Entrapment

Travellers and School Admission

ROUND HALL
Offering a one to one personal service covering all aspects of your financial needs.

Taxation advice & compliance

Full range of accounting services

Retirement planning & wealth management

Mortgage arrangements

Revenue & bank negotiations

Looking forward to your call

Thomas Power, Trading as Power Consultancy, is Regulated by the Central Bank of Ireland.
Contents

116 Travellers, equality and school admission: Christian Brothers High School Clonmel v Stokes
Mel Cousins BL

120 Deception and Entrapment
Garnet Orange BL

124 Disciplinary Proceedings in the Health Professions and the European Convention on Human Rights
Cathal Murphy BL

CXXVII Legal Update

127 Marriage and the Family: A Changing Institution? Part II
Peter Charleton and Sinead Kelly

138 Irish Rule of Law Project runs Professional Practice Course in Kosovo
Rachel Power and Alison de Bruir BL
Travellers, equality and school admission: *Christian Brothers High School Clonmel v Stokes*

**Mel Cousins BL**

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

The facts

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

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

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

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

The law

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

\[(2)\] An educational establishment [which includes a post-primary school] shall not discriminate in relation to—

\[(a)\] the admission or the terms or conditions of admission of a person as a student to the establishment, ...

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

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

The equality officer's decision

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

---

1 [2011] IECC 1. The case is under appeal to the High Court.
2 DEC-S2010-056.
3 The data provided by the equality officer and the Court are slightly different.
justified. Finally, it argued that the school had an excellent record of working with students who are members of the Traveller community. There were 5 members of the Traveller community enrolled in the school in 2010 and all Travellers who applied for admission in both 2007 and 2008 were accepted. No Travellers applied in 2009 and the complainant was the only Traveller to have been unsuccessful in his application to date.

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

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

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

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

The Circuit Court judgment

The High School appealed to the Circuit Court which involves, in effect, a rehearing of the case. Although the claim against the Department of Education and Science was not pursued, it was argued that the Circuit Court could make findings against the school on the basis of alleged breaches of statutory duty under the Education Acts. Judge Teehan correctly did not accept that argument for two reasons. First, the principle of finality in litigation required that matters determined under the Education Act, 1998 could not be revisited; and, second (and rather more convincingly), he ruled that proceedings under the Equal Status Acts could only succeed where a breach of duty under that legislation had been established. Nonetheless, he pointed out that the court must necessarily be informed by relevant statutory provisions and, in particular, sections 6 and 15 of the Education Act 1998.5

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

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

Accordingly, he found that it could

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

With regard to the question of the legitimacy of the aim, Judge Teehan found that the aim of the Board in introducing the ‘parental rule’ was entirely in keeping with its goal (as set out in the admissions policy) of ‘supporting the family ethos within education’ and the ‘characteristic spirit of the school’, a concept to which it must have regard in accordance with section 15(2) (b) and (d) of the Education Act 1998.6

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

4 The equality officer also rejected a complaint against the Department of Education and Science for failure to enforce its guidelines. This issue was not appealed to the Circuit Court.
5 At 8.
6 At 15.
7 At 16.
8 At 17.
principal concerning the history of the admissions policy. This showed that, in most years, there had been more applicants than places. At one time, priority was given to students where there were 'exceptional circumstances' which had led to almost all applicants seeking admission under this heading. Prior to that, a lottery applied to all applicants, while at one time entry was by means of an assessment test. The evidence had been that these policies were 'for obvious reasons' highly unsatisfactory. Judge Teehan found that the current policy fell somewhere between these extremes. This did not, in itself, mean that the policy was appropriate, but it was one which is reviewed annually and he was satisfied that, having regard to all the many relevant considerations of which the Board must take account, it struck the correct balance and was, therefore, appropriate.

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

Judge Teehan concluded that these issues were:

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

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

**Discussion**

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

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

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

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

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

---

9  At 19.
10  At 20.
---

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

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

13 Ibid at 196. In E v The Governing Body of JFS [2008] EWHC 1535 (Admin), Munby J accepted that attempts to justify practices which are potentially racially discriminatory must be assessed strictly, the measure in question must be shown to correspond to a ‘real need’ and the means adopted must be ‘appropriate’ and ‘necessary’ to achieving that objective. There must be a ‘real match’ between the end and the means ((at 183–4). However, he found that the rule in question was objectively justified. This decision was overturned on appeal (ultimately) to the House of Lords which held, by a narrow majority, that the case involved direct discrimination which could not be justified E, R (on the application of) v Governing Body of JFS [2009] UKSC 15. However the unusual facts of the case make it of limited relevance. See also Mandia (Sima Singh) v Dwavel Lee [1982] UKHL 7; and IG v Head Teacher & Governors St Gregory’s Catholic Secondary School [2011] EWHC 1452 (Admin) although the facts of these cases – which concern children excluded from school because of wearing a turban and a hair style relating to ethnicity respectively – are again far from the facts here.
the sibling rule. For reasons which were not explained, no appeal was lodged in relation to the finding that the sibling rule was not discriminatory. Mr. Stokes was clearly disadvantaged by the operation of the rule but this was, in part, because he was the oldest child. However, the figures quoted for Traveller participation and the fact that there are only 5 Traveller children in the High School would strongly suggest that the rule does have a disproportionate impact on Travellers (notwithstanding their larger families). However, it would appear that the rule could be objectively justified as there are additional arguments in favour of such an approach including the advantages to parents in having all their children (of a given gender) in one school and the support which may be provided amongst siblings attending a school. Such a rule appears to be common in other jurisdictions and does not appear to have attracted judicial notice.\footnote{See, for example, Parents Involved in Community Schools v Seattle School District No. 1 551 U.S. 701 (2007).}

Access to Travellers to education is clearly of critical importance. However, the parental rule involved in this case makes a rather marginal difference in terms of such access. Indeed, more children appear to have been admitted under the sibling rule. For reasons which were not explained, no appeal was lodged in relation to the finding that the sibling rule was not discriminatory. Mr. Stokes was clearly disadvantaged by the operation of the rule but this was, in part, because he was the oldest child. However, the figures quoted for Traveller participation and the fact that there are only 5 Traveller children in the High School would strongly suggest that the rule does have a disproportionate impact on Travellers (notwithstanding their larger families). However, it would appear that the rule could be objectively justified as there are additional arguments in favour of such an approach including the advantages to parents in having all their children (of a given gender) in one school and the support which may be provided amongst siblings attending a school. Such a rule appears to be common in other jurisdictions and does not appear to have attracted judicial notice.\footnote{See, for example, Parents Involved in Community Schools v Seattle School District No. 1 551 U.S. 701 (2007).}

Irish Corporate Law Forum Seminar

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

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

GARNET ORANGE BL

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

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

Controlled purchase

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

Test purchasing

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

Controlled delivery

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

UK entrapment procedures

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

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


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

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

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

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

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

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


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

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

12 R v Jones [2010] 3 All ER 1186.
Other cases show that the issue of entrapment can arise in a variety of situations including customs and police officers engaging in smuggling heroin so that a foreign drug dealer might be lured into travelling to the UK, establishing a sham jewellery shop to entice suspects into selling stolen jewellery, approaching a suspected forger in order to induce him into uttering forged banknotes, the placing of goods in a van to see who (if anyone) steals them in an ongoing investigation into theft from cars in a particular area, posing as contract killers in order to make a recording of a husband who wanted to murder his wife and posing as insurance company agents negotiating to secure the return of stolen artwork.

The current position

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

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

An unexceptional opportunity to commit a crime

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

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

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

Ordinary participant or agent provocateur?

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

In making this determination, one of the factors that a trial judge must consider is the nature and extent of the participation of the undercover operative in the crime: “The greater the inducement held out by the police, and the more forceful or persistent the police overtures, the more readily may a court conclude that the police have overstepped the boundary; their conduct might well have brought about commission of a crime by a person who would normally avoid crime of that kind. In assessing the weight to be attached to the police inducement, regard is to be...”
had to the defendant’s circumstances, including his vulnerability. This is not because the standards of acceptable behaviour are variable. Rather, this is a recognition that what may be a significant inducement to one person may not be so to another. For the police to behave as would an ordinary customer of a trade, whether lawful or unlawful, being carried on by the defendant will not normally be regarded as objectionable.”

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

The test to be applied

Where the court is considering whether the police (or his agent) was an agent provocateur or merely providing the accused with an exceptional opportunity to commit a crime, the judgment of Lord Bingham of Cornhill CJ in Nottingham City Council v Amin is regularly cited. In that case, the defendant was a taxi driver who stopped and carried two plain clothes officers when they had flagged him. The defendant carried the passengers through an area that was not covered by his licence and he was prosecuted for that offence. The defendant was a taxi driver who stopped and carried two plain clothes officers when they had flagged him. The defendant carried the passengers through an area that was not covered by his licence and he was prosecuted for that offence.

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

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

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

Predisposition and reasonable suspicion

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

30 Nottingham City Council v Amin [2000] 1 WLR 1071 per Lord Bingham of Cornhill CJ at p 1075.
32 The People (DPP) v Mbeme ex temp decision of the Court of Criminal Appeal 22nd February, 2008 unreported.
see what happens. There should be evidence to show how the suspect became a target. This may be proven by showing that the suspect brought suspicion onto himself or that he repeated the crime without provocation. For this reason, the gardaí tend to target drug dealing in particular areas that are shown to be frequented by drug dealers or they rely on evidence of repeated drug purchases to show predisposition on the part of the suspect. In test purchasing, the relevant authorities usually perform a general sweep through an area or rely on information showing that complaints have been made against a particular shop or off-licence of selling alcohol or cigarettes to underage purchasers.

Stay of proceedings or exclusion of evidence?

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

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

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

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

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

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

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

The necessity for supervision

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

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

CATHAL MURPHY BL

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

The purpose of the legislation

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

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

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

The European Convention on Human Rights Act 2003

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

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

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

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

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

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

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

“(1) Everyone has the right to respect for his private and family life, his home and his correspondence.”

“(2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

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

“53. The Court observes that private life “encompasses the right for an individual to form and develop relationships with other human beings, including relationships of a professional or business nature” (see *C. v. Belgium*, 7 August 1996, § 25, Reports 1996-III). It also considers that Article 8 of the Convention “protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world” (see *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III) and that the notion of “private life” does not exclude in principle activities of a professional or business nature. It is, after all, in the course of their working lives that the majority of people have a significant opportunity of developing relationships with the outside world (see *Niemitz v. Germany*, 16 December 1992, § 29, Series A no. 251-B). Finally, the Court refers to its recent finding that a far-reaching ban on taking up private-sector employment did affect “private life” (see *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, § 47, ECHR 2004-VIII), particularly in view of Article 1 § 2 of the European Social Charter, which came into force in respect of Italy on 1 September 1999, and which states “[w]ith a view to ensuring the effective exercise of the right to work, the Parties undertake ... to protect effectively the right of the worker to earn his living in an occupation freely entered upon."

54. In the instant case the Court notes that the entry of a person’s name in the bankruptcy register entails a series of personal restrictions prescribed by law, such as a prohibition on being appointed as a guardian (Article 350 of the Civil Code), a prohibition on being appointed as the director or trustee in bankruptcy of a commercial or cooperative company (Articles 2382, 2399, 2417 and 2516 of the Civil Code), exclusion ex lege from membership of a company (Articles 2288, 2293 and 2318 of the Civil Code), and the prohibition on carrying on the occupations of trustee in bankruptcy (Article 393 of the Civil Code), stockbroker (section 57 of Law no. 272 of 1913), auditor (Article 5 of Royal Decree no. 228 of 1937), or arbitrator (Article 812 of the Code of Civil Procedure). Further restrictions flow from the fact that the bankrupt, since he or she no longer enjoys full civil rights, cannot be registered as a member of certain professions (for instance as a lawyer, notary or business adviser). In the Court’s view, restrictions of this kind, which would have affected the applicant's ability to develop relationships with the outside world, undoubtedly fall within the sphere of her private life (see, mutatis mutandis, *Sidabras and Džiautas*, cited above, § 48). Article 8 of the Convention is therefore applicable in the instant case.”

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

Private Hearing

In light of *Campagnano*, the holding by the Committee of a fitness to practise inquiry in public undoubtedly constitutes interference, by an organ of the State, with a medical practitioner’s right to respect for private life. Consequently, that interference must be compatible with Article 8(2) of the Convention. The holding of an inquiry in public is provided for in Section 65 of the 2007 Act. Accordingly, the interference is in accordance with the law within the meaning of Article 8(2). Therefore, it falls to be considered whether the interference is “… necessary in a democratic society in the interests…” of one, or more, of the aims specified in Article 8(2).

In the present context, the only aims that the holding of a public inquiry could possibly achieve are public safety and the protection of health. Therefore, unless the Committee can satisfy itself that, in the circumstances of the inquiry before it, it is necessary in the interests of public safety or the protection of health to hold that inquiry in public, it is submitted that it is obliged, as an organ of the State, to accede to a request for the holding of a private inquiry.

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

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

### Tension between Article 8 and Article 6 of the Convention

Some commentators have referred to the duties imposed on organs of the State by Article 6 of the Convention as obliging disciplinary bodies to hold inquiries in public. Article 6, entitled “Right to a Fair Trial”, provides that:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the Court in special circumstances where publicity would prejudice the interests of justice.”

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

### Conclusion

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

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

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

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

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

---

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


6 *Dienet v. France* (1996) 21 EHRR 554, para. 33: “Admittedly, the Convention does not make this principle an absolute one, since by the very terms of Article 6 para. 1 (art. 6-1), ‘...the press and public may be excluded from all or part of the trial in the interests of morals ... where the ... protection of the private life of the parties so require[g], or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice’.”
A directory of legislation, articles and acquisitions received in the Law Library from the 13th October 2011 up to 18th November 2011  
Judgment Information Supplied by The Incorporated Council of Law Reporting  
Edited by Desmond Mulhure, Law Library, Four Courts.

Examinership


Article

Ahearn, Deirdre
Legislating for the duty on directors to avoid conflicts of interest and secret profits: the devil in the detail
XLV (2010) IJ 82

CONSTITUTIONAL LAW

Personal rights


Official language


Personal rights


Articles

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

Foley, Brian
The BUPA Ireland case and constitutional litigation
XLV (2010) IJ 230

Gallagher, Paul
The Irish constitution – its unique nature and the relevance of international jurisprudence
XLV (2010) IJ 22

CONTRACT

Building contract


Forgery


Rescission


Sale of land

Misrepresentation – Duty of care – Negligence – Rescission – Assessment of damages – Development site – Construction of distributor road included in development plan objective – Grant of planning permission to third party for different purpose – Whether plaintiff induced to enter into sale – Whether duty of care owed

Darlington Properties Ltd v Meath County Council

[2010] IEHC 469

F yarn Air Ltd v Billilhugse GmbH


Private Residential Tenancies Board v S&L Management Company Ltd

CRIMINAL LAW

Arrest


Dooody v Member in charge Store Street Garda Station

Assault causing harm

Joint venture — Indictment — Form of count on indictment — Judges charge — Whether form gave insufficient notice as to case applicant had to meet — Whether indictment should have referred to where and how injury was sustained — Whether indictment should have referred to kicks to head — Whether injury properly charged — The People (DPP) v E D [2006] IECCA 3, [2007] 1 IR 484; Crown v Landy [1981] 1 CLR 355 and R v Galbraith [1981] 1 WLR 1039 considered — Non-Fatal Offences against the Person Act 1997 (No 26), s 3 — Criminal Justice (Administration) Act 1924 (No 44) — Leave to appeal refused (25/10/2010 — CCA — 14/12/2010) [2010] IECCA 121

People (DPP) v O’Brien

Drink driving

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

DPP (Garda Grant) v Reddy

**Evidence**


People (DPP) v O’Brien

**Evidence**


People (DPP) v Halley

**Evidence**


Stirling v Collins and DPP

**Judicial review**

Legal aid


Tighe v District Judge Flahunt

Proceeds of crime


Murphy v Gilligan

Road traffic offences


DPP v O’Neill


DPP v Leipina and Suhanovs

Sentence

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

People (DPP) v Woods

Sentence


People (DPP) v Cunningham

Sentence

Trial

Articles
Ashworth, Andrew
Should strict criminal liability be removed from all imprisonable offences? XLV (2010) IJ 1

Library Acquisition
O’Shea, Eoin
The bribery act 2010: a practical guide
Bristol: Jordan Publishing, 2011
M563.6

DAMAGES

Breach of contract

Personal injuries

DATA PROTECTION

Article
Lupton, Ronan
Communications (retention of data) act 2011 (no 3 of 2011) 2011 (4) 2 IBLQ 8
Duty of care


Mansoor v Minister for Justice

Statutory Instruments

Secondary, community and comprehensive school teachers pension (amendment) (no.2) scheme 2011 SI 332/2011

Student support act 2011 (commencement of certain provisions) order 2011 SI 303/2011

Student support regulations 2011 SI 304/2011

Student support (amendment) regulations 2011 SI 381/2011

Employment Appeals Tribunal


Barry v Minister for Agriculture

Reduction in allowance


Barry v Minister for Agriculture

Sincere cooperation

EXTRADITION

European arrest warrant


Minister for Justice v Runner-Dillon

European arrest warrant


Minister for Justice, Equality and Law Reform v Zielinski

European arrest warrant


Minister for Justice, Equality and Law Reform v Ciechanowicz

European arrest warrant


Minister for Justice, Equality and Law Reform v Tighe

European arrest warrant

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

Minister for Justice v Marxicyzynski

EVIDENCE

Expert witness


Markby v Minister for Justice
European arrest warrant


European arrest warrant


European arrest warrant


European arrest warrant


European arrest warrant


European arrest warrant


European arrest warrant


European arrest warrant

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

Res judicata


Minister for Justice, Equality and Law Reform v Tobin

FAMILY LAW

Children


D (R) v Judge Haughton

Dworce


F (N) v F (E)

Divorce


B (G) v B (J)

Divorce


D (S) v D (B)

Judicial separation


S (E) v S (O)

Judicial separation

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

HOUSING

Eviction


Statutory Instrument

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

HUMAN RIGHTS

European Convention


Article

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

IMMIGRATION

Appeal


Asylum

Asylum


Asylum


Asylum


Deportation


Deportation


Deportation


Deportation


Deportation

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

1 I (P) v Minister for Justice

Deportation


Roberto v Governor of the Dublin Centre

Deportation


Odra v Minister for Justice, Equality and Law Reform

Deportation


U (M-A) v Minister for Justice, Equality and Law Reform (No 1)

Deportation


O-A (O) v Minister for Justice

Deportation


K (T) v Minister for Justice, Equality and Law Reform

Deportation


Irjan v Minister for Justice

Deportation

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

Dismissal of proceedings


Family reunification


X (R) v Minister for Justice, Equality and Law Reform

Family reunification


Hasan v Minister for Justice

Leave


T (F) v Refugee Appeals Tribunal

Naturalisation


Matta v Minister for Justice

Residence

European Union national employed in State – Marriage – Family member of European Union national – Application for residency
Mohamud v Minister for Justice

Residence
Lamaaz v Minister for Justice

INSURANCE
Evidence
Michovský v. Allianz Ireland Public Limited

JUDICIAL REVIEW
Discretion
Star Homes (Midleton) Ltd v Pensions Ombudsman and Syceds

Fair procedures
Mannion v Legal Aid Board

Leave

Pleadings
Saleem v Minister for Justice, Equality and Law Reform

LAND LAW
Right of way
Victory v Galloy Inns Ltd

LEGAL SYSTEMS
Article
Devlin, Alan
Law and economics
XLV (2010) IJ 165

INFORMATION TECHNOLOGY
Article
O’Farrell, Gemma
The position of internet service providers after EMI v UPC 2011 (4) 2 IBLQ 2

Legal Update December 2011
MEDIATION

Article

Twomey, Majella

The mediation and conciliation bill 2010 – proposed changes to alternative dispute resolution

2011 (4) 2 IBLQ 22

MENTAL HEALTH

Access to courts


NEGLIGENCE

Duty of care


Duty of care


Medical negligence


PATENTS & TRADEMARKS

Article

Brennan, Anna Marie

The harmonisation of the patent system: An Article

2011 (4) 2 IBLQ 18

PENSIONS

Rectification


Compulsory purchase order


Development


Statutory Instrument

Secondary, community and comprehensive school teachers pension (amendment) (no 2) scheme 2011 SI 332/2011

Legal Update December 2011
Planning permission


Lackagh Quarries Limited v Galway City Council

Planning permission


Sweetman v An Bord Pleanála

Planning permission


W&CE v An Bord Pleanála

Rezoning


Tristar Ltd v Minister for Environment, Heritage and Local Government, Dún Laoghaire Rathdown County Council and Others

Articles

Hastings, Amy

Rights to light law and the potential for use of its principles in the assessment of planning applications under the Planning and Development act 2000, as amended

2011 IP & ELJ 74

Seannell, Yvonne

Climate change law in Ireland: part II

2011 IP & ELJ 56

Simons, Garrett

EIA directive: direct effect and the Irish Courts

2011 IP & ELJ 67

Statutory Instrument

Environmental Protection Agency act (fluorinated greenhouse gas) regulations 2011

SI 278/2011

PRACTICE AND PROCEDURE

Abuse of process


**Dismissal of proceedings**


**Costs**


**Dismissal of proceedings**


**Jurisdiction**


**Non-suit**


**Non-suit**


**Particulars**


Page exxiv

Legal Update December 2011
Summary summons


Summary summons


Third party notice


Third party proceedings


Trial


Wicklow County Council v O’Reilly and Others

PRISONS

Statutory Instrument


PROFESSIONS

Medical profession

Professional misconduct – Inquiry – Confirmation of decision – Costs – Censorship of practitioner – Imposition of conditions upon registration – Whether applicant entitled to costs where consent to application – Jurisdiction of court – Penalty to award costs – Discretionary power – Obligation on council to
NATURE OF TAX APPEAL – BURDEN OF PROOF

Duty of care – Vicarious liability – Member of public attacked while assisting supermarket manager – Whether duty of care extends to wrongful act of third party by rescuer – Whether liability for injury to rescuer extends to wrongful act of third party

failure to establish on evidence that pain and bruising caused by puncturing of major blood vessel – Possibility of penetration of minor blood vessel – Absence of medical evidence establishing penetration of minor blood vessel comprised negligence – Claim that salpingectomy incorrectly performed by way of open surgery – Ectopic pregnancy – Necessity for salpingectomy – Absence of experience with laparoscopic salpingectomy – Possibility of locating laparoscopically skilled practitioner

Negligence


G (A) v K (J)

Concurrent wrongdoers


Medaloney v Liddy

Medical negligence

Expert evidence – Necessity for immediate treatment – Obligation to take safest course for patient – Applicable principles – Duty to provide surgical treatment of standard consistent with careful medical practitioner of like specialisation and skill – Consultant obstetrician and gynaecologist – Multiple claims – Diagnostic laparoscopy – Claim that secondary port incorrectly located in abdomen puncturing blood vessel –
of vessels) regulations 1976 (revocation) regulations 2011
DIR/2011-17
SI 316/2011

European Communities (classical swine fever) (restrictions on imports from Germany) regulations 2011
SI 312/2011

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

European Communities (conservation of wild birds (Lough Carra special protection area 004051)) regulations 2011
DIR/2009-147, DIR/1997-62
SI 340/2011

European Communities (conservation of wild birds (Lough Foyle special protection area 004087)) regulations 2011
DIR/2009-147, DIR/1992-43
SI 341/2011

European Communities (conservation of wild birds (Malahide estuary special protection area 004025)) regulations 2011
DIR/2009-147, DIR/1992-43
SI 285/2011

European Communities (conservation of wild birds (Tramore Back Strand special protection area 004027)) regulations 2011
DIR/2009-147, DIR/1992-43
SI 286/2011

European Communities (electronic communications networks and services) (framework) regulations 2011
SI 333/2011

European Communities (environmental liability) (amendment) regulations 2011
SI 307/2011

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

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

European Communities (mergers and divisions of companies) (amendment) regulations 2011
SI 306/2011

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

European Communities (phytosanitary measures) (brown rot in Egypt) (amendment) regulations 2011
DEC/2008-857, DEC/2009-839
SI 309/2011

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

European Communities (sheep identification) regulations 2011
SI 279/2011

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

European Union (restrictive measures) (Syria) regulations 2011
REG/442-2011
SI 341/2011

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

Road Traffic Act 2011
Signed 27/04/2011

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

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

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

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

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

Biological Weapons Act 2011
Signed 10/07/2011

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

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

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

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

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

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

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

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

Criminal Justice Act 2011
Signed 02/08/2011

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

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

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

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

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

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

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

Signed 02/02/2011

Signed 06/02/2011

7/2011

8/2011

9/2011

10/2011

11/2011

12/2011

13/2011

14/2011

15/2011

16/2011

17/2011

18/2011

19/2011

20/2011

21/2011

22/2011

23/2011

24/2011

Page cxxxviii
Legal Update December 2011
BILLS OF THE OIREACHTAS AS AT 17TH NOVEMBER 2011 (31ST DÁIL & 24TH SEANAD)

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

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

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

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

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

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

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

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

**Electoral (Amendment) (Political Donations) Bill 2011**
Bill 13/2011

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

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

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

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

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

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

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

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

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

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

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

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

**Mental Health (Amendment) Bill 2008**
Bill 36/2008
2nd Stage – Dáil [pmb] Senators Dőrőt de Bòré, David Norris and Don Bøjle (Initiated in Seanad)

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

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

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

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

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

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

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

**Property Services (Regulation) Bill 2009**
Bill 28/2009
Order for 2nd Stage – Seanad Senator Donie Cassidy (Initiated in Seanad)

**Public Service Pensions (Single Scheme) and Remuneration Bill 2011**
Bill 56/2011
Order for 2nd Stage – Dáil
Qualifications and Quality Assurance (Education and Training) Bill 2011
Bill 41/2011
Committee Stage – Seanad (Initiated in Seanad)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Whistleblowers Protection Bill 2011
Bill 26/2011

ABBREVIATIONS

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

The references at the foot of entries for Library acquisitions are to the shelf mark for the book.
Marriage and the Family: A Changing Institution? Part II

Peter Charleton and Sinéad Kelly*

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

The Old Certainties

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

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

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

Immigration, Marriage and the Family

The pressure on our asylum system tested Ireland’s pro-marriage and pro-family values. The courts were confronted with the dilemma of deciding between the constitutional rights of the family and our Government’s power to deport aliens. In Fajujonu v. The Minister for Justice, the applicants were a married family comprising foreign national parents and their Irish born daughter.2 She had acquired citizenship under legislative provisions that were prior to the 1998 Article 2 constitutional amendment. On refusing the father, a national of Nigeria, a work permit, the Minister requested that he leave the country. He had no legal right to remain here. The applicants, relying on the Irish born child’s constitutional rights, challenged the Minister’s decision and sought, inter alia, a declaration that the relevant provisions of the Aliens...
Act 1935 were inconsistent with Articles 40, 41 and 42 of the Constitution and a declaration that they were entitled to reside within the State. By the time the case reached the Supreme Court, two further Irish children had been born to the couple. Finlay C.J. acknowledged that the children, as citizens, had a constitutional right to the company and care of their parents within a family unit and that prima facie this was a right which they were entitled to exercise within the State. Walsh J. held that the applicants constituted a family within the meaning of the Constitution and that “in the particular circumstances”, where the family had been in the State for an appreciable length of time (eight years), it would be contrary to Article 41 of the Constitution were the Minister to move to deport the parents. This right, said the Chief Justice, was subject to the exigencies of the common good and:-

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

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

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

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

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

---

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


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

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

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

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

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

The Issue of Polygamous Marriages

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

---

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

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

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

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

14 per Lord Penzance in Hyde v. Hyde (1866) L.R. 1 P & D. 130 at 133; approved by Haugh J. in Griffiths v. Griffith [1944] I.R. 35 at 40; In R. v. R. [1995] 1 L.R.M. 491 at 495, Costello P. stated that “[m]arriage was and is regarded as the voluntary and permanent union of one man and one woman to the exclusion of all others for life.”
marry polygamously. In the U.K., the Matrimonial Causes Act 1973 allows recognition of polygamous marriages entered into outside the U.K. provided neither party was domiciled in the U.K. at the relevant time.\(^\text{15}\) The Act also clarifies that a marriage is not regarded as polygamous if at its inception, neither party has any other spouse. In Ireland, the position as regards the recognition of such marriages is less clear.

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

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

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

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

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

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

---

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


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


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

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

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

Take for instance, the scene in a church in Tilbury, where a vicar, who was performing three marriages ceremonies one bank holiday Monday, married the second couple first, as the bride to the first marriage was almost three hours late. The vicar told The Sunday Times: “In the course [of the first marriage]… I watched what was going on at the back [of the church]. The woman who was late burst in and went to the far side of the church and stripped to her bra and knickers and rummaged in a black bin bag for an outfit. Her groom … didn’t seem to recognise his bride. She was a very small woman, must have been a size 10, and the dress was about size 18.”

Last year, marriage registrars in Ireland estimated that 10% to 15% of all civil ceremonies were sham marriages. The dark side to this industry was acknowledged by Hogan J. in Izmilionie v. Commissioner of An Garda Síochána when he stated that: “If citizens of other European Union states are being induced on a systematic basis to come to this State to enter into such marriages of convenience for monetary gain, then the shadow of organised crime, people trafficking and prostitution probably cannot be far behind.”

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

---

22 [Unreported, High Court, Clark J., 27th May, 2011].
27 (Unreported, Supreme Court, 3rd April, 1992); See also the decision of the House of Lords in Verswege v. Smith [1983] 1 A.C. 145 where
Portuguese man aged 25, while on a two week holiday in Portugal. They had a relationship together and met again a year later when H. returned to Portugal for a further two weeks. S. then visited H. in Ireland and stayed with her at her family home. H. had secured a visa to work in the United States and wanted S. to travel with her. She made enquiries with the U.S. embassy and discovered that she could be accompanied by a spouse. This prompted the young couple to marry on the understanding that they would obtain a divorce in the United States. The marriage took place in a registry office unknown to H.’s parents. It was never consummated. S. returned to Portugal a few days after the ceremony and it appears husband and wife did not meet again. H. sought a decree of nullity only sixteen days after the marriage.

The argument was made that there was no intention “to go the distance”, there was no marriage. This was rejected by a majority of the Supreme Court. 29 McCarthy J. stated:-

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

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

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

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

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

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

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

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

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

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

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

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

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

**Marriage, Civil Partners and Cohabitants**

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

The legislation does not, however, place civil partnerships on an equal footing to marriage – had it done so it would certainly have left itself open to constitutional challenge. It does not, for example, extend or alter the institution of marriage or its status by conferring a right to marry on same sex couples. Nor does it present civil partnership as an alternative to marriage – a civil partnership is a partnership of two persons of the same sex;35 a marriage is a union of two persons of the opposite sex. Further, while the Act confers certain statutory (as opposed to constitutional) benefits and protections on non-marital relationships, it does not in any way penalise or disadvantage marital unions. The grounds for annulment and dissolution differ. Non-consummation is a ground upon which a marriage may be annulled, but not a civil partnership.6 This reflects the intrinsic relationship between marriage, the family and the rearing of children. A decree of dissolution of a civil partnership may be granted on more liberal grounds than a decree of divorce. In the case of a civil partnership, the parties must have lived apart from one another for two out of the preceding three years; in the

30 European Communities (Free Movement of Persons) (No. 2) Regulations, S.I. No. 656 of 2006.
31 The Legislative Programme for the Oireachtas Autumn Session 2011, which was published on 14th September, 2011, includes a Marriages Bill to deal, inter alia, with marriages of convenience. The Bill, the Heads of which have yet to be approved by the Government, is expected to be published in 2012.
33 The Act of 2010 was signed into law on 19th July, 2010, and all sections (except s. 5) were commenced on 1st January, 2011; s. 5 was commenced on 23rd December, 2010; see S.I. No. 648 of 2010.
35 See s. 3 of the Act of 2010; The U.K. civil partnership regime is also limited to same sex couples; see s. 1(1) of the Civil Partnership Act 2004. It is understood that a number of heterosexual couples in the U.K. who were refused a civil partnership are challenging the legislation in the European Court of Human Rights on the basis that it is discriminatory.
36 Part 11 of the Act of 2010 (ss. 107 and 108) deals with nullity of civil partnerships; the grounds for annulment may be broadly categorised as (i) a lack of capacity; (ii) a failure to observe the formalities for the registration of a civil partnership; and (iii) a lack of consent.
case of a divorce the requirement is four out of the preceding five years. Unlike divorce, there is no requirement that the courts be satisfied that there is no prospect of reconciliation amongst the civil partners.

The stricter requirements in the case of divorce reflect a desire to create stable and lasting marital relationships insofar as possible. Finally, the privileges attaching to marriage, whether pursuant to the Constitution, the statute or the common law, are superior to those attaching to civil partnerships, e.g. civil partners cannot jointly adopt children and nor do they enjoy the same succession rights as spouses.

As regards cohabitants, prior to making an order in favour of a qualified cohabitant, the courts must have regard to the rights and entitlements of any spouse or former spouse.

The Same Sex Marriage Debate

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

In Zappone v. Revenue Commissioners, the plaintiffs were a lesbian couple who had married in Canada. On their return to Ireland, their claim to be treated as a married couple for tax purposes was rejected by the Revenue Commissioners on the ground that Irish tax law relating to married couples applies only in respect of a husband and wife. The High Court was asked to decide whether the right to marry inherent in the marriage of a man with a biological woman is entitled to adopt a cautious approach to changing the concept of marriage. Dunne J. found that it does not. Marriage under the Constitution, the judge stated, is an “inseparable part of the family. That Act, the judge stated, is an expression of the prevailing view as to the basis for capacity to marry.”

In Zappone v. Revenue Commissioners, the plaintiffs were a lesbian couple who had married in Canada. On their return to Ireland, their claim to be treated as a married couple for tax purposes was rejected by the Revenue Commissioners on the ground that Irish tax law relating to married couples applies only in respect of a husband and wife. The High Court was asked to decide whether the right to marry inherent in the marriage of a man with a biological woman is entitled to adopt a cautious approach to changing the concept of marriage. Dunne J. found that it does not. Marriage under the Constitution, the judge stated, is an expression of the prevailing view as to the basis for capacity to marry. It enjoys a presumption of constitutionality which had not been rebutted. Recognition of a constitutional right of

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

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

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

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

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


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


45 Ibid at 507.

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

47 See fn. 44 above at 506; since this judgment was delivered on 14th June 2006, the following countries have also granted recognition to same sex marriages: Norway, Sweden, Portugal, Iceland and Argentina. Same sex marriages are not recognised federally in the United States but are recognised by 6 states. Notably, on 24th June 2011, the New York Senate passed a bill legalising such marriages.
same sex couples to marry could have the effect of rendering the Act unconstitutional. Further, she held, any discrimination as against same sex couples could be justified both by the terms of Article 41 and by reference to the welfare of children. Finally, Dunne J. was of the view that the right to marry implicitly derives from Article 41. It is very difficult, she said, to see how the definition of marriage could, having regard to the ordinary and natural meaning of the words of Articles 41 and 42, relate to a same sex couple.

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

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

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

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

The Court rejected the argument that Article 14 of the Convention, which prohibits discrimination on grounds such as sex, imposed an obligation on contracting states to recognise same sex marriage. It was also against an argument that if a state chooses to provide same sex couples with an alternative means of recognition, it is obliged to confer same sex marriage entered into in Canada. Potter P. rejected their arguments based on Articles 8 and 14 of the Convention. He noted that the Convention does not require contracting states “to establish particular forms of social and legal institution to recognise particular relationships, especially in areas of social controversy.” He cited the decision of the Court in Johnston v. Ireland (1987) 9 E.H.R.R. 203 to the effect that Article 8 does not impose on contracting states a positive obligation to establish for unmarried couples or those who are legally incapable of marrying a status analogous to that of married couples. Potter P. also dismissed the argument that the U.K. Civil Partnership Act 2004 infringed Article 14 by downgrading the status of same sex couples when compared to that of married couples. His approach was not alien to that enshrined in Article 41 of the Constitution:-

“It is apparent that the majority of people, or at least of governments, not only in England but Europe-wide, regard marriage as an age-old institution, valued and valuable, respectable and respected, as a means not only of encouraging monogamy but also the procreation of children and their development and nurture in a family unit (or ‘nuclear family’) in which both maternal and paternal influences are available in respect of their nurture and upbringing.

The belief that this form of relationship is the one which best encourages stability in a well-regulated society is not a disreputable or outmoded notion based upon ideas of exclusivity, marginalisation, disapproval or discrimination against homosexuals or any other persons who by reason of their sexual orientation or for other reasons prefer to form a same sex union.

---

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


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

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

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

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

Advancements in Science

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

In December 2010, the Supreme Court delivered two judgments which considered the implications of developments in modern reproductive science. In the first, a unanimous five judge Supreme Court, held that a sperm donor father of a child born to a lesbian couple had a right of access to the child, although no guardianship rights existed in his favour.55 In the second, the Court held that a frozen embryo is not an “unborn” person and so is not protected by Article 40.3.3 of the Constitution.56 It must always be borne in mind that people will go to great lengths to establish a family and in the area of family law, predictability and certainty as to the status of familial or parental rights is clearly desirable. Our courts have not yet had an opportunity to consider the minefield of legal issues which can arise in a surrogacy case, although one might expect that it is only a matter of time. Newspaper reports suggest an increase in the number of Irish couples travelling abroad to avail of surrogacy services, most often, it would appear, to the United States or the Ukraine.

The law in many U.S. states and in the Ukraine provides for the names of the “commissioning parents” to be entered on the birth certificate. However, difficulties can arise where the foreign birth certificate is not recognised in Ireland or where the Irish authorities refuse to issue an Irish passport.

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

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

Surrogacy arrangements can arise in many shapes and forms, none of which are straightforward from a legal point of view. Consider, for instance, the situation of a married couple who enter into a traditional surrogacy type arrangement, i.e. the woman contributes her own egg, the man contributes his own sperm and a third party carries the baby to term. As the law currently stands, it is likely that the surrogate/birth mother would be considered to be the legal mother of the child. The commissioning couple would, therefore, have to adopt the child. Yet, our current adoption legislation excludes unmarried couples from the right to adopt.57 Alternatively, the commissioning man, as the biological father, could apply for guardianship under the Guardianship of Infants Act 1964, but this option would not be available to the commissioning woman.58 Further difficulties might arise where the surrogate is married. In such a case, her husband would be presumed to be the child’s father and, under the Guardianship of Infants Act 1964, they would be its joint guardians.59 They would be a family for the purposes of the Constitution and the child, being a child of married parents, could not be adopted by the commissioning couple. The Commission on Assisted Human Reproduction,

53 Ibid at 329.
54 See fn. 44 above at 512.
55 As recorded by the 2006 census, see www.cso.ie.
57 Rade v. Rade [2010] 2 I.L.R.M. 411 (“the embryo case”). Article 40.3.3 of the Constitution provides that: “The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.”
58 This position may not be compatible with the European Convention; see the decision of the House of Lords in In re R. and Others (A.P.) [2008] UKHL 38 (18 June 2008) where the Court held that an outright prohibition on adoption by an unmarried couple was a disproportionate interference with Article 8 family rights.
59 Section 6A of the Guardianship of Infants Act 1964, as amended by s. 12 of the Status of Children Act 1987, provides that: “Where the father and mother of an infant have not married each other, the court may, on the application of the father, by order appoint him to be a guardian of the infant.” [Emphasis added]
60 Section 46 of the Status of Children Act 1987 provides that where a woman gives birth to a child during a subsisting valid marriage, her husband is the father of the child. Section 6 of the Guardianship of Infants Act 1964 provides that the married father and mother of an infant shall be joint guardians.
in its 2005 report, recommended that legislation regulating the area of assisted human reproduction be enacted and that it contain a presumption that a child born through surrogacy is the child of the commissioning couple. Legislation in this area will require careful drafting.

Conclusion

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

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

From the year 2000, the out-rush of people had stopped and the inrush was in full swing. New forms of expression as to marriage came in and have become well established in the law of their homeland. It is and not how we would like it to be. When Yeats wrote in his poem The Wild Swans at Coole about visiting after a gap of twenty years the place where his soul had been captured by Nature’s perfection, he explained his youthful self as having “trod with a lighter tread”. Well, things in family law were once simple too, one might say, twenty years ago. No surrogacy, no divorce and a bulwark of protection by our fundamental law for the nuclear and traditional family. With the arrival of the European Convention on Human Rights and the European Union Charter of Fundamental Rights, as the poet said, “all’s changed”. But, despite vast changes, respect for the choice people make to become, for instance, Mr. and Mrs. S, and traditional respect for the Irish children of foreign parents in their choice of Ireland as a home, live on yet. We are a more open and a much more complex society, but values that were dismissed by many as being rigid may still inform the decisions of judges in the years to come.

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

Irish Rule of Law Project runs Professional Practice Course in Kosovo

RACHEL POWER AND ALISON DE BRUIR BL

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

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

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

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

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

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

We also watched as tensions escalated in northern Kosovo³. Relations have been strained in the period surrounding an agreement reached on the subject of trade between Serbia and Kosovo allowing for the free flow of exports in both directions through border checkpoints. This agreement was the first of its kind since Kosovo declared independence in 2008; previously, Serbia had banned all exports entering the country from Kosovo. Under the agreement, the Kosovo authorities would have overall authority over the crossings but would be under the supervision of EULEX (EU Rule of Law Mission in Kosovo).

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

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

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

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

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

¹ Case No. KO-98/11, ‘Concerning the immunities of Deputies of the Assembly of the Republic of Kosovo, the President of the Republic of Kosovo and Members of the Government of the Republic of Kosovo’. (Referral by the Government of Kosovo)
² http://www.nytimes.com/2011/10/07/world/europe/death-of-
GET OFF TO A FLYING START
WHEN DRAFTING LEGAL PLEADINGS

3 good reasons to start your subscription to
Civil Litigation Precedents Service:
1. Helps you get your drafting right, offering you a library of expertly
drafted civil litigation precedent documents.
2. Saves you time by letting you quickly prepare documents for the
most common civil litigation transactions.
3. In one publication, you have access to over 135 documents that you
can tailor to meet each client’s particular requirements.

This service is also available on CD or in looseleaf.

Future updates
Future releases will include such topics as Defamation, Judicial
Review, Nuisance, Trespass, Probate, and Equity and Trusts.
Precedents will also be updated and amended to take account of
relevant legislative developments in existing subject areas.

PLACE YOUR ORDER TODAY
VISIT www.roundhall.ie
EMAIL TRLUKI.CS@thomsonreuters.com
CALL 1 800 937982 (IRE) +44 (0) 1264 388570 (INT)
Judge our **figures** for yourself

50%

Join our unique **solicitors’ scheme** to save 50%* on your **car** and **home insurance**.

Simply call 1890 88 22 33 or get a quick quote online at [http://solicitors.glennons.ie](http://solicitors.glennons.ie) today.

* Premium savings may vary depending on your risk profile and your present insurer.