re Greene*, 51 L.J.Q.B. 41, sub nom. *Greene v Penzance*, 6 App. Cas. 657, Selbourne C. stated that:

"'Cause' is not a technical word signifying one kind or another, it is *causa jurisdictionis*, any suit, action, matter, or other similar proceeding competently brought before, and litigated in, a court".
The use of the words "any legal proceedings" in section 53(1) appears inconsistent with restricting the application of this statutory provision to civil proceedings. The term "any" has been judicially construed as being a word that may exclude limitation or qualification.[10]

In any legal proceedings in relation to a charity, there is a statutory condition precedent that prior to those proceedings a person must have given notice to the CRA of their intention to commence those proceedings.

Mandatory statutory requirement

The statutory requirement in section 53(1) placed upon a person intending to commence any legal proceedings in relation to a charity to give prior notice of that intention to the CRA appears, by virtue of the presence in that provision of the word "shall", to be a mandatory requirement. A court, in considering whether the word "shall" is to be interpreted as being mandatory or directory, might well decide, having regard to the public interest[11] considerations contained in this statutory provision, to support the view that this provision is mandatory in its effect.
When account is also taken of the statutory functions[12] of the CRA, it is clear that the Authority has a proper statutory interest in being made aware at the earliest opportunity of the fact that, and the particular circumstances in which, a charity is about to become involved in any legal proceedings, whether those proceedings are civil, statutory or criminal. The grant of charitable status is a special public law privilege that involves the continuing public interest. The grant of this privileged status is also a requirement for a charity being in a position to separately apply to the Revenue Commissioners for charitable tax exemption in relation to certain taxes and charges that would otherwise be payable in the ordinary way.[13]
It is important to note that section 53(1) of the Act as amended is confined to the requirement to give prior notice of an intention to commence legal proceedings in relation to a charity, but does not require a party intending to commence any legal proceedings to additionally obtain the consent[14] of the CRA before such proceedings can be commenced.[15]

Legal risk regarding jurisdiction

Where the statutory condition precedent of giving prior notice of an intention to commence legal proceedings in relation to a charity has not been complied with, this may give rise to a legal risk that an argument may be made that the court has no jurisdiction to hear and determine those proceedings or, where a notice is served subsequent to commencing any legal proceedings, that the court has no jurisdiction to rely on a retrospective compliance with this statutory requirement.
It is suggested that to ensure compliance with this statutory requirement, a person intending to commence any legal proceedings in relation to a registered charity should:

- serve a notice pursuant to section 53(1) of the Act as amended on the CRA prior to issuing any legal proceedings;
- serve copies of the notice on the charity trustees and any other interested party to the intended proceedings;
- indorse on any pleading or document used to commence those proceedings the fact that a statutory notice has been served on the CRA prior to commencing the proceedings so as to assert that this statutory condition precedent to the court having jurisdiction to hear and determine those proceedings has been satisfied; and,
- in due course, adduce in evidence to the court a true copy of the statutory notice served on the CRA as formal proof of compliance with this statutory condition together with evidence as to the date and manner of its service.

Possible form of notice

A suggested possible form of notice might include a variation on the following precedent:

Registered Charity Number (RCN) [number]
CHY (Revenue) Number [number]

IN THE MATTER OF SECTION 53(1) OF THE CHARITIES 1961 AS AMENDED AND IN THE MATTER OF THE CHARITIES ACT 2009
AND IN THE MATTER OF INTENDED PROCEEDINGS IN RELATION TO [registered name of charity]

NOTICE

TAKE NOTICE that Section 53(1) of the Charities Act 1961 as amended by Section 11,
Schedule 2, and Part 6 of the Charities Act 2009 provides:

"Before any legal proceedings (except legal proceedings instituted by the authority of or by the direction of the [Charities Regulatory Authority] under section 25) in relation to any charity are commenced by any person [ ] that person shall transmit to the [Charities Regulatory Authority] notice in writing of the proposed legal proceedings and such information as may be requisite or proper or may be required from time to time by the [Charities Regulatory Authority], for explaining the nature and objects thereof".

AND TAKE NOTICE that [name] of [address] intends to institute legal proceedings by way of [insert type of proceedings] naming the [Registered name of charity] of [address], a registered charity Registered Charity Number (RCN) [number] and CHY (Revenue) Number [number], seeking, *inter alia*, an order of the High Court [set out relief sought and costs].

AND TAKE NOTICE that a draft copy of the intended legal proceedings is attached to the Schedule to this Notice so as to provide such information as may be requisite or proper for explaining the nature and objects of those proceedings.

AND TAKE NOTICE that [name] the intended [plaintiff/applicant] does not name the Charities Regulatory Authority as a party to these intended legal proceedings.

SCHEDULE

[Attached draft copy of intended legal proceedings]

Dated this [date] day of [month] [year]

Signed: [Name]
Solicitors
[Address]
[Eircode]
[Email address]

To: Charities Regulatory Authority[16]
3 Georges' Dock
IFSC
Dublin 1
D01 X5X0
[Email address]

And to: [Trustees of the registered charity][17]
[Address]
[Eircode]
[Email address]

A suggested possible indorsement[18] on any civil pleadings of compliance with the requirements of section 53(1) of the Act as amended might include a variation on the following precedent:

"(1) The [registered name of charity] is a charity registered by the Charities Regulatory Authority pursuant to the provisions of the Charities Act 2009 and has Registered Charity Number (RCN) [number] and CHY (Revenue) Number [number].

(2) The (plaintiff/applicant) in compliance with the provisions of section 53(1) of the Charities Act 1961 as amended served in advance of the issue of these proceedings a Notice of intention to commence these legal proceedings in relation to the [Registered name of charity] on the Charities Regulatory Authority on the [ ] day of [ ] 2021, served a true copy of that Notice on [names of the trustees] the trustees of the [Registered name of charity] on the [ ] day of [ ] 2021, and served a true copy of that Notice on [names of parties to the legal proceedings] on the [ ] day of [ ] and the Court in this regard has jurisdiction to hear and determine these proceedings".

References

1. A retrospective application to the President of the High Court for consent to pursue an appeal on behalf of the ward of court was unsuccessful. See also section 9 of the Courts (Supplemental Provisions) Act 1961 and *K. (C.) v Northern Area Health Board and ors* [2003] IESC 34 (May 29, 2003).
2. Section 53(1) of the Charities Act 1961 as amended. At the time this statutory provision was enacted legal proceedings in relation to a charity were something of a rarity. With the more recent phenomenon of the State and its statutory authorities outsourcing the assessment and provision of public services to charities, the incidence of these charities being involved in litigation has significantly increased.
3. The grant of charitable status to the Health Service Executive appears to be questionable in law having regard to the provisions of the Health Acts 1947 to 2020.
4. There is no statutory definition of the words "in relation to" a charity. The paperback *Oxford English Dictionary* (7th ed.) (2012) OUP defines the meaning of this phrase as including "in connection with" (page 610).
5. This statutory provision does not require the consent of the CRA to the commencement of any legal proceedings involving a charity. Its statutory purpose is limited to placing a prior notice requirement as a condition precedent to jurisdiction on a party intending to commence any legal proceedings involving any charity.
6. Section 14(1)(*i*) of the Charities Act 2009 provides that: "The general functions of the [Charities Regulatory] Authority shall be to– (i) encourage and facilitate the better administration and management of charitable organisations by the provision of information or advice, including in particular by way of issuing (or, as it considers it appropriate, approving) guidelines, codes of conduct, and model constitutional documents".
7. An interesting and unresolved question of statutory interpretation is whether the provision of a retrospective consent is permissible under the provisions of section 53(1) of the Charities Act 1961 as amended.
8. The word "suit" is a term wider than "action" and may include proceedings on a petition: *Re Wallis* 23 L.R. Ir. 7.
9. It is suggested that the public interest considerations in the CRA having notice of a charity's involvement in legal proceedings are equally applicable in both civil and criminal proceedings. Order 125, rule 1 of the Rules of the Superior Courts (1986) defines the terms "cause" and "suit" in the same way as section 3 of the Supreme Court of Judicature Act (Ireland) 1877, while the term "action" is worded somewhat differently in the Rules as follows: "'Action' means a civil proceeding commenced by originating summons or in such other manner as may be authorised by these Rules, but does not include a criminal proceeding at the suit of the Attorney General".
10. *Duck v Bates* 13 Q.B.D. 843 at 851-852 (per Fry, L.J. dissenting).
11. "If the purpose of the provision is to protect the rights of the public, then it is likely to be viewed as mandatory" (Dodd, *Statutory Interpretation in Ireland*. Tottel Publishing, 2008: page 321, para. 12.11).
12. Section 14(1)(a) to (k) of the Charities Act 2009 lists the general statutory functions of the CRA.
13. Section 7(1) of the Charities Act 2009 provides that: "Nothing in this Act shall operate to affect the law in relation to the levying or collection of any tax or the determination of eligibility for exemption from liability to pay any tax". Charitable tax exemption under the Taxes Consolidation Act 1997 includes certain exemptions from paying income tax (sections 207 and 208), Corporation Tax (sections 76 and 78), Capital Gains Tax (section 609), deposit interest retention tax (section 266), Capital Acquisitions Tax (sections 17, 22 and 76 of the Capital Acquisitions Tax Consolidation Act 2003), dividend withholding tax (Chapter 8A of Part 6), professional services withholding tax, stamp duty on the transfer or lease of land (section 82 of the Stamp Duties Consolidation Act 1999), Local Property Tax (sections 7 and 7A of the Finance (Local Property Tax) Act 2012), and several specific reliefs from Value Added Tax (Council Directive 2006/112/EC of November 28, 2006, on the common system of value-added tax as amended, Title IX, Chapter 2; Value-Added Tax Consolidation Act 2010 as amended, "exempted activity" Section 2(1), Section 52(1) and Schedule 1, Part 1).
14. Examples where consent is required to institute proceedings include section 73 of the Mental Health Act 2001 and a relator action pursuant to Order 15, rule 20 of the Rules of the Superior Courts (1986) as amended.
15. Breen and Smith, *Law of Charities in Irel*and, 2019, Bloomsbury Professional, at page 266, note 42, observe in relation to the statutory language of section 53(1) of the Charities Act 1961: "This would appear to lead to the somewhat odd result that if a charity wishes to challenge an action or decision of the CRA concerning the charity in the courts, then, in addition to the normal notice of proceeding, it must notify the CRA under the Charities Act 1961, s 53 of the intention to institute proceedings".
16. This is the registered address of the CRA.

Jury's out on defamation reform

The proposal to abolish the role of juries in defamation cases is a controversial one, which could undermine the court's ability to vindicate the rights to reputation and free speech.

Mark Harty SC

On March 1, 2022, the Minister for Justice brought proposals to cabinet regarding the reform of the defamation laws. The most radical and fundamental of these is a proposal to abolish the role of juries. This follows from a review of the area by the Department of Justice, which included a symposium and written submissions. Unfortunately, at that symposium, the viewpoint of those who are compelled to bring defamation actions to protect their reputation was significantly under represented.

The Department's chosen path, which would render this jurisdiction an outlier in the common law world in removing juries in their entirety from defamation actions, was not argued for in the vast majority of submissions made. While many submissions raised issues with the unpredictability of jury awards, and with excessive awards, for the most part they did not seek to have juries abolished in their entirety.

A mystifying decision

There is nothing in the report to indicate why the proposed removal of juries was chosen in preference to a number of other options, which are set out in the report. There is a complete failure on the part of the authors of the report to consider the importance of a jury verdict, as opposed to award, as a vindication of the rights of the parties involved.

Where a person is alleging that he or she has been defamed to the community at large, it has always been the position in this jurisdiction that the body best placed to determine that fact is the community itself as represented by 12 randomly selected members of the public. Similarly, where a defendant seeks to uphold their right to free speech, in all its manifestations, that right is central to the interests of the community, and is one that a jury is best placed to protect. In my experience, neither the parties nor their legal representatives underestimate the power of the verdict or the quality of the decision-maker.

In the public discourse, I would respectfully suggest, the decision on facts by one judge cannot, and does not, carry the same weight as a verdict of 12 members of that body politic randomly selected as a jury.

The Department's report does not contain any analysis of the effects of the restriction on the right to a jury trial in England and Wales. Anecdotally, the effect of restricting the role of decision-maker to a judge alone is not universally popular within the press. Some elements of the media note that in losing the right to trial by jury they have lost the possibility of their target audience being part of the decision-making process. A further effect has been media criticism of judicial decisions in media cases, which has on occasion come dangerously close to *ad hominem* attacks.

The importance of the jury

Six days after the publication of the report, the Supreme Court issued the most recent decision in *Higgins v Irish Aviation Authority*. The decision of that Court has finally given clarity on the direction that must be given to juries as to awards, and has set out clear bands of damages. The Court has thereby ensured that future juries can be given clear direction on awards, thus significantly reducing the risk of an unsafe verdict and subsequent appeals.

Of no less importance in the *Higgins* decision is the robust defence of juries and the importance of their role. McMenamin J. stated as follows:

"When the 12 jurors, as members of the community, came to deal with the issues in this defamation action, they had before them material which showed how the evidence emerged, as well as what it proved. The jurors had the opportunity to assess the demeanour of the witnesses, and the myriad of other ways in which each juror could bring their life experience and judgement to bear in the task of adjudication, and public accountability. The jury could also discern not only how both parties sought to address the issues to be determined, but what was not addressed. The task of the jury was to apply its values as members of the community".

The value of a jury verdict has rarely been so pithily expressed.

In terms of the Department's proposals and motivation, it is perhaps also worth quoting one other portion of the decision:

"When a person's constitutional right to good name is taken away, the courts must be adequately resourced, and mechanisms provided in law, so as to ensure that vindication of the constitutional right can be achieved as soon as is practicable, and in a timely way". McMenamin J.

Failure on the part of the State to properly resource civil jury actions must not be relied upon by the Department to abolish the best and truest forum for the vindication of the rights to reputation and free speech.

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