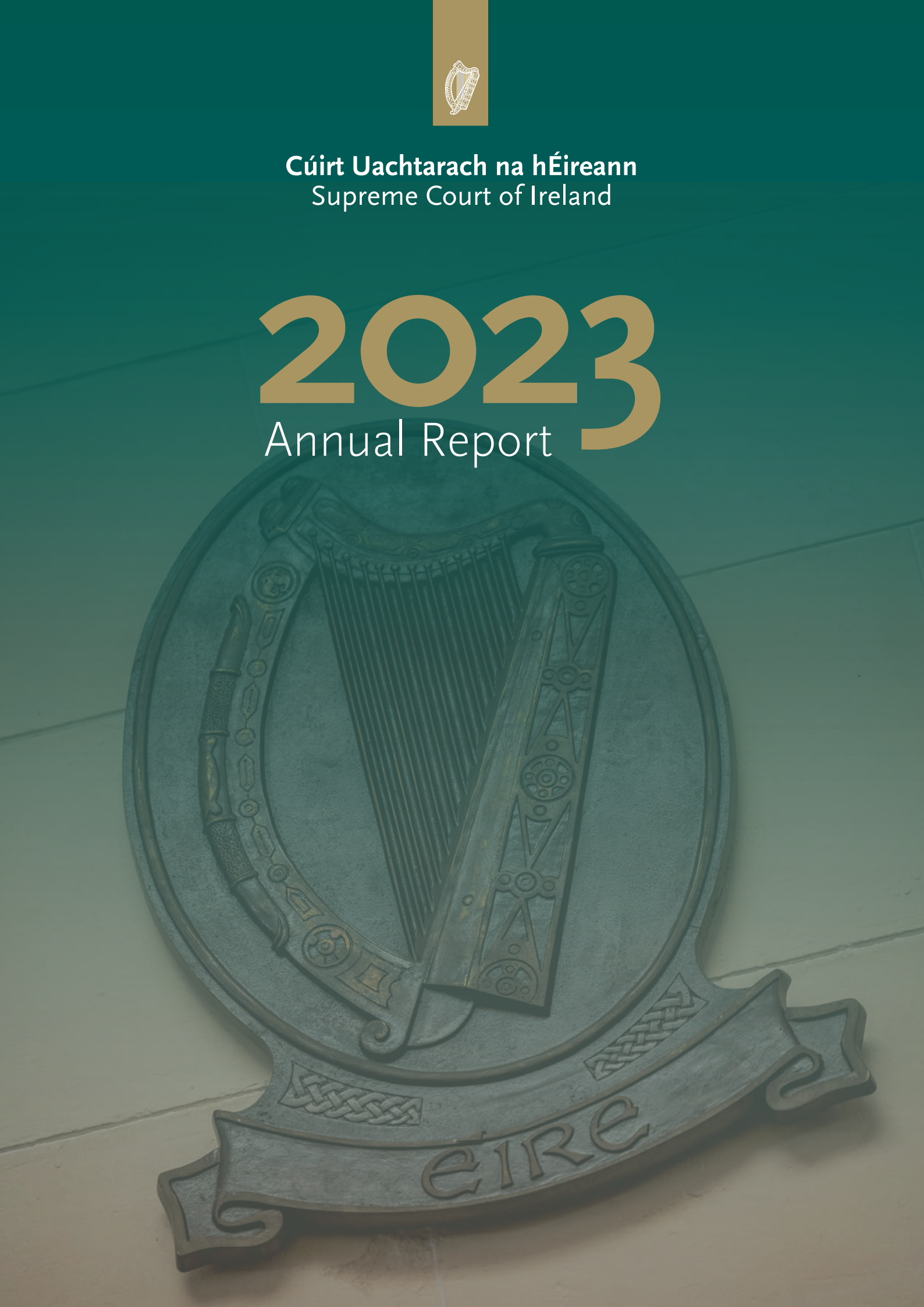
Cúirt Uachtarach na hÉireann
Supreme Court of Ireland

2023 Annual Report



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Cúirt Uachtarach na hÉireann
Supreme Court of Ireland

2023 Annual Report

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Foreword by the Chief Justice

I am pleased to present the sixth annual report of the Supreme Court which highlights the work undertaken both inside and outside the courtroom throughout 2023.

"One may have a legal system with no legislature and no police force and no legal professions – that is to say a purely customary legal system – but one has no legal system at all until one has courts; i.e., adjudicative institutions charged with administering a system of rules by which they themselves are bound."[1]

Courts at every jurisdictional level are an important interface between the laws that bind people and the people themselves. While the average citizen may never have cause to read a Supreme Court judgment or consider the international engagements of its members, what goes on inside the courtroom and what members of the Court do can affect everyone. It is important to make such information available in order to provide insight into an integral part of the legal system.

The following pages of this report provide summaries of some important cases decided by the Court during 2023, which remains the core function of the Court, but also gives some idea of the work beyond the courtroom and the range of events and engagements which were hosted by or involved members of the Supreme Court throughout 2023.

One such event, organised under the auspices of the Chief Justice's Working Group on Access to Justice, saw the gathering of attendees from the judiciary, legal professions, and academic community, together with public sector organisations, NGOs and those who volunteer in community law centres, at Dublin Castle for the Group's second conference titled '*Civil Legal Aid Review: An Opportunity to Develop a Model System*'. Over two days in February, an impressive lineup of keynote speakers and three expert panel sessions examined various important aspects of the civil legal aid system in Ireland, citing key areas for reform and possible solutions. A report summarising the content of the speeches and discussions was subsequently launched and presented to Minister for Justice Helen McEntee TD in July at the offices of the Legal Aid Board in Dublin.

2023 also saw the establishment of a new tradition for the Irish courts system: a formal opening of the legal year ceremony in the Round Hall of the Four Courts – the first such ceremony in the building since the establishment of the new courts system in 1924 and the restoration of the Four Courts building in 1931. On this Monday in 2023, members of the judiciary from Ireland and neighbouring jurisdictions, legal professionals, Courts Service officials and members of the wider legal community gathered to reflect on the developments since the establishment of the courts system nearly 100 years prior and to look to new developments in the future. An important theme of the speeches delivered at this event is that traditions should not merely be preserved for traditions' sake, but rather that each generation must look at what is valuable to preserve and what perhaps requires improvement.

As the report demonstrates, the activities of the Supreme Court this year extended beyond the borders of the State. International engagements were a key feature of the Court's calendar beyond the daily business of hearing and deciding cases. Members of the Court represented Ireland at events such as the International Criminal Court's Fifth Annual Judicial Seminar in The Hague, the Opening of the Judicial Year at the European Court of Human Rights in Strasbourg and the UNECE Judicial Colloquium in Geneva, Switzerland to name a few. In addition, there was a bilateral meeting between senior members of the Irish judiciary and our colleagues in Northern Ireland, hosted by the Judicial Studies Board for Northern Ireland in Belfast, as well as a visit from the Chief Justice of Zambia here in Dublin. We also played host to judges from the Federal Administrative Court of Germany and the Supreme Court of Estonia who took part in a judicial exchange programme.

I hope this report shows that the Supreme Court does much more than perform the basic function of courts, identified by Gardner, of constituting the legal system, and provides some insight into how the Court has performed its distinctive role during 2023.

Donal Ó Donnell

Mr Justice Donal O'Donnell, Chief Justice
Dublin, 2024

1 John Gardner, *Law as a Leap of Faith* (Oxford 2012) at 257.

Introduction by the Registrar

I am pleased to introduce this report of our activities during 2023. The court administration continued to deliver high quality support to court users, judges and to the public, while at the same time absorbing changes in practice and technology that will further enhance the services that we deliver.

In respect of core court business, the 2023 year-end position saw an increase of 10% in the number of applications for leave to appeal filed when compared to 2022. In addition, there was an 8% increase in the number of applications determined by the Court. A further increase in the business level is anticipated during 2024.

By the end of the year, litigants at final appellate level where leave to appeal had been granted could expect a hearing within 20 weeks. In this context, the Court essentially had no backlog of appeals awaiting a hearing date and the cases not disposed of were not delayed other than by the extent to which parties required time to prepare the case for appeal and to fulfil the necessary procedural steps which were required.

On 8th December 2023, the Court gave judgment in the Reference by the President of Ireland of the Judicial Appointments Commission Bill 2022 having held a hearing in respect of the Reference over two days on 15th and 16th November. Under the provisions of Article 26 of the Constitution, the Court is required to give judgment within 60 days of the date of reference by the President. The decision in respect of whether any provision of a Bill is repugnant to the Constitution under the Article 26 procedure is one of the Court's foremost constitutional responsibilities. The requirement to have a hearing and a judgment delivered within an expedited timeframe was managed efficiently and effectively by the Court and all necessary steps were taken to limit the impact on other cases which had been scheduled for progress during that period.

An upgraded video technology system was installed in the main courtroom during August. This has improved the overall quality and experience for participants during video-enabled hearings where the Court determines that such hearings are appropriate in the circumstances of the case. Remote or virtual hearings are principally used for the case management of cases and are efficient and convenient for the vast majority of practitioners. The installation has also enhanced our capacity for hybrid video hearings where one or more participants are present in the courtroom and the remaining participants access the hearing remotely.

I am grateful to the Chief Justice and to the judges of the Court for their invaluable assistance and continued support during what was another busy year, continuing a consolidation of our business activity since the pandemic.

The new online appointments system which I mentioned in my introduction last year was launched in February and it has provided appointment certainty for practitioners and lay litigants at a date and time that suits and has allowed the Supreme Court Office to manage these interactions more efficiently.

We continued our engagement with our Data Unit colleagues during the year and I am very hopeful that this will significantly improve the information available from our systems to the Chief Justice in respect of the business of the Court and to me in respect of the management of that part of the business which is transacted through the Office.

I would like to thank the staff of the Office and indeed all staff who have supported the Court during the year. Their dedication and continued good humour created an enjoyable work environment which has been very conducive to the smooth and efficient transaction of business and to the delivery of a good service.

We look forward with renewed purpose to 2024 with the possibility to further improve the services that we deliver to all of our stakeholders.

John Mahon, Supreme Court Registrar
Dublin, 2024

2023 at a Glance

160 Applications for leave lodged

160 Applications for leave resolved

35% of applications for leave granted

58% of applications for leapfrog appeal granted

32 Full appeals resolved

61 Judgments delivered

1 Request for a preliminary ruling to the Court of Justice of the European Union

4.5 weeks

Average length of time from filing of complete documents to issue of application for leave determination

19.75 weeks

Average length of time from grant of leave to appeal to listing of appeal hearing

Members of the Supreme Court

Back L-R: *Ms Justice Aileen Donnelly, Mr Justice Brian Murray, Mr Justice Seamus Woulfe, Ms Justice Marie Baker, Mr Justice Gerard Hogan, Mr Justice Maurice Collins*

Front L-R: *Ms Justice Iseult O'Malley, Mr Justice Peter Charleton, Mr Justice George Birmingham (ex officio), Mr Justice Donal O'Donnell (Chief Justice), Mr Justice David Barniville (ex officio), Ms Justice Elizabeth Dunne*

Part 1

About the Supreme Court

About the Supreme Court

The Supreme Court of Ireland sits at the top of the Irish courts system and is the court of final appeal in civil and criminal matters. It also has the final say in respect of the interpretation of Ireland's basic law, Bunreacht na hÉireann (the Constitution of Ireland). As the highest court in the land, the decisions of the Supreme Court have binding precedence on all other courts in Ireland.

Composition of the Court

At the end of 2023, the Supreme Court comprised the Chief Justice, who is the President of the Court, and nine ordinary judges. In addition, both the President of the Court of Appeal and the President of the High Court are ex-officio (by virtue of their respective offices) members of the Supreme Court.

Appeals are usually heard and determined by five judges of the Court unless the Chief Justice directs that any appeal or other matter (apart from matters relating to the Constitution) should be heard and determined by three judges. Occasionally, the Supreme Court may sit as a composition of seven if the importance of the case warrants it.

In instances where the Supreme Court is exercising its original jurisdiction, it sits at a minimum as a panel of five judges.

Applications for leave to appeal are considered and determined by a panel of three judges of the Supreme Court. The Chief Justice or an ordinary judge of the Supreme Court may sit alone to hear certain interlocutory and procedural applications, however this does not generally happen in practice. The Chief Justice appoints a judge of the Court to case manage appeals for which leave to appeal has been granted.

Jurisdiction of the Supreme Court

Appellate Jurisdiction	Constitutional Jurisdiction
Jurisdiction	
Original Jurisdiction	Implementation of EU law

1) Appellate Jurisdiction

Appeals are only heard where the Supreme Court grants permission once it determines that the relevant test set out in Article 34.5 of the Constitution has been satisfied.

- The Supreme Court hears appeals from decisions of the Court of Appeal where it is satisfied:
  a) that the decision involves a matter of general public importance, or
  b) it is in the interests of justice that there be an appeal to the Supreme Court.
- The Supreme Court can also hear appeals from decisions of the High Court ('leapfrog appeals') where it is satisfied that there are exceptional circumstances warranting a direct appeal to it, a precondition for which is the presence of either or both of the following factors:
  a) the decision involves a matter of general public importance, or
  b) the interests of justice.

2) Constitutional Jurisdiction

The Supreme Court has the final say in the interpretation of the Constitution of Ireland. It ensures that the laws enacted by the Oireachtas, Ireland's Parliament, are upheld and interpreted in light of the Constitution and the jurisprudence that has developed since it came into force in 1937. In that way, it may be said to function as a constitutional court.

This is a role of particular importance in Ireland as the Constitution expressly permits the courts to review any law, whether passed before or after the enactment of the Constitution, in order to determine whether it conforms with the Constitution. The Superior Courts (the High Court, Court of Appeal and Supreme Court) retain the power to declare invalid any legislation that is determined to be inconsistent with the Constitution.

3) Original Jurisdiction

Original jurisdiction refers to the Supreme Court's role in dealing with the following two matters when called on:

i) where a Bill is referred to the Court by the President of Ireland in accordance with Article 26 of the Constitution, for a determination of whether that Bill (or certain provisions of it), as passed by both Houses of the Oireachtas, is incompatible with the Constitution, and

ii) where the Court is requested to determine, in accordance with Article 12.3 of the Constitution, whether the President of Ireland is incapacitated.

While no requests under Article 12.3 have come before the Supreme Court to date, the Article 26 procedure has been invoked by the President on sixteen occasions, with the Supreme Court determining in seven of those cases that the Bill in question was incompatible with the Constitution. The most recent Article 26 reference came before the Court in November 2023 and concerned certain provisions of the Judicial Appointments Commission Bill 2022.[2] See page 82 to read the summary of the decision reached by the Supreme Court.

4) Implementation of EU Law

The Supreme Court has a role in implementing the law of the European Union. As the court of final appeal in Ireland, it is obliged under the Treaty on the Functioning of the European Union ('TFEU') to refer to the Court of Justice of the European Union ('CJEU') questions regarding the interpretation of EU law which arise in cases before it, where the interpretation is not clear and clarification is necessary in order for the Supreme Court to decide a question before it.

2 In the Matter of Article 26 of the Constitution and in the Matter of the Judicial Appointments Commission Bill 2022 [2023] IESC 34.

Journey of a Typical Appeal

Decision made by the High Court or Court of Appeal and judgment delivered.

Party dissatisfied with decision may file an application for leave to appeal.

Other parties to the case given the opportunity to file notice setting out why leave to appeal should be refused.

Once satisfied that both application for leave and respondent's notice(s) are in order, application will be listed for consideration.

Panel of three Supreme Court judges convene to consider application for leave.

Panel issues determination setting out whether leave has been granted or not.

If granted, case management process begins and both parties are required to follow the directions of an assigned Supreme Court judge to ensure appeal is on track to be heard.

Once appeal is ready to be heard, a hearing date is set.

Judges assigned to hear appeal read written submissions of both parties in advance.

Oral hearing takes place during which both parties make arguments and Court poses questions to both sides.

Court reserves judgment and begins its deliberations.

Judges circulate draft judgments for consideration by other members of the Court.

The decision reached is determined by majority and the Court delivers its judgment in-person.

The legal effect of the judgment takes the form of a written court order which is communicated to the parties.

Members of the Supreme Court

Mr Justice Donal O'Donnell, Chief Justice

Mr Justice Donal O'Donnell was appointed the 13th Chief Justice of Ireland in October 2021. He has been a judge of the Supreme Court since January 2010.

Born in Belfast, Mr. Justice O'Donnell was educated at University College Dublin, The Honorable Society of King's Inns, and the University of Virginia. He was called to the Bar of Ireland in 1982, commenced practice in 1983, and was called to the Bar of Northern Ireland in 1989. He was admitted to the Inner Bar of Ireland in 1995.

Mr. Justice O'Donnell was a council member of the Irish Legal History Society from 2018 to 2021 and is now a joint patron of the society. He is also an honorary member of the Society of Legal Scholars.

Ms Justice Elizabeth Dunne

Ms Justice Dunne was appointed to the Supreme Court in July 2013.

Born in Roscommon, Ms Justice Dunne was educated at University College Dublin and The Honorable Society of King's Inns. She was called to the Bar of Ireland in 1977. In 1996, Ms Justice Dunne was appointed as a judge of the Circuit Court before her appointment to the High Court in 2004.

Ms Justice Dunne is a correspondent judge for the Supreme Court on ACA-Europe and is a member of the Courts Service Board.

Mr Justice Peter Charleton

Mr Justice Charleton was appointed to the Supreme Court in 2014.

A native of Dublin, Mr Justice Charleton was educated at Trinity College Dublin and The Honorable Society of King's Inns. He was called to the Bar of Ireland in 1979 and to the Inner Bar in 1995. In 2006, Mr Justice Charleton was appointed to the High Court and was assigned principally to the commercial list.

Mr Justice Charleton is an adjunct professor of criminal law and criminology at the University of Galway and has published numerous texts on criminal law. In addition, he is the lead Irish representative on the Colloque Franco-Britannique-Irlandais and, in October 2023, took up the role of Director of Judicial Studies at the Judicial Council.

Ms Justice Iseult O'Malley

Ms Justice O'Malley was appointed to the Supreme Court in October 2015.

Born in Dublin, Ms Justice O'Malley was educated at Trinity College Dublin and The Honorable Society of King's Inns. She was called to the Bar of Ireland in 1987 and to the Inner Bar in 2007. In 2012, Ms Justice O'Malley was appointed to the High Court.

Ms Justice O'Malley is chair of the Sentencing Guidelines and Information Committee of the Judicial Council.

Ms Justice Marie Baker

Ms Justice Baker was appointed to the Supreme Court in December 2019.

Born in Wicklow, Ms Justice Baker was educated at University College Cork and The Honorable Society of King's Inns. She was called to the Bar of Ireland in 1984 and to the Inner Bar in 2004. In 2014, Ms Justice Baker was appointed to the High Court before being appointed to the Court of Appeal in 2018.

Ms Justice Baker is the assigned judge for the purposes of the Data Protection Act 2018 and, in February 2023, she was appointed the first chair of An Coimisiún Toghcháin by the President of Ireland.

Mr Justice Seamus Woulfe

Mr Justice Woulfe was appointed to the Supreme Court in July 2020.

A native of Clontarf, Mr Justice Woulfe was educated at Trinity College Dublin, Dalhousie University, Nova Scotia, and The Honorable Society of King's Inns. He was called to the Bar of Ireland in 1987 and to the Inner Bar in 2005.

Prior to his appointment to the Supreme Court, Mr Justice Woulfe served as Attorney General to the 31st Government of Ireland from June 2017 until June 2020.

Mr Justice Gerard Hogan

Mr Justice Hogan was appointed to the Supreme Court in October 2021.

A native of Tipperary, Mr Justice Hogan was educated at University College Dublin, the University of Pennsylvania, The Honorable Society of King's Inns, and Trinity College Dublin. He was called to the Bar of Ireland in 1984 and to the Inner Bar in 1997.

Mr Justice Hogan previously served as a judge of the High Court from 2010 to 2014, as a judge of the Court of Appeal from 2014 to 2018, and as Advocate General of the Court of Justice of the European Union from 2019 to 2021.

Mr Justice Brian Murray

Mr Justice Murray was appointed to the Supreme Court in February 2022.

From Dublin, Mr Justice Murray was educated at Trinity College Dublin, the University of Cambridge, and The Honorable Society of King's Inns. He was called to the Bar of Ireland in 1989 and to the Inner Bar in 2002. He was elected a bencher of the Honorable Society of the Kings Inns in 2010.

Mr Justice Murray served as a judge of the Court of Appeal from November 2019 until his appointment to the Supreme Court. He was a lecturer in the law school at Trinity College from 1999 until 2003.

Mr Justice Murray is the lead judge for international relations at the Supreme Court. In addition, he is a member of the Superior Court Rules Committee, the Judicial Studies Committee of the Judicial Council, the Legal Research and Library Services Committee, the Judicial Editorial Board of the Irish Judicial Studies Journal, and the organising committee for the National Conference and Superior Court Conference.

Mr Justice Maurice Collins

Mr Justice Collins was appointed to the Supreme Court in December 2022.

A native of County Cork, Mr Justice Collins was educated at University College Cork and The Honorable Society of the King's Inns. He was called to the Bar of Ireland in 1989 and admitted to the Inner Bar in 2003.

In 2019, Mr Justice Collins was appointed as a judge of the Court of Appeal and served on that court until his appointment to the Supreme Court.

Since October 2020, he has been a part-time Commissioner of the Law Reform Commission.

New to the Court:

Ms Justice Aileen Donnelly

Ms Justice Donnelly was appointed to the Supreme Court in June 2023.

Born in Dublin, Ms Justice Donnelly was educated at University College Dublin and The Honorable Society of King's Inns. She was called to the Bar of Ireland in 1988 and admitted to the Inner Bar in 2004.

In 2014, Ms Justice Donnelly was appointed to the High Court where she took charge of the extradition list as her primary responsibility. She was subsequently appointed to the Court of Appeal in June 2019, where she served for four years before her appointment to the Supreme Court.

Since December 2020, Ms Justice Donnelly has chaired the Judicial Studies Committee, a statutory committee of the Judicial Council. She served as a member of the Board of the Judicial Council, as the Court of Appeal representative, from 2020 to 2023.

Chief Justice O'Donnell pictured with Ms Justice Donnelly following her declaration ceremony

Ex Officio Members of the Supreme Court

Mr Justice George Birmingham

Mr Justice George Birmingham was appointed President of the Court of Appeal in 2018.

Born in Dublin, Mr Justice Birmingham was educated at Trinity College Dublin and The Honorable Society of King's Inns. He was called to the Bar of Ireland in 1976 and admitted to the Inner Bar in 1999.

In 2007, Mr Justice Birmingham was appointed to the High Court where he sat across almost all lists and had charge of the Minors' List. When the Court of Appeal was established in 2014, he was appointed to that court and took charge of the criminal division, a function he continued once appointed President.

Mr Justice Birmingham is the Judicial Visitor to Trinity College Dublin. He also has ongoing extensive involvement with the Ukrainian judiciary, and has given speeches and attended events in Kyiv, Kharkiv and Lviv.

Mr Justice David Barniville

Mr Justice David Barniville was appointed President of the High Court in 2022.

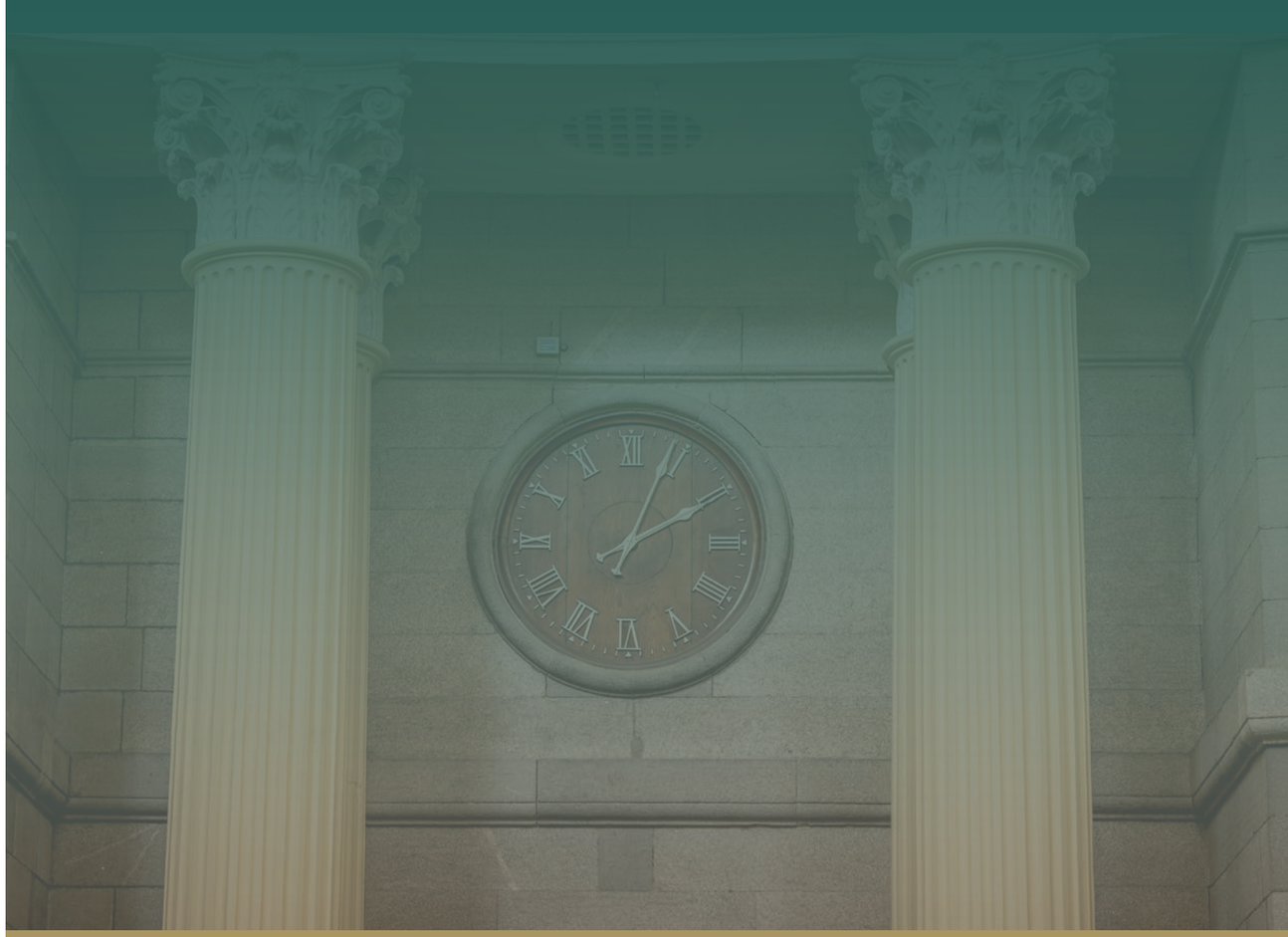
Born in Dublin, Mr Justice Barniville was educated at University College Dublin and The Honorable Society of King's Inns. He was called to the Bar of Ireland in 1990 and admitted to the Inner Bar in 2006.

In 2017, Mr Justice Barniville was appointed to the High Court where he took charge of the commercial division of that court and became the designated arbitration judge.

He was appointed to the Court of Appeal in 2021 where he served until his subsequent appointment as President of the High Court, succeeding Ms Justice Mary Irvine.

Part 2

Statistics



Statistics

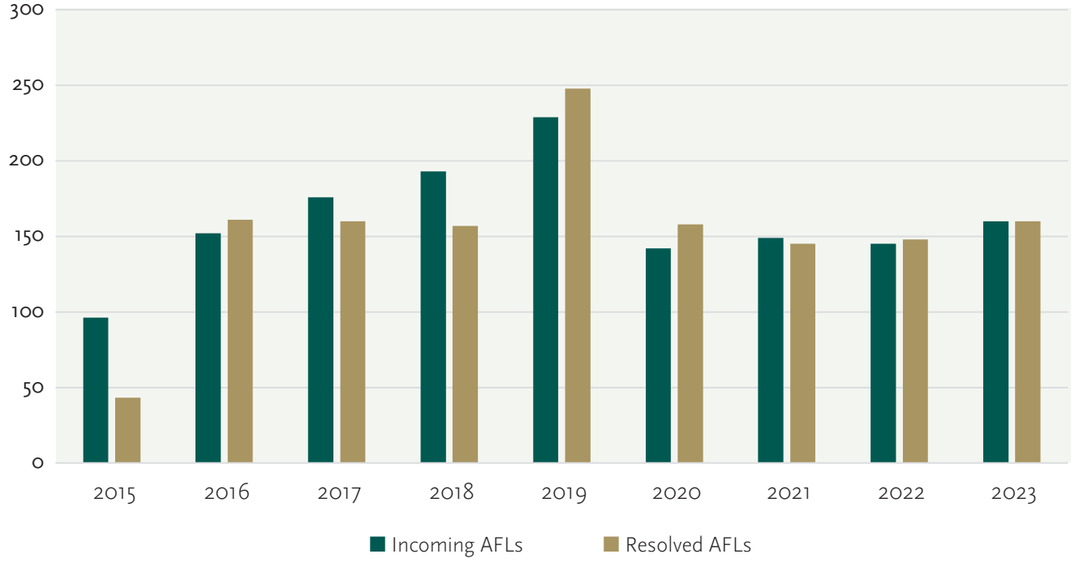
Applications for leave to appeal

The Supreme Court resolved 160 applications for leave to appeal in 2023, and a total of 1,382 since the Court began to determine applications for leave to appeal under its reformed jurisdiction in 2014.[3]

The number of applications for leave to appeal ('AFL') brought to the Supreme Court each year since 2015 is set out in the graph below, *'Incoming and Resolved AFLs: 2015-2023'*.[4] Of the 160 applications for leave to appeal determined in 2023, the Court granted leave in relation to 56 applications (35%) and refused leave in relation to 97 (61%).[4] The remaining applications were withdrawn before determination.

The figure of 160 represents the continuous increase in applications determined since the COVID-19 pandemic, with an 8% increase from 2022. In addition, it departs from the recent trend of decreasing applications for leave, which may be explained by the abating impacts of the COVID-19 pandemic and the associated restrictions placed on the courts during that time. While the knock-on effect of the disposal of fewer cases in the High Court and the Court of Appeal on the number of applications for leave to appeal brought to the Supreme Court was most acute in 2020, it had a continued impact in 2021, with knock-on effects to 2022.

Incoming and Resolved AFLs: 2015-2023



3 Annual statistics for cases considered by the Supreme Court can be found in the Annual Reports of the Courts Service and the Supreme Court, available at www.courts.ie.

4 While the jurisdiction of the Supreme Court was reformed in 2014, 2015 is used as year one for the purposes of statistical analysis as it represents the first full year of the reformed jurisdiction.

5 160 applications for leave to appeal were lodged in the Supreme Court Office and seven were withdrawn.

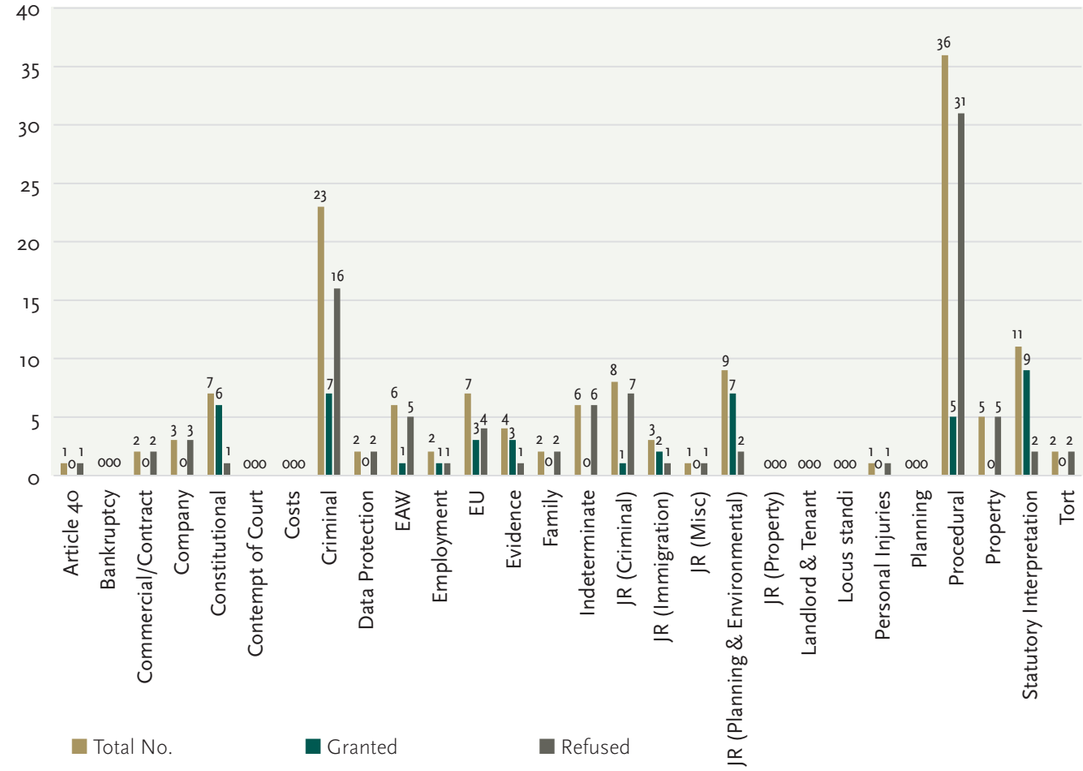
Categorisation of applications for leave to appeal

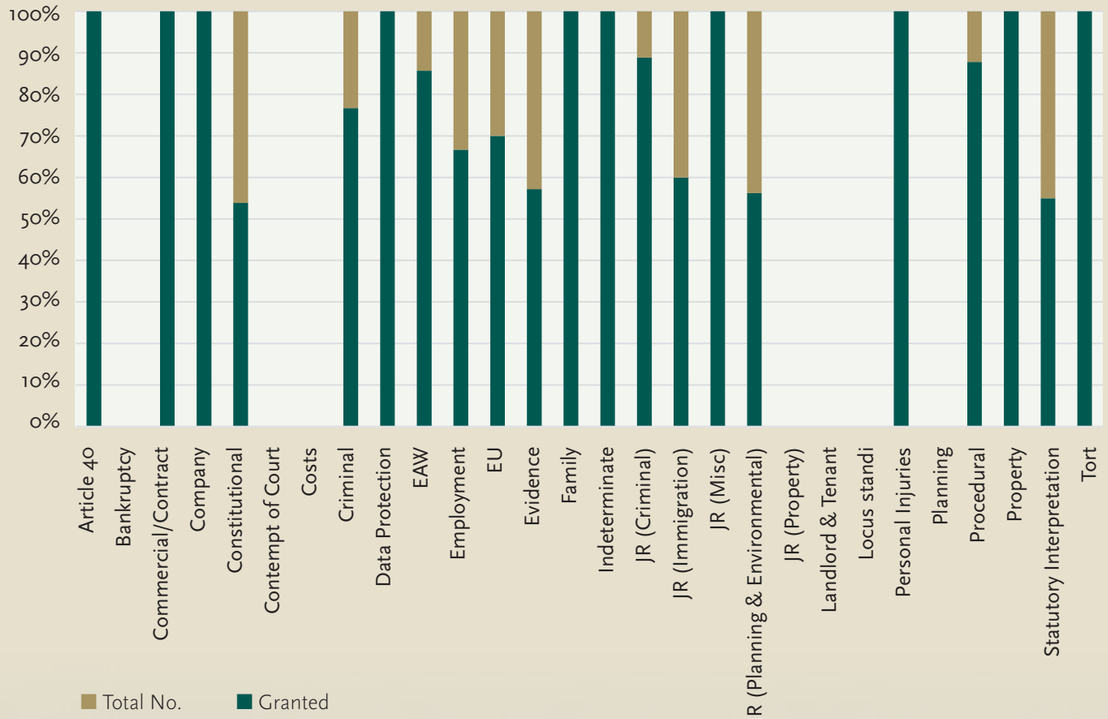
The chart below categorises all applications for leave to appeal brought from the High Court and the Court of Appeal to the Supreme Court in 2023 according to areas of law. It is important to keep in mind that many appeals involve issues which could potentially be categorised into several areas of law. Therefore, the categorisation attempts to identify the most relevant single category relating to each appeal. It does not take into account that there may be features of a case which involve important issues in other categories.

As was the case in 2020, 2021 and 2022, procedural issues gave rise to the highest number of applications for leave to appeal in 2023 (25% of applications). These primarily involved applications for an extension of time to appeal or general aspects of civil procedure. The substantive area of law which gave rise to the highest number of applications for leave to appeal in 2023 was criminal law (16%). The next largest categories were as follows: statutory interpretation (8%); judicial review (planning & environmental) (6%); judicial review (criminal) (5.6%); constitutional law (5%); EU law (5%); and European Arrest Warrant ('EAW') matters (4%).

Of these areas of law, leave to appeal was granted in: 14% of the applications involving issues of procedure; 30% of the applications concerning criminal law; 82% of the applications concerning statutory interpretation; 78% of the applications concerning judicial review ('JR') (planning & environmental); 13% of the applications concerning judicial review (criminal); 86% of the applications concerning constitutional law; 43% of the applications concerning EU law; and 17% of the applications concerning EAWs.

Categorisation of AFLs 2023





Breakdown of applications for leave to appeal

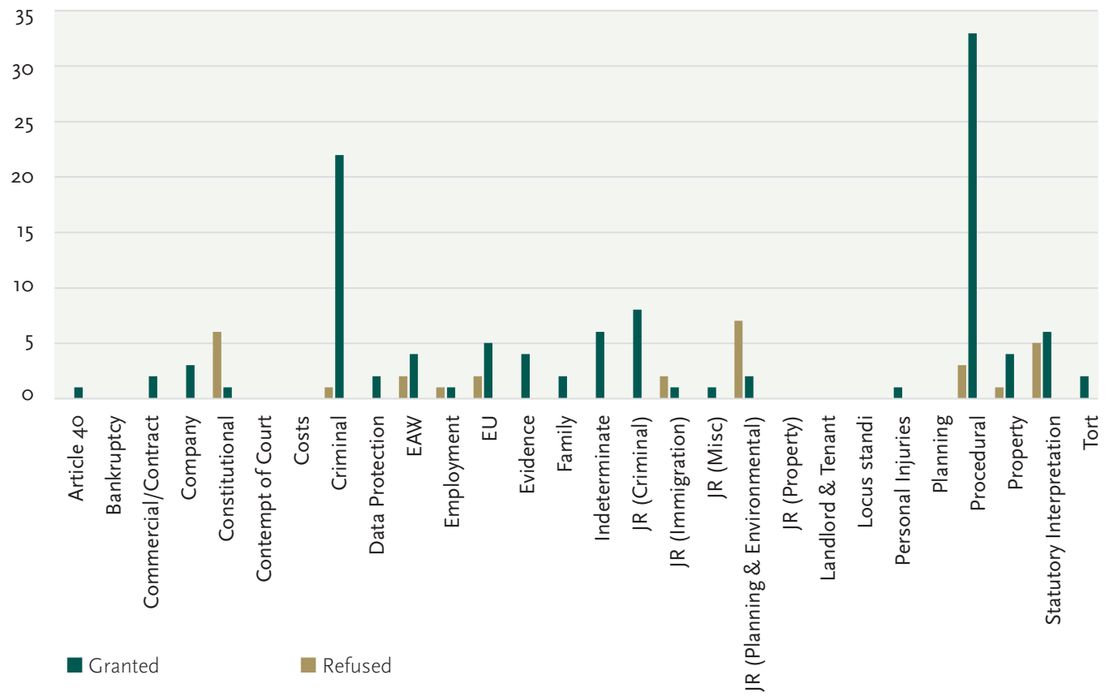
The Constitution provides for an appeal from the Court of Appeal to the Supreme Court if the Supreme Court is satisfied that the decision involves a matter of general public importance or it is necessary that there be an appeal in the interests of justice. The Constitution also provides for a direct appeal (often referred to as a 'leapfrog' appeal) from the High Court to the Supreme Court in exceptional circumstances.

Appeals from the High Court

59 of the 160 applications for leave to appeal made in 2023 (31%) were leapfrog appeals. This is a decrease in comparison to 2022, where 41% of applications made were leapfrog appeals. The Supreme Court granted leave to appeal in 34 of the 59 (58%) applications for leave to appeal directly from the High Court and refused leave in 22 of the applications (37%).[6]

A categorisation of determinations in which applications for a leapfrog appeal were granted indicates that decisions involving judicial review in planning and/or environmental matters accounted for the highest percentage of applications for which leapfrog appeals were sought (12%). The next largest category, accounting for 10% of the applications for which leapfrog appeals were sought, was constitutional matters. The remaining categories in which an application for a leapfrog appeal was granted were as follows: statutory interpretation (8%); procedural (4%); EAWs (3%); EU (3%); judicial review (immigration) (3%); criminal (2%); employment (2%); and property (2%).

Categorisation of AFLs from High Court



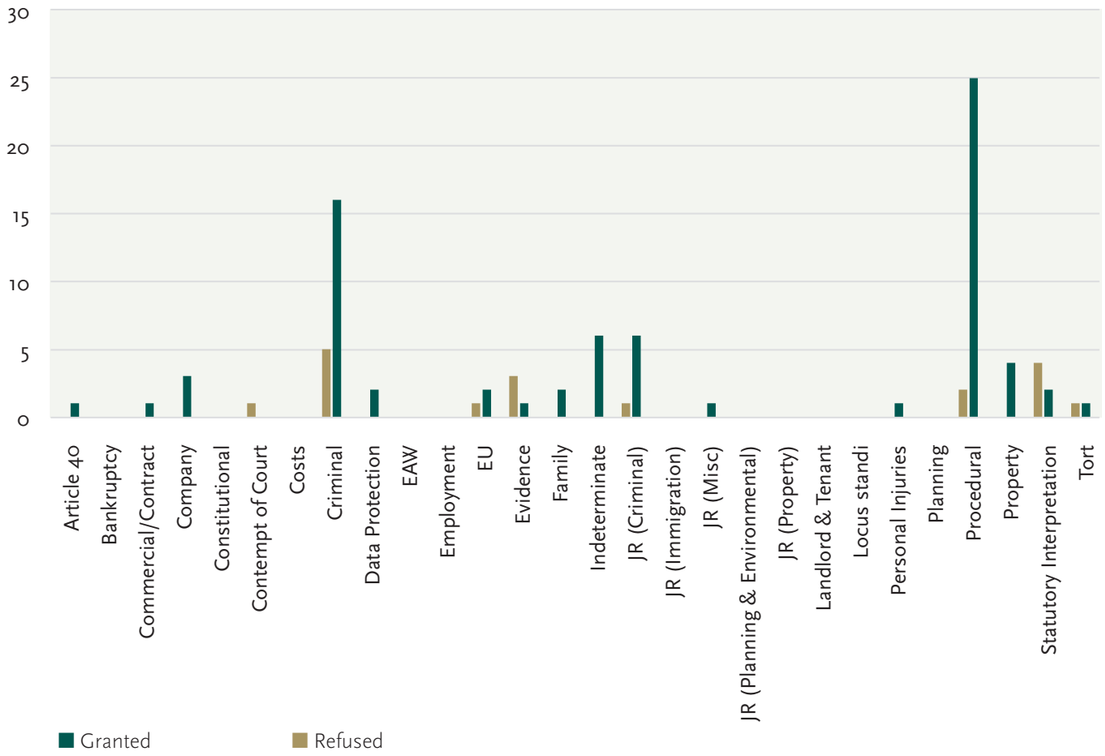
6 3 of the leapfrog applications were withdrawn.

Appeals from the Court of Appeal

101 of the 160 applications for leave to appeal (63%) that were lodged with the Supreme Court in 2023 related to decisions of the Court of Appeal. Procedural matters formed the largest category of applications for leave to appeal (27%). The next largest category was criminal law (21%), followed by judicial review (criminal) (7%).

Leave to appeal from decisions of the Court of Appeal was granted in 5% of applications concerning criminal law; 4% of applications concerning statutory interpretation; 3% of applications concerning the law of evidence; 2% of procedural matters; and 1% of applications concerning contempt of court, EU law, judicial review (criminal) and tort respectively.

Categorisation of AFLs from High Court



Full appeals resolved

The Supreme Court resolved 32 'full' appeals in 2023, which is a decrease on the figure of 66 in 2022, and of 77 for 2021. However, all 32 were appeals brought under the reformed jurisdiction of the Supreme Court which came into effect on the establishment of the Court of Appeal (down slightly from 55 in 2022). The last of the 'legacy appeals', which were appeals brought under the previous jurisdiction of the Court and still in the system due to procedural issues, were heard in 2022.

Waiting times

The average waiting time from the filing of complete documents in respect of an application for leave to appeal to the issue by the Supreme Court of its determination of the application was 4.5 weeks.

The average length of time from the grant of leave to appeal to the listing of an appeal was 19.75 weeks.

Written judgments

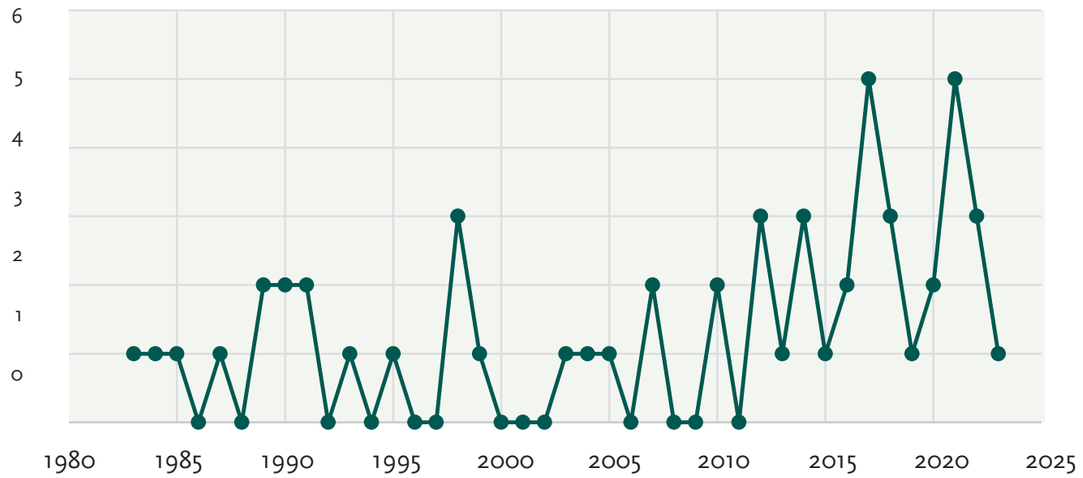
The Supreme Court delivered 61 reserved judgments in 2023, which was a decrease on the 80 delivered in 2022. Judgments are publicly available on the website of the Courts Service.

Requests for preliminary rulings to the Court of Justice of the European Union

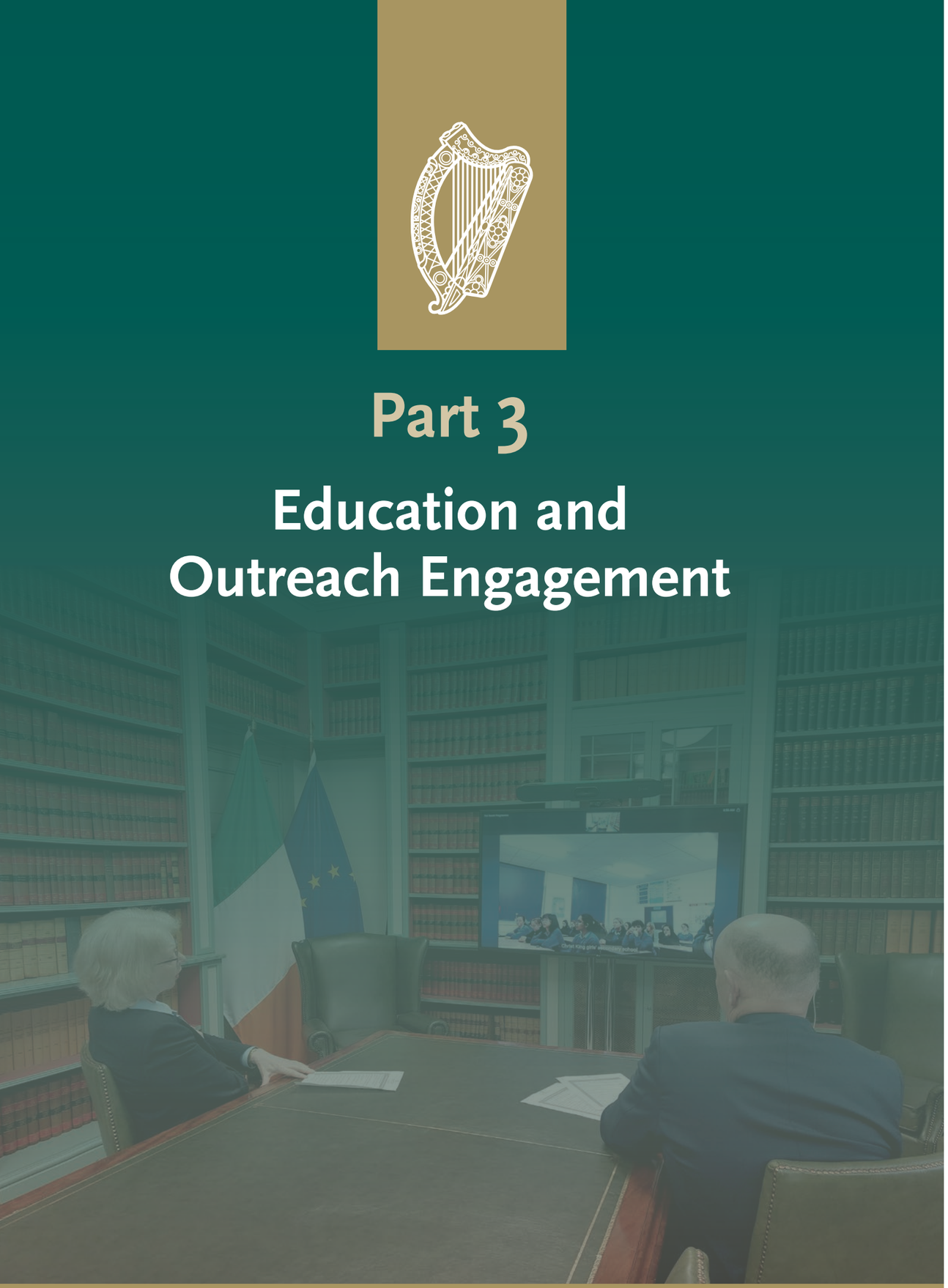
Article 267 of the Treaty on the Functioning of the European Union ('TFEU') provides a mechanism whereby national courts that apply European Union law in cases before them may refer questions of EU law to the Court of Justice of the European Union ('CJEU') where clarification is necessary to enable them to give judgment. The Supreme Court, as the court of final appeal, is under a duty to refer questions to the CJEU where necessary before it concludes a case.

The Supreme Court of Ireland has requested preliminary rulings under Article 267 of the TFEU (or formerly under Article 234 EC) in 52 cases since 1983, as depicted in the below graph. The Supreme Court made one reference to the CJEU in 2023.[7]

Requests for Preliminary Rulings 1983-2023



7 Minister for Justice and Equality -V- Sergeis Radionovs [2023] IESC 37



Part 3

Education and Outreach Engagement

Education and Outreach Engagement

The Supreme Court values its engagement with educational institutions, the legal professions and wider society, and considers such interaction as important in creating an awareness of the role of the Supreme Court and its work. Education and outreach make Supreme Court proceedings more accessible to citizens, which is critical in light of the Court's role in deciding cases of public importance. It also provides an opportunity for judges of the Supreme Court to discuss the law and the legal system with those who are interested in it and allows students to gain an insight into possible career paths in the law. Some of the ways in which the Supreme Court engages with wider society are outlined below.

Comhrá: In 2019, the Supreme Court launched 'Comhrá' (the Irish word for 'conversation'), an outreach programme which allows secondary school students around Ireland to participate in live video calls with judges of the Supreme Court.

Third level institutions: Members of the Supreme Court engage regularly with and hold positions in third level educational institutions. Mr Justice Barniville is an adjunct professor at the University of Limerick and the University of Galway. Mr Justice Charleton is also an adjunct professor at the University of Galway. Ms Justice Marie Baker is an adjunct professor at University College Cork.

Mooting, mock trials and debating: Members of the Supreme Court regularly judge or preside over moot court competitions and mock trials which allow students to act as legal representatives in simulated court hearings and trials. Debating and negotiating competitions also provide a platform for students to develop and enhance skills which are important to practising law.

Publications: Members of the Supreme Court regularly publish articles and contribute to legal publications.

Mr. Justice Charleton chairs the Judicial Editorial Board of the Irish Judicial Studies Journal, of which Mr Justice Murray is also a member. The journal is a peer-reviewed legal publication interfacing between the judges, legal practitioners, and academics, and published in conjunction with the University of Limerick.

The first edition of the 2023 journal featured articles from Mr Justice Charleton and Judicial Assistant Ivan Rackhmanin ('The Safe Use of Expert Evidence') and Mr Justice Hogan ('Alfred Thompson Denning: A 20th Century English Legal Icon Re-Examined').

The second edition of the 2023 journal featured articles from Chief Justice O'Donnell ('Our Collective Commitment: Ireland and Its Relationship with the European Court of Human Rights and the European Convention on Human Rights'), Mr Justice Charleton and Judicial Assistant Liam Lochrin ('The Mysteries of the Common Law'), and Ms Justice O'Malley ('Ireland and the European Convention on Human Rights').

Mr Justice Hogan also authored an article titled 'Examining the wider considerations underpinning State aid and Article 107 TFEU: from BUPA to Hinkley Point' in Lopez, Hancher and Rubini eds., *The Future of EU State Aid Law* (EU Law Live Press) (Madrid, 2023) at 215-222.

Speeches: Members of the Supreme Court often chair, contribute to, or participate in panel discussions at conferences, seminars, and CPD events.

The Honorable Society of King's Inns: The Honorable Society of King's Inns is the institution of legal education with responsibility for the training of barristers in Ireland. King's Inns comprises barristers, students and benchers, which include all of the judges of the Supreme Court, Court of Appeal and High Court. The affairs of King's Inns are managed by a Council which includes a Judicial Benchers Panel of which the Chief Justice, the President of the Court

of Appeal and the President of the High Court are *ex officio* members.

Judges of the Supreme Court are regularly involved in the delivery of education at King's Inns and participate in related events, and their engagements in this regard are captured further on in this chapter.

They also serve on various King's Inns committees. Throughout 2023, Mr Justice Birmingham served as the external examiner for the assessment in criminal litigation, evidence and sentencing; Mr Justice Barniville served as the external examiner for the assessment of 'Advocacy 2'; Ms Justice Baker served as chair of the Education Committee of King's Inns (until April); and Mr Justice Hogan served as the external examiner for constitutional law as part of the King's Inns entrance examination.

The Bar of Ireland: The Bar of Ireland is the representative body for the barristers' profession in Ireland and is an independent referral bar. Members of the Supreme Court regularly chair, contribute to or engage in conferences, seminars, and other initiatives organised by the Bar or specialist bar associations.

The Law Society: The Law Society is the educational, representative, and regulatory body of the solicitors' profession. Members of the Supreme Court regularly chair, contribute to or engage in conferences, seminars, and other initiatives organised by the Law Society and its committees.

The Placement Programme: Introduced in 2013, the Chief Justice's Summer Placement Programme for Law Students ('the Programme') sees law students nominated from third level institutions take part in a four-week placement and shadow a judge of the Superior Courts. The programme emerged out of longstanding links with Fordham Law School in the United States and has gradually expanded to become an Irish and international programme involving universities across the island of Ireland; Fordham University School of Law, New York; the University of Missouri, Kansas City; and Bangor University, Wales.

Hardiman Lecture Series: A lecture series named in honour of the late Mr. Justice Adrian Hardiman, judge of the Supreme Court, is an integral part of the Summer Placement Programme. In 2023, the lectures were delivered in-person in the Four Courts and in Green St Courthouse. They were open to all participating students, judges, judicial assistants, Courts Service staff, members of the Bar of Ireland and of the Law Society. The 2023 Series included lectures by Mr Justice Peter Charleton, Ms Justice Marguerite Bolger, Remy Farrell SC and Margaret Gray SC, KC, on subjects such as the influence of US constitutional law on employment equality law in Ireland and running a criminal trial.

The Chief Justice's Working Group on Access to Justice: Established in 2021 by former Chief Justice Frank Clarke and continued under the leadership of Chief Justice O'Donnell, this working group recognises that equality before the law is a fundamental principle in a democratic state which requires equality of access to justice to achieve it. The working group brings together key stakeholders with in interest in advancing access to justice to collaborate on initiatives which work towards achieving this objective. In February 2023, this working group hosted its second conference, details of which have been captured further on in this chapter.

The Supreme Court values its engagement with educational institutions, the legal professions and wider society, and considers such interaction as important in creating an awareness of the role of the Supreme Court and its work.

Engagements at a Glance 2023

19 JANUARY

Mr Justice Barniville attended a Law Society parchment ceremony for newly qualified solicitors.

20 JANUARY

Chief Justice O'Donnell delivered a speech at the conferring ceremony for graduates of the Faculty of Notaries Public held at Blackhall Place.

25 JANUARY

Mr Justice Barniville delivered the Inaugural Nael G. Bunni Lecture at Trinity College Dublin titled 'The Irish Experience of UNCITRAL Model Law'.

27 JANUARY

Ms Justice Baker attended a conferral ceremony at the Law Society and presented diplomas to those who had successfully completed the Diploma in IP and Technology Law.

Mr Justice Collins chaired a conference titled 'Litigation and Environmental Challenges' hosted by the Climate Bar Association in conjunction with the Cork Bar and the Southern Law Association.

Mr Justice Woulfe was the guest speaker at the Dublin Solicitors Bar Association's annual dinner.

29 JANUARY

Chief Justice O'Donnell attended and delivered remarks at the National Holocaust Memorial Day commemoration at the Mansion House in Dublin.

1 FEBRUARY

Chief Justice O'Donnell spoke with transition year students participating in The Bar of Ireland's 'Look into Law' Programme.

2 FEBRUARY

Mr Justice Charleton chaired the judging panel for the Eoin Higgins Memorial Moot at the Royal Courts of Justice in Belfast.

10 FEBRUARY

Mr Justice Woulfe judged the final of the Intervarsity Law Summit Moot Court 2023 between Maynooth University and Queen's University Belfast.

15 FEBRUARY

Mr Justice Barniville delivered the 'View from the Bench' lecture to students undertaking the Advanced Diploma in Public Procurement Law at the King's Inns.

22 FEBRUARY

Chief Justice O'Donnell chaired a seminar titled 'Cross-Border Practice on the Island of Ireland: Convergence and Divergence' co-organised by The Bar of Ireland and Trinity Centre for Constitutional Governance.

23 FEBRUARY

Mr Justice Barniville attended a Law Society parchment ceremony for newly qualified solicitors.

24-25 FEBRUARY

Chief Justice O'Donnell and members of the Supreme Court contributed to a conference organised by the Chief Justice's Working Group on Access to Justice at Dublin Castle.

25 FEBRUARY

Mr Justice Collins delivered a paper titled 'The Role of the Expert Witness' at the annual Medico-Legal Society Academic Day. The theme of the conference was expert evidence.

Mr Justice Barniville attended a Law Society parchment ceremony for newly qualified solicitors.

28 FEBRUARY

Mr Justice Barniville delivered a keynote speech at the Ireland for Law General Counsel Summit held in Blackhall Place.

24 MARCH

Mr Justice Hogan delivered a lecture to students undertaking the Advanced Diploma in Quasi-Judicial Decision-Making at the King's Inns.

21 MARCH

Mr Justice Birmingham chaired and delivered the opening remarks at an annual conference held at the King's Inns on opportunities for law graduates as lawyer linguists within the European Union.

22 MARCH

Ms Justice Baker delivered the 'View from the Bench' lecture to students undertaking the Advanced Diploma in Data Protection Law at the King's Inns.

23 MARCH

Mr Justice Hogan chaired a session on developments in Irish constitutional law at the New and Emerging Voices in Constitutional Law Symposium organised by the UCD Centre for Constitutional Studies.

27 MARCH

Mr Justice Collins chaired and delivered remarks at a seminar organised by the Irish Centre for European Law titled 'Reforming and Revising European Energy Law: Cross-Cutting Impacts'.

28 MARCH

Chief Justice O'Donnell launched Volume XXVI of the Trinity College Law Review, having contributed the foreword to this volume.

30 MARCH

Mr Justice Barniville and Mr Justice Woulfe both spoke at the Lawyers Against Homelessness Easter CPD event organised in aid of the Capuchin Day Centre for Homeless People. The conference focused on commercial law, as well as planning and environmental law.

Mr Justice Barniville also chaired a panel session on the topic of 'arbitration funding – new developments and learnings from Ireland and the UK' at the British and Irish Commercial Bar Association's Annual Conference.

18 APRIL

Mr Justice Barniville contributed to a panel discussion on comparative approaches to the use of alternative dispute resolution in Ireland and the United States. The panel took place as part of the Chicago Bar Association's International CLE Conference in Dublin.

22 APRIL

Chief Justice O'Donnell delivered an address titled 'From Belfast to Dublin via Charlottesville: Some Reflections on the Rule of Law' at the International Academy of Trial Lawyer's Annual Meeting 2023.

27 APRIL

Mr Justice Murray delivered a lecture on the Aarhus Convention to students undertaking the Advanced Diploma in Planning and Environmental Law at the King's Inns.

Mr Justice Barniville chaired a seminar hosted by the UCD Centre for Constitutional Studies on the topic of 'The Assisted Decision-Making Capacity Act: implications for legal and healthcare professionals'.

28 APRIL

Chief Justice O'Donnell and Ms Justice Elizabeth Dunne participated in a Comhrá call with Christ King Girls' Secondary School in Cork. Students asked a range of interesting questions including how the judges became judges, what the most difficult and enjoyable parts of the role are, and how the Court goes about deciding a case and delivering judgment.

5 MAY

Mr Justice Barniville contributed to a panel discussion titled '[t]he case for a technology and construction court in Ireland – only a matter of time?' at the Construction Bar Association's Annual Conference 2023.

9 MAY

Mr Justice Hogan delivered the keynote address at an event organised by the EU Bar Association with the Amicales des Référendaires the Court of Justice of the European Union on the topic of evolving trends in the practice of EU law.

11 MAY

Mr Justice Collins chaired a CPD event held by the Tax Bar Association on the subject of 'expert evidence and its limits'.

14 MAY

Mr Justice Barniville delivered opening remarks at a dinner hosted by the American Board of Trial Advocates at the King's Inns.

17 MAY

Ms Justice Dunne, along with Ms Justice Mary Faherty of the Court of Appeal and Mr Justice Conor Dignam of the High Court, judged the final of the Brian Walsh Memorial Moot organised by the King's Inns.

18 MAY

Chief Justice O'Donnell addressed attendees at the McCarthy Bursary fundraiser at the King's Inns.

Mr Justice Barniville attended a Law Society parchment ceremony for newly qualified solicitors.

24 MAY

Mr Justice Barniville delivered the opening remarks at an event held by The Bar of Ireland to mark World International Day for Cultural Diversity.

6 JUNE

Chief Justice O'Donnell welcomed 30 law graduates to the Four Courts marking the beginning of the Chief Justice's Summer Placement Programme for Law Students.

7 JUNE

Mr Justice Barniville delivered the keynote address at a dinner held to mark Dublin International Disputes Week 2023.

8 JUNE

Mr Justice Charleton narrated and presided over the first instalment of the Hardiman Lecture Series 2023, which involved a re-enactment of the trial of Robert Emmet at Green St Courthouse.

20 JUNE

Mr Justice Charleton chaired an 'in conversation with' discussion with Mary Carolan, Legal Affairs Correspondent for The Irish Times, for students of the Placement Programme.

26 JUNE

Mr Justice Woulfe delivered a lecture to students of the Placement Programme on the role of the Attorney General in Ireland.

29 JUNE

Chief Justice O'Donnell drew the Placement Programme to a close with the delivery of some departing remarks in the Supreme Court.

12 JULY

Chief Justice O'Donnell addressed attendees at the launch of his Access to Justice Working Group's second conference report which took place in the offices of the Legal Aid Board at Montague Court Law Centre.

13 JULY

Mr Justice Hogan was a speaker on the topic of professional negligence at the Lawyers Against Homelessness Summer CPD Conference in aid of the Capuchin Day Centre for Homeless People. The conference examined updates to the law in the areas of ethics, personal injury law and professional negligence.

Mr Justice Barniville attended a Law Society parchment ceremony for newly qualified solicitors.

14 JULY

Mr Justice Barniville delivered closing remarks as part of an online round table discussion, hosted by the Commercial Litigation Association of Ireland, on the possible introduction of a pilot scheme for discovery in the commercial court.

26 SEPTEMBER

Chief Justice O'Donnell addressed newly qualified barristers at The Bar of Ireland's Orientation Day 2023.

Mr Justice Collins delivered an address titled 'Expert Evidence: The Challenges of Complexity' at the 22nd Annual Grange Conference.

Mr Justice Barniville chaired a conference hosted by the Nursing and Midwifery Board of Ireland on 'The Role of the High Court in Fitness to Practise Regulatory Matters'.

29 SEPTEMBER

Mr Justice Murray delivered introductory remarks at the Tax Bar Association's Annual Conference 2023.

30 SEPTEMBER

Mr Justice Charleton addressed incoming students at the induction for the Barrister-at-Law Degree and presented the McCarthy Scholarship and prize for first place in the entrance examination.

2 OCTOBER

Chief Justice O'Donnell hosted the first formal opening of the legal year ceremony in the Four Courts.

13 OCTOBER

Mr Justice Barniville, along with Mr Justice Alexander Owens of the High Court and Judge Patricia Lucas, judged the Antonia O'Callaghan Exhibition Moot organised by the King's Inns.

19 OCTOBER

Mr Justice Barniville attended a Law Society parchment ceremony for newly qualified solicitors.

20 OCTOBER

Mr Justice Hogan delivered the keynote address at the EU Bar Association's Annual Conference 2023 titled 'Fifty Years of EU Law in the Irish Legal System'.

24 OCTOBER

Mr Justice Hogan delivered the Hale Lecture 2023 on the topic of 'Grundnormen in UK and Irish Constitutional Law'. The Hale Lecture is an annual event organised by the Society of Legal Scholars in honour of Baroness Hale of Richmond, former President of the UK Supreme Court.

25 OCTOBER

Mr Justice Barniville delivered the opening address at the Law Society Litigation Committee's Annual Conference 2023, which explored topics including the State Litigation Principles, collective redress, the fundamental importance of expert evidence and the expert's primary duty, and litigation funding.

26 OCTOBER

Mr Justice Barniville spoke at the International Conference of Legal Regulators, hosted by the Legal Services Regulatory Authority. The theme of the conference was 'The Future of Legal Regulation – Navigating the Decade Ahead'.

2 NOVEMBER

Ms Justice Donnelly received the Praeses Elit Award from the Law Society at Trinity College Dublin.

9 NOVEMBER

Mr Justice Barniville delivered the opening address at a conference hosted by the Society of Construction Law on the theme of 'construction experience: the name we give our mistakes?'.

16 NOVEMBER

Chief Justice O'Donnell delivered remarks on the topic of environmental law enforcement from the perspective of the Supreme Court at the EPA-ICEL Environmental Law Enforcement Conference 2023.

23 NOVEMBER

Chief Justice O'Donnell chaired the Brian Walsh Memorial Lecture 2023 which was delivered by Caoilfhionn Gallagher KC on 'Rights Protection Across New Frontiers: Extraterritoriality and the Council of Europe'.

24 NOVEMBER

Mr Justice Collins delivered an address titled 'Citizenship, Sovereignty and the Limits of Equality' at a conference organised by the Immigration, Asylum and Citizenship Bar Association. The conference examined developments in asylum cases, changing judicial attitudes to the Irish citizenship regime and notable EU human rights law cases.

1 DECEMBER

Mr Justice Hogan delivered an address at a conference titled 'Human Rights in Practice: The Role of Human Rights on the 20th Anniversary of the ECHR Act 2003' organised by the Irish Centre for European Law at the Royal Irish Academy. Mr Justice Hogan spoke on the topic of the European Convention on Human Rights ('ECHR') and constitutional rights post the ECHR Act.

8 DECEMBER

Mr Justice Barniville chaired a conference hosted by the Professional, Regulatory and Disciplinary Bar Association on the subject of 'Fair Procedures and Fitness to Practice Inquiries.'

9 DECEMBER

Ms Justice Donnelly chaired the annual 'Criminal and Public Law Update' conference organised by Irish Rule of Law International.

Spotlight Events 2023

Civil Legal Aid Review: An Opportunity to Develop a Model System

On 24 and 25 February, the Chief Justice's Working Group on Access to Justice ('the Group') held its second conference titled 'Civil Legal Aid Review: An Opportunity to Develop a Model System'. The public conference took place at The Printworks Centre in Dublin Castle and brought together individuals and interest groups from the legal and academic community, civil society groups, public sector organisations, NGOs, and the voluntary sector. At the time of the conference, the Group comprised Chief Justice O'Donnell, chairperson; Mr Justice John MacMenamin, the second judicial representative; Joan Crawford, representing the Legal Aid Board; Eilis Barry, representing FLAC; Joseph O'Sullivan BL, representing The Council of The Bar of Ireland; and John Lunney, representing the Law Society.

The issue of civil legal aid was chosen as the focus of the conference following consideration by the Group of the most pressing issues which emerged during discussions at the Group's first conference in October 2021, which had been held to inform and guide the direction of the Group's work. In the period following the first conference, the Minister for Justice established the Civil Legal Aid Review Group to review, for the first time in its 40-year history and under the leadership of former Chief Justice Franke Clarke, the operation of the civil legal aid scheme and make recommendations to the government in respect of its future. Accordingly, it was decided that the next conference should set out to examine how the review of the civil legal aid scheme presents an opportunity to develop a model system in Ireland.

The first day of the conference featured keynote addresses from a range of speakers including Chief Justice O'Donnell, then Minister for Justice Simon Harris TD and former Chief Justice Frank Clarke, as well as three expert panel sessions which examined: (i) the current system of legal aid in Ireland;[8] (ii) the international experience, featuring contributions from colleagues in the UK and Canada;[9] and (iii) alternative modes of legal assistance.[10]

The second day of the conference was opened by Professor Luke Clements, Chair in Law and Social Justice at the University of Leeds, and featured two further expert panel discussions which focused on: (i) the view from the judiciary and statutory bodies;[11] and (ii) a vision for the future.[12] The conference was closed on behalf of the Chief Justice's Working Group by Mr Justice John MacMenamin.

8 This panel was chaired by Muriel Walls and featured contributions from John McDaid, Keith Walsh SC, Deirdre Lynch BL and Doncha O'Sullivan.

9 This panel was chaired by David Fennelly BL and featured contributions from Professor Pleasance Pascoe of UCL, Professor Dame Hazel Genn of UCL and Mark Benton KC.

10 This panel was chaired by Gary Lee and featured contributions from Sinead Lucey, Farzana Choudhury, Catherine Cosgrave, Jane O'Sullivan and Aoife Kelly-Desmond.

11 This panel was chaired by His Honour Judge Colin Daly and featured contributions from Judge Susan Fay, His Honour Judge Paul Kelly, Sharon Dillon-Lyons BL and Sinead Gibney.

12 This panel was chaired by Philip O'Leary and featured contributions from Nuala Jackson SC, Eilis Barry, Maura Derivan, Gerry Whyte, Sara Phelan SC and Fiona Coyne.

Members of the Working Group on Access to Justice and then Minister for Justice Simon Harris pictured at the Group's second conference

Launch of Conference Report [13]

On 12 July, Chief Justice O'Donnell launched and formally presented to the Minister for Justice, Helen McEntee TD, a report which summarised the contents of the two-day conference.

Speaking at the launch held in the offices of the Legal Aid Board at Montague Court Law Centre, Chief Justice O'Donnell remarked on the position of legal aid today, noting that it is "only available on restricted grounds, subject to unrealistic means test thresholds, and provided by an under-resourced and over-stretched organisation. People receive assistance from voluntary groups, from some admirable charities, and from the long tradition of goodwill within the professions, but many others are sometimes driven to resort to self-help or fall into the clutches of those outside the legal professions offering deceptively cheap and simple solutions, or simply suffer in silence. The challenge must be to improve every aspect of the system of provision of legal advice and assistance."

Citing the advantages of a conference such as the one held in February, which brought together an array of interest groups and international experts from the UK, Australia and Canada, Chief Justice O'Donnell commented that he was "struck by the discussion on the position in the UK, and particularly the contribution of Professor Dame Hazel Genn...that the provision of legal assistance can be preventative... like providing a fence at the top of a cliff, rather than simply an ambulance at the bottom."

Chief Justice O'Donnell concluded his remarks by acknowledging the work carried out by solicitors and staff in Legal Aid Centres, and those instructed by them at the Bar, commenting:

"If the Law Centres of the Legal Aid Board did not exist then I think very many people would find themselves in the position of those with serious health problems in the late 19th or early to mid-20th century, where access to advice was a matter of luck and where many – if not most people – simply suffered in silence. It is a mark of a civilised society that their voices be heard and their problems addressed. The Legal Aid Board at the moment can only deal with a small portion of the demand for legal services, but the work that they do, in sometimes difficult circumstances, is very valuable and also gives us some picture of the scope of the demand which is not being met at the moment. Inevitably, we look to reforms that we hope will improve the delivery of access to justice in Ireland, but it is also appropriate to recognise and appreciate work that is being done on a daily basis by those seeking to improve access to justice and provide access to legal assistance and advice."

Members of the Working Group on Access to Justice pictured with Minister for Justice Helen McEntee at the launch of the conference report

13 The report is available on the Supreme Court website.' and hyperlink 'website' to this link https://www.courts.ie/news/access-justice-conference-%E2%80%98-civil-legal-aid-review-opportunity-develop-model-system-ireland%E2%80%99

The Chief Justice's Summer Placement Programme for Law Students

Throughout the month of June, 30 law students were welcomed to the Four Courts and the Criminal Courts of Justice to participate in the Chief Justice's Summer Placement Programme for Law Students 2023.

For a four-week period, the participants were assigned to judges of the Superior Courts and given a first-hand insight into the work of the courts system. Participants shadowed their assigned judge and judicial assistant, which involved attending court and observing cases set down for hearing before their assigned judge, reading written legal submissions and court papers, and engaging in discussions with judges about cases. The programme allows participants to witness law in action beyond textbooks, introduces them to practice and procedure, and affords them the opportunity to observe the important and varied roles carried out by all those who work within or support the work of the courts.

Participants of the programme also engaged in a secondary, complementary itinerary of workshops, tours, lectures, and talks which were scheduled to take place outside of court hours. The participants attended lectures in the Supreme Court delivered by Remy Farrell SC, Margaret Gray SC, KC, Ms Justice Marguerite Bolger and Mr Justice Peter Charleton. They also received a lecture from Mr Justice Seamus Woulfe, and attended lunchtime "in conversation with" discussions between Mr Justice Peter Charleton and Mary Carolan, legal affairs correspondent for The Irish Times, and between Ms Justice Elizabeth Dunne and Tom O'Malley SC, barrister and law lecturer at the University of Galway.

The 2023 programme also introduced for the first time sessions on mediation and alternative dispute resolution, and participants engaged in three hands-on workshops delivered by Dr Treasa Kenny (mediator and lecturer at Maynooth University), Fiona McAulsan (director of Family Mediation Services at the Legal Aid Board), Andrea O'Neill (mediator) and Noreen Fitzpatrick (mediator).

Participants on the Placement Programme pictured at various events

Testimonials

"During my time on the Chief Justice's Placement Programme 2023, I was assigned to a judge of the High Court and I had the opportunity to observe cases involving wardship applications, judicial review hearings, statutory appeals and other non-jury types of cases.

I really enjoyed getting an insight to the way judges think and reason. My assigned judge had a penchant for asking penetrating questions to counsel which really got to the heart of the matter. I enjoyed observing the exchange between judge and counsel on technical points of substantive and procedural law. I also really enjoyed conversing with my assigned judge about their decision-making process and the issues they prioritised when coming to a determination. It was a real privilege to be able to do various pieces of research for the judge and to learn about their judgment-writing process.

One of the most striking things I learned during my time on the programme was the importance of paying keen attention to the facts of a case. Whilst in the academic context law students learn a lot about legal doctrines and principles, in the courts I saw my assigned judge place heavy emphasis on the specific facts of a case and how the facts can have a major impact on a case's ultimate outcome.

As a future solicitor, these lessons influence how I have come to understand the role of a lawyer. My time on the Placement Programme showed me that a precise comprehension of the factual basis underlying a legal claim is integral to the persuasive presentation of a case before the courts. As a commercial solicitor, reflecting on these learnings will encourage me to invest significant time into understanding a client's unique factual and contextual situation prior to giving any legal advice."

Emmanuel Ntemuse
(LLB, Trinity College Dublin)
Trainee Solicitor

"During the programme, I had the pleasure of being assigned to a judge of the Court of Appeal. I had the incredible opportunity of attending his court hearings and discussing the issues with the judge afterwards. This gave me invaluable insight into the role of the judge, and the intricate processes involved in judicial decision making.

As well as this, one of my favourite parts of the programme was getting to meet other law students from across the country. There is no doubt that from the experience I have formed a lot of connections and friendships that will last a lifetime. Finally, I found the events organised by the Office of the Chief Justice during the programme exciting and very interesting. From attending the prestigious Hardiman Lecture series, to observing the work of the Drug Treatment Court, the programme provided me with wonderful opportunities to see many different aspects of the work of the Courts Service.

Overall, I would recommend the Chief Justice Summer Placement Programme to any ambitious law student looking to take the first steps of their legal careers."

Emily Lundy
(LLB, South East Technological University)
Judicial Assistant to the High Court

Opening of the Legal Year Ceremony

On 2 October, Chief Justice O'Donnell, in cooperation with the Courts Service, hosted the first formal ceremony to mark the opening of the new legal year in Ireland.[14] The ceremony took place in the Round Hall in the Four Courts and featured addresses by Rossa Fanning SC, Attorney General; Angela Denning, CEO of the Courts Service; and the Chief Justice. The ceremony was attended by members of the judiciary from Ireland and neighbouring jurisdictions, legal professionals, Courts Service officials, representatives of neighbouring bar and solicitors' associations, and members of the wider legal community.

The ceremony was borne out of a proposal submitted to the Chief Justice by a working group he established in October 2022 under the leadership of Ms Justice Dunne to explore the formalisation of the opening of the legal year in Ireland.

During his address, the Chief Justice detailed the formal ceremony that had once taken place to mark the opening of the courts following the commencement of the Courts of Justice Act 1924:

"It was only on 11th June 1924 that the courts were established in a formal opening ceremony in Dublin Castle designed and supervised by Hugh Kennedy, the first Attorney General of the Free State and the principal architect of the Courts of Justice Act, who on that same day became the first Chief Justice of Saorstát Éireann. The ceremony was attended by the senior members of the Government and accompanied by the Army No. 1 Band... To modern eyes, it looks quaint and formal; nine men (and only men) in morning suits constituting the entirety of the new Supreme Court and High Court walking in in single file through light drizzle in the Castle yard. But to contemporary eyes it was, and was intended to be, a very deliberate break with the past."

The Chief Justice went on to say that while we are fortunate to have two "beautiful [religious] ceremonies" which take traditionally place on the first Monday of the Michaelmas term, "somewhere along the way, the opening of term in the courts fell away and increasingly these services have been seen, perhaps by default, or by analogy with what occurred in other jurisdictions, as marking or even constituting the formal opening of the legal year." Now reinstating, nearly 100 years later, an official event hosted by the judiciary and courts administration to formally open the legal year, Chief Justice O'Donnell remarked that the new ceremony now reflects the "republican form of government based on the essential equality of every citizen" envisaged in both the 1922 and 1937 Constitution. He added that formal ceremonies are useful occasions because they offer an opportunity for reflection, and proceeded to recite a set of ideals, enshrined in the Constitution, which he suggested continue to be of "enduring importance and particular relevance" and "to which we should commit ourselves" for the upcoming legal year:

"These include that justice is administered in courts (Article 34.1); that such justice shall be administered without fear or favour, affection or ill-will (Article 34.6.1°); that Ireland has a republican form of government which does not permit titles of honour or nobility (Article 40.2); and that the form of government is based upon the essential equality of all human persons (Article 40.1)."

14 The ceremony can be viewed on the Court Service's YouTube channel.

Speakers and guests pictured at the opening of the legal year ceremony'

Part 4

International Engagement

International Engagement

Formal legal engagement

The Supreme Court engages with the Court of Justice of the European Union through the avenue of dialogue provided for in the preliminary reference procedure set out in Article 267 of the Treaty on the Functioning of the European Union. It is also common for senior courts of countries with a common law legal tradition to refer to judgments of other jurisdictions in which the same or similar issues arise. Such judgments are persuasive rather than binding. Under the European Convention on Human Rights Act 2003, courts in Ireland must have regard to the jurisprudence of the European Court of Human Rights in Strasbourg. Outside of these formal legal channels, there is an increasing level of cooperation between the Supreme Court and other senior courts through, for example, bilateral meetings or through the Court's membership of international bodies.

International organisations

The Supreme Court cooperates on a multilateral basis through its membership of several international networks and organisations which facilitate cooperation with courts and institutions in other jurisdictions. The areas of law associated with each of these organisations varies but they have in common the aim of providing a forum through which courts of similar jurisdiction can meet to discuss their work, the nature of their functions and the organisation of their systems, and to promote dialogue between such courts. Some organisations of which the Supreme Court or the Chief Justice is a member include:

ACA-Europe - An organisation comprising the Councils of State or the supreme administrative jurisdictions of each of the members of the European Union and the Courts of Justice of the European Union. Through ACA-Europe, the Supreme Court exchanges views and information with other member institutions on jurisprudence, organisation and functioning, particularly with regard to EU law.

Network of the Presidents of the Supreme Judicial Courts of the European Union - A network of the Presidents of the Supreme Courts of EU Member States with general jurisdiction (as opposed to constitutional courts or courts with final jurisdiction in particular areas of law, such as supreme administrative courts). Supreme Court Presidents, including the Chief Justice of Ireland, participate in meetings and exchange information through this network, which also consults with institutions of the EU. Following his appointment as Chief Justice in October 2021, Mr. Justice O'Donnell was elected a member of the board and vice-president of the Network.

Conference of European Constitutional Courts ('CECC') - An organisation comprising European constitutional or equivalent courts with a function of constitutional review. Meetings and information exchanges on issues relating to the methods and practice of constitutional review are the key features of this organisation, which aims to advance shared values of democracy, the rule of law and the protection of fundamental rights. Every three years, the presiding constitutional court organises a pan-European congress to discuss fundamental doctrinal and conceptual issues. The Conference is currently chaired by the Constitutional Court of Moldova. The XIXth Congress of the CECC is scheduled to take place in Chisinau, Moldova, in 2024.

Judicial Network of the European Union ('JNEU') - An association which was established on the initiative of the President of the Court of Justice of the European Union and the Presidents of the Constitutional and Supreme Courts of EU Member States at the Meeting of Judges ('Forum des Magistrats') hosted by the Court of Justice in 2017. The JNEU is based on a website designed to promote greater knowledge, in particular from a comparative law perspective, of law and legal systems of Member States and contribute to the dissemination of EU law as applied by the Court of Justice of the European

Union and the national courts.

Superior Courts Network - In 2021, the Supreme Court joined the Superior Courts Network ('SCN'), which is managed by the Jurisconsult of the European Court of Human Rights. The aim of the SCN is to enrich dialogue and the implementation of the Convention by creating a practical and useful means of exchanging relevant information on Convention case-law and related matters.

Venice Commission Joint Council on Constitutional Justice and World Conference of Constitutional Justice - Through the Joint Council on Constitutional Justice, the Supreme Court cooperates with constitutional courts and courts of equivalent jurisdiction in Member States of the Venice Commission, the Council of Europe's advisory body on constitutional matters. This is primarily achieved through the sharing of information between liaison officers of member courts, including officials in the Office of the Chief Justice of Ireland.

Bilateral engagement

The Supreme Court benefits from bilateral meetings with courts in neighbouring jurisdictions, other EU Member States and further afield.

Other international engagements

Members of the Supreme Court regularly attend and participate in conferences, seminars and working groups held by courts in other jurisdictions on matters of mutual interest for the purposes of knowledge-sharing and strengthening international dialogue between jurisdictions.

International Engagements 2023

20 JANUARY

International Criminal Court's Fifth Annual Judicial Seminar

Ms Justice Iseult O'Malley attended the opening of the judicial year at the International Criminal Court ('ICC') in The Hague which was marked by a solemn hearing, followed by the ICC's Fifth Annual Judicial Seminar. This year's seminar focused on the role that national courts play in the international criminal justice system in closing the gap of impunity for the most serious crimes under international law, and participants engaged in discussion about, among other things, the legal aspects of the principle of complementarity.

27 JANUARY

European Court of Human Right's Solemn Hearing and Judicial Seminar

Mr Justice Birmingham and Mr Justice Barniville attended the opening of the judicial year at the European Court of Human Rights ('ECtHR') in Strasbourg which was marked by a solemn hearing, at which President Síofra O'Leary addressed attendees, followed by a judicial seminar. This year's seminar examined the role of judges in preserving democracy through the protection of human rights.

23-24 MARCH

Roundtable at the Court of Justice of the European Union

Mr Justice Woulfe attended a high-level roundtable at the Court of Justice of the European Union ('CJEU') in Luxembourg, co-organised by that court, the European Union Agency for Asylum, the ECtHR and the International Association of Refugee Law Judges. The roundtable featured contributions on the topic of 'developments in judicial dialogue through the case-law of the CJEU, the ECtHR and national courts in the field of the Common European Asylum System'.

23 MARCH

Visit from a Saxon State Parliamentary Committee

The Supreme Court, together with the Courts Service, facilitated a visit by the Saxon State Parliamentary Committee for Constitution, Justice and Consumer Protection. The group of Saxon parliamentarians and parliamentary advisors received a tour of the Four Courts and met with Ms Justice Elizabeth Dunne and Leonie Bowles, who has responsibility for criminal ICT in the Courts Service, to discuss Ireland's experience of digitisation of courts.

29 MARCH

Paris Arbitration Week

Mr Justice Barniville travelled to France where he was the guest speaker at an event held at the Irish College in Paris by Arbitration Ireland in conjunction with Paris Arbitration Week 2023. Mr Justice Barniville is the designated arbitration judge in Ireland.

3-4 APRIL

UNECE Judicial Colloquium

Mr Justice Murray attended the United Nations Economic Commission for Europe's Judicial Colloquium 2023 and a meeting of the Task Force on Access to Justice under the Aarhus Convention held in Geneva, Switzerland. The colloquium was convened by the UNECE on the topic of 'judicial protection of human rights and public interest against environmental pollution from chemicals and wastes'. The meeting of the Task Force featured a number of sessions which examined recent trends, best practice, barriers, challenges and innovative approaches in relation to access to justice relating to climate change and biodiversity protection.

27 APRIL

ACA-Europe Conference

Mr Justice Woulfe participated in a seminar organised by the Supreme Court of Latvia and ACA-Europe in Riga on the topic of 'the judge and inert administration [and] administrative discretionary power'.

4-5 MAY

Congress hosted by the Federal Constitutional Court of Germany

Chief Justice O'Donnell and Mr Justice Gerard Hogan attended a congress hosted by the Federal Constitutional Court of Germany for the presidents of the constitutional courts across Europe on the subject of climate change as a challenge for constitutional law and constitutional courts. The congress, which was opened by the Federal Minister for Justice, Dr Marco Buschmann, featured three working sessions which dealt with recourse to constitutional courts in climate litigation cases, the potential of constitutional courts in tackling climate change, and questions of constitutional responsibility.

Chief Justice O'Donnell and Mr Justice Hogan pictured at the Congress hosted by the Federal Constitutional Court of Germany

9 MAY

Visit from the Amicales des Référendaires of the CJEU

The Chief Justice hosted an information session with a group of référendaires from the CJEU who visited Ireland in celebration of Europe Day. The Chief Justice spoke to the référendaires about the history and functioning of the Supreme Court and European integration. The visit also included a meeting with Mr Justice George Birmingham and other members of the Court of Appeal, attendance at a Supreme Court hearing, and participation in a conference hosted by the EU Bar Association in conjunction with the Amicale des Référendaires on 'Evolving Trends in the Practice of EU Law', at which Mr Justice Gerard Hogan delivered the keynote speech on the decision of the Supreme Court in *Costello v. Government of Ireland* [2022] IESC 44.

Chief Justice O'Donnell speaking with a delegation of référendaires from the CJEU

30 MAY – 4 JUNE

Ireland for Law – US trade mission

Mr Justice Barniville travelled to New York, San Francisco, and the Bay Area as part of the Ireland for Law trade mission to promote Ireland as a destination for legal services for US companies in Europe. Mr Justice Barniville delivered the Ireland for Law opening speech on the topic of 'data privacy regulation through Ireland' on 31 May. Mr Justice Barniville also participated in two panel discussions, one on the subject of 'technology and data litigation in the Irish Courts' and another on 'international data transfers'. On 1 June, Mr Justice Barniville delivered the 'breakfast briefing on privacy litigation in Ireland'.

31 MAY - 3 JUNE

XXX FIDE Congress of EU Law

Mr Justice Gerard Hogan attended the XXX FIDE Congress of EU Law which was held in Sofia, Bulgaria.[15] FIDE brings together the European law associations of each member state and candidate country, as well as Norway and Switzerland. The Congress facilitated 18 expert panel discussions which examined topics related to (i) mutual trust, mutual recognition and the rule of law, (ii) the new geopolitical dimension of the EU competition and trade policies, and (iii) European social union.

8-9 JUNE

North-South Bilateral Meeting

Members of the Supreme Court, Court of Appeal and High Court, including the Chief Justice and Court Presidents, participated in a North-South Bilateral Meeting in Belfast, organised by the Judicial Studies Board for Northern Ireland. The meeting was attended by the Lady Chief Justice of Northern Ireland, The Rt Hon. Dame Siobhan Keegan, and other senior members of the judiciary of Northern Ireland. Papers were prepared and delivered by members of the judiciary across three working sessions, which explored topics of interest to both delegations.

9-10 JUNE

Four Jurisdictions Conference

Following the conclusion of the bilateral meeting, a number of the Supreme Court judges attended the Four Jurisdictions Law Conference, also held in Belfast. Topics examined by speakers at the conference included devolution, the cab rank rule, the legal landscape post-Brexit, and alternative dispute resolution.

15 Fédération Internationale Pour Le Droit Européen/International Federation of European Law.

26-27 JUNE

ACA-Europe Conference

Ms Justice Elizabeth Dunne attended a colloquium organised by the Council of State of Italy and ACA-Europe, which brought to an end the two-year Italian Presidency of ACA-Europe. The colloquium examined the approach of supreme administrative courts of the member states towards 'services to citizens and social rights'.

31 AUGUST

EUnited in Diversity II

Chief Justice O'Donnell, along with other representatives of the constitutional courts and supreme courts of the EU Member States, of the CJEU and of the ECtHR, met in The Hague to discuss the role of their courts in upholding the fundamental values on which the European Union is founded, such as the rule of law and human rights.

The conference, titled 'EUnited in Diversity II: The Rule of Law and Constitutional Diversity' was a sequel to a previous conference held in September 2021 in Riga, Latvia, titled 'EUnited in Diversity: Between Constitutional Traditions and National Identities'. The conference was co-organised by the CJEU, the Constitutional Court of Belgium, the Constitutional Court of Luxembourg and the Supreme Court of the Netherlands, and included keynote speeches from Koen Lenaerts, President of the CJEU, Síofra O'Leary, President of the ECtHR, and Dineke de Groot, President of the Supreme Court of the Netherlands. Contributions from the representatives in attendance explored the following themes:

- the independence of the judiciary as a conditio sine qua non (a necessary condition) for the protection of democracy, mutual trust and the rule of law,
- the rule of law – primacy of EU law and equality before the law of EU citizens,
- diversity and uniformity in EU law, and
- legal protection of current and future generations.

Ms Justice Elizabeth Dunne pictured at the ACA-Europe Conference held in Naples

Chief Justice O'Donnell pictured at the EUnited in Diversity conference in The Hague

4-5 SEPTEMBER

Opening of the Legal Year in Northern Ireland

Mr Justice Charleton attended events organised to mark the opening of the new legal year at the Royal Courts of Justice in Belfast.

7-8 SEPTEMBER

Cour de Cassation

Mr Justice Charleton spoke at a seminar held in the Cour de Cassation on 'L'office du juge, la raison et ses émotions' (the office of the judge, reason and his emotions). Mr Justice Charleton also attended a solemn hearing of the Cour de Cassation, during which the new Prosecutor-General, Mr Rémy Heitz, was appointed by the French Prime Minister, Élisabeth Borne.

17-20 SEPTEMBER

Cooney & Conway Judge-in-Residence

Mr Justice Hogan travelled to Loyola University Chicago where he delivered three lectures in his capacity as the School of Law's fourth Cooney & Conway Judge-in-Residence.

18 SEPTEMBER

ACA-Europe Conference

Mr Justice Woulfe travelled to Leipzig, Germany, to participate in an ACA-Europe working group tasked with carrying out a cross-sectional analysis of 'fundamental rights [from] the perspective of the new generation of social rights'.

21 SEPTEMBER

Committee of Ministers of the Council of Europe Conference

Mr Justice Woulfe participated in a conference on 'the role of the judiciary in [the] execution of judgments of the European Court of Human Rights' held in Riga, Latvia, by the Constitutional Court and the Supreme Court of the Republic of Latvia, as part of Latvia's presidency of the Committee of Ministers of the Council of Europe. Judge Síofra O'Leary, President of the ECtHR, delivered the keynote speech. Exchanges of views by the participants explored an array of themes including res judicata and the reopening of proceedings after a ECtHR judgment, the role of the ECtHR in the supervision of the execution of its judgments, the supervision of national measures executing judgments of ECtHR and the separation of powers, and national constitutional identity as an obstacle to execution.

Mr Justice Murray pictured at an ACA-Europe seminar in Stockholm

2 OCTOBER

Opening of the Legal Year in London

Mr Justice Birmingham and Ms Justice Baker travelled to London to attend the events to mark the opening of the legal year.

9-10 OCTOBER

ACA-Europe Seminar

Mr Justice Murray participated in a seminar in Stockholm organised by the Supreme Administrative Court of Sweden and ACA-Europe which explored the theme of 'preliminary rulings of the Court of Justice of the European Union – from CILFIT to Consorzio'.

11 OCTOBER

Study Visit from delegation of Turkish judges

A delegation of Turkish judges travelled to Ireland on a study visit as part of the European Union/ Council of Europe Joint Project titled 'Improving the Effectiveness of Family Courts: Better Protection of the Rights of Family Members'. The visit was designed to glean insights into the functioning of family justice in the UK and Ireland, focusing in particular on abolition of the fault principle in divorce cases, financial and child-centred practices in the family court, digital divorce process, cooperation mechanisms in family justice, and family mediation.

The project aims to ensure that the rule of law and fundamental rights in Turkey are fully in line with international and European standards and to improve the effectiveness of family courts in protecting the rights of women, children, and other family members. During the visit, the delegation met with Ms Justice Dunne of the Supreme Court, Liam Coen of the Family Justice Strategy, His Honour Judge Geoffrey Shannon of the Circuit Court and Fiona McAuslan of the Family Mediation Service.

13 OCTOBER

European Court of Human Rights Seminar

Ms Justice O'Malley participated on behalf of the Supreme Court in a seminar hosted by the ECtHR on 'judicial dialogue through the advisory opinion mechanism under Protocol No. 16' to mark the fifth anniversary of the protocol and corresponding mechanism. Participants of the seminar examined how the mechanism has been operating in practice and discussed how it could be developed in the future.

24 OCTOBER

Conference to mark the anniversary of the Constitutional Court of the Republic of Kosovo

Ms Justice Baker attended a solemn ceremony and participated in a corresponding international conference held in Prishtina, Kosovo, to mark the 14th anniversary of the Constitutional Court of the Republic of Kosovo. The conference examined 'the contribution of constitutional courts in protecting and strengthening fundamental values of democracy, human rights and rule of law', during which Mr Laurent Fabius, President of the Constitutional Council of France, delivered the keynote speech.

29 OCTOBER – 4 NOVEMBER

International Bar Association Conference

Mr Justice Barniville travelled to France where he participated in a conference held by the International Bar Association at Le Palais des Congrès de Paris. While there, Mr Justice Barniville chaired two sessions, the first on the subject of 'judges as representatives of society – quality and diversity', and the second on 'the Unified Patent Court explained'.

Delegation of Turkish judges pictured visiting the Four Courts

Ms Justice Baker pictured at the conference to mark the anniversary of the Constitutional Court of the Republic of Kosovo

Chief Justice O'Donnell pictured at the Network of the Presidents Colloquium

9-11 NOVEMBER

Network of the Presidents Colloquium

The Network of the Presidents of the Supreme Judicial Courts of the EU convened in Vienna, Austria, for a colloquium and a joint meeting with members of the CJEU and the ECtHR. The programme included discussions on case-law uniformity and the handling of internal divergences. Chief Justice O'Donnell moderated and contributed to a working session on the 'impact of artificial intelligence on the work of the courts and the administration of justice', which also featured contributions from Mr Andreas Kumin (Judge of the CJEU) and Ms Gabriele Kucsko-Stadlmayer (Judge of the ECtHR).

10 NOVEMBER

Conference of the Presidents of Constitutional Jurisdictions of EU Member States

Ms Justice Dunne travelled to Brussels to attend, on behalf of the Chief Justice, the Conference of the Presidents of Constitutional Jurisdictions of EU Member States organised by Justice Commissioner Didier Reynders.

13-24 NOVEMBER

Judicial Exchange Programme

The Supreme Court hosted Prof. Dr Christoph Külpmann, judge of the Federal Administrative Court of Germany, and Ms Heili Sepp, judge of the Supreme Court of Estonia, as part of this year's judicial exchange programme. Over the course of two weeks, the visiting judges engaged with the Irish legal system, observing hearings in the Supreme Court, Court of Appeal and High Court, and had the opportunity to meet with judges across each jurisdiction.

Prof. Dr Külpmann and Ms Sepp were selected to participate in the programme through ACA-Europe and the Network of the Presidents of the Supreme Judicial Courts of the European Union. During their time in Ireland, the visiting judges focused their attention on their areas of specialism, which included planning and zoning law, and the intricacies of defence rights and the use of interpretation in criminal proceedings. The visiting judges also participated as observers in the National Judicial Conference 2023 held in Dublin Castle.

The judicial exchange programme, which takes place annually, facilitates a valuable exchange of knowledge and practices between European judicial systems.

20 NOVEMBER

Engagement with the Zambian Judiciary

The Supreme Court welcomed the Chief Justice of Zambia, the Hon. Dr Mumba Malila, and a delegation of Zambian judges and lawyers, including the Hon. Lady Justice Ann Malata-Ononuju, the Hon. Mr Justice Dominic Sichinga, and the Hon. Rodgers Kaoma, to the Four Courts to meet with Chief Justice O'Donnell, Mr Justice Birmingham, President of the Court of Appeal, and Mr Justice Barniville, President of the High Court.

The meeting, which was also attended by Mr Justice Charleton, Ms Justice Baker, Mr Justice Murray and Ms Justice Donnelly, was arranged as part of Irish Rule of Law International's ('IRLI') Zambia Programme which is funded by the Embassy of Ireland in Lusaka. One part of the programme focuses on supporting Zambian institutions in the area of economic and financial crimes. Highlights of IRLI's work on the programme so far have included the coordination of a two-day conference in March 2023 at which Irish experts, including Mr Justice Alex Owens, Judge of the High Court, and Mr Justice Peter Kelly, former President of the High Court, delivered presentations, and the provision of assistance in the development of Rules of Court for the new Economic and Financial Crimes Court. While falling under the economic and financial crimes arm of the programme, discussions during the meeting with members of the Supreme Court covered a number of additional topics of interest to the Chief Justice and Zambian delegation, such as judicial training and court ICT systems.

Chief Justice O'Donnell and members of the Court pictured with the delegation of Zambian judges

23-24 NOVEMBER

UK-Ireland Judicial Studies Council Event

Ms Justice Donnelly attended the United Kingdom Ireland Judicial Studies Council event hosted by the Judicial Studies Board for Northern Ireland in Belfast.

26-28 NOVEMBER

Forum des Magistrates

Ms Justice Aileen Donnelly attended the Forum des Magistrats (Meeting of Judges) at the CJEU. The meeting was opened by Mr Koen Lenaerts, President of the CJEU, and featured a number of panel discussions and workshops which examined a range of topics including recent developments to the preliminary ruling procedure under Article 267 of the TFEU, the concept of judicial independence in EU law, indirect taxation, recent case-law in consumer protection, recent case-law on judicial cooperation in criminal matters, and recent case-law of the General Court in the field of EU banking law.

8 DECEMBER

International Conference on Access to Justice

Ms Justice Donnelly presented online at an international conference on the subject of 'equal opportunities in the courtroom – access to justice for vulnerable social groups: challenges and solutions in Europe' organised by the Office of the Commissioner for Fundamental Rights of Hungary and Res Iudicata – Judges for Social Awareness Association.

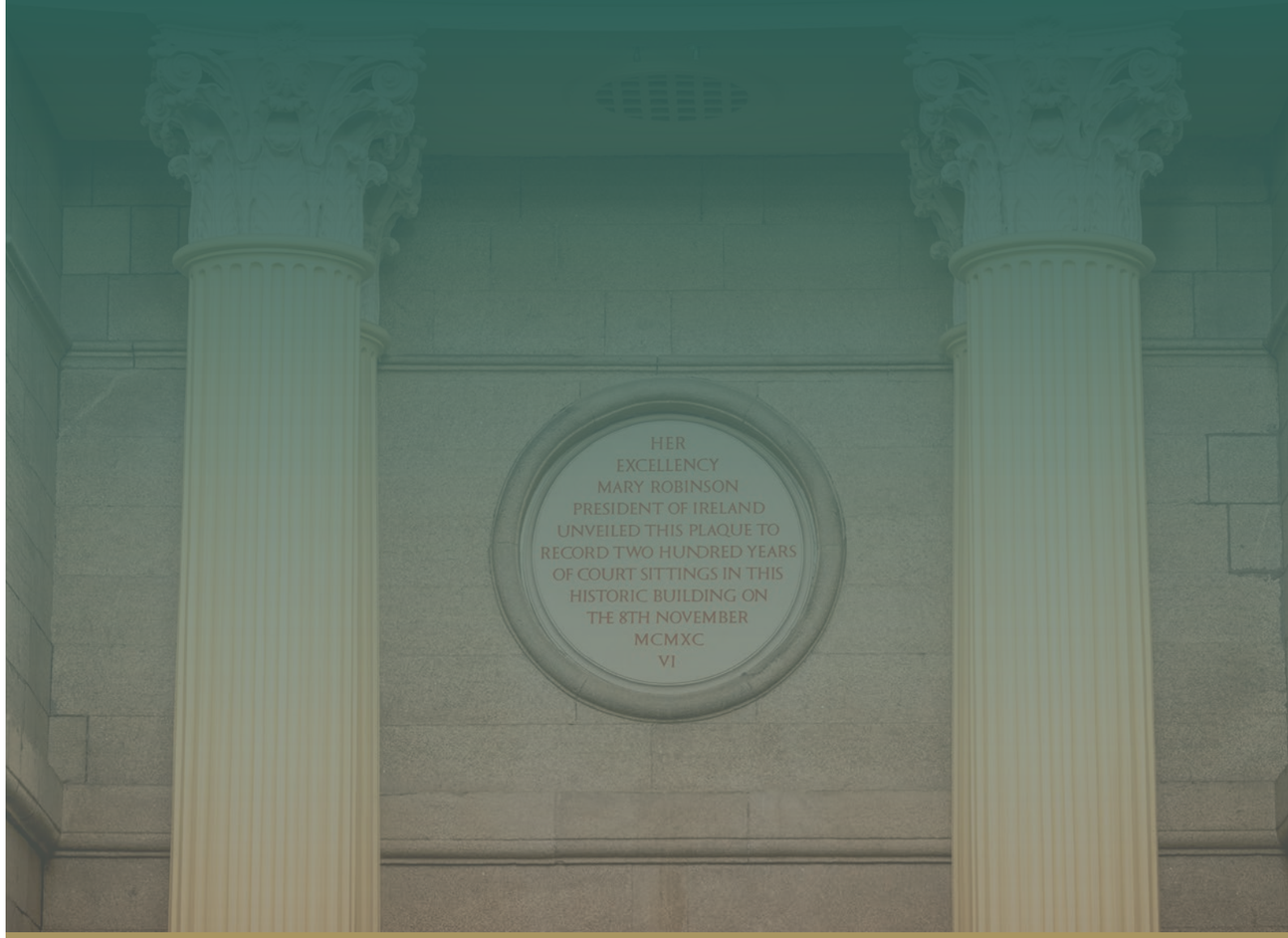
13 DECEMBER

Fifth Anniversary of the International Commercial Chamber

Mr Justice Barniville attended the Fifth Anniversary Conference of the International Commercial Chamber of the Paris Court of Appeals ('ICCP-CA'). The conference took place in the civil chamber of the Court and brought together judges, practitioners and academics to reflect on the achievements of the ICCP-CA since its establishment five years ago.

Part 5

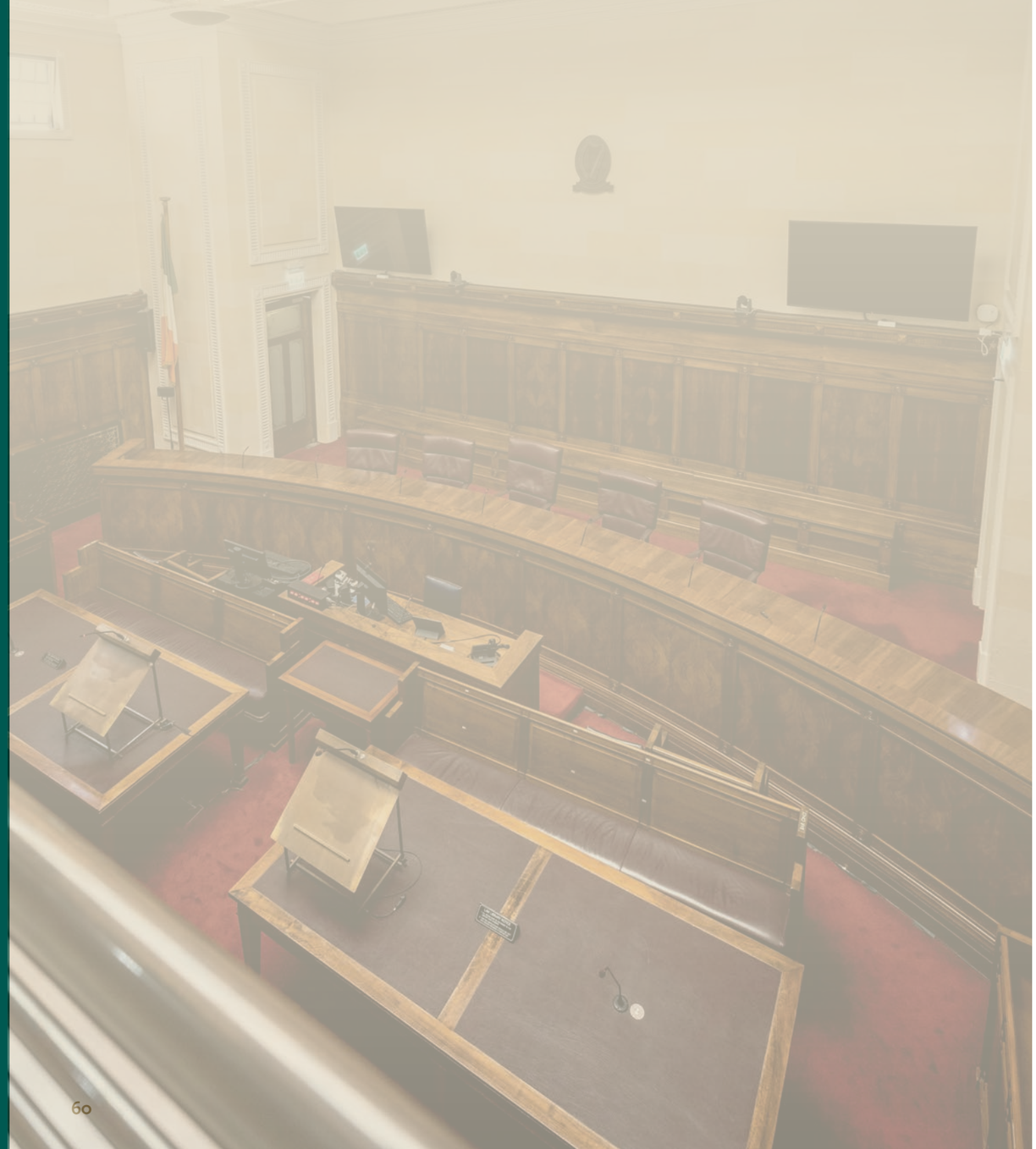
Judgment Summaries



Judgment Summaries

The following ten judgment summaries have been included to provide a sample of some of the cases considered by the Supreme Court in 2023. They do not form part of the reasons for the decision in the respective cases, nor do they intend to convey a particular interpretation of the case summarised.

The judgment summaries are not binding on the Supreme Court or any other court. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at www.courts.ie/judgments.



Middelkamp v. Minister for Justice and Equality [2023] IESC 2

On appeal from: [2021] IEHC 521

Headline

The Supreme Court held that a decision of the Minister for Justice and Equality ('the Minister') to refuse to vary a time-limited permission entitling a Canadian national ('Ms Middelkamp') to remain in Ireland did engage her right to family life under Article 8(1) of the ECHR as the practical effect of the decision was to oblige her to separate from her husband for a period of two years. The Court further held, however, that while the Minister fell into error in considering that Ms Middelkamp's Article 8(1) ECHR rights were not engaged, that the Minister's decision was nonetheless justifiable as being necessary in a democratic society for the purposes of Article 8(2) of the ECHR. The Court concluded that as such rights could not in themselves prevail against the public policy objective of the orderly application of the immigration system save for the existence of special or exceptional circumstances, the Minister was fully entitled to conclude that the interference with those rights was outweighed. The Court considered that in so concluding that the Minister had conducted, at least implicitly, the relevant analysis for the purposes of Article 8(2) in light of the obligations imposed on her by s. 3(1) of the European Convention on Human Rights Act 2003 ('the 2003 Act'). The Court held therefore that her decision could therefore not be regarded as unreasonable or unlawful, as any contrary decision by the Minister would have wholly compromised the State's capacity to operate time-limited visa schemes.

Composition of Court

O'Donnell C.J., Dunne, Charleton, Hogan and Murray JJ.

Judgments

Hogan J. (with whom O'Donnell C.J., Dunne and Murray JJ. agree); Dunne J. (with whom O'Donnell C.J and Murray J. agree); Charleton J. concurring in the result.

Background to the Appeal

Ms Middelkamp and her husband, Mr Paul, both Canadian nationals, came to Ireland in August 2018. Mr Paul entered on a student visa, commencing a four-year course in Dentistry in UCC that autumn. Ms Middelkamp, however, entered on a different visa. Ms Middelkamp was granted a permission under the 'Working Holiday Authorisation' programme, which permits foreign nationals to fund an extended holiday in the State through work. She found work as a legal secretary in the Cork region. The permission, granted on August 31st, 2018, was valid for a two-year period, and was expressly stated to be non-renewable, save for special leave by the Minister to vary the permission. Ms Middelkamp signed a document in which such conditions were explained to her.

In December 2019, in anticipation of the expiry of the permission the following summer, Ms Middelkamp applied to the Minister under s. 4(7) of the Immigration Act, 2004 seeking a variation of her permission such that she would have an extended entitlement to remain in Ireland with her husband. Her application further made it clear that she also actively contemplated qualifying as a solicitor during this extended period. On 2 January 2020, the Minister refused the application, stating that "the interests of public policy and the common good in maintaining the integrity of the immigration system outweigh such features of your [case] as may tend to support a decision to vary [your] permission". In a further letter, dated 30 January 2020, from the Department of Justice, Ms Middelkamp was told that her Article 8 ECHR rights were not affected by the Minister's decision and that the matter would not be revisited. Ms Middelkamp then commenced proceedings by way of judicial review in which she sought to quash the Minister's decision as violating her right to family life under Article 8 ECHR.

As it happened, a general extension was given to the permission (and to those similarly situated) due to the COVID-19 pandemic, extending the permission from its expiry date of 22 August

Judgment Summaries

2020 to September 2021. The case nonetheless proceeded and was heard before Barrett J., who, in his judgment on 22 July 2021, granted an order of certiorari quashing the Minister's decision and remitting it for fresh consideration on the basis that he considered that the reasons which had been given by the Minister in respect of the refusal of the visa extension were inadequate and that the decision was flawed insofar as it appeared to deliberately give "no consideration [to] Art.8 ECHR derived rights": see Middelkamp v. Minister for Justice [2021] IEHC 521. On 30 November 2021, Barrett J. heard an application from the Minister seeking leave to appeal the High Court decision to the Court of Appeal, which he declined on the basis that a point of law of exceptional public importance, as required by s. 5(3)(a) of the Illegal Immigrants (Trafficking) Act 2000, did not arise on the facts of the case: see Middelkamp v. Minister for Justice (No.2) [2021] IEHC 766.

Reasons for the Judgment

Did the Minister's decision engage Ms Middelkamp's Article 8(1) ECHR rights?

The first question which arose before the Court was whether the Minister's decision 'engaged' Ms Middelkamp's Article 8(1) ECHR rights, given the Minister's obligation to comply with the provision by virtue of s. 3(1) of the 2003 Act. Hogan J. held that it was clear that the Minister's decision did engage and interfere with such Article 8(1) ECHR rights because it had serious implications for the married life of the couple: Ms Middelkamp would be obliged, in effect, to separate and live apart from her husband for two years. **[31]**

In the course of his judgment, Hogan J. made reference to how this case is another example of a trend in practice of treating articles of the ECHR as if they were stand-alone quasi-constitutional provisions. While Hogan J. noted that the Court in this instance had little option but to address the appeal than by exclusive reference to the provisions of Article 8 ECHR due to the facts of the case and the failure of the applicant to raise the constitutional issue before the Minister, he cautioned legal professionals that in future cases constitutional issues should generally be raised appropriately in conjunction with any corresponding ECHR issues as arise within the confines of the 2003 Act, such that the Court does not proceed to adjudicate upon a particular ECHR issue as if the Constitution did not exist. **[20-24]**

In deciding that Ms Middelkamp's Article 8(1) ECHR rights were engaged, Hogan J. rejected the use of the minimum gravity test for the engagement of Article 8(1) ECHR rights initially set out in *R (Razgar) v. Home Secretary* [2004] UKHL 27, as it was interpreted by the Court of Appeal in *CI v. Minister for Justice* [2015] IECA 192. Hogan J. concluded that to follow the *'Razgar/CI'* analysis would oblige this Court to adopt an artificially restrictive interpretation of Article 8(1) ECHR which would confine the application of the Convention to those cases where either a particularly grave interference took place or where the interference had itself very serious consequences for the individual alone. **[35]** Hogan J. concluded that such an analysis was not supported by either the actual text of Article 8(1) ECHR nor was it one that the ECHR jurisprudence had ever adopted and was therefore satisfied that it ought not to be followed. **[32]** Hogan J. further held that in any event CI had been overtaken by the recent decision of this Court in *MK (Albania) v. Minister for Justice* [2022] IESC 48, and concluded that, as was held there, the decision of the Minister would go beyond any appropriate de minimis test for the engagement of Article 8(1) ECHR by virtue of its practical effect on the married couple affected. **[36]**

Hogan J. also concluded that Article 8(1) ECHR was engaged inasmuch as the instant case could be analogised with *Luximon v. Minister for Justice* [2018] 2 IR 542, in which MacMenamin J. held that both conditional and unconditional long-term residence requires consideration to be given to a person's Article 8 ECHR rights, inasmuch as they cannot be classified as simply 'visitors, or short term entrants, or persons who had no entitlement to be [there] at all'. **[38]**

Though Charleton J. concurred as to the overall result, he held, contrary to the judgment of Hogan J., that no Article 8 ECHR rights could be validly argued by the Ms Middelkamp in this case. Charleton J. stated that non-nationals have no general entitlement to enter a contracting state without the permission of state authorities. Indicating the broad application of ss. 1 and 3 of the 2003 Act, Charleton J. held that, in order to prevent excessive and unnecessary litigation in cases where ECHR rights are not engaged, a threshold test as to the engagement of the Convention remains indispensably important. **[8-9]** Charleton J. held that such a threshold test has consistently been applied by the ECtHR in cases such as *Hoti v. Croatia* (Application no. 6311/14, 26 April 2018). **[11]** Charleton J. held that such a threshold had not been reached in this case, observing that this was not a case of a person in peril, persecution or random violence. Rather, Charleton J. noted that it was clear from the point of application that variation or extension of the authorisation was not available to Ms Middelkamp and that she would be required to leave Ireland earlier than her husband. Only such exceptional circumstances, Charleton J. observed, can the removal of a non-national family member be deemed to be incompatible with Article 8 ECHR and that hence, in the circumstances of the instant case, where the permission granted is limited in order to remain within the State, family life considerations cannot be relied upon. **[6-12]**

If Ms Middelkamp's Article 8(1) ECHR rights were engaged, could the decision nonetheless be justified by reference to Article 8(2) ECHR?

The second issue before the Court was if the Minister's decision interfered with Ms Middelkamp's rights to family life under Article 8(1) ECHR, could the Minister have nonetheless reasonably concluded that such interference was necessary in a democratic society, such as to justify the decision for the purposes of Article 8(2) ECHR? Hogan J. concluded that while the Minister was in error in concluding that Ms Middelkamp's right to private life under Article 8(1) ECHR was not engaged, that since there were and are strong, consistent and weighty public interest in maintaining the integrity and coherence of the immigration system, the Minister was nonetheless fully entitled to conclude in the manner she did for the purposes of Article 8(2) ECHR. **[43]**

Hogan J. held that while the Minister's correspondence may not have exactly followed the analysis set out in the judgment of the Court, or the precise terminology of Article 8(2) ECHR insofar as it nevertheless conveyed properly the Minister's position that, absent exceptional circumstances, she did not feel she could make exceptions to the Working Holiday Scheme's finite and time-limited nature in individual cases, the decision was justifiable by reference to Article 8(2) ECHR. [43] Hogan J. held that the majority in this Court took a similar view in *MK (Albania)*, and that the reasoning found therein may be applied mutatis mutandis to the circumstances of the present case. **[44]** Hogan J. further held that a decision of this kind can nearly always be justified by reference to Article 8(2) ECHR, as to conclude otherwise would wholly compromise the State's capacity to operate such time-limited visa schemes and that it is only where exceptional circumstances – such as, for example, serious illness – present themselves that the decision would not be so justified by reference to Article 8(2) ECHR. **[40]** Hogan J also noted that the interference with family life was mitigated by the fact that Ms. Middelkamp was always free *qua* Canadian tourist to return to Ireland for periods of up to 90 days.

For her part, Dunne J. sympathised with the views of Charleton J. that there is a need for a threshold test before Article 8 rights are engaged. However, she agreed with Hogan J. that the respondent's Article 8 rights were in fact engaged in this case. Dunne J. had regard to the fact that the respondent was married before arriving in Ireland, they lived together for the duration of their time here and that Ms Middelkamp took up employment in order to support her husband in his studies. **[3]** Dunne J. concurred with both Hogan J. and Charleton J. that the Minister acted lawfully in refusing to extend the respondent's stay having regard to Article 8(2) of the European Convention on Human Rights. **[4]**

Were the reasons given by the Minister reasonable and lawful?

So far as the reasons given by the Minister to Ms Middelkamp, Hogan J. held that though the key phrase of the reasoning contained in the Minister's refusal letter of 2 January 2020 was pithy, (the statement amounting to no more than: 'the interests of public policy and the common good in maintaining the integrity of the immigration system outweigh such features of your case as might tend to support a decision to

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vary your permission') it conveyed with sufficient clarity, even if only by implication, the concerns of the Minister in relation to granting such leave, that being that the applicant's right to respect for family life did not outweigh the State's very weighty interest in the orderly application of the immigration system in the context of an Article 8(1) ECHR application. **[46-49]** Hogan J. therefore concluded that the Minister's appeal on this matter should be allowed inasmuch as neither the decision made nor the reasons in its favour could be said to be unreasonable or unlawful. **[50]**

In his judgment, Charleton J. held that it is only in exceptional circumstances that the removal of a non-national family be deemed to be incompatible with Article 8 ECHR. As such, Charleton J. held that the absence of such exceptional circumstances in this case meant that elaborate reasons were not required from the Minister, and that hence, the reasons that were given were sufficient. **[12, 15]** Charleton J. observed that clarity in the administration of legislation is of great importance, and that public servants should be safe in following legislation, stating that unless an ambiguity indicates a difficulty in interpretation that a simple indication of reasons for any decision made should be sufficient. **[3-4]**

Was the letter sent to Ms Middelkamp by Barrett J. appropriate?

In addition to the main appeal, the Minister also sought to question on appeal the appropriateness and vires of the letter attached by the judge to the High Court judgment, addressed to Ms Middelkamp, in which Barrett J. sought to provide a brief explanation of his judgment in nontechnical terms. Hogan J. held that whether a letter of this kind is written is quintessentially a matter of personal judicial judgment-writing style upon which opinions may legitimately differ, and that it did not seem appropriate for this Court to offer a view on this issue one way or another. Insofar as it was a ground of appeal in this case, it was rejected by Hogan J. **[54-55]** Charleton J. concurred on this matter, holding that a simple letter of this kind, while not universally necessary, was an appropriate method of ensuring that the decision was made clear to the parties. **[16-17]**

References in square brackets are to paragraphs in the relevantly named judgments of Dunne, Charleton and Hogan JJ.

Odum & Ors v. The Minister for Justice and Equality [2023] IESC 3

On appeal from: [2021] IEHC 747

Headline

The judgment sets out the circumstances in which an appeal may be considered moot, and the considerations which may lead the Supreme Court, in the exercise of the jurisdiction established by the Thirty-third Amendment to the Constitution, to use its discretion to hear the appeal.

Composition of Court

O'Donnell C.J., Charleton, Woulfe, Hogan, Murray JJ.

Judgments

O'Donnell C.J. (with whom Charleton, Woulfe, Hogan, and Murray JJ. agreed).

Background to the Appeal

The appellant was subject to a deportation order dated 21 June 2016. The validity of that deportation order is the subject matter of the substantive proceedings. On 22 November 2021, the High Court found that the appellant failed to establish any of the grounds of challenge to the respondent Minister's decision to make a deportation order, and refused to grant the reliefs sought. The appellant sought and was granted leave by this Court to appeal the decision of the High Court in a determination of 29 June 2022. Independently of these proceedings, the appellant successfully applied to the Regularisation of Long Term Undocumented Migrants Scheme. As a consequence of this, the appellant was granted permission to remain in the State for a period of two years, and the deportation order of 21 June 2016 was revoked. The issues to be determined in these proceedings are firstly, whether this appeal is moot as the deportation order has been revoked, and secondly, if this Court responds to the first issue in the affirmative, should this Court nevertheless use its discretion to hear the appeal.

Reasons for the Judgment

The Court, in a decision of O'Donnell C.J., reviewed the authorities on mootness in this jurisdiction and in other common law jurisdictions, in particular: *Lofinmakin v. The Minister for Justice, Equality & Law Reform and ors* [2013] IESC 49, [2013] 4 I.R. 274; *G. v. Collins* [2004] IESC 38 (Unreported, Supreme Court, Hardiman J., 12 July, 2004); *O'Brien v. Personal Injuries Assessment Board (No. 2)* [2006] IESC 62, [2007] 1 I.R. 328; *Borowski v. Canada* [1989] 1 S.C.R. 342; and *Elders Pastoral Ltd v. Bank of New Zealand* [1990] 1 W.L.R 1090. The Court also reviewed authorities relating to standing (a separate but related legal principle) including *Mohan v. Ireland and the Attorney General* [2019] IESC 18, [2021] 1 I.R. 293. The Court found that the appeal was moot because the subject matter of the proceedings, the deportation order, has been revoked.

Notwithstanding the finding that the case is moot, the Court determined that it would use its discretion to hear the appeal. The Court had regard to the changes brought in by the Thirty-third Amendment to the Constitution which had the effect of conferring this Court with second-tier appellate jurisdiction in circumstances where the appeal involves a matter of general public importance or it is in the interest of justice, under Article 34.5.3° and Article 34.5.4° of the Constitution.

In light of this jurisdiction, the Court identified several factors which influenced the Court's discretion to hear this case despite being moot:

i. The case would be heard in a full adversarial context.

ii. The existence of a determination that the appeal involves an issue of law of general public importance, and the desirability of clarifying the law.

iii. The precedential effect of the decision of the lower court which is sought to be appealed.

iv. The proper use of scarce and expensive court resources.

v. The existence of a risk of a continuing adverse consequence of the deportation order for the Appellants.

vi. The existence of a costs order.

In the matter of the Adoption Act 2010, Sections 49(1) and 49(3) and in the matter of A (a minor) and B (a minor): Adoption Authority of Ireland v. C and D and the Attorney General [2023] IESC 6

On appeal from: [2021] IEHC 784

Headline

The Supreme Court finds that the recognition of the stepparent adoption order and its entry onto the Register of Inter-Country Adoptions would not be contrary to Irish public policy.

Composition of Court

O'Donnell C.J., Dunne, O'Malley, Baker, Hogan, Murray, Collins JJ.

Judgments

O'Donnell C.J. (with whom Dunne, O'Malley, Baker, Murray, and Collins JJ. agree). Hogan J. (with whom Dunne, O'Malley, Baker JJ. agree).

Background to the Appeal

This case concerns the recognition in this State of a stepparent adoption order made by a court in Colorado, USA in respect of twin children, A and B.

A and B were born in Colorado pursuant to a Gestational Carrier Agreement made between the intended parents, C and D with E and a Known Egg Donor Agreement made between C and D and F. C and D are a same-sex married couple. C is the genetic father of the children, D adopted the children by way of a stepparent adoption order in Colorado, E is the surrogate and F is the genetic mother. C was born in England and D was born in Northern Ireland.

In August 2014, a Colorado court, following a petition for a determination of parent and child relationship, made an order declaring C the father and sole parent of the then unborn children. E was on notice of these proceedings, and she submitted an "Admission of Non-Maternity" in which she declared that she was not the natural, genetic, or intended mother and that she would not claim any rights in respect of the children. Subsequently, in February 2015, D obtained a decree of stepparent adoption from the Colorado court in respect of A and B. It is the recognition of this stepparent adoption order that forms the subject matter of this appeal.

D applied to the Adoption Authority pursuant to s. 90 of the Adoption Act 2010 ("the 2010 Act") to recognise the stepparent adoption and have it registered on the Register of Inter-Country Adoptions ("the RICA"). The Authority was of the view that the application raised one or more questions of public policy, and accordingly, as required by s. 49(3) of the 2010 Act, referred a Case Stated to the High Court. In the High Court, Barrett J. found that the stepparent adoption would not be contrary to Irish public policy and that the adoptions can be registered on the RICA.

Reasons for the Judgment

The Court dismisses the appeal and upholds the decision of High Court, albeit for different reasons than the trial judge. Both judgments make observations on the desirability of legislation on the topic.

The Court noted that there are two aspects of this appeal which concern public policy; the public policy surrounding the enforceability of aspects of the contractual agreements and the public policy concerning the recognition of the adopted status of children born pursuant to those agreements and consequently, parental status.

The Court finds that due to their commercial nature, aspects of the contractual agreements which formed the background to the stepparent adoption would be unenforceable for reasons of public policy had the parties sought to enforce them in this jurisdiction. Hogan J. further holds that some aspects of the agreements are unenforceable for reasons of public policy because they seek to effect a change in the parental status of C, D, and E, and the contracts intrude to a remarkable degree on E's fundamental liberties and personal autonomy, and her rights to privacy and the person under Article 40.3.1° and 40.3.2° of the Constitution. O'Donnell C.J., while acknowledging that significant issues would arise in respect of personal autonomy, but in the light of his conclusions on the commercial nature of the contracts, considers it is not necessary to express a concluded view on those issues. The Court also finds that on the facts of this case, there are no issues of enforceability arising from the fact that the consent of E was given before, and not subsequent to, birth, or the children's rights to know their genetic identity.

The Court finds that even though aspects of the contractual agreements would or could prove unenforceable on public policy grounds, this would not necessarily require or dictate that the subsequent adoption of any children born pursuant to such arrangements should not be recognised in the State. The Court finds that there is a strong public policy interest in recognising the status accorded to a person by the law of their domicile or habitual residence, particularly in the absence of clear domestic public policy to the contrary.

Furthermore, the Court finds that the general policy of the 2010 Act similarly favours the recognition of such adoptions. There is a strong interest in regularising the status of children and avoiding situations where children have differing statuses across jurisdictions. Finally, the Court finds that Article 42A.4 of the Constitution provides further support for the conclusion that the order should be recognised with regard to the public policy interest in safeguarding the best interests of children.

Therefore, the Court finds that there is no existing public policy barrier to the recognition of this stepparent adoption order and its entry onto the RICA.

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Tomás Heneghan v. The Minister for Housing, Planning and Local Government, The Government of Ireland, The Attorney General and Ireland [2023] IESC 7

On appeal from: [2021] IEHC 716

Headline

The Supreme Court allowed the applicant's appeal from the decision of the Divisional High Court, and decided that ss. 6 and 7 of the Seanad Electoral (University Members) Act, 1937 is not consistent with the provisions of Article 18.4.2° of the Constitution.

Composition of Court

O'Donnell C.J., Dunne, Charleton, O'Malley, Baker, Hogan, Murray JJ.

Judgments

Murray J. (with whom O'Donnell C.J., Dunne, O'Malley, Baker JJ. agree); Hogan J. concurring; Charleton J. dissenting.

Background to the Appeal

The applicant in this case is a graduate of the University of Limerick who requested that he be registered to vote in the next general election for seats in Seanad Éireann. After his request was refused by the Minister for Housing, Planning and Local Government, he brought proceedings challenging the constitutional validity and compatibility with the European Convention on Human Rights ("ECHR") of various aspects of the process for the election of members of the Seanad.

The applicant's claim was dismissed following a hearing before a Divisional High Court (Irvine P., Simons and O'Moore JJ.).The applicant thereafter applied for leave to appeal to the Supreme Court against the part of the High Court decision that dismissed his challenge to the constitutional validity and compatibility with the ECHR of the exclusion of graduates of institutions of higher education other than Trinity College Dublin ("TCD") and the National University of Ireland ("NUI") from participation in elections to Seanad Éireann.

Reasons for the Judgment

In the course of his judgment allowing the applicant's appeal from the Divisional High Court, Murray J. outlines the principles of law the Court should apply in resolving the difficult issues of interpretation arising from the positions of the parties as to the meaning of Article 18.4.2° of the Constitution as inserted following a referendum in 1979. He decides, having regard to those principles, that the effect of Article 18.4.2° was to mandate the introduction by the Oireachtas of legislation to expand the franchise for the election of the six members of Seanad Éireann referred to in Article 18.4.1(i) and (ii) of the Constitution.

He finds that the Oireachtas was given a very broad discretion as to how it reconstituted the franchise. However, at a minimum, the reconstitution had to result in the extension of the franchise so as to allow one or more institutions of higher education in addition to NUI or TCD to also participate in the election of those members of the Seanad previously elected by NUI and TCD alone.

The options available to the Oireachtas in so legislating thus were and are to ensure that the franchise is vested in NUI and TCD and one or more other institutions of higher education, although it would also be open to the Oireachtas to vest the franchise in NUI and one or more other such institutions, or in TCD and one or more other such institutions (the latter two options being relevant, in particular, in the event of the dissolution of either NUI or TCD). He finds that this is the only interpretation of the provision that both respects the text of Article 18.4.2° and that gives effect to the purpose of the Amendment as discerned from the text of Article 18.4 as a whole and as explained to the People in the statement of the proposal annexed to s. 1 of the Referendum (Amendment) Act, 1979.

It follows that ss. 6 and 7 of the Seanad Electoral (University Members) Act, 1937 ("the 1937 Act"), in limiting that franchise to TCD and NUI, are invalid because Article 18.4.2° requires the reconfiguration of that electorate in one or other of these ways. Murray J. found that this declaration should be wholly prospective in effect and that it should be suspended so as to allow the Oireachtas the opportunity to now legislate in compliance with its constitutional duty.

That suspension should operate in the first place until 31 July 2023. The Court will hear further submissions in advance of that date as to the extent to which it should be further suspended thereafter. Until such point as this suspension is lifted, this decision does not affect the validity of any Oireachtas or any act of any Oireachtas, and when that suspension is lifted the declaration will be wholly prospective.

Hogan J., concurring, decides that on its proper, contextual construction, Article 18.4.2° imposes a constitutional obligation to revise and to extend the University Seanad franchise within a reasonable time from the date of the enactment of the Seventh Amendment of the Constitution (Election of Members of Seanad Éireann by Institutions of Higher Education) Act, 1979. That reasonable time period has long since expired with the result that the 1937 Act has been rendered unconstitutional. The Oireachtas is under an obligation to revise these Universities' constituencies in a manner in accordance with law, and that obligation must now be discharged within a reasonable period. Hogan J. would therefore suspend that declaration of unconstitutionality in respect of ss. 6 and 7 of the 1937 Act until 31 July 2023 in the first instance, pending further order of the Court.

Charleton J., dissenting, differs from the majority in his analysis of the text of the Constitution. The Constitution is drafted in a different manner than statutes, which are reactive to current controversies. The Constitution is a carefully constructed and inherently structured document. Construing the Constitution through canons of statutory construction is illogical. The word 'may' cannot be given the meaning of 'must' within the constitutional text. Charleton J. relies on the Irish language version of the Constitution to support this view, through analysing the recurring use of enabling terms thought the text. Noting, however, that there was neither any parliamentary debate or the sponsoring before either the Dáil or the Seanad of any proposal in the aftermath of the Seventh Amendment of the Constitution, Charleton J. decides that the Constitution carries a fundamental political duty to consider and to take seriously the expression of the will of the people where there has been a positive vote in a referendum. This has been ignored in the political sphere. On his analysis, the will of the people has been set at nought for over 40 years and this is an affront to democracy. He decides that a declaration to the effect that a basic democratic obligation has been ignored should issue: but only that declaration. To go as far as the majority, he asserts, infringes the separation of powers doctrine.

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A, B and C (A Minor Suing by His Next Friend, A) v. The Minister for Foreign Affairs and Trade [2023] IESC 10

On appeal from: [2021] IEHC 785

Headline

The Supreme Court has allowed the Minister's appeal from the decision of the High Court and decided that A is not C's parent for the purposes of s. 7(1) of the Irish Nationality and Citizenship Act 1956.

Composition of Court

Dunne, Charleton, Woulfe, Hogan, Murray JJ.

Judgments

Murray J. (with whom Dunne, Charleton, Woulfe JJ. agree); Hogan J. concurring (with whom Woulfe J. agrees).

Background to the Appeal

The issue in this appeal concerns the meaning of s. 7(1) of the Irish Nationality and Citizenship Act 1956 ("the 1956 Act"), as amended. That provision states that a person is an Irish citizen 'if at the time of his or her birth either parent was an Irish citizen'. That issue is whether the effect of this subsection is that the third applicant, C, is an Irish citizen because the husband (A) of C's genetic father (B) is an Irish citizen. It arises in a context in which, by virtue of an order of the courts of England and Wales (where A, B and C are domiciled) A and B are now C's parents, but in which A was not C's parent at the time of C's birth. Irish law provides no bespoke mechanism for the recognition of foreign court orders of this kind.

A, B and C are residents of, and domiciled in, England. B is a British citizen, while A is an Irish citizen from birth, and also holds British citizenship. C was born in England in April 2015 by way of gestational surrogacy. He was conceived using embryos created by eggs provided by an anonymous (but traceable) donor inseminated with sperm from B. The resulting embryos were transferred to the uterus of D. Subsequent to C's birth, a United Kingdom birth certificate was issued which recorded D as C's mother, and B as his father.

In July 2015, A and B successfully applied to the Central Family Court in London for a parental order in respect of C pursuant to s. 54 of the Human Fertilisation and Embryology Act 2008 (an Act of the United Kingdom parliament). That order was granted on 21 July 2015. Under English law, the effect of that order was to reassign parentage of C from B and D, to A and B and the order thus operated to extinguish D's parental rights. A revised birth certificate was thereafter issued for C recording A and B as C's parents.

In early 2017, A and B applied to the Minister for Foreign Affairs and Trade ("the Minister") for a passport in respect of C. Section 7 of the Passports Act 2008 provides that before issuing a passport, the Minister must be satisfied that the relevant person is an Irish citizen. A and B contended that in the light of s. 7(1) of the 1956 Act, C was an Irish citizen because A was his parent, and by reason of A's Irish nationality. In the course of subsequent correspondence from the passport and visa office at the Irish Embassy in London, A and B were advised that the Department of Foreign Affairs and Trade intended to refuse the application for a passport for C, as (it was said) a 'parent' for the purposes of s. 7(1) was understood to mean either the 'mother' or 'father', or a male adopter of, the child.

The application still not having been determined in July 2020, these proceedings were instituted in the High Court. The applicants sought an order of mandamus directing the Minister to make a decision as to whether to issue an Irish passport in respect of C, and an order directing the Minister to issue an Irish passport in respect of C as well as various ancillary declaratory reliefs.

For reasons explained in a reserved judgment ([2021] IEHC 785), Barrett J. agreed with the construction of s. 7(1) of the 1956 Act urged by the applicants, finding that A was C's 'parent' for the purposes of that provision and that, in consequence, C was an Irish citizen.

Reasons for the Judgment

In the course of his judgment allowing the Minister's appeal from the High Court, Murray J. held that A is not C's parent as that term is used in s. 7(1) of the 1956 Act.

Murray J. decides: **[117]**

1. The parental order of the English court upon which the applicants rely is capable of being recognised in principle by the private international law of the State. The fact that Irish law does not allow for such orders to be made in this jurisdiction is not, in this case, relevant to that conclusion. However, that such an order is recognised by Irish common law rules for some purposes does not mean that the applicants are 'parent[s]' as that word appears in all legislative provisions in this jurisdiction. Each statute in which that word appears must be interpreted according to its own language, context and objective.
2. Section 7(1) of the 1956 Act, when it uses the term 'parent', refers to the genetic father of the child in question and includes the birth mother of the child (it is not necessary in this case to decide whether it also includes the child's genetic mother).
3. Even if one or all of the constitutional arguments advanced by the applicants in this case were well placed, it would not be possible to construe s. 7(1) so as to render A, C's 'parent' as that term is used in that provision. Not only does this construction sit most uncomfortably with the language used in s. 7(1), but to construe the provision in this way would radically alter the legislative scheme from that enacted, which envisaged citizenship by descent passing through persons who were parents at the time of the birth of the child as and from the point of his or her birth.
4. Noting that the constitutional argument suggested by the applicants is one according to which C would be entitled to Irish citizenship in circumstances in which an arguably like-positioned person domiciled in Ireland would not be entitled to such citizenship, the Court is not in any event free to consider granting the applicants' orders striking down the provisions of s. 7(1) of the 1956 Act as invalid having regard to the provisions of the Constitution for any of the reasons suggested in this case. Such declaratory relief was not sought in these proceedings, the parties required by law to meet that case were not before the court and the issue was not agitated before the High Court. Nor – for similar reasons – is the court free to grant a declaration of incompatibility pursuant to s. 5(1) of the 2003 Act.
5. The relief suggested by IHREC – a declaratory order that by failing to provide for a legislative route to birthright citizenship to a child born following surrogacy whose non-genetic parent is an Irish citizen, the State has breached C's rights under Articles 40.1, 40.3, 41 and 42A of the Constitution – may well ultimately reflect the logic of the applicants' complaint in this action. It certainly avoids the possible overbreadth that would follow from an interpretation of s. 7(1) that extended the section to all legal parents according to the law of domicile of an Irish citizen save and insofar as recognition was precluded by public policy. However, in order to even consider an application for relief of this kind (which was not sought by the applicants themselves), the Court would have to join the appropriate parties and would have to allow the State the opportunity to adduce evidence addressing the reasons it has not adopted this course of action.

This cannot be done at the instigation of a notice party at this stage of these proceedings.

Murray J. additionally observes that were Irish law to provide for the making by the courts in this jurisdiction of parental orders of the kind made in England in this case and under the type of conditions provided for in that jurisdiction, significant issues would arise under Article 40.1 of the Constitution were the Oireachtas to deprive the children of parents so decreed of a right of citizenship enjoyed within other families. **[119]** To do so would be to effect a differential treatment between seemingly like positioned persons at three levels – between the citizen through whom the citizenship can pass and the citizen through whom it cannot, between the child who benefits from the citizenship and the child who does

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not, and between the family unit within which that right can be transmitted and that within which it cannot. Murray J. says that if there is a justification for such differential treatment, it is not self-evident, and that such a justification was never identified by the respondent in the course of argument in this case. And, he says, if such orders were to be enabled under Irish law and citizenship extended by descent within the relationships thus established, the denial of citizenship to children of Irish citizens domiciled in another jurisdiction who have been determined to enjoy parentage under a legal regime similar to that applicable here would also require a clear and rational justification. In this regard also, he says, it is not immediately obvious what that justification would be. As such Murray J. would allow the appeal to the extent that the trial judge decided that A was C's parent as that term appears in s. 7(1) of the 1956 Act.

Hogan J. holds that absent a direct challenge to the constitutionality of s. 7(1) of the 1956 Act that the appeal should be allowed and disposed of in the manner suggested by Murray J. in his judgment. **[23]** Hogan J. holds that to hold otherwise would be to disregard the plain words of the subsection which are integral to the statutory scheme which this Court cannot simply ignore or treat as indispensable. **[5]** Hogan J. holds that while the failure of the Oireachtas to allow for citizenship by descent in a case of this kind certainly raises an acute constitutional issue having regard to the combined inter-action of Article 9.1.3 and Article 41.4 when read in conjunction with Article 40.1, that given the applicants had not actually challenged the constitutionality of the section or sought a declaration that the failure by the Oireachtas to so provide for citizenship by descent in the case of non-genetic Irish parents amounts to a breach of Article 40.1 that it would be inappropriate to proceed further. **[21]**

Hogan J. holds, moreover, that it would not be appropriate for the Court to pronounce upon the constitutionality of a legislative measure in any case without the service of the proceedings upon the Attorney General in the manner required by the Rules of the Superior Courts and fair procedures or to allow for the scope of an appeal to be expanded by the Irish Human Rights and Equality Commission's submissions on appeal where a constitutional argument was not otherwise previously advanced by the parties. **[21-22]**

Hogan J. furthermore holds that in the circumstances where a declaration of unconstitutionality was not sought that the double construction test cannot be expanded to operate as a form of substitute finding of unconstitutionality or to achieve a finding of quasi-unconstitutionality by radically distorting the ordinary meaning of what the statute actually says by forging new meanings beyond which the words of the legislation reasonably bear or which is beyond any construction which is reasonably open in the circumstances. **[8-10]**

References in square brackets are to paragraphs in the respective judgments of Mr Justice Murray and Mr Justice Hogan.

Christopher McGee v. Governor of Portlaoise Prison & Ors [2023] IESC 14

On appeal from: [2022] IEHC 210

Headline

The Supreme Court dismissed the appellant's appeal and affirmed the decision of the High Court.

Composition of Court

O'Donnell C.J., Irvine P., MacMenamin, O'Malley, Baker, Hogan, Murray JJ.

Judgments

O'Donnell C.J. (with whom Dunne, Charleton, O'Malley, Woulfe, Hogan, Collins JJ. agree).

Background to the Appeal

The appellant was detained in Portlaoise Prison between 2000 and 2004. During this time, the appellant alleges that he was required to engage in "slopping out" due to the lack of in-cell sanitation. This Court in *Simpson v. The Governor of Mountjoy Prison* [2019] IESC 81, [2020] 3 I.R. 113 held that the practice of having prisoners slop out infringed their personal rights as guaranteed by Article 40.3 of the Constitution, and gave rise to an entitlement to a claim for damages in civil proceedings.

In 2014, ten years after the appellant was released from prison, he commenced proceedings in the High Court against the respondents for breach of constitutional rights and sought damages. The respondents delivered a full defence and raised a preliminary objection that the appellant's action was barred pursuant to s. 11(2) of the Statute of Limitations Act, 1957 as amended ("the 1957 Act"). This subsection provides that: -

> "Subject to paragraph (c) of this subsection and to section 3 (1) of the Statute of Limitations (Amendment) Act, 1991, an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued".

The appellant contends that this provision of the 1957 Act is not applicable in this case, as his claim is a "pure *Meskell* claim", and not one which is "founded on tort" as it is a sui generis constitutional claim. The appellant further argues that a pure-*Meskell* claim arises where the claim does not fall within the heading of any existing tort claim, and therefore it cannot, by its nature, be founded on tort.

The net issue to be decided in this appeal is, therefore, whether a claim for damages for breach of constitutional rights is an action "founded on tort" for the purposes of s. 11(2) of the 1957 Act.

Reasons for the Judgment

O'Donnell C.J. discussed the ways in which the law of torts can interact with constitutional law, noting that the law of torts is one of the means by which the State performs part of its constitutional obligation under Article 40.3 to respect, protect, and vindicate the personal rights of the citizen. The State performs part of this obligation by enacting legislation permitting and facilitating claims in tort against tortfeasors. However, as was found in *Meskell v. Córas Iompair Éireann* [1973] I.R. 121 and *Hanrahan and ors v. Merck Sharp and Dohme* (Ireland) Limited [1988] I.L.R.M. 629, in circumstances where the existing common law or statute law fails to provide a remedy to an individual for a breach of duty of another, the courts provide a remedy in performance of the State's obligations under Article 40.3. The court has developed this remedy as a direct, horizontal remedy against the wrongdoer. This is referred to as a "pure *Meskell* claim". **[74-78]**

O'Donnell C.J. followed the approach of Keane J. in *McDonnell v. Ireland* [1998] 1 I.R. 134 that, although a pure-*Meskell* claim developed in the form of an action for an infringement of a constitutional right, such a claim may be classified as a civil wrong. This action has all of the indicia of a tort. O'Donnell C.J. found that a pure-*Meskell* claim is functionally identical to a nominate tort established by common law or by statute. Such a claim performs the same function as a nominate tort, to vindicate the person or dignity of the appellant. The law of torts is, therefore, a

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performance of the same obligation of the State as a pure-*Meskell* claim, which is the vindication of the personal rights of the citizen. It follows that a "pure *Meskell* claim" is one which can be said to be "founded on tort", and subject to s. 11(2) of the 1957 Act.

Therefore, the respondent can plead the Statute of Limitations as a defence to the appellant's claim for damages for breach of constitutional rights. **[79-80]**

References in square brackets are to paragraphs in the judgment of the Chief Justice.

Emmett Corcoran and Oncor Ventures Ltd t/a The Democrat v. The Commissioner of An Garda Síochána and the Director of Public Prosecutions [2023] IESC 15

On appeal from: [2022] IECA 98

Headline

The failure of An Garda Síochána in this case to state in two informations supplied to the District Court in support of an application for a search warrant that Mr Corcoran (a *bona fide* journalist) had been interviewed under caution and had asserted journalistic privilege meant that relevant information was not put before the District Court. The power conferred by s. 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997 was not therefore exercised lawfully. The Court held unanimously that these warrants must be quashed on this ground.

Composition of Court

O'Donnell C.J., Dunne, Charleton, O'Malley, Baker, Hogan, Collins JJ.

Judgments

O'Donnell C.J. (with whom Dunne, Charleton, O'Malley and Baker JJ. agree); Hogan J.; Collins J.

Background to the Appeal

On 11th of December 2018, a property in Falsk, Strokestown, Co. Roscommon was repossessed. Security personnel went into occupation of the property. Five days later, in the early hours of the 16th of December 2018, a number of masked and armed people attended the premises, attacked and injured the security personnel and set a number of vehicles alight. This case arose from judicial review proceedings taken by Mr Emmett Corcoran, the editor of a local newspaper 'The Democrat'. Mr Corcoran had attended the aftermath of the incident and had been interviewed under caution by An Garda Síochána a number of days later. Following this interview, the Gardaí sought warrants from the District Court pursuant to the provisions of s. 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997 ("the 1997 Act") (as inserted by s. 6(1) of the Criminal Justice Act 2006) which authorised the search of Mr Corcoran's home and the premises of the newspaper on the basis that they contended that Mr Corcoran was in possession of certain information, such as videos and photographs, on his mobile telephone which might assist them in their investigation of the incident. The fact that Mr Corcoran was a *bona fide* journalist or that The Democrat was a local newspaper was not recorded in the informations which grounded the application to the District Court, nor was the Court informed that Mr Corcoran had refused to identify his sources and had asserted journalistic privilege. Mr Corcoran handed his mobile telephone over under protest when a Garda Sergeant attended his home intending to seize the telephone on foot of the warrant on 4th April 2019. Mr Corcoran immediately appealed by way of judicial review to have the warrants struck out and his mobile telephone and all data accessed returned to him, maintaining that the material sought was protected from disclosure by journalistic privilege. Leave was granted for judicial review by Noonan J. on that day.

In the High Court Simons J. concluded that the public interest in accessing the material outweighed the assertion of privilege, though he ordered that access to Mr Corcoran's data was to be limited to relevant content over the period of 11th-17th December 2018. Simons J. held that it was appropriate for the High Court exercising jurisdiction in judicial review proceedings to make such a determination, rejecting that a District Judge ought to conduct the balancing exercise. In the Court of Appeal, Costello J. instead concluded that the District Judge had jurisdiction to consider and balance the competing rights of the public interest in the investigation and prevention of crime against the rights of journalists. In this instance, therefore, the District Judge ought to

have been furnished with the information that Mr Corcoran's constitutional and ECHR rights were engaged here and that it should have been stated that the public interest must outweigh journalistic privilege to grant the warrant. As this did not occur, Costello J. held that the Commissioner was not entitled to access any information pursuant to the warrants. The matter was subsequently appealed to this Court.

Reasons for the Judgment

Hogan J. affirmed the decision of the Court of Appeal to quash the search warrants issued on 2nd April 2019 on the basis that the failure of the two informations grounding the s. 10 application to state that Mr Corcoran had been interviewed under caution and had asserted journalistic privilege meant that highly relevant information was not before the District Court. Hogan J. held that it is at least implicit that the District Judge cannot properly exercise the independent adjudicatory function which the Oireachtas intended as a necessary safeguard unless all such relevant facts are furnished in circumstances where an objective failure to so have them might result in a breach of s. 3 of the 2003 Act or, perhaps, Article 40.6.1°. **[104-105]**

Collins J. held that s. 2 of the 2003 Act clearly required that s. 10 of the 1997 Act be interpreted as entitling a judge to have regard to Article 10 ECHR. The difficulty, Collins J. noted, was that the material presented to the trial judge did not adequately disclose the position so as to enable him to make a properly informed assessment as to whether it was appropriate to issue the search warrants. Collins J. considered that, at a minimum, the trial judge ought to have been told, in unambiguous terms, that Mr Corcoran was a journalist and that one of the purposes of the intended searches – if not the principle purpose – was to identify Mr Corcoran's sources, which he had made clear were confidential and which he had made clear he felt unable to disclose because of his obligations as a journalist. Collins J. considered that if such disclosure had been made, the judge may have nonetheless proceeded to grant the search warrants but that was not inevitable: the judge might have instead concluded that the search warrants would, in the particular circumstances, be disproportionate and/or incompatible with Article 10 ECHR, particularly in circumstances where the execution of the warrants might result in the seizure of, and access being obtained to, journalistic material unconnected to the incident being investigated. **(29-32)**

As not all relevant and material information relevant to the operation of s. 3 of the 2003 Act or, perhaps, Article 40.6.1° of the Constitution was before the Court, Hogan J. held that in this circumstance, viewed objectively, the exercise of the s. 10 power was not exercised reasonably. **[106]** Collins J. held that such was fatal to the validity of the two search warrants. **(32)**

Hogan J. expressed that furthermore, these proceedings exposed serious shortcomings in s. 10 of the 1997 Act in terms of the State's Article 10 ECHR and Article 40.6.1° obligations. Hogan J. identified the lack of safeguards designed to protect journalistic privilege and to provide for an independent, merits-based assessment of such a claim as particularly problematic with regard to both Article 10 ECHR and the Constitution. [112] Collins J. held that the availability of judicial review did not provide adequate protection against the violations of Article 10 ECHR. **[54-57]**

Hogan J. further noted that the constitutional matter was not fully argued on the appeal and for that reason he does not base his decision on that ground. However, he did express the view by way of obiter dicta, that without some constitutional protection of the right of the media to protect their sources, the press cannot realistically be expected to discharge their functions of educating public opinion and holding the Government to account in the manner expressly provided for by Article 40.6.1°. **[99]** Without a free press there is no democracy in the manner required as part of the State's constitutional identity as provided for in Article 5 and the general protection of sources is integral to a free press. **[63]**

In the absence of a full argument on the issue, Collins J. considered that it would not be appropriate for the Court to express any concluded view on whether Irish law, and in particular Article 40.6.1° of the Constitution, provides a privilege or protection against the compelled disclosure of journalists' sources and, if so, what the nature and scope of such privilege or protection may be. In his judgment, Collins J. discusses a number of issues which in his view are required to be addressed prior to any decision being made as to the existence of any form of journalistic privilege, whether that is to be located in the provisions of Article 40.6.1° (and/or Article 5) or in the common-law. In his view, it would not be appropriate to declare a privilege in principle, leaving its fundamental contours to be delineated later. Neither would it be appropriate to proceed on the basis that Article 40.6.1° should be read as embodying such a privilege because Article 10 ECHR has been held to do so or to proceed on the assumption that any constitutional privilege should necessarily be of the same scope as the protection under Article 10 ECHR. Even if (in a future appeal) the Court was to hold that a journalist source privilege ought to be protected as a matter of Irish law, it would not necessarily follow that the Court should recognize a constitutional privilege. **(93-96)**

O'Donnell C.J. (with whom Dunne, Charleton, O'Malley and Baker JJ. agreed) agreed that the warrant should be quashed because a judge dealing with an application was entitled and obliged to take account of the protection afforded for journalists under Article 10 of the ECHR. It followed that the District Court Judge ought to have been informed that the subject of the proposed search was a journalist and the failure to do so meant that the warrant was invalid. **{1}** Turning to the constitutional issues addressed by Hogan and Collins JJ. he considered that such issues, while important, had not been argued in the case at hand. He considered that the observations of Hogan and Collins JJ. represented an important contribution to the debate but concluded that the final resolution of the constitutional issues should not be addressed until such issues arise in proceedings which made it necessary to do so. Consequently, O'Donnell C.J. expressly reserved his position on the Article 40.6.1.i° question. **{5}**

Finally, Hogan J. observed however that the shortcomings in s. 10 of the 1997 Act so far as it concerns assertions of privilege by journalists stand beyond the capacity of the courts to amend or cure and rather are matters to which the Oireachtas may wish to give urgent consideration. **[90, 109, 114]**

References in square brackets are to the paragraphs in the judgment of Hogan J. References in round brackets are to the paragraphs in the judgment of Collins J. References in braces are to the paragraphs in the judgment of O'Donnell CJ.

Judgment Summaries

C.W. v. The Minister for Justice, Ireland, The Attorney General and the Director of Public Prosecutions [2023] IESC 22

On appeal from: [2022] IEHC 336

Headline

The Supreme Court unanimously dismissed the appellant's appeal and affirmed the decision of the High Court that s.3(5) of the Criminal Law (Sexual Offences) Act 2006 (as substituted by s.17 of the Criminal Law (Sexual Offences) Act 2017) is unconstitutional.

Composition of Court

O'Donnell C.J., Dunne, Charleton, O'Malley, Woulfe, Hogan, and Murray JJ.

Judgment

O'Donnell C.J. and O'Malley J. (with whom Dunne, Charleton, Woulfe, Hogan and Murray JJ. agree). Charleton J. also delivers a concurring judgment.

Background to the Appeal

The respondent was charged by the third named appellant with two offences, being one count of rape and one count of the offence of defilement of a child under the age of 17. After being returned for trial in the Central Criminal Court he issued these proceedings, in which he originally sought a declaration that the offence of defilement, as provided for in s.3 of the Criminal Law (Sexual Offences) Act 2006 (as substituted by s. 17 of the Criminal Law (Sexual Offences) Act 2017), was invalid having regard to the Constitution and/or was incompatible with the European Convention on Human Rights. The claim as litigated is considerably narrower and relates only to the defence available under the Act. The respondent was acquitted by the jury of rape but was convicted of defilement. He was sentenced to a term of imprisonment of one year and ten months. His appeal against conviction remains listed in the Court of Appeal pending the outcome of this appeal in the civil proceedings.

This was an appeal by the State parties against the finding of the High Court that s.3(5) of the Act is invalid having regard to the provisions of the Constitution and in particular Article 38 thereof (Stack J. – see *C.W. v. Minister for Justice* [2022] IEHC 336). Section 3(3) of the Act provides a defence for the accused to demonstrate that they reasonably believed the child was above 17 years old. Subsection 3(5) provides that an accused person who claims that he or she made a mistake about the age of the child must prove that claim on the balance of probabilities.

The respondent's case is primarily based on the proposition that the age of the child is a key ingredient of the offence of defilement, since no crime is committed unless the child is under 17. He says that it follows as a matter of law that this element must require *mens rea* on the part of the accused person. He accepts that it can be permissible to impose a reverse burden on the defence in this regard, but argues that any burden so imposed cannot go beyond the requirement to prove grounds for reasonable doubt on the issue. To go further than this amounts, he says, to an infringement of the presumption of innocence and, therefore, a violation of the constitutional guarantee of a right to a trial in due course of law. The Irish Human Rights and Equality Commission, which joined in this appeal as an *amicus curiae*, agrees with this proposition.

The appellant State parties accept that age is a key ingredient of the offence, and the age of the child at the relevant time must be proved beyond reasonable doubt. However, they contend that knowledge of the age is not an ingredient, and that, therefore, there is no onus on the prosecution to show that an accused person had any *mens rea* in relation to the age. They argue that the offence is complete if the accused person did in fact engage in sexual activity with a child who was under 17. They say that the section simply provides for a special defence available to a person who can show that they had made a reasonable mistake about the age of the child.

Reasons for the Judgment

Under the considered provision, two possible interpretations are open. While O'Donnell C.J. and O'Malley J. take a different view of the interpretation of the section, neither view concludes the analysis of the issues in the appeal in this particular case. They have come to the same conclusion on the central issue for broadly similar reasons. It is unanimously agreed that the defence burden carrying a standard of proof on the balance of probabilities cannot be constitutionally justified, on either view of the section. **[183]**

The Court finds that if the provision is intended to provide a chance of acquittal for the genuinely mistaken, it is unduly difficult to establish, and creates an unnecessarily high risk of conviction of a person who was so mistaken. If it is seen, alternatively, as relieving the prosecution of the onus of proof of *mens rea* and reversing that onus onto the defence, it similarly goes too far in obliging the accused to establish mental innocence. **[245]**

It is held by the Court that while the objective of the legislation is a legitimate one, and justifies both the imposition of a burden of proof on the defence and the requirement that the mistake be reasonable, the pitching of that burden at the level of proof on the balance of probabilities either impairs the right to be presumed innocent to the point where it must be considered disproportionate and contrary to the constitutional presumption of innocence or fails to fulfil the guarantee of a trial in due course of law as required by Article 38 of the Constitution. Accordingly, the appeal must be dismissed, the High Court's order declaring section 3(5) unconstitutional affirmed, and the stay imposed by the High Court on its order pending the appeal is now no longer operative. **[247]**

The effect of this judgment should be understood - the only part of the section to be found invalid is s.3(5), relating to the standard of proof in relation to the defence available under s.3. The rest of the section remains fully capable of operation. This includes section 3(3), which necessitates the defence to establish the existence of a reasonable doubt as to whether the accused was mistaken regarding the age of the complainant, and such mistake itself must be reasonable. Section 2 of the Act, dealing with offences against younger children, is entirely unaffected. **[249]**

Charleton J. delivers a concurring judgment setting out his reasons for agreeing with the joint judgment of O'Donnell C.J. and O'Malley J., discussing the history of reversed burdens and the content of a charge to a jury in cases under s.3 of the 2006 Act.

References in square brackets are to the joint judgment of the Chief Justice and Ms Justice O'Malley.

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The Revenue Commissioners v. Karshan (Midlands) Ltd t/a Domino's Pizza [2023] IESC 24

On appeal from: [2022] IECA 124

Headline

The Supreme Court allowed the appellant's appeal from the decision of the Court of Appeal, and decided that the Tax Appeal Commission was entitled to conclude that drivers who provide delivery services for the respondent's pizza business were employees of Karshan for the purposes of the relevant provisions of the Taxes Consolidation Act 1997, as amended ("TCA").

Composition of Court

O'Donnell C.J., Dunne, Baker, Woulfe, Hogan, Murray, Collins JJ.

Judgment

Murray J. (with whom O'Donnell C.J., Dunne, Baker, Woulfe, Hogan, Collins JJ. agree).

Background to the Appeal

The issue in this appeal is whether the Tax Appeal Commission was entitled to conclude that drivers who provide delivery services for the respondent's pizza business were employees of the respondent for the purposes of certain provisions of the TCA. The respondent ("Karshan") contended that these drivers were engaged as independent contractors under contracts for services, while the appellant ("Revenue") argued that they were employees. The resolution of that dispute determines which of two legal regimes governs the taxation of the drivers' income.

The Tax Appeal Commission ('TAC') decided that the drivers were employees of Karshan, and the High Court (before which the matter came on an appeal by case stated from the TAC), determined that the Commissioner was entitled to so conclude. A majority of the Court of Appeal (Costello and Haughton JJ.) allowed an appeal against that finding, deciding that the Commissioner erred in finding that the drivers were employees. One judge of that court (Whelan J.) dissented.

Reasons for the Judgment

Central to this appeal is whether it was necessary to the establishment of an employment relationship that there be a requirement that the employer and worker owe each other certain '*mutual obligations*'. Karshan's theory of *'mutuality of obligation'* had four components: firstly, that the mutual commitments in question had to present some type of continuity; secondly, that they had to have a forwards looking element; thirdly, that there had to be an obligation on the part of the employer to *'provide'* work; and fourthly, that there had to be an obligation on the part of the employee to *'perform'* work. Murray J. concludes in his judgment that there is no such requirement in Irish law.

He proceeds to decide that the question of whether a contract is one of service or for services should, having regard to the well-established case law, be resolved by reference to the following five questions:

1. Does the contract involve the exchange of wage or other remuneration for work?
2. If so, is the agreement one pursuant to which the worker is agreeing to provide their own services, and not those of a third party, to the employer?
3. If so, does the employer exercise sufficient control over the putative employee to render the agreement one that is capable of being an employment agreement?
4. If these three requirements are met the decision maker must then determine whether the terms of the contract between employer and worker interpreted in the light of the admissible factual matrix and having regard to the working arrangements between the parties as disclosed by the evidence, are consistent with a contract of employment, or with some other form of contract having regard, in particular, to whether the arrangements point to the putative employee working for themselves or for the putative employer.
5. Finally, it should be determined whether there is anything in the particular legislative regime under consideration that requires the court to adjust or supplement any of the foregoing.

In this case, the Commissioner was entitled to conclude, as she did, that the drivers were employees of Karshan for the purposes of the relevant provisions of the TCA. The evidence disclosed close control by Karshan over the drivers when at work, and while there were some features of their activities that were consistent with their being independent contractors engaged in business on their own account, the Commissioner was entitled to conclude that the preponderance of the evidence pointed to the drivers carrying on Karshan's business rather than their own.

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In the Matter of Article 26 of the Constitution and In the Matter of the Judicial Appointments Commission Bill 2022 [2023] IESC 34

Headline

The Supreme Court decides that the provisions of the Judicial Appointments Commission Bill 2022 ("the Bill") referred for its consideration by His Excellency President Michael D. Higgins under the provisions of Article 26.1.1° of the Constitution of Ireland are not repugnant to the Constitution or any provision thereof.

Composition of Court

Dunne, Charleton, O'Malley, Baker, Woulfe, Hogan, Murray, Collins JJ.

Judgment

Single decision of the Court pursuant to Article 26.2.1° of the Constitution, delivered by Dunne J.

Background to the Appeal

By order given on 13 October 2023, His Excellency President Michael D. Higgins referred a number of provisions of the Bill to this Court for a decision as to whether the said sections were repugnant to the Constitution, or any provisions thereof pursuant to Article 26.1.1° of the Constitution. The sections of the Bill referred to the Court are: ss. 9, 10, 39, 40(2), 42, 43, 45, 46, 47, 51, 57 and 58.

Article 35.1 of the Constitution provides that "The judges of the Supreme Court, the Court of Appeal, the High Court and all other Courts established in pursuance of Article 34 hereof shall be appointed by the President." Article 13.9 of the Constitution provides that "The powers and functions conferred on the President by this Constitution shall be exercisable and performable by him only on the advice of the Government, save where it is provided by this Constitution...". Thus, the power to appoint a person to judicial office is in essence a power exercisable by the executive arm of the State.

Hereto, although legislation since 1924 provided for eligibility conditions, the Government could nominate a person to judicial office who had not gone through the formal assessment procedures for which legislation has provided. It has accordingly been the case to date that in making the ultimate choice of persons to nominate for appointment the Government has been left with a large measure of discretion. The Courts and Courts Officers Act 1995 reduced that discretion to a certain extent, but it remains the situation that the Government may nominate a person who has not gone through the JAAB process for which that Act provides.

The Bill provides for a new body, the Judicial Appointments Commission ("the Commission"). It is intended that the Commission will draw up mandatory procedures for the assessment of applicants for judicial office and, having regard to certain matters identified in the Bill, set the criteria in respect of appointment to any judicial office within the State and in respect of nominations to certain international courts. It is to operate such procedures and apply such criteria to any persons who seek appointment to judicial office for the purpose of making recommendations to the Government regarding applicants who meet the criteria. The Government will, in most but not necessarily all circumstances, be given a list of recommended persons from which to choose a person to nominate to the President for appointment but can in no circumstances choose a person who is not recommended by the Commission.

Counsel assigned by the Court have argued that the referred measures interfere with the provision made by the Constitution in respect of all three branches of government, and thus infringe the principle of the separation of powers. They make the case that the Bill in effect impermissibly divests the executive of its constitutional role in appointing judges, that the vagueness and breadth of the powers conferred on the Commission are such as to amount to an unconstitutional delegation of the legislative functions of the Oireachtas, and that the measures infringe the constitutional principle of the independence of the judiciary. They also argue that the measures may bring about unjustified, and therefore unlawful, discrimination between individual applicants and may also interfere with their personal constitutional right to privacy. A further submission is that the Bill impermissibly permits the Commission to legislate, and thus breaches constitutional provisions of Article 15.2 by which the power to make laws is vested in the Oireachtas. It is also contended that the Bill breaches the principles underlying the rule of law.

The Attorney General contends that the Bill respects the constitutional powers of the Government to nominate persons for appointment as judges by the President, while enhancing the democratic legitimacy of the process leading to such nominations. He submits that the measures will strengthen and safeguard judicial independence and the rule of law, and will ensure consistency with the State's obligations under European Union and international law.

Reasons for the Judgment

Following an examination of the objectives of the Bill as set out in the Long Title and the international material referred to therein, the referred provisions, the history of the legislative provisions setting the eligibility criteria for appointment to judicial office before and since the foundation of the State and, noting the importance of an independent judiciary in a democratic state governed by the rule of law, the jurisprudence of the Court of Justice of the European Union and the European Court of Human Rights, and relevant domestic constitutional jurisprudence, the Court decided as follows:

Whilst noting that Article 29.4.4° of the Constitution affirms Ireland's commitment to the shared values of the European Union, the Court decides that by reason of the fact that the matter of judicial appointment is one within the exclusive competence of individual Member States of the European Union, the current regime of judicial appointment does not infringe on the independence of the judiciary, such that the provisions of the Bill providing for the selection and recommendation to Government of those eligible for appointment to judicial office are necessitated by the State's obligations of membership of the European Union for the purposes of Article 29.4.6° of the Constitution. **[103]**

Section 39(2) of the Bill does not adopt a strong form of positive action or automatic preference of candidates for judicial office such that it is repugnant to the constitutional guarantee of equality. **[244]**

While the Commission in its assessment of candidates will process sensitive data, including health data, the Bill contains sufficient safeguards to prevent the breach of the privacy rights of an applicant **[260]**, and to prevent discrimination against applicants with disabilities. **[283]**

Nothing in the Bill gives the Commission any power to give orders or instructions to judges or courts that could infringe on the institutional independence of judges and courts under the Constitution **[157]**, and the circumstances in which decisions of the Commission may be subject to judicial review are not material to this Court's decision on the constitutionality of the Bill.

The new model of the courts established in The Courts of Justice Act, 1924, and carried over in 1937, envisaged the making of rules as to qualifications needed to be eligible for appointment to judicial office, and this task was for the Oireachtas and not a matter for the untrammelled discretion of a Government. **[202]**

The Court decides that the Constitution by reason of its obligation from the combined effect of Articles 5, 6, 34.1 and 35.2 of the Constitution, encompassing, *inter alia*, their establishment (Article 34.1), the removal of judges (Article 35.4) and the broad legislative competence — and duty — arising under Article 36, requires the Oireachtas to legislate in respect of eligibility for appointment of persons to the judiciary, or in ordinary terms, that there should be rules as to who can or cannot be made a judge. **[140]** The power of appointment of judges described in Article 13.9 does not render the power of the Government to appoint judges beyond the scope of appropriate legislative regulation. The challenge to the power of the Oireachtas to enact such legislation in respect of eligibility requirements was firmly rejected in *State (Walshe) v. Murphy* [1981] I.R. 275.

Having concluded that the Oireachtas is constitutionally obliged to legislate in respect of eligibility requirements, the question then arises as to whether it can legislate more generally in

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relation to judicial appointments. There is no universal rule in this regard and the mere fact that a power or function comes within the scope of Article 13.9 does not in itself render it inviolate and beyond the scope of appropriate legislative regulation. Each power must be construed and assessed separately, on its own terms and having regard to the specific constitutional interests in play and with regard to how the power in question fits into the wider constitutional structure. It cannot be said that the context, wording, text and purpose of Article 35.1 (read, as necessary, with Article 13.9) is such that it excludes by implication all possible legislative regulation of the appointment procedure. In particular, it cannot be said to exclude the possibility of legislation that goes beyond prescription of minimum eligibility levels and further narrows down the pool of candidates to be considered by the Government. **[198-200]**

The Court considers that it is not necessary to delineate in some exhaustive or conclusive fashion the limitations on that legislative power. What is clear, however, is that if and insofar as there are any limitations necessarily implicit in the combined effect of Article 35.1 and Article 13.9, those limitations would fall to be defined by a requirement that the Oireachtas must respect all relevant constitutional considerations. **[201]** In this context, one such highly relevant consideration, about which there is no doubt, is the necessity to protect and enhance the independence of the judiciary that is so forcefully reflected in Article 35.2.

The constitutional power and function of the Government is to advise the President to nominate a person for judicial office. Under the Bill, the choice of who to nominate must be made by Government, it having considered the names recommended by the Commission. There is nothing express or implicit in s.51 of the Bill which requires the Government to nominate a person recommended by the Commission for appointment by the President. **[180]** In cases where only one person is recommended by the Commission, the Government is still exercising a choice, that choice being whether or not to advise the President to appoint that person. It follows that, if the Government is not satisfied to exercise its power to advise the President in respect of some or all of those recommended for appointment by the Commission, the process of selection for appointment will have to start again. The Court therefore rejects the argument that the Bill impermissibly interferes with the constitutional power of the Government by obliging it to act only on the recommendations of the Commission. The ultimate authority of the Government to make the final decision as to who to appoint as a judge has been preserved in the Bill, and the Government is left with a meaningful choice as to accept or reject that list, or to choose between those on the list.

The Court also decides that the Bill does not violate the principles established in the jurisprudence on Article 15.2.1°. The Bill sets out a sufficiently clear view of what constitutes merit in a judge and obliges the Commission to implement that view in its selection criteria. **[223]** The Oireachtas has not abdicated its power, but conferred a degree of discretion in a sufficiently narrow area of operation, in compliance with Article 15.2, which permits some level of delegation to subordinate bodies.

References in square brackets are to paragraphs in the judgment of the Court.

The Supreme Court of Ireland would like to thank all of the organisations, bodies and courts mentioned throughout this report that kindly provided photographs for use in its publication.

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