Cúirt Uachtarach na hÉireann
Supreme Court of Ireland

2021
Annual Report

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The composition of the Supreme Court

as at February 2022[3]

The Supreme Court of Ireland (Cúirt Uachtarach na hÉireann in Irish) sits at the apex of the Irish court system. It is the final arbiter and interpreter of the country's basic law, Bunreacht na hÉireann (the Constitution of Ireland).

Article 34.5.1° of the Constitution states that "[t]he Court of Final Appeal shall be called the Supreme Court" and bestows on the Court both an appellate and original jurisdiction.

With the establishment of the Court of Appeal in 2014, the appellate jurisdiction of the Supreme Court was recast. As a result, the Court has been conferred with the authority to determine whether to hear a case, where that case has satisfied the threshold as set out in the Constitution.

In addition to exercising an appellate and original jurisdiction, the Supreme Court, as a constitutional court, also has a role in ensuring that the laws which the Oireachtas (the Irish Parliament) enacts are upheld and interpreted in light of the Constitution and the jurisprudence that has developed since the Constitution's enactment in 1937.

The Supreme Court also has a role in the implementation of the law of the European Union. As a court of last resort, the Supreme Court is obliged under the Treaty of the Functioning of the European Union ('TFEU') to refer questions regarding the interpretation of European Union law to the Court of Justice of the European Union where the interpretation of such law is not clear, and clarification is necessary in order for the Supreme Court to decide a question which has been put before it.

Through its decisions, the Supreme Court brings finality to the appeals brought and heard before it. As the highest court in the land, the decisions of the Supreme Court have binding precedence on all court jurisdictions in Ireland.

2 Mr. Justice Brian Murray was appointed a judge of the Supreme Court in February 2022. As of 31st December 2021, the Supreme Court comprised all the other judges photographed..

Foreword by the Chief Justice

Mr. Justice Donal O'Donnell, Chief Justice[3]

This shift towards further deploying and embracing technology to provide a more modern and efficient service represents the Supreme Court's commitment to enhancing access to justice for all court-users and is something we hope to develop further.

I am pleased to present the fourth annual report of the Supreme Court which highlights the work undertaken by the Court both inside and outside the courtroom during 2021.

While it was hoped at the beginning of the year that normal service could soon resume, the covid-19 pandemic continued to have an impact upon the work of the Supreme Court throughout much of 2021, with remote hearings continuing to be the default position until October when physical hearings at last resumed. However, that is not to say that all usual practices were immediately restored; the continued conducting of case-management hearings remotely contributed to the efficient and effective use of court time, and the Court's judgments were delivered electronically throughout the legal year. These new practices, which had been successfully adopted throughout 2020 to ensure the smooth running of the Court's business, were captured in a revised practice direction (SC 19) which was signed into effect on 30th September 2021. Another new development encapsulated in the practice direction includes the setting of an indicative timeline for the hearing of an appeal of thirteen to sixteen weeks from the grant of leave to appeal (unless otherwise indicated by the case management judge). This shift towards further deploying and embracing technology to provide a more modern and efficient service represents the Supreme Court's commitment to enhancing access to justice for all court-users and is something we hope to develop further. 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 five and a half weeks. The average length of time from the grant of leave to appeal to the listing of an appeal ranged from 14.5 weeks to 17 weeks in the four quarters of 2021.

Other important work also continued in spite of continuing restrictions. In October 2021, the Chief Justice's Access to Justice Working Group – which had been established under my

3 Mr. Justice Frank Clarke was Chief Justice of Ireland until October 2021 when he was succeeded by Mr. Justice Donal O'Donnell.

predecessor, Chief Justice Clarke, in January 2021 – hosted a two-day conference aimed at informing its views and identifying its strands of work. The conference was borne out of a desire to bring together a wider group of people and organisations with an interest or expertise in access to justice issues, to hear from those with experience of unmet needs, and to facilitate a meaningful conversation about what is needed to improve access to justice. The conference was a great success, involving keynote addresses from speakers such as Minister for Justice Heather Humphreys, Judge Síofra O'Leary of the European Court of Human Rights, and Trevor C. W. Farrow of Osgoode Hall Law School in Canada – each of whom offered different perspectives on the critical importance of improving access, and highlighted current and planned initiatives aimed at removing barriers for those seeking to access justice. The second day of the conference delivered a plenary overview of unmet legal needs, followed by breakout workshops which focused on six specific themes or issues including, for example, access to justice in environmental matters, access to legal services for those in poverty and disadvantaged groups, and equal treatment in the court process. The compilation of a report detailing the conference and the various addresses delivered is underway and is expected to be published in Q1 of 2022, and I will be delighted to continue the Working Group and to build on the important work already undertaken. It is proposed that a further conference on the topic of reform of the legal aid system will take place in early 2023.

Another important development this year which the Supreme Court hopes will not only complement the general modernisation of the Court but will also promote public understanding and improve the accessibility of Supreme Court judgments was the introduction in November 2021 of a short accompanying summary which is published simultaneously with each judgment. I hope that these summaries will not only reflect the fact that decisions of the Supreme Court are of public importance, but that they will ensure that judgments of the Court are as clear, digestible, and useful for as many people as possible.

I was appointed the 13th Chief Justice of Ireland in October 2021. It is a great honour, and also a great responsibility. I take considerable encouragement from the example set by my predecessors. I am particularly grateful for the support I have received from my colleagues and staff in the Supreme Court, the Office of the Chief Justice, and the Courts Service, and I look forward to reporting on the activities of the Court in the years to come.

Mr. Justice Donal O'Donnell
Chief Justice

Dublin, 2022

Introduction by the Registrar of the Supreme Court

Mr. John Mahon, Registrar of the Supreme Court

No significant backlog has been allowed to develop during the pandemic and the Court was in a strong position to maintain its level of service during the year and to continue to dispose of its caseload in a just and efficient manner.

This report reflects the breadth of the Court's work and its continuing progress in the achievement of its goals throughout 2021. I am very happy that we were able to successfully deliver services to judges, to practitioners and to the public during what was yet another difficult year. The Covid-19 pandemic continued to affect our work, but we have learned lessons from its effects, and I believe that we have become better at reacting quickly and changing our processes when this is needed.

The Court and the Office engage proactively with parties and practitioners to assist with their obligation to file compliant appeal documentation and to do so on time. The end-to-end management process for the Court's cases has been refined to ensure that applications and appeals are made ready for determination, that delays are minimised and that backlogs do not occur. This has been critical to the efficient functioning of the Court's lists and thus to the administration of justice in individual appeals. No significant backlog has been allowed to develop during the pandemic and the Court was in a strong position to maintain its level of service during the year and to continue to dispose of its caseload in a just and efficient manner. The Chief Justice has referred to the setting of an indicative timeline of 13 to 16 weeks from the grant of leave to the hearing of an appeal and the Court has worked hard to implement this. It is of the utmost importance that parties and practitioners comply with the time limits and documentation requirements contained in the revised Statutory Practice Direction. Members of staff in the Office are available to advise and assist with the detail of this as required.

We have also continued measures adopting technology enabled working. Judges and staff were able to utilise remote working during 2021 when this proved necessary. The management and use of electronic documentation has been challenging in some respects for us and for practitioners and litigants-in-person, but we will continue to adopt measures to optimise its use where appropriate and where it results in an improvement in our procedures and our

working processes. We hope to build on this work in 2022 and continue the refinement of our procedures and of our management systems for electronic documentation.

I am grateful to the Chief Justice and to the judges of the Court for their support and continued encouragement during the year. Once again, we have relied on the resilience of our staff, and I am grateful to each of them for the flexibility that they have shown in the face of our continuing challenges and in the implementation of further change.

Looking ahead, I believe that we can be confident that we are in strong position to meet whatever business challenges 2022 presents.

John Mahon
Registrar of the Supreme Court

Dublin, 2022

2021 at a Glance

PART 1
About the Supreme Court of Ireland

About the Supreme Court of Ireland

Drawing its basis and authority from Ireland's fundamental law – Bunreacht na hÉireann (the Constitution of Ireland) – the Supreme Court is the final court of appeal. The Constitution is Ireland's basic law in that it establishes the institutions of State such as the Office of the President, the Houses of the Oireachtas and the Executive. In addition, the Constitution enshrines certain fundamental personal rights to citizens.

Article 6 of the Constitution prescribes that "[a]ll powers of government, legislative, executive and judicial, derive, under God, from the people...". This establishes a classic tripartite separation of the powers of government into the legislature, the executive and the judiciary. Article 34.1 of the Constitution provides that "[j]ustice shall be administered in courts established by law by judges appointed in the manner provided by [the] Constitution." As members of the highest court in Ireland, judges of the Supreme Court are part of the judicial branch of government.

The source of the powers conferred on the institutions established by the Constitution is derived from the People.

Article 34.1 of the Constitution provides that "[j]ustice shall be administered in courts established by law by judges appointed in the manner provided by [the] Constitution." Under this Article, judges of the Supreme Court are constituent members of one of the three branches of State as provided for in the Constitution, namely the Judiciary, with the other two branches being the Legislature (that is both Houses of the Oireachtas) and the Executive (the Government).

The Constitution specifically describes the powers of each respective branch to ensure that the separate of powers is maintained and respected.

Whilst provided for in the Constitution, which was enacted in 1937, it was not until 1961 that the Supreme Court was established. As an apex court, the Supreme Court sits at the highest of five tiers of court jurisdiction in Ireland, the other courts being (in ascending order) the District Court, the Circuit Court, the High Court and the Court of Appeal.

The respective jurisdictions of the Supreme Court are defined in the Constitution. Articles 12 and 26 confer on the Supreme Court original jurisdiction in relation to specific matters. Article 12 provides that it is the Supreme Court that must determine, should the situation arise, whether the President of Ireland is permanently incapacitated. Article 26 confers on the Supreme Court the jurisdiction to determine the constitutionality of Bills which the President of Ireland has referred to it.

Regarding its appellate jurisdiction, the Supreme Court considers appeals from either the Court of Appeal or the High Court.

Article 34.5.3° of the Constitution confers on the Supreme Court an appellate jurisdiction to consider appeals from the Court of Appeal where it is satisfied that the decision in question involves a matter of general public importance, or it is in the interests of justice that there be an appeal to the Supreme Court. This is the route by which the majority of the appeals are heard by the Supreme Court.

The Constitution also confers on the Supreme Court jurisdiction to consider appeals directly from the High Court. Colloquially referred to as "leap-frog" appeals, such appeals, in effect, by-pass the Court of Appeal. In order to bring an appeal via this route, in addition to meeting the constitutionally prescribed threshold, there must also be exceptional circumstances which warrant the consideration by the Supreme Court of hearing the appeal directly.

Irrespective of the route an appeal takes, the Supreme Court determines all appeals properly brought before it on all matters in respect of which leave to appeal has been granted. Such appeals typically involve questions of interpretation of the Constitution itself or of primary and secondary legislation. In addition, questions involving the interpretation of common law or the law of the European Union may also be considered by the Supreme Court, having regard to the provisions of the Constitution.

History of the Supreme Court

The Supreme Court is the court of final appeal and the ultimate arbiter of the law. Prior to Ireland's independence from the United Kingdom in 1922, this function was the preserve of the House of Lords in London, with the courts in Ireland largely reflecting those in England. Upon the creation of the Irish Free State in December 1922, one of the first tasks was to establish a new court system. Legislation enacted in 1924 – the Courts of Justice Act – established this new system, which included a Supreme Court as the final court of appeal in Ireland, subject to an exceptional right of appeal to the Privy Council in London. By 1935, the right of appeal to the Privy Council had been abolished.

In 1937, the People ratified by plebiscite a new Constitution, Bunreacht na hÉireann. This Constitution provided for, amongst other things, a new court system. Legislation to establish these new courts was enacted in 1961.

In 2014, the Constitution was amended to create a new court – the Court of Appeal – which sits below the Supreme Court in the now five-tiered court system. The Constitution was also amended to provide that the Supreme Court will hear appeals only in exceptional cases involving matters of public importance or where the interests of justice require it to hear such an appeal.

The Supreme Court comprises a Chief Justice and a maximum of nine ordinary judges. There are eight ordinary judges at present with one vacancy. The Presidents of the Court of Appeal and the High Court are *ex officio* members of the Supreme Court.

Jurisdiction of the Supreme Court

The Supreme Court enjoys both an appellate and an original jurisdiction as prescribed by the Constitution. The jurisdiction of the Supreme Court was altered in 2014 upon the establishment of the Court of Appeal.

In principle, a party may bring before the Supreme Court an appeal in respect of any type of case, including a civil or criminal law case, provided that the case meets the threshold which the Constitution sets out.

The Supreme Court 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. The Supreme Court is also, therefore, a constitutional court.

In addition, the Supreme Court has a role in the implementation of the law of the European Union and, as the court of final appeal in Ireland, is obliged under the Treaty on the Functioning of the European Union to refer questions regarding the interpretation of EU law which arises in cases before it to the Court of Justice of the European Union where the interpretation is not clear and clarification is necessary in order for the Supreme Court to decide a question before it.

The Supreme Court, through its decisions, brings finality to the appeals brought and heard before it. As the highest court in the land, the decisions of the Supreme Court have binding precedence on all other courts of Ireland.

The Supreme Court's jurisdiction can be broken down into three categories:

General appellate jurisdiction

The Supreme Court, upon granting leave to appeal, may hear appeals in respect of decisions of the Court of Appeal. It may also hear appeals directly from decisions of the High Court. This procedure is colloquially referred to as a 'leapfrog' appeal in that the appeal is heard directly by the Supreme Court.

Appellate constitution jurisdiction

The Supreme Court is the final arbiter in interpreting the Constitution of Ireland. Article 34 provides that:

> "No law shall be enacted excepting from the appellate jurisdiction of the Supreme Court cases which involve questions as to the validity of any law having regard to the provisions of the Constitution."

As a result, the Supreme Court 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, to ascertain whether it conforms with the Constitution. While such cases must be brought in the first instance in the High Court, there is an appeal from every such decision to the Court of Appeal, and the Supreme Court if the threshold is met. Subordinate legislation and administrative decisions may also be subjected to such constitutional scrutiny. The High Court, Court of Appeal and Supreme Court, known collectively as the Superior Courts, retain the power to annul legislation that is determined to be inconsistent with the Constitution.

Original jurisdiction

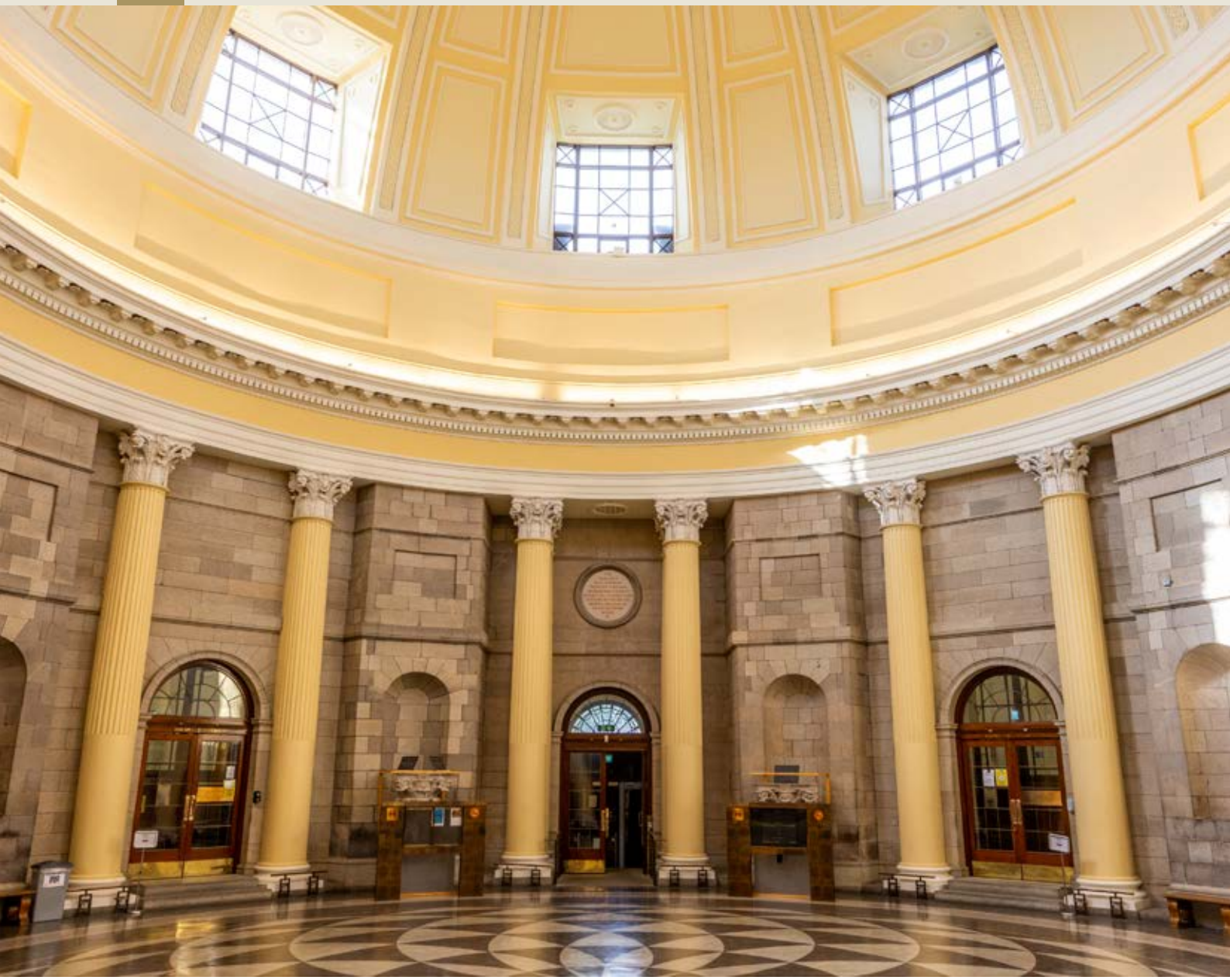
The Constitution confers on the Supreme Court original jurisdiction in respect of two matters. The first arises where a Bill is referred to the Court by the President – as prescribed by Article 26 of the Constitution – for a determination of whether the Bill or a section thereof, as passed by both Houses of the Oireachtas, is repugnant to the Constitution. The second matter, as provided for by Article 12.3 of the Constitution, is where the Supreme Court has been requested to determine whether the President of Ireland is incapacitated. To date, no such request has come before the Supreme Court pursuant to this constitutional provision.

In respect of the jurisdiction conferred on the Supreme Court pursuant to Article 26 of the Constitution, a rigid and temporal mechanism is provided for within that Article whereby the President of Ireland may, after consultation with his or her Council of State, refer a legislative Bill which has been deemed to have passed both Houses of the Oireachtas to the Supreme Court to determine its constitutionality. It is open to the President to refer a section of a Bill or the Bill in its entirety and the President has absolute discretion in whether to refer such a Bill to the Supreme Court.

Where the decision to refer a Bill to the Supreme Court is made, a constitutionally prescribed time period of sixty days commences. During this time, the Supreme Court must assign counsel to argue the unconstitutionality of the Bill or section(s) referred to it, hear oral arguments, adjudicate on the matter, and pronounce its decision. The government's chief legal advisor, the Attorney General, advocates in favour of the Bill's constitutionality.

The decision reached by the Supreme Court in an Article 26 reference is required by the Constitution to be delivered in the form of a single judgment, whereby only the decision of the majority of the Court is pronounced. Where the Supreme Court decides that a Bill (or any part thereof referred to it) is or are incompatible with the Constitution, that Bill or the offending provisions must not be signed into law by the President.

Where the Supreme Court adjudicates that a Bill or any provisions of a Bill referred to it are not incompatible with the Constitution, the Bill in question must be signed into law by the



President forthwith. The Constitution affords indefinite immunity to such provisions from being the subject of any subsequent constitutional challenge before the Courts while such provisions remain in force.

Since the enactment of the Constitution in 1937, the Article 26 mechanism has been invoked by the President of the day on fifteen occasions, with the Supreme Court determining in seven of those cases that the impugned Bill or a part thereof was repugnant to the Constitution.

Whilst the Article 26 mechanism and its activation is a matter solely for the President to exercise, its use is relatively rare. The last reference made pursuant to this provision before the Supreme Court was made in 2005. In that reference, relating to the Health (Amendment) (No. 2) Bill 2004, the Supreme Court found that its provisions were repugnant to the Constitution.

Seat of the Supreme Court

The seat of the Supreme Court is located in the historic Four Courts complex in Dublin, the capital city of Ireland, which has been the heart of the Irish legal system since 1796.

Taking its name from the four superior courts which were first established on the site – being the Court of King's Bench, the Court of Common Pleas, the Court of Exchequer and the Court of Chancery – the Four Courts has been the nucleus of the administration of justice in Ireland for two and quarter centuries.

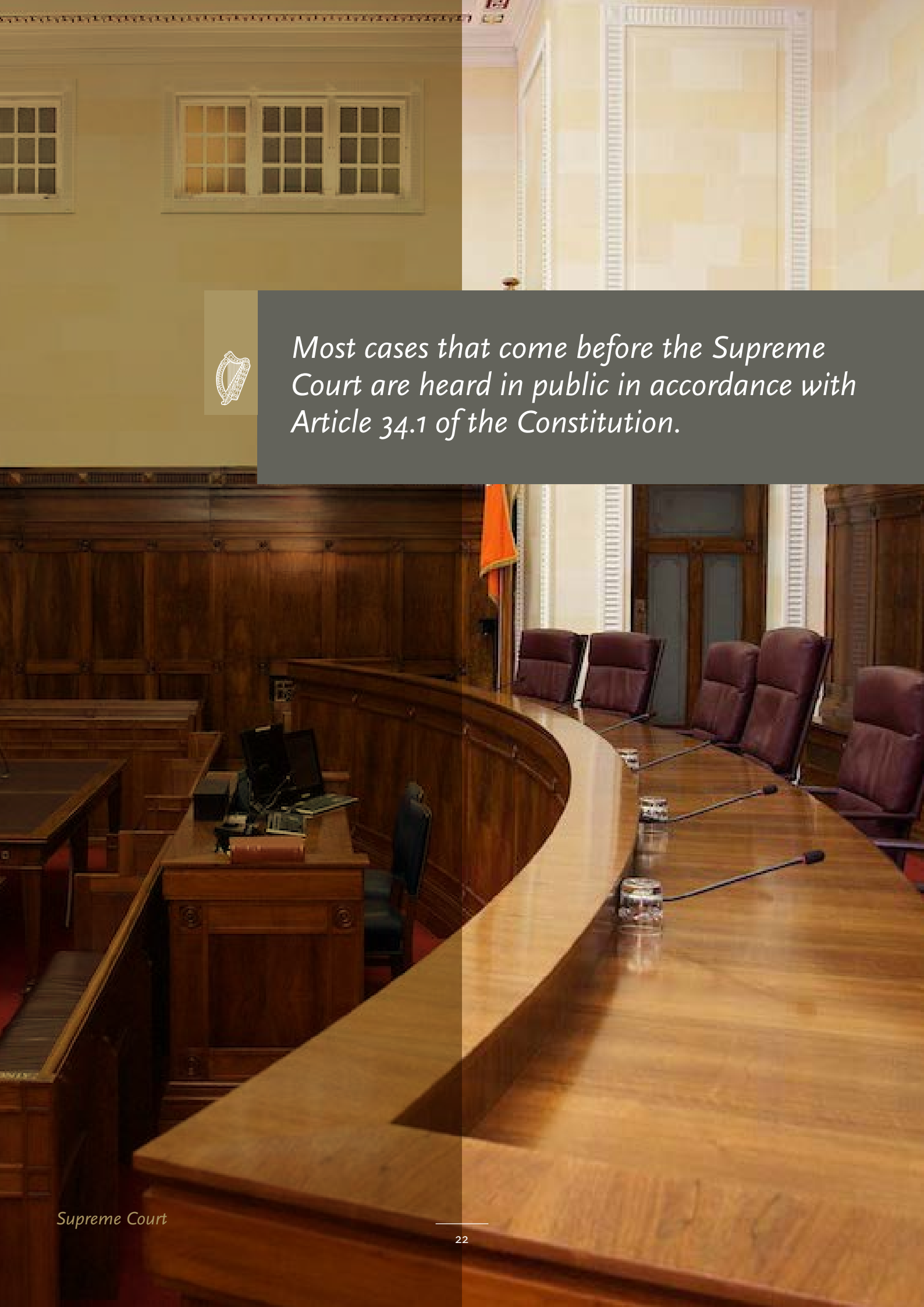
Whilst the courts that lend the site its name no longer exist today, the High Court occupies the four courtrooms off the great Round Hall.

The main courtroom used by the Supreme Court for oral hearings is located in the original building partly designed by Thomas Cooley and subsequently developed and completed by James Gandon.

On 28th June 1922, during the Civil War, the Four Courts was significantly damaged by heavy bombardment. In addition to the devastating loss of centuries of archival records, which were housed in the Public Records Office, the Four Courts building was damaged to such an extent that the courts were required to move to alternative venues. Between 1922 and 1931, the courts sat first at The Honorable Society of King's Inns on Constitutional Hill, moving subsequently to Dublin Castle. The Supreme Court returned to the Four Courts in 1931.

In 1924, the Irish court structure was established pursuant to the Courts of Justice Act 1924. Section 5 of that Act provided for the establishment of a Supreme Court of Justice (Cúirt Bhreithiúnais Uachtarach) which was to be the Supreme Court of the Irish Free State. The section provided that the court would consist of three judges: a President (the Chief Justice) and two other judges. Section 6 provided that the President of the High Court would be an ex-officio member of the Supreme Court.

The courtroom used by the Supreme Court, along with an adjacent courtroom (the Hugh Kennedy Court) did not exist in the original Gandon building or at any stage prior to the substantial destruction that occurred in June 1922. While much of the main building was reconstructed to resemble its form prior to destruction, the areas currently occupied by the Supreme Court courtroom, the Supreme Court Office, the Chief Justice's Chambers and the Hugh Kennedy Court emerged from a new design during the reconstruction process. The interior and exterior designs, which feature intricate detailing in the external masonry and internal cabinetry, reflect both the prevailing architectural fashion of the time, as well as the best Irish craftsmanship of the time.



Most cases that come before the Supreme Court are heard in public in accordance with Article 34.1 of the Constitution.

Supreme Court

The Supreme Court courtroom

The Supreme Court courtroom is the main courtroom in which the Supreme Court hears cases and delivers its judgments. It accommodates compositions of the court sitting in panels of three, five, or in exceptional cases, seven judges. Since the coming into effect of the Thirty-third Amendment to the Constitution, the Supreme Court considers cases when satisfied that the decision involves a matter of general public importance, or in the interests of justice it is necessary that there be an appeal to the Supreme Court. Therefore, cases are now generally heard by a panel of five or, on occasion, seven judges.

Most cases that come before the Supreme Court are heard in public in accordance with Article 34.1 of the Constitution. The courtroom contains a viewing gallery where members of the public may observe court proceedings. There is also a dedicated area for members of the press and staff supporting the Supreme Court.

As a response to the pandemic, a large screen was used to display Supreme Court proceedings conducted remotely in order to satisfy the constitutional requirement that justice be administered in public. When conducted remotely, proceedings were streamed live into the Supreme Court courtroom, where the Registrar was present. Members of the public could, subject to complying with any public health safety measures, observe proceedings and share the same view as all other participants in a remote hearing.

The Supreme Court resumed in-person hearings at the start of the Michaelmas term in October 2021, ensuring that all necessary public health measures to protect all court users were put in place. This included increasing ventilation in the courtroom and limiting the capacity to a pre-determined number. On one occasion, proceedings from the Supreme Court were broadcast into the adjoining Hugh Kennedy Courtroom.

The Supreme Court courtroom continued to be used throughout 2021 for the conduct of ceremonial events including Calls to the Bar of Ireland, the Inner Bar, the presentation of Patents of Precedence to solicitor and barrister applicants, judicial declarations and appointment ceremonies for Commissioners for Oaths and Notaries Public.

The courtroom enables remote hearings via the Pexip video-conferencing platform to be streamed into the courtroom. As is the case with all other courtrooms across the State, the Supreme Court courtroom is equipped with Digital Audio Recording ('DAR') facilities to audio record all court proceedings. These audio recordings are available to the members of the Court and their judicial assistants. In addition, where directed by the Court, a written transcript of a court proceeding may be prepared based on the DAR recording.

Looking back – the Supreme Court on the enactment of the Constitution

In late 2021, UCD Digital Library revealed a photograph of the Supreme Court from its archives. This photograph of the Supreme Court courtroom dates from 1938. A striking feature of this photograph is the presence of a walnut canopy which adorns the bench.

The Courts of Justice Act 1924 provided that the membership of the Supreme Court would consist of three justices, one of whom would be the president "who shall be styled as the Chief Justice of the Irish Free State". The 1924 Act also provided that the President of the High Court shall be ex-officio an additional judge of the Supreme Court.

The Supreme Court was constructed as part of the works undertaken following the destruction of the Four Courts in 1922. This work was completed in 1931 and the re-opening of the Four Courts took place on 12th October 1931.

On its establishment under the Courts (Establishment and Constitution) Act 1961, the Supreme Court comprised the Chief Justice and such number (not being less than four) of ordinary judges, as may from time to time be fixed by an Act of the Oireachtas.

The Court and Court Officers Act 1995 amended the 1961 Act to increase the number of ordinary judges that could be provided for from four to seven. This increase necessitated the reconfiguration of the bench in the Supreme Court courtroom which remains to this day. The elongated bench occupied by the Registrar of the Supreme Court was removed to facilitate the installation of a crescent shaped bench. A smaller bench was installed for the Registrar. The seats and writing desks visible on the bench were removed and are used in other courtrooms across the Four Courts building.

The counsel benches and desks which are visible in this photograph are unchanged and remain in place, save for the addition of two lecterns which were installed on the desks used by counsel.

Photograph reproduced courtesy of G. & T. Crampton and UCD Digital Library.

Journey of a typical appeal

Whilst the path of an appeal to the Supreme Court has not altered as a result of the pandemic, certain procedural and administrative changes were made to ensure the safety and well-being of parties, judges, practitioners and Courts Service staff.

An appeal that comes before the Supreme Court begins its journey following a decision of the Court of Appeal, or where leave is sought to appeal directly, from the High Court. A party to proceedings in either of those courts who wishes to bring an appeal against a decision may file an application for leave to appeal to the Supreme Court. Since February 2019, it has been possible for such an application to be filed directly online via the Courts Service Online ('CSOL') portal. Since the onset of the pandemic, and pursuant to Practice Direction SC21, applicants are encouraged, where possible, to file their application online.

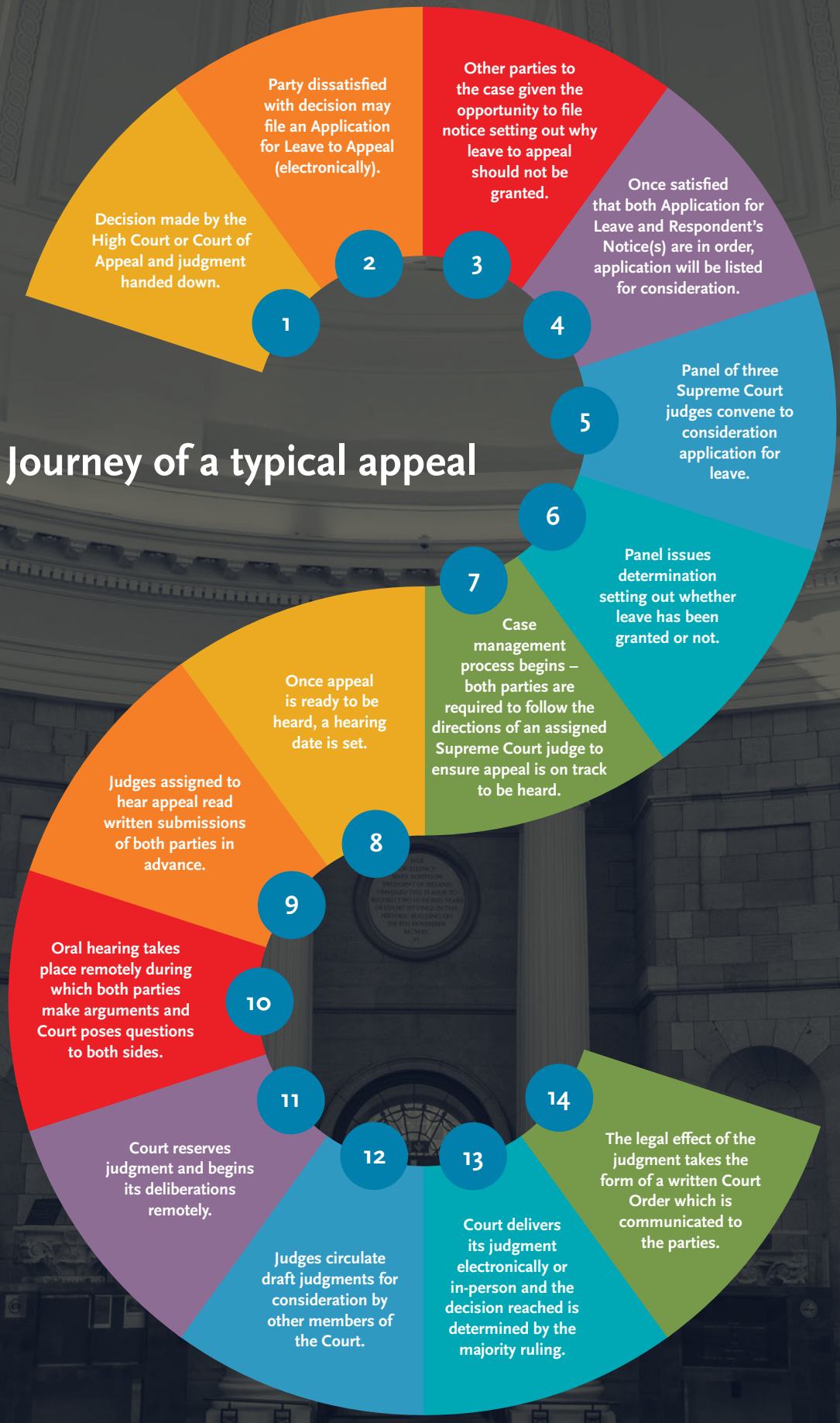
The party wishing to bring an appeal (known at this stage of the process as the 'applicant') must inform the party on the opposing side of the case (known as the 'respondent') that they have lodged an application for leave to appeal and the respondent is required to file a notice setting out whether it opposes the application for leave to appeal and, if so, why. In practice, in most cases, the respondent opposes the application for leave to appeal and sets out the grounds upon which it is said that the constitutional threshold has not been met by the applicant. There are a minority of cases in which the respondent does not oppose leave to appeal as both parties express the view that it is important that the Court provides clarity on an issue of law.

On receiving the application for leave to appeal and the respondent's notice, a panel of three judges of the Supreme Court convenes to consider whether the constitutional threshold for granting leave to appeal has been met. In addition to the application for leave and respondent's notice, the panel reviews the written judgment(s) of the High Court and/or the Court of Appeal. Having considered the application, the panel prepares and issues a written determination stating whether leave to appeal has been granted. The determination is then circulated to the affected parties.

While most hearings are conducted orally and in public, consideration of applications for leave to appeal generally takes place in private, as is specifically provided for in the Court of Appeal Act 2014, which makes provision in relation to the reformed jurisdiction of the Supreme Court and the Court of Appeal. The Court may direct an oral hearing where it considers it appropriate to do so. This happens only occasionally. Pursuant to the constitutional requirement that justice be administered in public, the Supreme Court publishes its written determinations and accompanying documentation on the website of the Courts Service of Ireland.

Where leave has been granted and the applicant, who at this stage is referred to as 'appellant', files a notice of intention to proceed, the Chief Justice assigns the appeal to a judge of the

Journey of a typical appeal



Supreme Court for the purposes of case management. This is to ensure that the procedural requirements as laid down in the Rules of the Superior Courts and applicable Practice Directions are complied with, enabling the appeal to be conducted in an efficient manner.

At the case management stage, the assigned judge may issue directions to the parties in relation to legal authorities, exhibits and other relevant documents that the panel of the Court assigned to hear the appeal may require access to in order to adequately determine the matter.

Both the appellant and the respondent must prepare and lodge written submissions, limited to a directed word count, in which both sides set out their respective reasons as to why the decision being appealed should be reversed or upheld. As the Irish legal system is part of the common law legal tradition, decisions of the Superior Courts of Ireland are binding on courts of lower jurisdiction by virtue of the doctrine of precedent and case law constitutes an important source of law. Therefore, legal submissions of the parties generally rely on previous court decisions in support of their respective arguments.

The written submissions, together with other relevant documentation properly put before the Court, are reviewed by each Supreme Court judge who is part of the panel assigned to hear the appeal before the oral hearing is conducted.

At the oral hearing which, since the onset of the pandemic, takes place in most instances remotely, both the appellant and the respondent are allocated a period of time in which to make their respective arguments. At the end of the respondent's oral arguments, the appellant is provided with an opportunity to reply to arguments made by the respondent. When this has concluded, the Supreme Court ordinarily reserves its judgment, meaning that the Court indicates that it will not deliver its decision there and then, but will do so at a later date, following careful consideration and deliberation of the arguments made.

Occasionally, the Supreme Court delivers judgment immediately following the hearing, which is known as an *ex tempore* judgment. The delivery of *ex tempore* judgments is rare since the implementation of the reformed jurisdiction of the Supreme Court.

Once the oral hearing of the appeal has concluded, the judges who heard the appeal meet to deliberate in what is referred to as a 'conference'. Each judge arrives at his or her respective decision independently of the other members of the Court. As the Court sits in odd numbers of three, five or seven, a decision is arrived at either unanimously or by majority.

By tradition, at the first case conference after the oral hearing, the most junior member on the panel (that being the judge most recently appointed in time) makes the first observations, followed by the other judges in ascending order of seniority. This is different to the practice adopted by Supreme Courts in some other jurisdictions, such as the United States of America.

Owing to the importance and the complexity of the appeals to be determined, it is often necessary for the Court to hold subsequent case conferences to decide the case and enable the members of the Court to reach their individual decisions.

The decision reached by each judge is formulated in written judgments (with the exception of judgments delivered ex tempore) which set out the reasons for either allowing or dismissing the appeal. Each judge may deliver his or her own separate judgment and a number of concurring judgments may together form a majority. A judge who does not agree with the decision taken by the majority of the Court may deliver a dissenting judgment.

In recent times, the Court has sometimes prepared a single judgment, to which all members of the composition hearing an appeal have contributed. As the judgment is not attributed to one single judge, but rather to the Court as a whole, it is the convention for the presiding judge (that is the most senior judge on the panel) to deliver the judgment on behalf of the other members of the Court.

When the written judgment(s) is to be delivered, the Court is ordinarily convened, and its decision is pronounced in public. However, after the onset of the pandemic, the Court delivered its judgment electronically. Judgment(s) were emailed to the parties at an appointed date and time as notified in the Supreme Court Legal Diary on the website of the Courts Service. Following the resumption of oral hearings, the Court resumed its usual practice of delivering judgments in public followed by publication of the judgment following the Courts Service website.

The decision reached by a majority of the Court is given formal effect by an order of the Court. Any cost or ancillary applications are generally also considered on the delivery of the judgment of the Court.

In addition to being circulated to the parties, the judgment(s) delivered are uploaded to the Courts Service website. Since October 2021, an information note or statement is also be published which summarises the issues considered and the decision reached by the Court. This summary is for information purposes only and does not purport to be an interpretation of the Court's decision.

Members of the Supreme Court

At the end of 2021, the Supreme Court comprised the Chief Justice, who is the President of the Court, and eight 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. Since the establishment of the Court of Appeal, the Court has never sat as a panel of three members for a substantive appeal. 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.

Mr. Justice
Frank Clarke

Mr. Justice Clarke was Chief Justice of Ireland from July 2017 to October 2021, having been appointed a judge of the Supreme Court in 2012.

Mr. Justice Clarke, was educated at Drimnagh Castle CBS, University College Dublin and The Honorable Society of King's Inns.

Mr. Justice Clarke was called to the Bar of Ireland in 1973 and to the Inner Bar in 1985. In 2004, he was appointed to the High Court and was primarily assigned to the newly established commercial list of that court. While a judge of the High Court, he was Chairperson of the Referendum Commission on the Twenty-eight Amendment of the Constitution (Lisbon Treaty II) in 2009.

He has been a member of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union since March 2018.

Mr. Justice
Donal O'Donnell

Mr. Justice O'Donnell was appointed 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 St. Mary's C.B.S., University College Dublin, The Honorable Society of King's Inns and the University of Virginia.

Mr. Justice O'Donnell was called to the Bar of Ireland in 1982, commenced practice in 1983, and was called to the Bar of Northern Ireland in 1989. In 1995, he was admitted to the Inner Bar.

He 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.

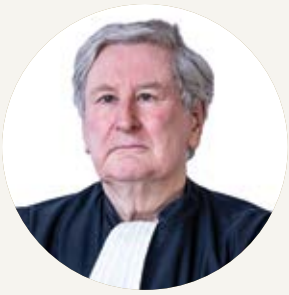
Mr. Justice
William McKechnie

Mr. Justice McKechnie was appointed to the Supreme Court in June 2010 until his retirement in April 2021.

A native of Cork, Mr. Justice McKechnie was educated at Presentation Brothers College, Cork, University College Cork, University College Dublin and The Honorable Society of King's Inns.

Mr. Justice McKechnie was called to the Bar of Ireland in 1971 and was admitted to the Inner Bar in 1987. He was appointed to the High Court in 2000, taking charge of the competition list from 2004 to 2010.

He is a member of the Advisory Board of Fundamental Rights In Courts and Regulation and a co-chair of the Irish Hub of the European Law Institute.



Mr. Justice
John MacMenamin

Mr. Justice MacMenamin was appointed to the Supreme Court in March 2012.

Born in Dublin, Mr. Justice MacMenamin was educated at Terenure College, University College Dublin and The Honorable Society of King's Inns.

Mr. Justice MacMenamin was called to the Bar of Ireland in 1975 and was called to the Inner Bar in 1991.

Mr. Justice MacMenamin was appointed to the High Court in 2004, where he predominantly presided over the non-jury/ judicial review list.

Mr. Justice McMenamin is a member of the Judicial Studies Committee of the Judicial Council and of a Working Group on Access to Justice established by the Chief Justice.

Mr. Justice
Elizabeth Dunne

Ms. Justice Elizabeth 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.

Ms. Justice Dunne was called to the Bar of Ireland in 1977.

In 1996, Ms. Justice Dunne was appointed as a Judge of the Circuit Court and was appointed to the High Court in 2004.

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

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

A native of Dublin, Mr. Justice Charleton was educated at Trinity College Dublin and The Honorable Society of King's Inns.

Mr. Justice Charleton was called to the Bar of Ireland in 1979 and was called 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 NUI Galway and has published numerous texts on criminal law. In addition, he is the lead Irish representative on the Colloque Franco-Britannique-Irlandais.

Mr. 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.

Ms. Justice O'Malley was called to the Bar of Ireland in 1987 and to the Inner Bar in 2007.

Ms. Justice O'Malley was appointed to the High Court in 2012. Ms. Justice O'Malley is chair of the Sentencing Guidelines and Information Committee of the Judicial Council.

Mr. Justice
Marie Baker

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

Born in County Wicklow, Ms. Justice Baker lived most of her childhood in County Cork and was educated at St. Mary's High School, Midleton, County Cork, University College Cork and the Honorable Society of King's Inns.

Ms. Justice Baker 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. She was appointed to the Court of Appeal in 2018. Ms. Justice Baker is currently the assigned judge for the purposes of the Data Protection Act 2018.

Mr. Justice
Séamus Woulfe

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

A native of Clontarf, Dublin, Mr. Justice Woulfe was educated at Belvedere College SJ, Trinity College Dublin, Dalhousie University, Nova Scotia, and the Honorable Society of King's Inns.

In 1987, Mr. Justice Woulfe was called to the Bar of Ireland 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 Franciscan College, Gormanstown, University College Dublin, the University of Pennsylvania, the Honorable Society of King's Inns, Trinity College Dublin, and University 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 and as a judge of the Court of Appeal from 2014 to 2018. In addition, he served 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 King's 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.

Ex-officio members of the Supreme Court

Mr. Justice
George Birmingham

President of the
Court of Appeal

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

Born in Dublin, President Birmingham was educated at St. Paul's College, Trinity College Dublin and The Honorable Society of King's Inns.

President Birmingham was called to the Bar of Ireland in 1976 and to the Inner Bar in 1999.

In 2007, he was appointed to the High Court and, upon its establishment in 2014, was subsequently appointed as a judge of the Court of Appeal.

President Birmingham is the Judicial Visitor at Trinity College Dublin.

Mr. Justice
Mary Irvine

President of the
High Court

Ms. Justice Irvine was appointed President of the High Court in June 2020.

Born in Dublin, President Irvine was educated at the Convent of the Sacred Heart, Mount Anville, University College Dublin and The Honorable Society of King's Inns.

President Irvine was called to the Bar of Ireland in 1978 and to the Inner Bar in 1996.

In 2007, she was appointed to the High Court and, upon its establishment in 2014, was subsequently appointed as a judge of the Court of Appeal.

Appointment

Mr. Justice Gerard Hogan

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

Immediately prior to his appointment to the Supreme Court, Mr. Justice Hogan served as Advocate General of the Court of Justice of the European Union ('CJEU'). He was called to the Bar of Ireland in 1984 and to the Inner Bar in 1997. Mr. Justice Hogan was appointed a judge of the High Court in 2010 and a judge of the Court of Appeal on its establishment in 2014, where he served until his appointment to the CJEU.

Retirement

Mr. Justice Liam McKechnie

In April 2021, Mr. Justice Liam McKechnie retired as a judge of the Supreme Court, having served as a member of the Court since 2010. Mr. Justice McKechnie was called to the Bar of Ireland in 1971 and was admitted to the Inner Bar in 1987.

He was appointed to the High Court in 2000, taking charge of the competition list from 2004 to 2010.

Paying tribute on behalf of the Supreme Court, the Chief Justice, Mr. Justice Frank Clarke, acknowledged the enormous contribution Mr. Justice McKechnie made for almost 50 years. He stated:

> *"The progression of 'Mr. Justice McKechnie's" career is marked by success at every level...*
> *As a judge [he] has decided some of the most important judgments of the last 20 years..."*

The Chief Justice also remarked on the particularly high level of Mr. Justice McKechnie's contribution in "other aspects of the work of a judge which perhaps go unseen to all but those close colleagues in particular on a collegiate court – the contribution that is made at case conferences both before and after hearings: the contributions that judges make to encouraging an evolving approach in judgments that they themselves do not write can make an immeasurable contribution to the overall jurisprudence of the Court."

The Chief Justice wished Mr. Justice McKechnie every health, happiness, and success in the future on behalf of all his colleagues.

Mr. Justice Frank Clarke, former Chief Justice of Ireland, with family members on the occasion of his retirement

Retirement

Mr. Justice Frank Clarke

In October 2021, Mr. Justice Frank Clarke retired as Chief Justice and a judge of the Supreme Court. He was called to the Bar of Ireland in 1973 and to the Inner Bar in 1985. He was appointed a judge of the High Court in 2004 and a judge of the Supreme Court in 2012. He served as Chief Justice from July 2017 until October 2021.

Numerous judicial colleagues, members of the practising professions and Courts Service formed a guard of honour to welcome Mr. Justice Clarke and his family to the Four Courts for his last sitting.

Paying tribute to Mr. Justice Clarke on his retirement, the designate Chief Justice, Mr. Justice O'Donnell commented on the "breath taking" scale of the subject matter of judgments that the former Chief Justice delivered throughout his judicial career and noted the "clarity with which they are expressed", suggesting that "Clarke judgments are always likely to value clarity over cleverosity."

Mr. Justice O'Donnell remarked that the former Chief Justice shouldered the multiple demands that are made of the Chief Justice "with considerable cheerfulness and enthusiasm." He commented that Mr. Justice Clarke "understood that the law courts and the cases decided within them are a small engine that drives a very big machine which is after all nothing less than the impact of law on the lives of all the citizens of this country" and described him as "a legal engineer moving his way through the legal system with the precision of a watch maker taking out pieces, cleaning them, sanding them down or refurbishing them, lubricating them with good sense and then replacing them and watching carefully to see that they moved more freely, smoothly efficiently and most of all fairly."

Those who paid tribute to the former Chief Justice in a ceremony marking his retirement included the Attorney General, the President of the Law Society, Vice-Chair of The Bar of Ireland, the CEO of the Courts Service, Secretary of the Judicial Council and Registrar of the Supreme Court.

PART 2
Statistics

Applications for leave to appeal

The Supreme Court resolved 145 applications for leave to appeal in 2021, and a total of 1,074 since the Court began to determine applications for leave to appeal under its reformed jurisdiction in 2014.[3]

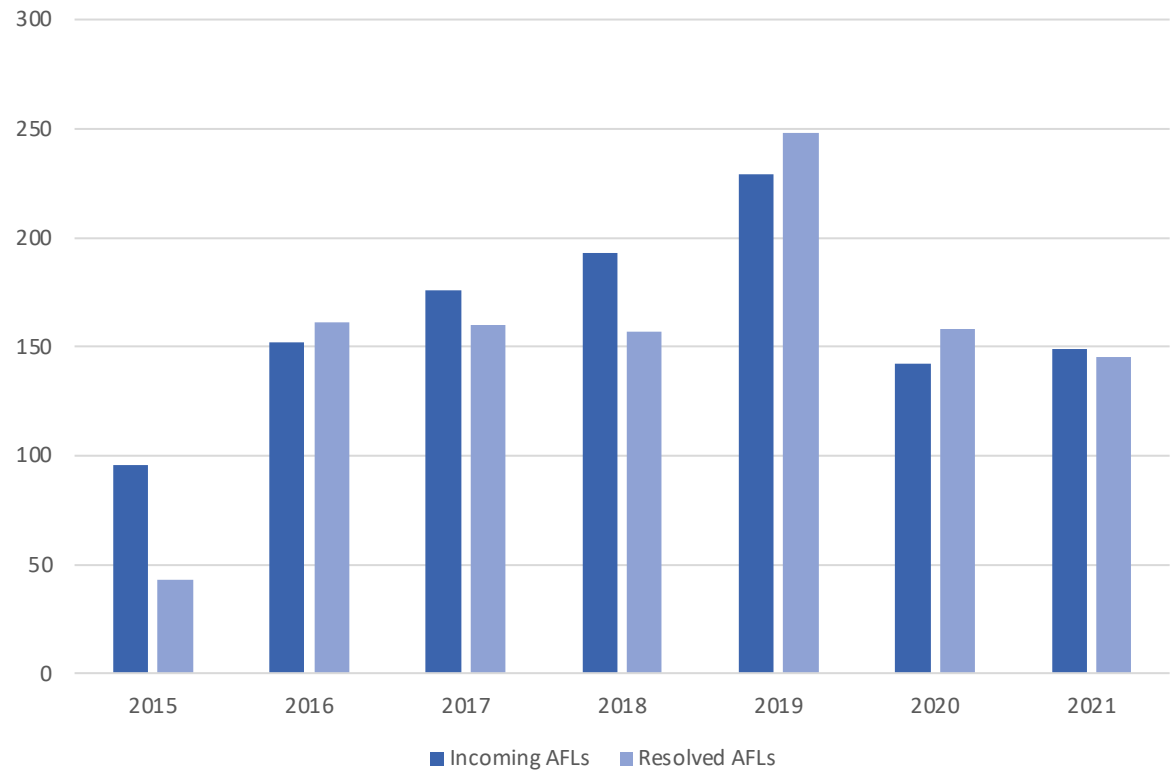
The number of applications for leave to appeal ('AFL') brought to the Supreme Court each year since 2015 is set out in the graph below, 'Incoming and Resolved Applications for Leave to Appeal 2015-2021'. Of the 145 applications for leave to appeal determined in 2021, the Court granted leave in relation to 46 applications (32%) and refused leave in relation to 96 (66%).[4]

The figure of 145 represents a 51% increase in applications for leave determined since 2015, when the Court determined 96 applications. However, 2021 is the second year in which there has been a decrease in applications, with 8% fewer applications determined in 2021 than in 2020. This increase is significantly less than the 36% decrease in 2020 in comparison with 2019.

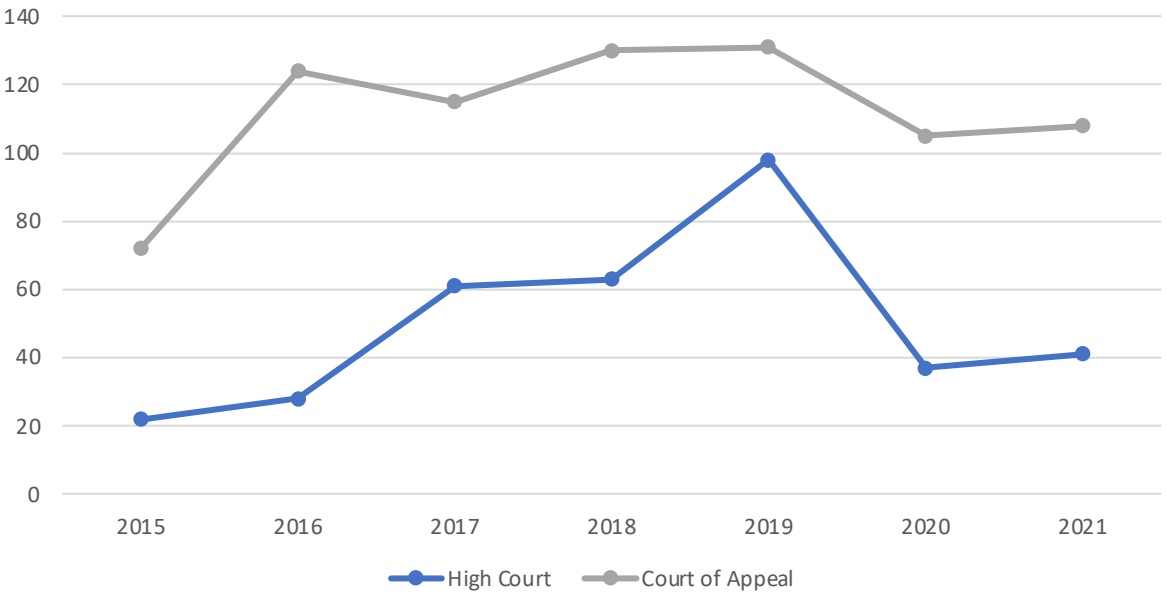
This may be explained by the continuing effect of the restrictions associated with COVID-19 on all of the courts. While the knock-on effect of the disposal of fewer cases in the High Court and the Court of Appeal on the number of applications for leave to appeal brought to the Supreme Court was most acute in 2020, it had a continued impact in 2021. The sharp decrease in the number of incoming applications for leave to appeal from the High Court in 2020 into 2021 may be explained by the greater impact of COVID-19 restrictions on the High Court as a trial court.

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 49 applications for leave to appeal were lodged in the Supreme Court Office and three were withdrawn.

Incoming and resolved AFLs 2015-2021



Incoming and resolved AFLs 2015-2021



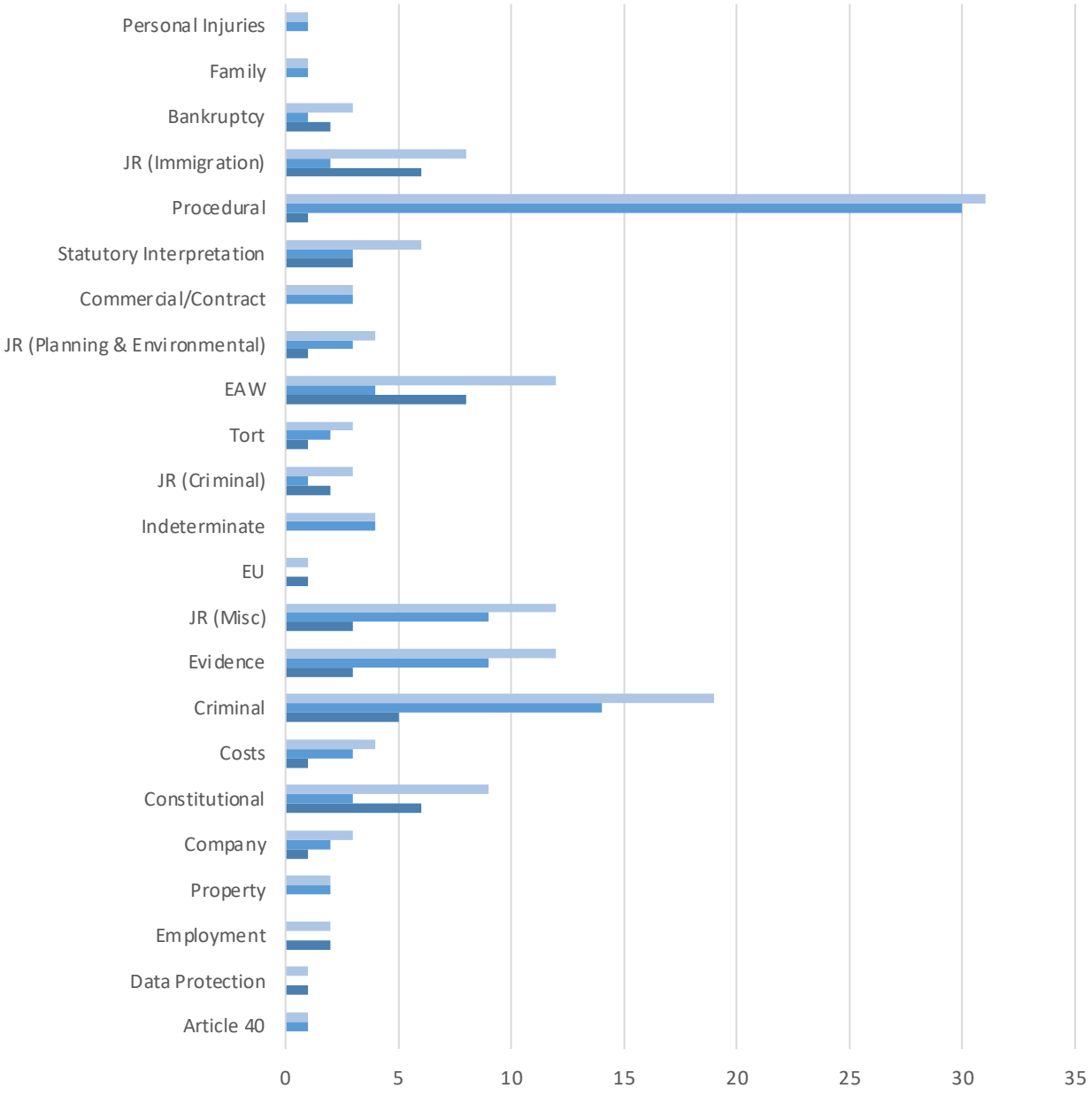
Categorisation of applications for leave to appeal

The chart on page 43 categorises all applications for leave to appeal brought from the High Court and the Court of Appeal to the Supreme Court in 2021 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.

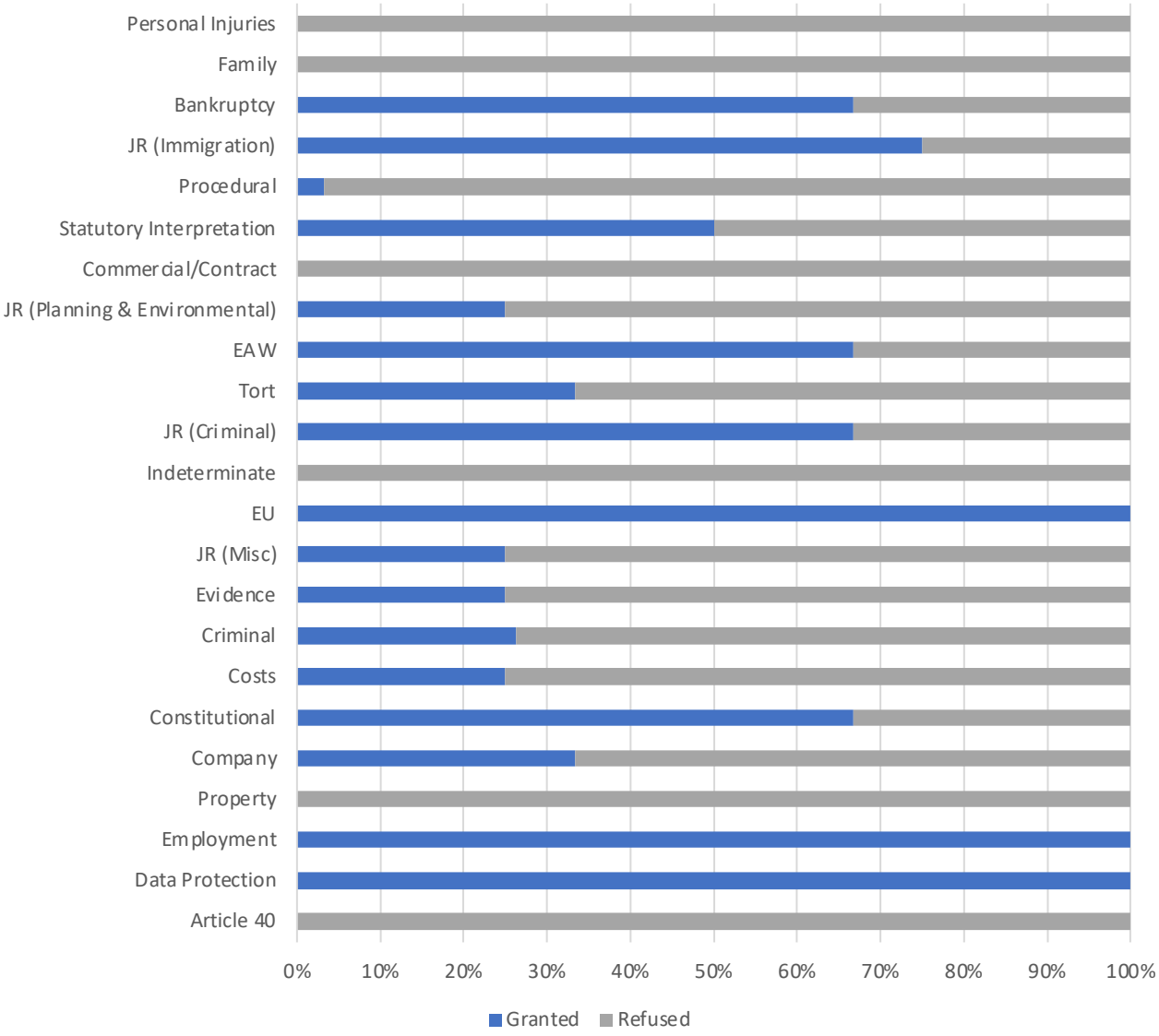
As was the case in 2020, procedural issues gave rise to the highest number of applications for leave to appeal in 2021. These primarily involved applications for an extension of time to appeal. The substantive area of law which gave rise to the highest number of applications for leave to appeal in 2021 was criminal law (13% of total applications). The next largest categories, which gave rise to the same number of applications for leave to appeal, were: evidence; judicial review (miscellaneous) ('JR'); and European Arrest Warrant ('EAW') issues, each of which amounted to 8% of total applications.

Of these areas of law, leave to appeal was granted in: 3% of the applications involving issues of procedure; 26% of applications involving issues of criminal law; 25% of applications concerning the law of evidence; 25% of applications in the area of judicial review (miscellaneous); and 67% in the category of European Arrest Warrants.

Categorisation of Applications for Leave to Appeal



% of Applications Granted Leave in each Category



Breakdown of applications for leave to appeal

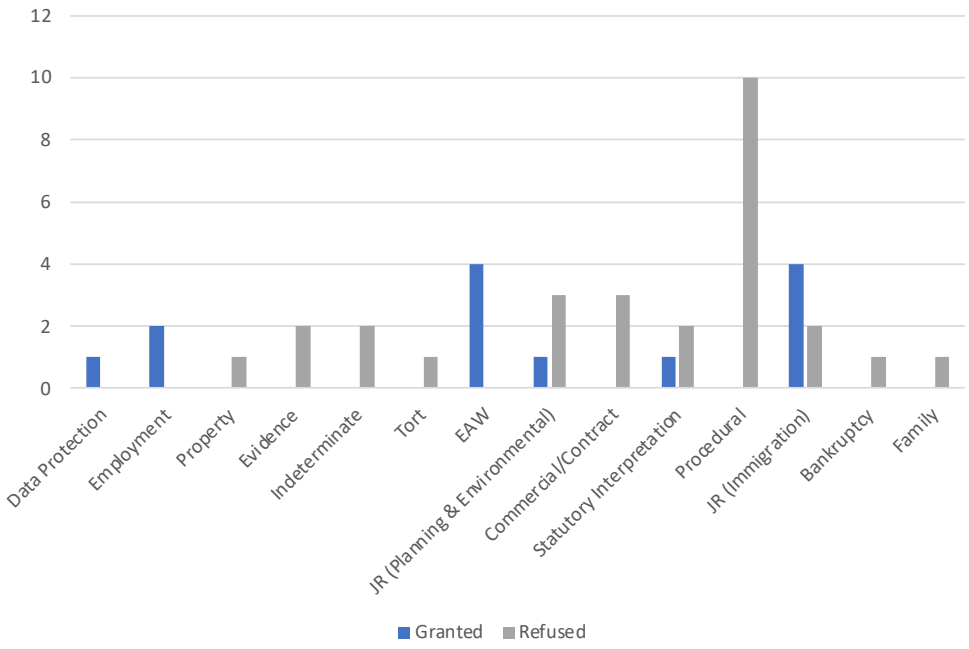
The Constitution provides for an appeal from the Court of Appeal to the Supreme Court if: (a) the Supreme Court is satisfied that the decision involves a matter of general public importance, or (b) in the interests of justice, it is necessary that there be an appeal to the Supreme Court. 104 of the 145 applications for leave to appeal (72%) which the Supreme Court determined in 2021 related to decisions of the Court of Appeal.

The Constitution 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

Forty one of the 145 applications for leave to appeal determined in 2021 (29%) were leapfrog appeals. This is a decrease in comparison with 2020, when 36% of applications determined were leapfrog appeals. The Supreme Court granted leave to appeal in 13 of the 41 applications (32%) for leave to appeal directly from the High Court and refused leave in 28 (68%) of applications.

Categorisation of AFLs from High Court

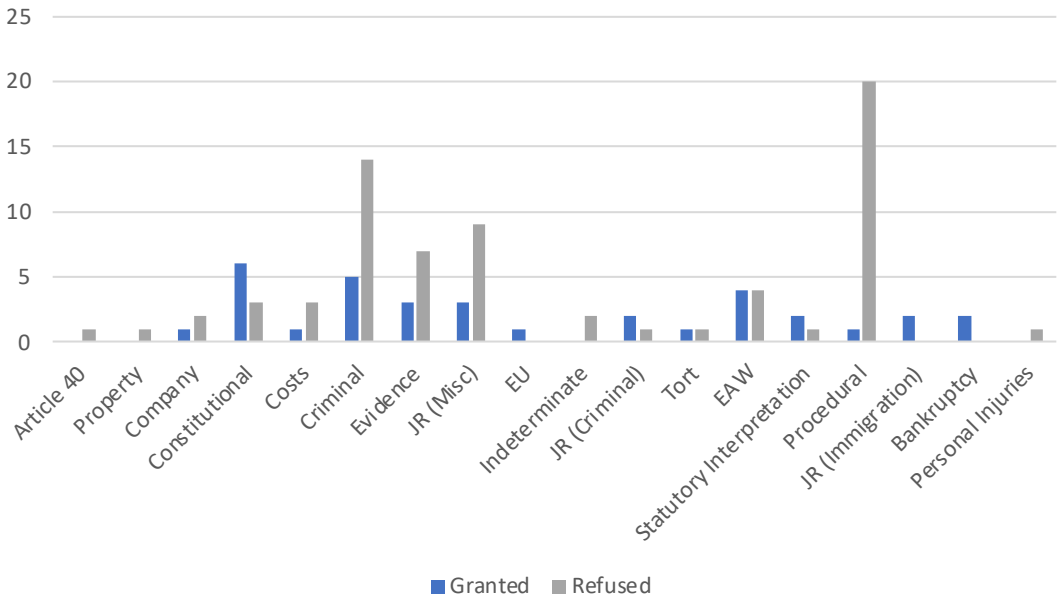


A categorisation of determinations in which applications for a leapfrog appeal were granted indicates that decisions involving procedural issues accounted for the highest percentage of applications for which leapfrog appeals were sought (20%). Judicial review in the area of immigration law attracted the next highest number of leapfrog appeals (15%), followed by European Arrest Warrant matters (10%) and judicial review in the area of planning and environmental law (10%). Leave to appeal directly to the High Court was refused in all cases categorised as concerning procedural issues. Leave was granted to appeal directly from the High Court in 67% of judicial review (immigration and asylum) cases, 100% of European Arrest Warrant cases and 25% of judicial review (planning and environmental).

Appeals from the Court of Appeal

Regarding appeals from the Court of Appeal to the Supreme Court, the largest category in which applications were brought was, again, procedural (20%), followed by criminal law (18%), judicial review (miscellaneous) (12%) and evidence (10%). In those categories, leave to appeal was granted in 4% of cases involving procedural issues, 25% of applications involving miscellaneous judicial review issues and 30% of applications in the category of evidence law issues.

Categorisation of AFLs from Court of Appeal



Full appeals resolved

The Supreme Court resolved 77 'full' appeals in 2021, which was a slight increase on the figure of 65 for 2020. Fifty-nine were appeals brought under the jurisdiction of the Supreme Court which came into effect on the establishment of the Courts of Appeal (up very slightly from 55 in 2020). Eighteen were 'legacy appeals' under the previous jurisdiction of the court, which were still in the system due to procedural issues.

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 if its Determination of the application was five and a half weeks.

The average length of time from the grant of leave to appeal to the listing of an appeal ranged from 14.5 weeks to 17 weeks in the four quarters of 2021.

Written judgments

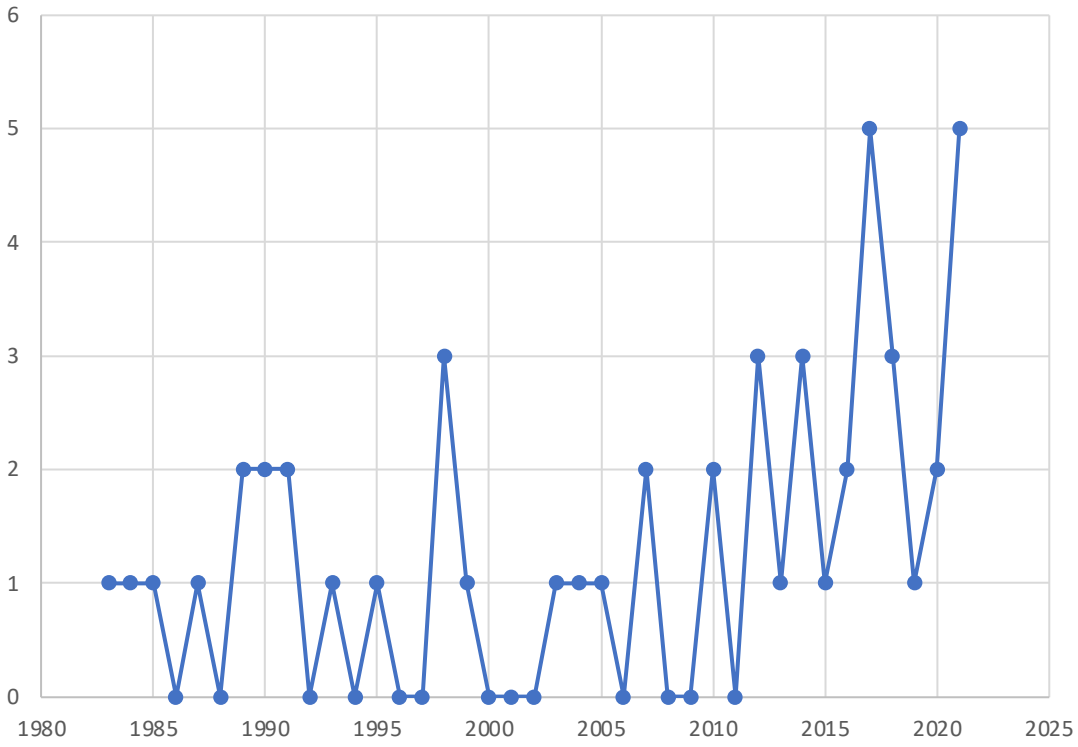
The Supreme Court delivered 101 reserved judgments in 2021, which was an increase on the 89 delivered in 2020. Judgments are publicly available on the website of the Courts Service.

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 under which national courts which 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 such a reference 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 TFEU (or formerly under Article 234 EC) in 49 cases since 1983, as depicted in the below graph. The Supreme Court made five references to the CJEU in 2021. In two instances, the requests were referred in joined cases.

Requests for Preliminary Rulings 1983-2021



S & Anor v. Minister for Justice & Equality

In a judgment delivered on 20th December 2020, Charleton J. found that a request to the CJEU under Article 267 TFEU was necessary in this case in which two issues arose on appeal. First, guidance was sought as to the proper approach of a judge who is faced with an argument that the English or Irish version of European Union legislation may be informed by reading that text in another official language, such as French or Greek. The second issue concerned the meaning to be ascribed to defining or describing who is a "member of the household" of an EU citizen. Under the European Communities (Free Movement of Persons) (No. 2) Regulations 2006 (S.I. No. 656 of 2006), as amended, which in turn implements Directive 2004/38/EC on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States, OJ L158/77 30.4.2004, a person is assessed as being a "permitted family member" of a Union citizen by the Minister for the purposes of considering whether or not the Minister will grant to him or her a residence card.

With regard to the first issue, Charleton J. found that EU legislation is not ordinarily to be read other than in the official languages of the State, which is the version that is valid and the version that is designed for the greatest level of precision of which language permits in EU legislation. In respect of the second issue, Charleton J. considered that this was not a case where the Supreme Court, as the court of final appeal, could decide the meaning of who is a member of the household of an EU citizen such that in he or she moving from one country to another, consideration ought to be given to particular factors in defining or describing the concept. Further, since the Directive applies across the EU, he considered it desirable that a uniform definition, or certainly a uniform set of applicable criteria, be set by the CJEU so that in this important area touching on the four freedoms of the EU, a common definition or set of criteria may be applied by all the courts of the EU.

The Supreme Court referred the following questions to the CJEU:-

(1) Can the term "member of the household of an EU citizen", as used in Article 3 of Directive 2004/38/EC, be defined so as to be of universal application throughout the EU and if so, what is that definition?
(2) If the term cannot be defined, by what criteria are judges to look at evidence so that national courts may decide according to a settled list of factors who is or who is not a member of the household of an EU citizen for the purposes of freedom of movement?

SN (Saqlain) v. The Governor of Cloverhill Prison & The Attorney General, SD (Shazad) v. The Governor of Mountjoy Prison

In a judgment delivered on 20th July 2021, Clarke C.J., with whom the other members of the panel agreed, determined that it was necessary to refer the following questions to the CJEU concerning the extent to which either or both of the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019) O.J. C3841/1 ('the Withdrawal Agreement') and the Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community and the United Kingdom of Great Britain and Northern Ireland (2020) O.J. L444.14 ('the Trade and Cooperation Agreement') are binding on Ireland in the absence of Ireland having exercised an opt in under Protocol No. 21 annexed to the Treaty on European Union ('TEU') and the Treaty on the Functioning of the European Union ('TFEU'):

Having regard to the fact that:

- Ireland has the benefit of retaining sovereignty in the area of freedom security and justice ('ASFJ') subject to Ireland's entitlement to opt into measures adopted by the Union in that area made pursuant to Title V of Part Three TFEU;
- the stated substantive legal basis for the Withdrawal Agreement (and the Decision on the conclusion of same) is Article 50 TEU;
- the stated substantive legal basis for the Trade and Cooperation Agreement (and the Decision on the conclusion of same) is Article 217 TFEU; and
- it followed that it was not considered that an opt in was required or permitted from Ireland so that no such opt in was exercised:-

(1) Can the provisions of the Withdrawal Agreement, which provide for the continuance of the EAW regime in respect of the United Kingdom, during the transition period provided for in that agreement, be considered binding on Ireland having regard to its significant AFSJ content; and (2) Can the provisions of the Agreement on Trade and Cooperation which provide for the continuance of the EAW regime in respect of the United Kingdom after the relevant transition period, be considered binding on Ireland having regard to its significant AFSJ content?

Minister for Justice & Equality v. WO (Orlowski) and Minister for Justice and Equality v. JL (Lyskiewicz)

In a judgment delivered on 23rd July 2021, Dunne J., with whom the other members of the panel concurred, found that it was necessary for the Supreme Court to send a request for a preliminary ruling to the CJEU regarding questions arising in respect of the Council Framework Decision 2002/584/JHA as amended by Council Framework Decision 2009/299/JHA and the appropriate test to be applied when an objection is raised pursuant to s. 37 of the European Arrest Warrant Act 2003 that ordering the surrender of a respondent who is the subject of an EAW would potentially lead to a violation of their rights under the European Convention on Human Rights or the Charter of Fundamental Rights of the European Union.

The Court referred the following questions to the CJEU:-

(1) Is it appropriate to apply the test set out in Minister for Justice and Equality (Deficiencies in the system of justice) Case C-216/18 PPU, ECLI:EU:C:2018:586, "LM" herein, as Celmer v. Minister for Justice and Equality [2019] IESC 80 was identified in the CJEU affirmed by the CJEU in Joined Cases C-354/20 PPU and C-412/20 PPU, L&P, ECLI:EU:C:2020:1033 where there is a real risk that the appellants will stand trial before courts which are not established by law?

(2) Is it appropriate to apply the test set out in LM and affirmed in L&P where a person seeking to challenge a request under an EAW cannot meet that test by reason of the fact that it is not possible at that point in time to establish the composition of the courts before which they will be tried by reason of the manner in which cases are randomly allocated?

(3) Does the absence of an effective remedy to challenge the validity of the appointment of judges in Poland, in circumstances where it is apparent that the appellants cannot at this point in time establish that the courts before which they will be tried will be composed of judges not validly appointed, amount to a breach of the essence of the right to a fair trial requiring the executing state to refuse the surrender of the appellants?

PART 3
Education and Outreach

Education and Outreach

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.

Comhrá

In 2019, the Supreme Court launched 'Comhrá' (the Irish word for 'conversation'). In a collaboration between the judges of the Supreme Court, the Courts Service and the National Association of Principals and Deputy Principals, Comhrá allows secondary school students around Ireland to participate in live video calls with judges of the Supreme Court.

Although Comhrá began before remote video calls became the norm with the onset of the pandemic, the online nature of the programme meant that it could safely continue throughout 2021.

In May, Chief Justice Clarke and Ms. Justice Baker participated in a Comhrá video call with Bishopstown Community School in Cork. Students asked interesting questions on topics such as the intersection between domestic and EU law, why the judges chose to become members of the judiciary, and the role of the Supreme Court.

Students of Clarin College, Co. Galway undertook a Comhrá with Mr. Justice MacMenamin and Ms. Justice Dunne in November. Some of the interesting points of discussion included the judges' careers and aspects of their work, their favourites songs and films, and the way in which the media report on court proceedings.

Students of Clarin College, Co. Galway, participating in a 'Comhrá' with Mr. Justice MacMenamin and Ms. Justice Dunne.

Third level institutions

Members of the Supreme Court engage regularly with and hold positions in third level educational institutions. Chief Justice Clarke is an Adjunct Professor of Law at University College Cork and a Judge in Residence at Griffith College Dublin. Mr. Justice MacMenamin is an Adjunct Professor at the National University of Ireland Maynooth and Mr. Justice Charleton is an Adjunct Professor at the National University of Ireland Galway ('NUIG'). Ms. Justice O'Malley and Mr. Justice MacMenamin serve as Judges in Residence at Dublin City University. Ms. Justice Baker was appointed an Adjunct Professor at University College Cork ('UCC') in September 2021.

On 1st March, Chief Justice Clarke delivered a remote address as part of NUI Galway's Student Law Society's programme of events to mark its 100th Anniversary. He also launched the 12th edition of the Cork Online Law Review.

Mr. Justice MacMenamin participated in a judicial reasoning round table discussion in Dublin City University in November and was keynote speaker at Dublin Business School's Law Week.

In July, Ms. Justice Baker gave an address to the UCC graduating classes of 2021 during their conferral ceremony. She also chaired a webinar hosted by the UCC School of Law on 'Prescriptive Easements: Another Cliff Edge?' in February and chaired the annual conference hosted by the UCC Centre for Law and the Environment, 'Enforcing European Union Environmental Law', in October.

In November, Trinity College Dublin's Law Society awarded Mr. Justice Hogan the Society's Praeses Elit award.

Publications and extra judicial speeches

The members of the Supreme Court continued to publish materials in legal publications throughout 2021.

Chief Justice Clarke wrote the foreword to the third edition of 'The Law of Credit and Security' by Professor Mary Donnelly, University College Cork, published in July 2021. He also contributed an article, co-authored by Rachael O'Byrne, titled 'The Influence of the Common Law Tradition on the Development of Constitutions: an Irish Perspective' to 'Law in a Time of Constitutional Crisis: Studies Offered to Mirosław Wyrzykowski'.

Mr. Justice Charleton is chair of the judicial editorial board of the Irish Judicial Studies Journal, a peer-reviewed legal publication interfacing between judges, legal practitioners and academics, and published in conjunction with the University of Limerick. Mr. Justice Charleton and Orlaith Cross published an article in the October 2021 edition of the IJSJ titled 'Towards a Presumption

of Victimhood: Possibilities of Rebalancing the Criminal Process'.
Ms. Justice Baker wrote forewords to 'Damages' (2nd edition) by Tadhg Dorgan and Peter McKenna, published by Round Hall, and 'Civil Litigation of Commercial Fraud' by Arthur Cunningham published by Clarus Press.

Some of the judges' extra judicial speaking engagements throughout the year included Ms. Justice Baker's keynote address at the European Networking and Training for National Competition Enforcers for Judges in Italy in September 2021 and her address at the Academy of European Law (ERA) online conference for members of the judiciary in December on the topic of 'Judging GDPR compliance cases at national level – selected problems arising in the domestic case law'.

In June, Chief Justice Clarke launched the 2020 Annual Report of FLAC (Free Legal Advice Centres) 'Remote Justice'.

Mooting, mock trials and debating

Moot competitions and mock trials allow students to act as legal representatives and other participants in simulated court hearings and trials. Debating and negotiating competitions also provided a platform for students to develop and enhance skills which are important to practising law.

In 2021, Mr. Justice MacMenamin chaired the final of the 12th annual National Moot Court competition, hosted by Dublin City University, and sponsored by A&L Goodbody.

Ms. Justice Baker judged the final of the Conor Ringland Memorial Moot organised by the Trinity College Dublin FLAC Society in April.

Mr. Justice Woulfe was the judge for the final of the Cambridge v Trinity Varsity Mock Trial hosted by Trinity College Law Society in November 2021.

The final of the Bar of Ireland's Adrian Hardiman Memorial Moot Competition took place in a socially distanced manner in the Supreme Court on Thursday, 23rd July 2021, before Chief Justice Clarke, Ms. Justice O'Malley, and Ms. Justice Baker.

The Honorable Society of King's Inns

The Honorable Society of King's Inns is the institution of legal education responsible for the training of barristers in Ireland. It also offers a Diploma in Legal Studies and a range of advanced diploma courses for both legally qualified and non–legally qualified participants. The

Honorable Society of King's Inns comprises barristers, students and benchers, which include all of the judges of the Supreme Court, Court of Appeal and High Court.

Members of the Supreme Court and other senior judges also serve on various committees of King's Inns. Mr. Justice MacMenamin is chair of the Disciplinary Committee and Ms. Justice O'Malley is chair of the Education Appeals Board and a member of the General Purposes Committee. Ms. Justice Baker chairs the Education Committee. Mr. Justice Murray, who was appointed to the Supreme Court in early 2022, is chair of the Entrance Exam Board. 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 High Court and the President of the Court of Appeal are ex officio members. Ms. Justice Baker is also a member of the Judicial Benchers Panel. Mr, Justice Birmingham, President of the Court of Appeal, is an external examiner of the criminal procedure module of the degree of Barrister-at-Law course.

Judges of the Supreme Court were involved in the delivery of education at King's Inns. Ms Justice O'Malley spoke at a webinar on quasi-judicial decision making in June 2021 and Ms Justice Baker chaired the judging panel for the Brian Walsh Memorial Moot.

The Bar of Ireland and the Law Society of Ireland

The Bar of Ireland is the representative body for the barristers' profession in Ireland and is an independent referral bar that has a current membership of approximately 2,150 practising barristers. The Law Society is the educational, representative, and regulatory body of the solicitors' profession. The members of the Supreme Court often participate in initiatives of both the Law Society and The Bar.

Engagement with the Law Society

On 7th October 2021, Chief Justice Clarke led a line-up of speakers at the Law Society of Ireland's Younger Members Committee's annual conference. Organised by the Younger Members Committee in partnership with Law Society Professional Training, the conference addressed issues relating to the courts, client care, diversity and inclusion, and health and wellbeing.

In January 2021, the Ms. Justice Marie Baker joined as a speaker on a panel discussion delivered to the participants of the Law Society's Diploma in Judicial Skills and Decision-Making course. The Law Society was also the venue of a conference hosted by the Chief Justice's Working Group on Access to Justice in October 2021, further details of which are reported on page 61.

Engagement with The Bar of Ireland

Chief Justice Clarke, President Birmingham and President Irvine addressed transition year students who participated in The Bar of Ireland's 'Look into Law' programme which gives TY students a comprehensive insight into the role of the legal system, courts and the work of barristers.

In June, Chief Justice Clarke and Chief Justice O'Donnell spoke at The Bar of Ireland's Chair Conference on 'Human Rights: Universal Rights? Home and abroad'.

In November, Chief Justice O'Donnell addressed the 2021 Immigration, Asylum and Citizenship Bar Association conference on the topic of 'The Relationship between Claims under the Constitution and the ECHR (and Charter); A New Phase?'. An updated version of the accompanying paper, entitled 'The ECHR Act 2003: Ireland and the Post-War Human Rights Project', was published in the sixth volume of the Irish Judicial Studies Journal.

In May, Ms. Justice Baker chaired the Bar of Ireland Cork Employment Law CPD Seminar.

Faculty of Notaries Public

A Notary Public is a public officer constituted by law to serve the public in non-contentious matters usually concerned with foreign or international business. The Faculty of Notaries Public is responsible for the promotion, advancement, and regulation of the profession of Notary Public in Ireland and the Institute of Notarial Studies, a division of the Faculty, has the role of preparing candidate notaries for entry into the profession. The Notarial Professional Course aligned with the Diploma in Notarial Law & Practice (Dip.N.L.) is the entry route to the profession and the final stage of the process of appointment as a Notary Public involves a formal petition to the Chief Justice in open court by way of notice of motion.

The Chief Justice's summer placement programme for law students

The Chief Justice's Summer Placement Programme for law students took place remotely for two weeks in June 2021. The move to a remote programme enabled the longstanding programme to go ahead in a safe way at a time when pandemic restrictions were in place.

Twenty-eight students from third level institutions in Ireland, the United States and Wales were assigned to judges of the Supreme Court, Court of Appeal and High Court. They shadowed the judge to whom they were assigned and observed remote court hearings. Over the course of the programme, students also undertook legal research projects and attended the Hardiman Lecture Series involving a range of judicial and academic speakers.

Other remote events organised for the programme included a lunchtime Book Club Series involving conversations with Mr. Justice Peter Charleton and Mr. Justice Brian Cregan in relation to non-legal books they have written, and sessions with judicial assistants in the Courts Service with practising barrister Patrick Fitzgerald BL. In addition, students were given talks from Ms. Justice Mary Rose Gearty on wellbeing, the role of the European Court of Human Rights by Ms. Justice Ann Power, the role of the Office of the Attorney General by Damien Moloney, and the Special Criminal Court by Alice Harrison BL.

A 'Criminal Justice Day' included an overview of the criminal justice system by the Research Support Office, and talks by Claire Loftus, Director of Public Prosecutions, Dr. Marie Cassidy, former State Pathologist, and Victim Support at Court.

A visit to the Drug Treatment Court provided an opportunity for students to observe that court and meet with the judge and coordinating team.

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 Irish universities, institutes of technology, colleges and higher-level institutions, Fordham University School of Law, New York and Bangor University, Wales.

The 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 2021, the lectures took place remotely. They were open to all participating students, judges, judicial assistants, Courts Service staff, and members of the Bar of Ireland and of the Law Society.

The 2021 series included:

- 'Black Lives Matter' delivered by Professor Michael Martin, Associate Professor of Law, Fordham University;
- 'Unearthing the continental origins of the Constitution of Ireland' by Gerard Hogan, then Advocate General of the Court of Justice of the European Union; and
- 'The principle of judicial independence in the European Union' by Ms. Justice Niamh Hyland.

Members of the Chief Justice's Working Group on Access to Justice pictured at the Access to Justice conference

Chief Justice Clarke opening the Access to Justice conference

Minister for Justice, Heather Humphreys TD, addressing the Access to Justice conference

The Chief Justice's working group on access to justice

Equality before the law is a fundamental principle in a democratic state. To achieve it, there must be equal access to justice. Against the backdrop of this fundamental principle and recognising the potential for the judiciary to work with some of the other key actors with an interest in advancing access to justice, Chief Justice Clarke established a Working Group on Access to Justice. Other members of the Working Group include a judge of the Supreme Court, the Chief Executive of FLAC, a representative of The Bar of Ireland, a representative of the Law Society and the Chair of the Legal Aid Board.

In order to hear from people with experience of unmet needs and provide an opportunity for groups and individuals with such needs to engage in a conversation about what is needed to improve access to justice, the Working Group hosted a two-day conference to help to inform its views and identify its strands of work. The conference was hosted by the Law Society which facilitated the attendance of keynote speakers and working group members at its premises, with all other participants and attendees joining remotely due to the COVID-19 pandemic.

Day one involved keynote addresses from speakers who highlighted the importance of access to justice and current initiatives which are planned and underway in the justice sector which aim to remove barriers and advance access to justice. Speakers included Chief Justice Clarke; Síofra O'Leary, judge of the European Court of Human Rights; Heather Humphreys T.D., Minister for Justice; Professor Trevor Farrow, Osgoode Law School; and Angela Denning, CEO of the Courts Service.

This set the scene for the second day of the event, which involved a plenary overview of unmet legal needs by Eilis Barry, Chief Executive of FLAC (Free Legal Advice Centres), followed by six breakout workshops on specific themes led by expert moderators and panellists who delivered presentations which opened discussions. The themes covered in the breakout workshops included:

- Awareness and information;
- Access to justice in environmental matters;
- Legal community outreach: advancing access to justice through education and awareness;
- Accessibility of courts: court procedures and legal representation;
- Access to legal services for people in poverty and disadvantaged groups; and
- Equal treatment in the court process.

Time and time again during the conference, participants emphasised that access to justice involves complex, interconnected and overlapping issues. The Chief Justice noted in his opening remarks that "the range of issues is wide and potential improvement requires action across many strands." Although the focus of the workshops was on unmet needs, they provided a

forum for panellists to refer to the positive work being undertaken by organisations and projects working to support access to justice. However, a clear message arising out of the event and, in particular, the workshops, was that the needs of many are not met by the current system. The diversity, volume and experience of participants generated very rich conversation and will undoubtedly assist the Working Group in considering how it may contribute to improving access to justice.

In concluding the event, the then designate Chief Justice O'Donnell noted that there are many ways in which access to justice can be improved progressively and incrementally, with a significantly cumulative impact. He expressed a hope that the initiative that this conference represents will stimulate developments large and small.

The Working Group produced a report of the conference, which is available here.

Angela Denning, CEO of the Courts Service, and Chief Justice Clarke at the Access to Justice Conference

PART 4
International Engagement

International Engagement

The Supreme Court engages with the Court of Justice of the European Union via the avenue of dialogue provided for in the preliminary reference system 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 have arisen. 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 co-operation between the Supreme Court and other senior courts through, for example, bilateral meetings or through the membership of the Supreme Court of international bodies.

Continued travel restrictions in 2021 meant that it was not possible for judges to participate in face-to-face meetings or in-person events with courts in other jurisdictions for most of the year. However, virtual engagement took place where possible.

International organisations

The Supreme Court cooperates on a multilateral basis via 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 in which courts of similar jurisdiction can meet (when the public health situation allows) to discuss their work, the nature of their functions and the organisation of their systems in order to promote dialogue between such courts.

Chief Justice Clarke delivering a remote address at the Congress of the Conference of European Constitutional Courts

Some organisations of which the Supreme Court or the Chief Justice is a member include:

ACA-Europe – an organisation comprised of 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. In 2021, Ms. Justice Dunne participated in a working group on 'Supreme Administrative Courts in times of Covid-19 crisis' and attended a seminar organised by the French Conseil d'État on 'Judicial Review of Regulatory Authorities'. Chief Justice Clarke and Mr. Justice O'Donnell attended the Colloquium and General Assembly which was hosted remotely by the Supreme Administrative Court of Germany and Chief Justice Clarke and Ms. Justice Baker attended a seminar on 'Law, Courts and guidelines for the public administration in Fiesole in October.

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, Mr. Justice O'Donnell was elected a member of the Board (Vice-President) if the Network, a position which was also held by Chief Justice Clarke until his retirement in October.

Conference of European Constitutional Courts – an organisation comprised of European constitutional or equivalent courts with a function of constitutional review. Meetings and exchange of information on issues relating to the methods and practice of constitutional review are the key feature of this organisation. The Conference is currently chaired by the Constitutional Court of the Czech Republic. Chief Justice Clarke attended and delivered an address at the XVIIIth Congress in 2021, which was hosted remotely as a result of the pandemic.

Judicial Network of the European Union – 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 hosted by the Court of Justice in 2017. The JNEU is based on an internet site 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, 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 other EU states and beyond. Owing to the pandemic, any in person bilateral meetings scheduled for 2021 were postponed.

Other international engagements of the judges

Although restrictions associated with the global pandemic prevented judges from participating in overseas events to the same extent as in previous years, some overseas engagements took place in a way that complied with prevailing public health restrictions. Others took place remotely.

In April, Chief Justice Clarke participated in a remote seminar on 'the Role of the Supreme Court Judge', hosted by the French Cour de Cassation. In the same month, the designate Chief Justice, Mr. Justice Donal O'Donnell, and Chief Justice Clarke attended a remote informal meeting with the Northern Ireland Assembly's Ad Hoc Committee on a Bill of Rights and discussed a range of issues including the interpretation and enforcement of human rights, the three main rights instruments in Ireland, and the impact of Brexit on human rights.

The designate Chief Justice and Chief Justice also attended a conference together at the European Court of Human Rights in September, which was organised in place of an event to mark the opening of the legal year in January as a result of the pandemic.

PART 5
Supporting the Supreme Court

Supporting the Supreme Court

The Courts Service

The Supreme Court is supported by the Courts Service, the statutory independent agency responsible for the administration and management of all courts in Ireland. Established pursuant to the Courts Service Act 1998, the Courts Service manages all aspects of court activities except for judicial functions and the administration of justice, which are matters exclusively for the judiciary.

The functions of the Courts Service are to:

- manage the courts,
- provide support services for the judges,
- provide information on the courts system to the public,
- provide, manage, and maintain court buildings, and
- provide facilities for users of the courts.

All Courts Service staff members are civil servants of the State and are statutorily required to act fairly and impartiality in the discharge of their respective duties.

Chief Executive Officer

The Chief Executive Officer ('CEO'), Angela Denning, is responsible for implementing policies approved by the Courts Service Board, managing Courts Service staff, and overseeing the administration and business of the Courts Service.

The CEO is supported by the Senior Management Team comprising:

- Assistant Secretary - Superior Court Operations,
- Assistant Secretary - Circuit and District Court Operations,
- Assistant Secretary - Strategy and Reform Directorate,
- Assistant Secretary – Corporate Services,
- Chief Information Officer,
- Principal Officer in the Office of the CEO, and
- A nominee from the Court Service's Principal Officer Network.

The CEO liaises closely with the Chief Justice, judges of the Supreme Court and staff of the relevant offices in supporting the Supreme Court. A Judicial Support Unit within the Office of the CEO provides support to judges of all jurisdictions, including the Supreme Court, in a variety of areas, including foreign travel, protocol matters, internal and external liaison, and co-ordination of visits.

Registrar of the Supreme Court

The position of Registrar of the Supreme Court is a statutory one and the Registrar has superintendence and control of the Office of the Supreme Court. He is responsible to the Chief Justice for the business of the Court transacted in the Office. He is also subject to the general direction of the Courts Service for matters of general administration. The Registrar is John Mahon.

Supreme Court Office

The Supreme Court Office provides administrative and registry support to the Court. It has a public office where applications for leave to appeal and appeal documentation are filed. The Registrar is supported by an Assistant Registrar and six additional members of staff.

The Rules of Court require that all applications, appeals and other matters before the Supreme Court are prepared for hearing or determination in a manner which is just, expeditious and likely to minimise the costs of the proceedings.

The Office and its staff are responsible for the following functions:

- Reviewing filings and documentation for compliance with the rules and practice of the Court.
- Managing applications for leave to appeal and appeals to ensure that they are progressed fairly and efficiently.
- Listing of applications and appeals.
- Issuing and publication of the Court's Determinations and Judgments.
- Drafting and finalisation of the Court's orders.
- Enrolling of the text of the Constitution embodying amendments in accordance with Article 25.5.2° of the Constitution and enrolling of Acts of the Oireachtas in accordance with Article 25.4.5° of the Constitution.
- Processing of applications to be appointed as a Notary Public or a Commissioner for Oaths.
- Authenticating the signatures of Notaries or Commissioners on legal documents for use in Ireland or other jurisdictions.
- Supporting protocol functions including the swearing in of new judges by the Chief Justice and calls to the Bars of Ireland.

Some of the team in the Supreme Court Office

New developments

Covid-19

During 2021, the pandemic continued to affect the work of the Office. It affected business levels because of its impact on business transacted in the High Court and in the Court of Appeal, from which the Supreme Court takes applications for leave to appeal. On the other hand, the increased level of administration and support was required to continue for remote hearings, for the implementation of revised procedures and for the management of systems for electronic and hard copy documentation. There had been no significant backlog of applications or appeals going into the pandemic and thus the Court was in a strong position to maintain its level of service during the year and to continue to dispose of its caseload in a just and efficient manner.

Revised Practice Direction

A revised Statutory Practice Direction (SC19) was signed by the Chief Justice and came into effect on 30th September 2021. The principal changes are:

- The setting of an indicative timeline for the hearing of an appeal (13 to 16 weeks from the grant of leave to appeal) which the parties are expected to adhere to unless the case management judge gives other directions in a particular case. Parties should note that any failure in this regard that jeopardises the timeline may have costs implications. The detail of the timeline is set out in Schedule B to the revised Practice Direction.
- The Registrar may refuse to accept books of documentation "clearly significantly inconsistent" with the provisions of the revised Practice Direction.
- The incorporation of case management and additional procedures introduced at the beginning of the pandemic which the Court believes have worked effectively and which contribute to the just and efficient determination of appeals and applications. These include a requirement that parties file a joint document setting out matters agreed and those not agreed in advance of the first case management hearing and a new procedure where the Court may issue a Statement of Case setting out the Court's understanding of the relevant facts and the issues to be determined together with a Clarification Request addressed to the parties in advance of the hearing.
- With the exception of the 21-day period for filing an application for leave to appeal, time does not now run during the month of August or during the period from 22nd December to 4th January. Where time is limited for the filing of documentation it must be filed by 1.00 pm on that day at the latest to allow time to address deficiencies, if any.
- The respondent's notice, in the alternative, may now be filed within 21 days of the filing of the Application for Leave to Appeal where the Application is not filed within 21 days from perfecting of the order.
- A physical hearing of the appeal is the default position.
- The electronic delivery of judgments is the default position.

- The Registrar may require any document or documents to be filed electronically and in a manner which complies with any guidance in that regard for the time being in force.

The office has continued to proactively engage with parties and their representatives to assist with parties' obligation to file compliant documentation and to do so on time. An end-to-end management process for the Court's cases has been developed to assure the just and efficient determination of all cases within a reasonable period, and to ensure that no backlogs occur. This is critical to the efficient functioning of the Court's lists.

VMR Hearings

Physical appeal hearings returned in October. Case management hearings and other court business continued to be conducted remotely. Practically all of the documentation and correspondence received by the Office, including the additional materials required by the new procedures, have been managed and shared electronically with the Court over this period. This has been a very significant undertaking for the Court and for the Office. Processes and administrative procedures were put in place very quickly to support these new innovations which have worked very well notwithstanding the constraints on working during the pandemic.

Electronic Delivery of Judgments

Practically all the Court's judgments have been delivered electronically during the year. Parties have communicated electronically with the Court concerning issues arising post judgment which are not agreed. New procedures have been put in place to track these cases and to ensure that parties comply with their obligations to identify outstanding issues in a timely fashion. New procedures also ensure that electronic documentation is shared with the Court to enable it to make its determinations. The rulings of the Court on post-judgment matters are also delivered electronically and have been published on courts.ie throughout the year.

Waiting Times

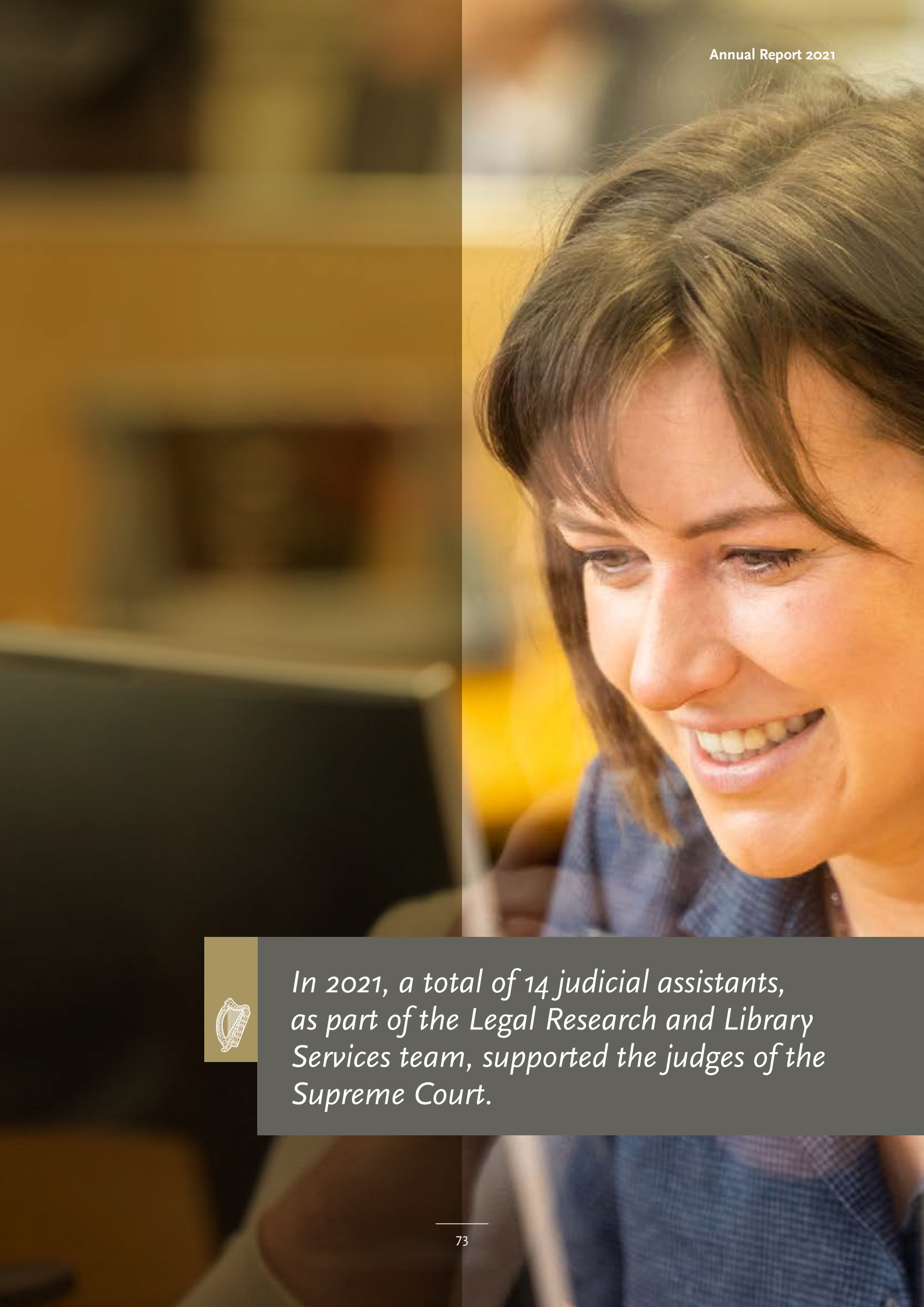
The number of AFLs filed in 2021 is on a par with 2020. The increased level of administration and support continued throughout 2021 for remote VMR hearings, the new procedures and for the management of systems for electronic and hard copy documentation. There is no significant backlog of applications or appeals and one of the challenges for 2022 will likely be dealing with the business overhang as it starts to come back online, given that in excess of 10% growth in applications had been experienced year on year. Currently litigants at final appellate level where leave to appeal has been granted can ordinarily expect a hearing within 16 weeks.
At year end all scheduled hearings have taken place and no backlog has been allowed to develop. Applications where leave is granted in the current term can expect an appeal hearing date in the following term.

The Chief Justice and members of the team in the Office of the Chief Justice

Office of the Chief Justice

The Chief Justice, in carrying out his judicial, statutory, and administrative functions at a domestic and international level, is supported by a team comprising:

- Senior Executive Legal Officer ('SELO') to the Chief Justice, Sarahrose Murphy, who provides legal and administrative support to the Chief Justice and other judges nominated by the Chief Justice in the discharge of their international functions and their engagement with international organisations. The SELO also assists the Chief Justice in discharging his domestic, administrative, and organisational functions.
- Executive Legal Officer to the Chief Justice, Patrick Conboy, who also provides legal and administrative support in respect of the Chief Justice's domestic and international functions.
- Judicial Assistant, Aislinn McCann, who was assigned to Chief Justice Clarke in February 2020 and concluded her role in September 2021.
- Judicial Assistant, Cormac Hickey, who was assigned to Chief Justice O'Donnell in September 2019.
- Judicial Assistant, Caoimhe Gethings, who was assigned to Chief Justice O'Donnell in September 2021.
- Private Secretary, Tina Crowther, who provides secretarial support to the Chief Justice.
- Usher, Tony Carroll, who provides the Chief Justice with practical and court-going assistance.



In 2021, a total of 14 judicial assistants, as part of the Legal Research and Library Services team, supported the judges of the Supreme Court.

Superior Courts Operations

The Superior Courts Operations Directorate oversees the provision of administrative support to the Supreme Court, the Court of Appeal, and the High Court. The Directorate is also responsible for the offices attached to these courts and the staff associated with each office, including the Supreme Court Office.

Tom Ward is Assistant Secretary with responsibility for the Superior Courts Directorate and Chief Registrar of the High Court.

Legal Research and Library Services

The Legal Research and Library Services ('LRLS') team is led by Laura Butler. Over 90 members of staff provide support to members of the judiciary across all court jurisdictions. This includes legal research managers and executives, library staff, executive legal officers to court presidents, judicial assistants ('JAs') and research support associates ('RSAs'). The LRLS committee, made up of members of the judiciary from each jurisdiction and the Head of the LRLS, acts as a liaison providing feedback to the Head of the LRLs on behalf of the judiciary.

The LRLS department covers a wide remit and has responsibility for the running of the Judges' Library; the management and training of the RSAs and JAs; the implementation of a knowledge management system; and work associated with a number of European Union and international committees.

Judicial assistants

In 2021, a total of 14 judicial assistants, as part of the LRLS team, supported the judges of the Supreme Court, including those who concluded their positions as judicial assistants ('JAs') during the year. The work undertaken by JAs varies depending on the requirements of the judge to whom they are assigned. However, the work will invariably involve providing legal research assistance, practical assistance, and assisting in the proofreading of reserved judgments prior to delivery.

As a result of the Financial Measures in the Public Interest (Amendment) Act 2011, the assignment of ushers to judges has been replaced by the recruitment of JAs, who are recruited by the Courts Service on a three-year non-renewable contract. JAs, as an essential entry requirement, must possess a law degree of Level of 8 on the National Framework of Qualifications or an appropriate professional legal qualification. In addition, JAs must demonstrate an extensive knowledge of Irish law and the Irish legal system. The Courts Service conducts regular open competitions for the recruitment of judicial assistants, further information of which is available on its website: www.courts.ie.

Supreme Court Judicial Assistants

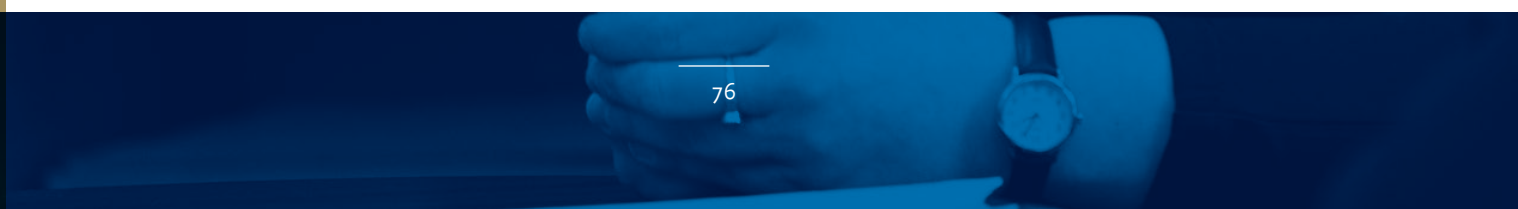
A day in the life of a Supreme Court judicial assistant

By Katie Cundelan and Heather Burke

I started my work as a judicial assistant (or 'JA') in the Supreme Court in November 2020, when phrases like "the new normal" had not become quite as dated as they are now. In-person proceedings were swapped for remote proceedings on the Pexip platform and courtrooms were swapped for online login codes. The restrictions have since lifted, and slowly enough, life inside and outside of the Supreme Court has restored itself to pre-pandemic practices, with many of the once-regular features of the on-site judicial assistant returning. I can now be spotted darting down corridors of the Four Courts to get to a hearing, robes flying behind me, meeting with my judge to discuss the day's cases, and bouncing research ideas off of my judicial assistant colleagues. However, not every aspect of our work is as fast paced. The typical life cycle of a Supreme Court case takes twelve to fourteen weeks, and judicial assistants are involved at every stage of that process. Most of that work does not take place in the bustling halls of the Gandon Building of the Four Courts, but from our desks in Áras Uí Dhálaigh, an adjacent building on the Four Courts complex.

Applications for leave to appeal are the first step in the case process, heard by a panel of three judges, who determine whether a party has reached the constitutional threshold to be granted leave to appeal to the Supreme Court. These applications are usually heard on Fridays and are held in the one of the judges' chambers. Article 34.5.3° of the Constitution sets out the threshold for appeals from the Court of Appeal and Article 34.5.4° outlines that threshold for 'leapfrog appeals' from the High Court. In such cases where my assigned judge is on the panel, my role is to read the papers in advance and set out the relevant legal history of the case, and the points of appeal that the parties argue reach the constitutional threshold to be granted leave. Once the decision has been finalised by the panel and the Determination has been drafted, I am tasked with proofreading it and making sure it is formatted correctly. Before sending it off, I consult the 'Determination Spreadsheet' where previous determination results are recorded to check if any recent determinations have dealt with similar issues as those in the application. The Determination is then finalised by the judicial panel, signed by the chair of the panel and sent to the parties via the Supreme Court Office.

When an application is granted leave to appeal, the matter moves into case management. In pre-pandemic times, these were held in-person, but the practice of conducting these hearings remotely has been retained. Prior to the case management hearing, a case management booklet is usually lodged. I check this book for compliance with the Practice Direction SC19. During the case management hearing, I take notes of any relevant directions made by my assigned judge. The usual details that are agreed at case management are the length of time for speaking at the hearing, the date of the hearing of the appeal and assurances that the parties are in agreement about the issues that were granted leave. Sometimes, when there



is a disagreement between the parties about the scope of the issues in the appeal, the case management judge will call a full panel of five judges to hear submissions and determine the scope of the appeal.

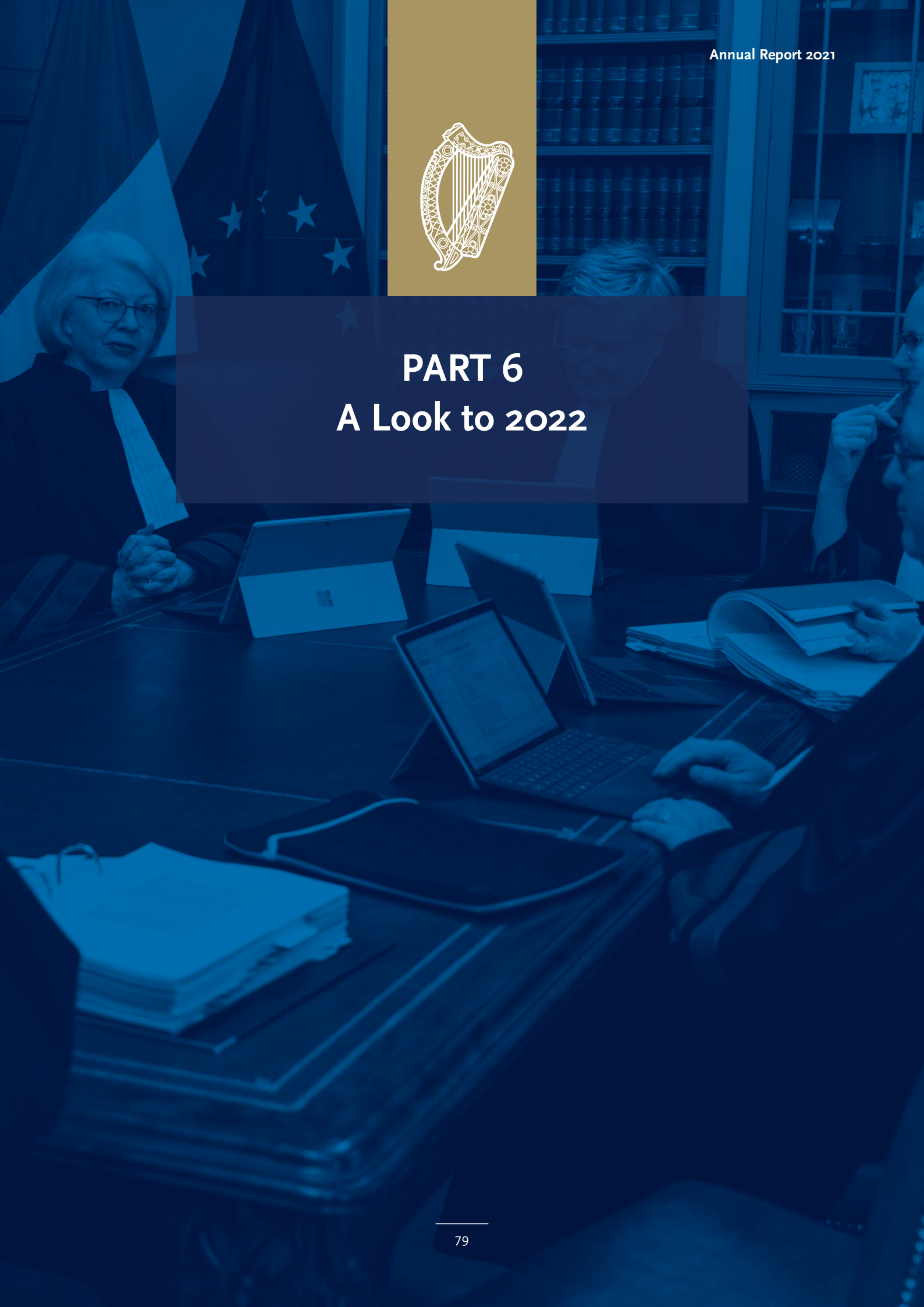
It is also at the case management stage that any notice parties or amici curiae apply to join the proceedings. Deadlines for filing full sets of appeal books are also agreed, and I check these books for compliance with SC19. Since the pandemic, it has become common practice that parties file both hard copy and soft copy books. Both of these are checked for compliance with the practice direction.

Two weeks prior to the scheduled hearing, if the judge to whom I am assigned is going to be writing the lead judgment for the case ("the starred judge") I assist in drafting a statement of case for the benefit of the parties. The purpose of the statement of case is to outline the Court's understanding of the background to the proceedings, the outcome of the relevant issues in the lower courts, and the submissions of the party, although it does not reflect any preliminary views of the Court. When the statement of case is finalised, it is sent to the parties via the Supreme Court Office. Sometimes, the statement of case is accompanied by a clarification request, where the parties are asked to clarify any matters that would be useful to the Court before the hearing.

After the hearing, I may be asked by my assigned judge to research legal questions, discovering that often the answer to one question leads straight to another question. Legal research takes up a large portion of the day, although I am lucky that our office is only a stone's throw away from the Judges' Library where I can access a lot of contemporary legal books and legal reports. I feel very lucky as well that I can rely on my judicial assistant colleagues to tease out legal ideas and arguments, and to pick their very capable brains. It means that my work as a judicial assistant, although often very independent and self-directed, is never isolated nor completely separate from work of the other JAs.

Since the start of 2022, as part of a broader effort to improve access to justice, the Supreme Court has published case summaries simultaneously with the judgment(s) in a case. Once a judgment has been drafted, I proofread it and then assist my assigned judge with the preparation of a case summary. These are two-page nutshells that are published alongside the judgments, providing a more accessible way to digest cases, and they are available on courts.ie.

While the pandemic has left a lasting influence on some of the practices of the Supreme Court, it certainly hasn't changed the variety of the work for judicial assistants. The opportunity and insight gained from researching complex legal issues, discussing cases with our assigned judges and each other, and working alongside the Supreme Court Office and the Office of the Chief Justice provides a unique space to develop and learn.



PART 6
A Look to 2022

A look to 2022

Judgment Summaries

In November 2021, the Supreme Court began to publish a short summary of every judgment at the same time as the delivery of the judgment itself. Each summary provides a background to the appeal and the reasoning of the court in its judgment. The initiative aims to promote public understanding and accessibility of Supreme Court judgments and reflects the fact that decisions of the Supreme Court are of public importance. The Court will continue to publish judgment summaries in 2022 and review this practice in light of any feedback received.

Access to Justice Working Group

Following a conference organised by the Chief Justice's Working Group on Access to Justice in October 2021, the Working Group plans to publish the papers delivered by keynote speakers and a report of the breakout workshops on themes relating to access to justice in a conference booklet. The Working Group hopes that the material will be a useful resource for people and organisations with an interest in access to justice issues and will assist the Working Group in planning the next stage of its work.

Decade of Centenaries

2022 will mark 100 years since a number of historic events took place in the Four Courts, where the Supreme Court is now located, including the occupation and battle of the Four Courts and the destruction of the Public Records Office. It will also be the 100-year anniversary of the enactment of the Constitution of the Irish Free State. A committee chaired by the CEO of the Courts Service and of which the Chief Justice will be patron will organise a programme of commemoration to mark these important events in our history.

Summer Placement Programme for Law Students

The Chief Justice's Summer Placement for law students will take place again in the summer of 2022. Participants nominated by third level institutions in Ireland, the United States of America and Wales will have the opportunity to shadow judges of the Supreme Court, Court of Appeal and High Court. They will observe court hearings, undertake legal research assignments, and attend the Hardiman Lecture Series in addition to a number of other events.

Bilateral meeting with UK and Ireland Judiciaries

At the invitation of The Rt. Hon. Lord Reed Of Allermuir, President of the Supreme Court of the United Kingdom, the Chief Justice of Ireland will visit London for a series of bilateral meetings with members of the United Kingdom Supreme Court and the heads of Judiciaries of Northern Ireland, Scotland and England and Wales in 2022. The engagement is in line with a longstanding arrangement which enables senior members of the Irish judiciary to discuss issues of mutual interest with judicial colleagues in our neighbouring jurisdictions.

Bilateral meetings with the Supreme Court of Canada

Chief Justice O'Donnell and members of the Supreme Court of Ireland look forward to welcoming the Rt. Hon. Richard Wagner, P.C., Chief Justice of Canada, and members of the Supreme Court of Canada to Dublin for bilateral meetings in July 2022. The visit will be a valuable opportunity to discuss a number of topics relating to the law and the work of both common law Supreme Courts.

Presidency of Committee of Ministers of Council of Europe

Ireland will hold the Chairmanship of the Committee of Ministers of the Council of Europe from May to November 2022. As part of Ireland's programme of events during its Presidency, the Chief Justice will host a visit of the President and members of the European Court of Human Rights to Dublin in October 2022 for bilateral meetings with members of the Supreme Court. The programme, which will be supported by the Department of Foreign Affairs and the Courts Service, will also include a public conference hosted by the Chief Justice and members of the judiciary.

PART 7
Case Summaries

The following case summaries are published solely to provide an overview of some of the cases considered by the Supreme Court in 2019. They do not form part of the reasons for the decision of the respective case and do not intend to convey a particular interpretation of the case summarised. The case 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.

Case Summaries

In the Matter of JJ [2021] IESC 1

On appeal from

[2021] IEHC 655

Headline

The Supreme Court held that a court is entitled to override the wishes of parents in relation to a decision concerning their child's medical treatment where this decision prejudicially affects the child's health and welfare.

Composition of Court

O'Donnell, McKechnie, Dunne, O'Malley, Baker JJ.

Judgments

O'Donnell, Dunne, O'Malley and Baker JJ.
McKechnie J. dissenting in part.

Baker J. (with whom O'Donnell, Dunne and O'Malley JJ. agreed).

Background to the Appeal

The issue in this appeal concerned the circumstances in which a court is permitted, pursuant to Article 42A of the Constitution, to override the wishes of parents in relation to their child's medical treatment.

"John", the minor at the centre of the case, suffered catastrophic injuries in a road traffic accident in the summer of 2020. Among these injuries was damage to the basal ganglia in the brain, which control movement. As a result of this injury, John developed dystonia, a condition which causes prolonged, involuntary, and extremely painful contractions of muscles. In John's case, the dystonia affected all four limbs and was of a severity the likes of which an expert in the field had only seen once previously. As part of the medical team's efforts to control the dystonia, pain-relief medication was administered to John. During a particularly severe episode, known as a dystonic crisis, the doctors' professional opinion was that the quantities of medication necessary to control the pain would cause John's respiratory functions to cease. At this point in the treatment, the doctors wished to move to a palliative care regime as they were of the opinion that the crisis would inevitably repeat, weakening John each time, while John's parents wished the doctors to use ICU measures which – it was unquestioned – would themselves cause John further pain but allow him to prolong his life until a subsequent dystonic crisis would overwhelm him.

With this dispute between the parents and the treating doctors, the Hospital applied to the High Court in August 2020 to have John made a ward of court and for the grant of orders permitting the Hospital to refuse to administer ICU measures to John in the event of a life-threatening dystonic crisis, instead moving to palliative care. Irvine P. admitted John to wardship at the outset of the proceedings and heard evidence. The day before judgment was due, counsel informed the Court that John's dystonia had been brought under control. However, it was the doctors' opinion that the control over the dystonia was merely temporary and that the orders were still necessary as the situation requiring them would inevitably arise at some undeterminable point in the future. In her judgment, Irvine P. granted the orders sought, after which John's parents sought leave to appeal to the Supreme Court.

The Supreme Court dismissed the appeal, holding that the High Court was correct in its conclusion that the orders permitting the Hospital to move to palliative care for John once his condition deteriorated to a certain point were permissible.

Reasons for the Judgment

At this point of the proceedings, the issues included: the use of the wardship jurisdiction; the procedures adopted; and the test applied. In relation to the constitutional issue, additional questions arose as to:

whether the course of treatment proposed amounted to an impermissible acceleration of death and, therefore, euthanasia; the status of John, his mother, and father as a family; the interpretation of judicial decisions in relation to Article 42.5 of the pre-existing Constitution, and, in particular, the decision of the Supreme Court in *NWHB v. HW* [2001] 3 IR 622; whether the test for intervention under Article 42A of the current Constitution requires both a showing of exceptionality and parental failure; whether, if the test for intervention under Article 42A was not satisfied, intervention could be justified either by reference to a compelling reasons test, or on the basis of the vindication of the personal rights of the child; and, finally, the meaning of "provided for by law" when used in Article 42A.

In a majority judgment delivered jointly by O'Donnell, Dunne, O'Malley and Baker JJ., the Court held that although John should not have been admitted to wardship until the close of the High Court proceedings, this did not affect the validity of any order made under the wardship. Further, the majority found that the orders sought did not constitute euthanasia, as their objective was not to inflict death but to minimise John's suffering. Considering the application of Article 42A, the majority held that it could be engaged in respect of a single decision by the parents which prejudicially affected their child's safety and welfare. The instant case was distinguished from *NWHB* as that case involved screening for potential illnesses, while this case dealt with a present threat to the minor's life. And, while the text of Article 42A required any intervention in the family to be provided for by law, this was not, contrary to the arguments of the parents, limited to statutory law only.

In a separate concurring judgment, Baker J. discussed the use of the wardship jurisdiction. She took the view that the jurisdiction is capable of being exercised in a flexible and limited way so as to preserve the essential rights and obligations of the parents, of the minor and of the family generally in the constitutional order. Baker J. reviewed the case law and discerned two principles on the nature of minor wardship: its flexible nature is equitable, and the jurisdiction may permit the making of directions regarding welfare without an absolute suspension of legal rights and duties of the parent and child. For this reason, Baker J. concluded that the order taking John into wardship ought to have been limited for the purpose of giving directions regarding the administration of pain-relieving medication and life supporting treatment should a dystonic episode require.

Dissenting in part from the majority but coming to the same overall conclusion in relation to the validity of the orders, McKechnie J. held that the constitutional issues could have been dealt with outside of the wardship jurisdiction and that the manner in which John was admitted to warship was inappropriate. He further discussed the relevance of John's parents being unmarried, and ultimately agreed with the majority on the form of the orders to be made.

Braney v. Special Criminal Court & Ors. [2021] IESC 7

On appeal from

[2020] IEHC 222

Headline:

The Supreme Court rejected claims that s. 30(3) of the Offences Against the State Act 1939, concerning police powers of arrest and detention relating to certain specific offences, offended either the Constitution or the European Convention on Human Rights.

Composition of Court

O'Donnell, McKechnie, MacMenamin, Charleton and O'Malley JJ.

Judgment

Charleton J. (with whom O'Donnell, McKechnie, MacMenamin and O'Malley JJ. agreed)

Background to the Appeal

The issue in this appeal involved a challenge to the validity of s. 30(3) of the Offences Against the State Act 1939 ("the 1939 Act") concerning police powers of arrest and detention relating to certain specified offences. The appellant had been convicted of membership of the Irish Republican Army and sought to challenge his arrest and dentention. Firstly, Mr. Braney challenged a procedural difference between the 1939 Act and the Criminal Justice Act 1984 ("the 1984 Act"), whereby arrest under the latter Act relating to offences carrying a possible penalty of 5 years imprisonment or more requires the authorisation of the arrestee's detention for questioning in a Garda station by another Garda officer in charge of the station, but the former Act does not. Furthermore, s. 30(3) of the 1939 Act permits the initial detention period to be extended by a further 24 hours on the authorisation of a Chief Superintendent who is not required to be a Garda officer independent of the investigation which led to the suspect's arrest. The appellant claims that, analogous to police search of the home, which requires a warrant from a judge or a police officer independent of the initial investigation, it should also be the case that only a judge or independent police officer can extend the initial period of detention. Secondly, the appellant challenged the decision of the Supreme Court in *The People (DPP) v. Quilligan and O'Reilly (No 3)* [1993] 2 I.R. 205 which held that the provisions of s. 30 of the 1939 Act were not repugnant to the Constitution. Thirdly and finally, the appellant challenged the provisions in the 1939 Act relating to the drawing of inferenc from failure to answer pertinent questions relevant to a charge of membership of an unlawful organisation and asserted that such provisions were unconstitutional and incompatible with the Convention. The Supreme Court dismissed the appeal.

Reasons for the Judgment

On the first issue, Charleton J. held that the sole difference between a s. 30 arrest under the 1939 Act and a s. 4 arrest under the 1984 Act is the additional opinion required beyond that of the arresting officer that the detention is necessary for the investigation of the offence for which the person was arrested. In addition, he noted that several key protections of the arrested person apply whether such a person was arrested under s. 30 or s. 4. He held that no one under either Act is entitled to arrest anyone without having reasonable grounds of suspicion as to their involvement in an offence or to continue with an arrest where during the course of investigation that suspicion dissipates. There is also a general "floor of rights" applying to all arrested persons which includes, among other things, clarity as to reasons for arrest. Charleton J. also examined the constitutional safeguards that apply to the arrested or detained person flowing from Article 40.4 of the Constitution. On the difference between s. 30 and s. 4, Charleton J. noted that even countries based on codes will experience the development of law whereby strictures applied to certain crimes are not found with others – this is as a result of the way the legislature typically develops law in response to novel situations

or changes in the social order. He acknowledged the difference between arrest powers under s. 30 and s. 4 respectively, but held that this reflects the difference between the nature of the crimes covered by each statute. This difference, he held, does not mean the denial of rights given the floor of rights discussed above. **[17-34]**

On the second issue, Charleton J. rejected the contention that the extension of the detention period was the same as the issue of a search warrant such that there was a violation of the constitutional guarantee of equality. The difference between how a warrant is acquired versus an extension of the detention period under s. 30 of the 1939 Act may be a situation of non-homogeneity, but this fact would not be unconstitutional if the differing treatment was underpinned by practical reasons that do not seek to discriminate on an unfair basis. Charleton J. held that the differences between these circumstances were not so as to discriminate as between people but rather reflect the varying threats to society and the differing means to tackle those threats – for example, a search is a one-off offence but a detention is ongoing, therefore the safeguards must be in place before a search whereas they can be applied throughout a detention. Consequently, Charleton J. rejected the appellant's contention that the difference between procedures regarding an extension of detention under s. 30 versus the issuing of a search warrant violated constitutional or Convention guarantees of equality. **[35-48]**

Regarding the third issue, Charleton J. noted that there are a number of statutory provisions that permit the drawing of adverse inferences, however he also noted that such provisions generally contain a safeguard that such inferences cannot be sufficient by themselves to ground a conviction but can merely serve as evidence. He held that while s. 2 of the Offences Against the State (Amendment) Act 1998, relating to the charge of membership of an unlawful organisation, permits the drawing of adverse inferences, these too can only serve as evidence and not proof: *Rock v. Ireland* [1997] 3 I.R. 484. The practice of drawing adverse inferences to serve as evidence of certain offences has been found both by the Supreme Court and the European Court of Human Rights not to offend the right to silence – ultimately, it has been held that the right to silence is not absolute but may be subject to legislative restrictions which are proportional. Consequently, Charleton J. held that the ability to draw adverse inferences relating to the charge of membership of an unlawful organisation was permitted at both domestic constitutional and European levels. **[65-82]**

References in square brackets are to paragraphs in the judgment of Charleton J.

Director of Public Prosecutions v. Limen [2021] IESC 8

On appeal from

[2019] IECA 318

Headline:

The Court dismissed the appeal, finding that where there are two or more complainants in a case of alleged sexual violence, in determining whether the account of one can support the evidence of any other the court must consider whether the probative force of the evidence outweighs its prejudicial effect so as to make its admission just.

Composition of the Court

Clarke C.J., McKechnie, Charleton, O'Malley and Baker JJ.

Judgments

O'Malley J. (with whom Clarke C.J., McKechnie, Charleton and Baker JJ. agreed).

Charleton J. (with whom Clarke C.J., McKechnie, O'Malley and Baker JJ. agreed)

Background to the Appeal

The appellant was convicted of raping two women and sexually assaulting one of them at his residence in the early hours of 2nd June 2014. He was charged on one indictment and it was agreed at trial that the allegations would be treated as "one incident." In her closing speech, counsel for the prosecution stated that there were "striking similarities" between the allegations of the complainants, which were capable of supporting the evidence of each. Counsel for the defence objected to this assertion, arguing that it raised the issue of similar fact or system evidence when there was no basis for any suggestion that it arose on the evidence. A subsequent application to direct the jury to disregard the comments of the prosecution was dismissed.

The case was appealed to the Court of Appeal which held that when given its ordinary meaning, the phrase "striking similarities" would not have caused the jury to fall into error by thinking that there was cross-corroboration on a similar fact basis. On appeal, the main issue before the Supreme Court was whether, in a case of alleged sexual violence, where there are two or more victims, the account of one could support the evidence of any other, and if so, whether this could only be the case if the accounts are similar enough to be admitted as "system evidence" or is it sufficient that broadly concurrent accounts are given? A further issue arose as to what if any direction ought a trial judge give to a jury as to corroboration where there are two or more alleged victims in a sexual violence case.

Reasons for the Judgment

O'Malley J. delivered judgment on behalf of the majority (Clarke C.J, McKechnie and Baker JJ. concurring) with Charleton J. delivering a separate concurring judgment. Firstly, O'Malley J. restated the principle that evidence of an offence committed by the accused, other than that charged in the indictment, is not admissible for the purpose of leading the jury to believe that he is likely, by reason of his criminal conduct or character, to have committed the crime in respect of which he is charged.

However, O'Malley J. noted that such evidence may be admissible if it is relevant to an issue of fact that has to be determined by the jury. It will be relevant if it has probative value in relation to that issue. The types of issues that might be in question include any defence that may realistically be raised by the accused. As a separate consideration, evidence may be given of criminal behaviour if it is so connected with the offence charged as to form part of one continuous transaction so that the evidence of that behaviour is either necessary to the narrative in relation to the offence charged or demonstrates the nature of that offence. Similarly, Charleton J. affirmed that evidence of a prior crime may, in certain circumstances, constitute a logical component of proof allowing the prosecution to present a case to the jury based on logic and reason.

However, both judges cautioned that the trial judge may, in the exercise of his or her discretion, refuse to admit any such evidence if they consider that it would probably have a prejudicial effect on the minds of the jury out of proportion to its true evidential value.

O'Malley J. also critiqued the line of authority which suggested that "striking similarities" were required between charges on the same indictment before the evidence in relation to one could support the evidence of another. It was reiterated that the essential feature was whether the probative force of the evidence outweighed its prejudicial effect to make its admission just. The probative force might be found in the striking similarities in the evidence, but this is just one of the ways in which evidence might exhibit the degree of probative force required for admissibility. It was elaborated that some probative force may be found in the inherent unlikelihood that several people have made similar false accusations. The accusations need not be "strikingly similar" but must be of the same nature.

O'Malley J. concluded by outlining principles for trial judges to have regard to when an accused is charged with multiple offences of the same nature against several individuals. It was reaffirmed that a judge may in any case sever an indictment if of the opinion that it would be unfair to the accused to proceed with it as drafted. If an application to sever is made, the judge will have to consider whether or not the complainants are independent of each other, and whether there are grounds for concern that there may have been collusion or innocent mutual contamination. However, O'Malley J. stated that this does not mean, for example, that accusations by a number of family members against a relative cannot be tried together. While they may not be independent of each other, there may nonetheless be probative value in the content of their accounts. Where it is determined that the evidence of each complainant is admissible in respect of counts relating to other complainants in terms of cross-support, O'Malley J. found that there is no requirement to explain that ruling to the jury other than in general terms. Likewise, Charleton J. stated that a restrained judicial approach should be taken when explaining such a ruling to the jury. He cautioned that for a judge to enter into the field of evidence pointing out this and that as important or tending to prove a central fact risked moving into the jury's fact-finding realm. Both judges further reiterated that the jury should be warned that they can only convict on an individual count if satisfied beyond a reasonable doubt that the accused committed the offence charged, and that they must not reach that conclusion solely on the basis that there are multiple accusers.

O'Malley J. further held that it is unnecessary, and may be unhelpful, to direct the jury in relation to the rules about corroboration unless a corroboration warning is given. She affirmed that if the evidence does not fall within the definition of corroboration but is capable of being found by the jury to support the prosecution case in respect of any particular count, there is no reason why counsel should not say so.

In relation to the instant case, O'Malley J. found that the evidence of the two complainants was admissible in respect of each count on the indictment. She reached this conclusion not on the basis of any 'striking similarity' or 'system', but because each of the complainants could have properly been called to give evidence in a trial involving only the counts relating to the other. This would have involved evidence of the complainants' conversation in the aftermath of the alleged assaults. O'Malley J. found that such evidence would have been incomprehensible to a jury if they were not aware of the individual offences alleged by each complainant. Both judges also noted that in any event the trial judge had instructed the jury to consider each count separately which in the circumstances could only be seen as having been in the interest of the defence.

Quinn Insurance Limited (Under administration) v. PricewaterhouseCoopers [2021] IESC 15

On appeal from:

[2020] IECA 109

Headline

The Supreme Court upheld the decision of the Court of Appeal to order Quinn Insurance to provide PwC with security for costs, though on a slightly different basis to the Court of Appeal.

Composition of Court

Clarke C.J., O'Donnell, MacMenamin, Dunne, O'Malley JJ.

Judgments

Clarke C.J. (with whom O'Donnell, MacMenamin, Dunne and O'Malley JJ. concurred).

O'Donnell J. (with whom Clarke C.J., MacMenamin, Dunne and O'Malley JJ. concurred).

MacMenamin J.

Background to the Appeal

The issue in this case concerned the circumstances in which a Court may refuse to grant an order for security for costs which it otherwise would grant. Once the defendant shows that it has a *bona fide* defence and that the plaintiff will be unable to pay costs, the Court normally orders security for costs unless there are any special circumstances arising.

The case involves the test in *Connaughton Road Construction v. Laing O'Rourke Ltd.* [2009] IEHC 7, in which a plaintiff who would otherwise have to provide security for costs can avoid this order if it can show that its inability to pay arises from the defendant's wrongdoing, should be revisited. Further, the appellant had relied on the "public interest" special circumstance.

The proceedings arose from the collapse of Quinn Insurance ("the appellant"), leading to it being placed in administration. The appellant then issued proceedings against PwC ("the respondent"), alleging breach of contract and negligence, and the respondent then sought an order directing the provision of security for costs.

In the High Court, Haughton J. had refused the application on the basis of special circumstances existing – as he was satisfied that the appellant had established on a *prima facie* basis that its loss was due to the wrongdoing alleged of the respondent – and as the litigation was in the public interest, given the predominant position of Quinn Insurance in the Irish insurance market. While agreeing that the special circumstances were present, the Court of Appeal differed in opinion to the High Court, considering that the non-stifling effect of an order of security for costs in the present case led to the conclusion that the Court's discretion should be used to still grant an order of security for costs. Further, the Court of Appeal held that the case was not of sufficient general public importance to justify the refusal of an order of security for costs.

Shortly after leave to appeal was granted in the instant case, it was also granted on the same issue in *Protégé International Group (Cyprus) Ltd. v. Irish Distillers Ltd.*, which was then heard shortly after this case in the Supreme Court and before the same panel, and in which this judgment was then applied.

The Supreme Court dismissed the appeal, holding that it had not been established that the appellant's potential inability to pay costs arose from the alleged wrongdoing of the respondent, nor that it was in the public interest that an order for security for costs not be granted.

Reasons for the Judgment

The lead judgment was given by Clarke C.J. Firstly, the Court addressed whether it had been *prima facie*

established that the appellant's inability to pay had been caused by the alleged wrongdoing of the respondent and found that this exercise necessitates some analysis of the basis on which the plaintiff alleges the causation of its inability to pay by the wrongdoing of the defendant. As the total losses suffered by the appellant in this case exceeded the losses it claimed were due to the respondent's actions, the Court concluded that this special circumstance had not been made out, as it had not been shown that the respondent's alleged wrongdoing was the cause of the appellant's inability to pay.

In addition to this, the Court considered the circumstances in which it would be appropriate for a Court to order security for costs, notwithstanding that the first issue has been resolved in favour of the plaintiff. The Court held that in these cases, a Court must consider where the greatest risk of injustice lies.

Finally, the Court dealt with the public interest special circumstance. However, as it had not been established that the claim would be stifled should an order of security for costs be granted, the Court held that – irrespective of where the threshold for this special circumstance lay – the appellant could not avail of it.

In a concurring judgment, O'Donnell J. (as he then was) was in agreement that the *Connaughton Road* test did not need to be re-appraised to prevent the stifling of otherwise valid claims for a number of reasons: that that standard assumed the claim was otherwise valid, when all that needed to be proven was a *prima facie* defence; the approach does not take adequate account of the exceptionality of the *Connaughton Road* test, which only arises where security for costs would otherwise be granted; it does not follow that an order of security for costs would stifle a claim; if there is good evidence both that the party does have a valid claim and that this is being stifled by an order of security for costs, that in itself will be a consideration. This exception from orders of security for costs was one which the courts must examine strictly, and that was assisted by the *Connaughton Road test*, he concluded.

Also concurring, MacMenamin J noted that the security for costs jurisdiction involves the Court balancing the right of access to the Courts with the right to protection from unmeritorious claims, and thus in the future could involve some element of proportionality in the assessment. Additionally, MacMenamin J. commented on the potential development in the future of moving to a more phased assessment of security for costs, rather than the fixing of a specific sum quite early in the proceedings.

The People (at the suit of the Director of Public Prosecutions) v. C [2021] IESC 17

On appeal from:

[2019] IECA 367

Headline

The Supreme Court refused an appeal against conviction where the accused had sought to introduce evidence of events occurring post-conviction. The Court outlined the principles to be applied in assessing new evidence, highlighting an appellate court's role in assessing its credibility.

Composition of Court

McKechnie, MacMenamin, Dunne, Charleton, O'Malley JJ.

Judgment

Charleton J. (with whom McKechnie, MacMenamin, Dunne and O'Malley JJ. agreed).

Background to the Appeal

The accused, DC, had been convicted by a jury in February 2018 of multiple counts of rape and other forms of sexual violence against his daughter, T. He was sentenced to 15 years' imprisonment for each count of rape with, concurrently, 6 years for the sexual assault offences, with the last year being suspended on conditions. Prior to his being sentenced, T visited her father in jail; an action which DC and his wife, RC, contended came from a place of remorse at having lied at trial. Following the prison visit, T was contacted by DC's solicitor on the instructions of RC; the solicitor had done so in the belief that T wanted to retract her testimony which had led to her father's conviction. A meeting with another solicitor was set up but T did not attend. In the background, there were communications between T and RC, as well as between T and a family friend in New Zealand, KD. KD testified that during a phone call between them, T had said that her father did not belong in prison, that he was not a rapist, and that he did not do those things to her.

DC appealed on the basis that the post-conviction evidence, of the prison visit, communications, and T's supposed admission of having lied, ought to be admitted and a re-trial ordered. Although unusual for an appellate court, the Court of Appeal heard the fresh evidence: T testified and was cross-examined on the events occurring after her father's conviction; DC, RC and KD each gave evidence. The Court of Appeal applied the principles as to the admission and analysis of fresh evidence on appeal outlined in *Willoughby v. DPP* [2005] IECCA 4 and restated in *The People (DPP) v. O'Regan* [2007] 3 IR 805. The principles are as follows: there must be exceptional circumstances before a court should allow further evidence to be called; the evidence must not have been known at trial or else could not have reasonably been known; the evidence must be credible, with a material and important influence on the result of the case; the assessment of credibility is to be assessed by reference to the other evidence at trial.

The Court of Appeal focused on the last two of the *Willoughby principles*. **[114]** The Court found the evidence of DC and KD that T had allegedly confessed not to be credible. There was evidence of manipulation of T who was a vulnerable young person**. [146]** There was no credible evidence that she had confessed to lying to DC's solicitor. **[157]** The Court therefore rejected DC's appeal.

Reasons for the Judgment

The Supreme Court considered the approach adopted by the Court of Appeal to the new evidence. Counsel for DC argued that the Court of Appeal should not have assessed credibility of the evidence; this was the role of a jury. It should have instead considered if a jury might possibly find the evidence to be credible.

The judgment of the court, delivered by Charleton J., outlined that there must be a threshold standard; verdicts cannot be overturned on evidence which is devoid of substance. Hearing evidence on appeal and assessing whether or not it is 'irrelevant or beyond belief is part of the judicial function inherent in the constitutional structure.' **[39]** 'The phrase "capable of belief" [used by Fennelly J. in *Dutton* [2012] 1 IR 442, 447] ... reiterates that it is for appellate courts to test evidence as to believability.' **[43]**

Charleton J. indicated that where a prosecution witness admits post-conviction to having given unreliable evidence at trial, courts must exercise special care. The court should not blindly receive evidence as to events occurring after trial; the court must assess whether it might reasonably be believed. Only if the credibility test is met, should the court look to the building blocks of the case and consider whether the evidence could affect the original verdict. **[47]**

On the facts of this case, the Court's judgment agreed with the assessment conducted by the Court of Appeal. Charleton J. highlighted as important the background of threats and undermining of confidence which DC and RC concentrated on T, particularly after DC's conviction. In the light of these manipulative actions, their evidence could not be deemed credible. **[48]**

References in square brackets are to paragraphs in the judgment of Charleton J.

Word Perfect Translation Services Ltd. v. The Minister for Public Expenditure and Reform [2021] IESC 19

On appeal from:

[2019] IECA 264

Headline

The Supreme Court resolved outstanding issues relating to the precise order that should be made in light of the findings contained in the principal judgment in this case ([2020] IESC 56).

Composition of Court

Clarke C.J., O'Donnell, MacMenamin, Dunne, O'Malley JJ.

Judgment

Clarke C.J. (with whom O'Donnell, MacMenamin, Dunne and O'Malley JJ. agreed).

Background to the Appeal

This appeal concerns the specific issues regarding the specific order that should be made in light of the principal judgment in this case. The first issue concerned a proposal for an intermediate stage where the High Court would be invited to direct further discovery in advance of the rehearing, the second issue concerned questions of redaction on the basis of relevance, and the third issue concerned a dispute between the parties as to the proper order for costs which should be made. The Supreme Court made additional specific orders ahead of the hearing of this dispute before the High Court but declined to substantially vary the regime identified in the principal judgment by adopting the protocol suggested by Word Perfect.

Reasons for the Judgment

The first issue concerned a suggestion put forward on behalf of Word Perfect wherein a "Protocol of Inspection" which would enable the High Court to direct further discovery in advance of the hearing and after Word Perfect had received such discovery as this Court might now order. Initially, it was held that any discoverable documents which were considered by the Minister to be confidential or commercially sensitive to a tenderer, could be redacted. Clarke C.J. stated that a court should not lightly depart from a regime on which it has determined, unless there are strong grounds for believing that an alternative suggestion would clearly better meet the balance to be struck and was not satisfied that it would be appropriate to alter the regime originally determined on by the Court in the principal judgment. **[2.8-2.9]**

Second, there were certain questions of detail regarding the redaction of particular categories of documents for reasons of irrelevance. Clarke C.J. held that parties should err on the side of avoiding redaction where the only basis for the possible deletion of a portion of a document from disclosure is relevance as opposed to confidentiality or, indeed, privilege. If such information is manifestly irrelevant, no basis in privilege or confidence can be asserted in respect of a portion of a document, and the document itself is undoubtedly discoverable, parties should lean heavily against redaction on the grounds of relevance alone and a court should be slow, therefore, to exclude a category of discovery sought on the grounds of relevance unless the court is confident that no relevant documents could arise within that portion of the document **[3.14]**. Clarke C.J. thus rejected the Minister's submission that the order should limit the trial judge's entitlement to direct disclosure of any document, or redacted portion of document, to cases where the trial judge becomes satisfied that its disclosure is necessary for the just resolution of the proceedings.

Third, there was a dispute between the parties as to the proper order for costs which should be made. Clarke C.J. was not persuaded that it can safely be said that the overall costs of the appeal before this Court were materially increased because Word Perfect argued points on which it did not succeed **[4.12].** In those circumstances, Word Perfect were awarded its costs in this Court with no order as to costs being made in respect of either the High Court or the Court of Appeal.

References in square brackets are to paragraphs in the judgment of Clarke C.J.

Student Transport Scheme v. Bus Éireann [2021] IESC 22

On appeal from:

[2016] IECA 152/[2016] IESCDET 123

Headline

The Supreme Court dismissed the appeal. It held that the *Greendale* jurisprudence - the exceptional circumstances in which a Supreme Court finding could be revisited on the basis that a failure to reopen a case may itself amount to a clear and significant breach of the fundamental constitutional rights of a party - could apply, in principle, to determinations of the Supreme Court refusing leave to appeal.

Composition of Court

Clarke C.J., O'Donnell, MacMenamin, Charleton and O'Malley JJ.

Judgments

Clarke C.J. (with whom O'Donnell, MacMenamin, Charleton and O'Malley JJ. agreed).

Background to the Appeal

The issue in this appeal involved a motion brought by the applicant ("Student Transport") to reopen an application for leave to appeal to the Supreme Court which had previously been refused. This application arose from proceedings initiated by Student Transport where they claimed that the Student Transport Scheme ("the Scheme") was a public contract and as such, the Minister for Education and Skills ("the Minister") should have put it out to tender. This claim was dismissed by the High Court and on appeal by the Court of Appeal. The Supreme Court refused leave to appeal, which Student Transport sought to set aside. As Article 35.5.6° of the Constitution provides that a decision of the Supreme Court shall be final and conclusive, this motion could only proceed under what is referred to as the Greendale jurisprudence, arising from the decision in Re Greendale Developments Ltd. (No.3) [2000] 2 I.R. 514. It is only in very exceptional circumstances that this jurisdiction may be exercised: where a failure to reopen a case may itself amount to a clear and significant breach of the fundamental constitutional rights of a party. In this appeal, Student Transport contended that certain documentation would, had it been considered by the High Court and Court of Appeal, have led to the reversal of the orders made in those courts. This documentation consisted of a Report by the Comptroller and Auditor General in 2017 ("the ICAG Report") and two letters received by the Irish State from the European Union Commission in 2019 ("the Commission correspondence"). Regarding the former, Student Transport contended that the Report demonstrated that Bus Éireann misled the High Court by claiming not to have profited from the Scheme and furthermore that there was a negligent lack of oversight of the financial affairs of Bus Éireann on the part of the Minister. Regarding the latter, Student Transport argued that the Commission correspondence demonstrated that the decisions of the High Court and the Court of Appeal in the underlying proceedings represented an infringement of European Union procurement law. In light of this, Clarke C.J. held that there were two issues to be resolved. Firstly, whether the application of the Greendale jurisprudence differs when applied to a determination of the Supreme Court refusing leave to appeal rather than to a decision of the Court after a substantive appeal. Secondly, the application of that jurisprudence to the facts at hand.

Reasons for the Judgment

Regarding the first issue, Clarke C.J. noted that when the Supreme Court considers an application for leave to appeal, the Court is determining whether or not the constitutional threshold for an appeal is met as required by the Article 34.5 of the Constitution. In circumstances where the Court does not determine that this threshold has been met, it follows that the consequences of refusal of leave to appeal will normally mean that the

underlying proceedings are at an end. Consequently, he held, there could be no difference between the principle of finality applying to the case at hand and those cases in which there has been a full consideration by the Supreme Court of the issues on the merits. As a result, the *Greendale* jurisdiction could apply to a determination of the Supreme Court refusing leave to appeal just as it could apply to an order of the Supreme Court arising from the substantive hearing of an appeal. The underlying principle of the *Greendale* jurisprudence is that there may be "wholly exceptional cases" where it can be said that there has been such a significant departure from what the Constitution requires that a final decision of the Supreme court must be treated as a nullity. Consequently, in this case, the question to be asked is whether there was anything about the application for leave process itself that could be said to render the determination given as being properly regarded as a nullity. **[6.1-6.15]**

Regarding the second issue, the case made by Student Transport was that the Minister had failed in the substantive proceedings to conduct the litigation in the transparent manner in which state authorities are obliged to act. Clarke C.J. held that, while there is no doubt that proceedings can be brought against state authorities for failing to meet this obligation, it was far from clear that this same argument could be deployed to set aside a judgment of the Court in proceedings which have been finalised. Even if there were such a jurisdiction (and Clarke C.J. emphasised he was far from determining that it did), it could only be pursued by plenary proceedings and not through the deployment of the *Greendale* jurisdiction. Furthermore, Student Transport had identified no specific flaw which suggested that the process by which leave to appeal was refused by the Supreme Court was in any way flawed. Clarke C.J. concluded that the allegations raised by Student Transport concerned only allegations relating to the manner in which the proceedings were conducted before lower courts and such an appeal would not be an appropriate way in which to determine whether the very limited circumstances in which the principle of finality can be overcome have been established. **[7.1-8.4]**

References in square brackets are to paragraphs in the judgment of Clarke C.J.

Zalewski v. Adjudication Office & Ors [2021] IESC 24

On appeal from:

[2020] IEHC 178

Headline

The Supreme Court allowed the appeal. The majority of the Court held that the functions of the Workplace Relations Commission ("WRC") did constitute the administration of justice pursuant to the Article 34.1 of the Constitution, but that such administration of justice was sufficiently limited so as to fit within Article 37.1 of the Constitution and thus be permissible. A minority of the Court disagreed, finding the limitations insufficient and the procedures to constitute a breach of parties' fundamental rights under Article 40.3 of the Constitution.

Composition of Court

Clarke C.J., O'Donnell, McKechnie, MacMenamin, Dunne, Charleton and O'Malley JJ.

Judgments

O'Donnell J. (with whom Clarke C.J., Dunne and O'Malley JJ. agreed; McKechnie, MacMenamin and Charleton JJ. dissenting).

Background to the Appeal

The issues in this appeal were as follows: firstly, whether the adjudicative process established under the Workplace Relations Act 2015 ("the 2015 Act") amounted to the administration of justice required under the Constitution to be administered in courts; and secondly, whether the statutory framework under the 2015 Act adequately vindicated a claimant's rights under the Constitution and the European Convention on Human Rights ("EHCR") respectively. This appeal resulted from the purported dismissal of the appellant by his former employee, who then made statutory claims pursuant to the Unfair Dismissals Act 1977 and the Payment of Wages Act 1991. The procedure of those claims is now provided for in the 2015 Act and consequently it is that procedure which was challenged in this appeal. The High Court (Simons J., [2020] IEHC 178) held that the adjudicative process under the 2015 Act did not amount to the administration of justice. In addition, he made an order of *certiorari* setting aside the original dismissal decision made on 16th December 2016 and remitted the claims pursuant to the Unfair Dismissals Act 1977 and the Payment of Wages Act 1991 to the Director General of the Workplace Relations Commission. Leave to appeal to this Court was granted on 28th July 2020.

Reasons for the Judgment

O'Donnell J. (as he then was) firstly analysed the history and scope of the constitutional provision that justice is administered in courts by judges. This provision is of key importance to maintaining the separation of powers; however, it is not easy to define in practice what exactly the administration of justice consists of. As a result, the Irish courts have proceeded by way of "part broad definition, part analogy, and part description." This task became progressively more difficult as the administrative state grew and administrative bodies could exercise 'limited functions and powers of a judicial nature' in non-criminal matters, as per Article 37 of the Constitution. Consequently, a five-point test was developed in the decision of *McDonald v. Bord na gCon* [1964] I.R. 350 to determine what constituted the administration of justice. Only two of these points were in contention in this appeal and will be discussed in turn. **[36-88]** O'Donnell J. held that, in applying the *McDonald* test and being mindful of the growth of the administrative state, the courts have tended to a pragmatic approach in order to avoid restricting the capacity of the State to provide for decision-making functions in areas requiring specific expertise. In adopting this attitude, he noted that taking an overly narrow view of the contentious limbs of the *McDonald* test would be self-defeating where the other three limbs were met. **[89-97]**

With respect to the fifth limb of the test, which held that the making of an order by the Court which was historically exercised by that Court was indicative of the administration of justice, O'Donnell J. held that a claim for unfair dismissals in the W.R.C. and an action in court were not unduly dissimilar in substance. As a result, he held the form of order made by a decision pursuant to the 2015 Act was sufficient to comply with the fifth limb. **[98]**

The final limb to be considered related to the ability of a body to enforce (or have enforced) rights, liberties or liabilities. This limb presented a challenge, because the decision of the W.R.C. was not enforceable of its own force but required an application to be made to the District Court. However, O'Donnell J. held that the role of the Court in this instance was as a vehicle for an enforcement which was almost automatic. In other words, the court process is "conscripted in aid of enforcement" of the W.R.C. Consequently, he concluded that the function of the W.R.C., and the Labour Court on appeal, is the administration of justice. However, he held, this type of administration of justice was the limited kind permissible under Article 37. Article 37 permits the exercise of "limited functions and powers of a judicial nature". This means validating something which, in the absence of Article 37, would be considered an administration of justice and exclusively consigned to the courts, and not a mere component of the administration of justice such as the right to hear evidence or require the attendance of witnesses. In other words, he held that Article 37 permits a State-mandated decision-making function to be exercised by persons other than judges and it would seem to follow that these functions can determine some disputes conclusively. Applying this to the facts here, he held that there were a number of ways in which the functions and powers of the W.R.C. could be said to be limited in Article 37 terms. Firstly, it is limited by subject matter to areas of employment law specifically identified in the Act. Secondly, there is a limitation on awards which can be made by the W.R.C. – for example, in the case of unfair dismissals, an award of compensation is limited to 104 weeks' remuneration. Thirdly, there are limits on enforceability both within the W.R.C. itself and in the District Court to substitute compensation for redress by way of reinstatement or reengagement. Fourthly, the decision of the W.R.C. is subject to appeal and finally, the W.R.C. itself is a body subject to judicial review. **[100-117]**

Finally, on the issue of whether the statutory framework under the 2015 Act adequately vindicates a claimant's rights under the Constitution and the European Convention on Human Rights, O'Donnell J. held that the blanket prohibition on hearings in public breached the constitutional rule that justice must be done in public, and the lack of a provision permitting evidence to be given on oath breached the Constitution. However, the lack of a requirement of legal qualifications did not constitute a breach of the Constitution, nor did the lack of an express ability to cross-examine witnesses, as this could be permitted under the 2015 Act. Finally, as the constitutional issues disposed of the case, there was no need for the Court to consider the ECHR claim. **[134-147]**

McKechnie J. concurred that the function performed under the 2015 Act constituted the administration of justice under Article 34 but he dissented on whether or not this function could come within Article 37. He noted that Article 37 was intended as an exception to Article 34 and consequently must be narrowly interpreted. In applying this analysis to the functions of the W.R.C., he disagreed that its confinement to employment law issues rendered its functions limited as it was the "mainstream vehicle" by which employment law disputes are resolved. Furthermore, he remarked upon the wide-ranging potential impacts on a person involved in an employment law dispute and the comparatively large potential award relative to the average salary. He also disagreed that the powers of reengagement or reinstatement were limited. Consequently, he held that the function performed under the 2015 Act could not come under Article 37.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MacMenamin J., similarly to McKechnie J. agreed with the majority of the Court that the functions of the W.R.C and the Labour Court was an administration of justice as defined under Article 34.1 of the Constitution. He disagreed, however, with the conclusion that the procedures created under the 2015 Act should be "re-categorised" under Article 37, in circumstances where the extent to which the administration of justice conducted by the WRC could be characterised as "limited" had not yet been fully explored. He expressed concern that such an approach could make it possible, by statute, to engage in legislation which might have the effect of "hollowing out" Article 34. Discussing whether or not there were core areas of law which could not be taken away from the courts by statute, such as administrative law, he voiced apprehension that there are no objective constitutional criteria determining what such core areas are. He asked, rhetorically, whether it would not be possible for what was allowed for in the 2015 Act to be done in other areas of law, such as family law, or even in the area of fundamental rights. Finally, he held that the procedures under the 2015 Act should be seen as an administration of justice that did not come within Article 37 and that the full range of *Re Haughey* [1971] I.R. 218 rights should apply to applicants coming before the W.R.C. or Labour Court.

Charleton J. was critical of the approach taken by the W.R.C in its "template ruling", particularly the fact that the public is not admitted to view its activities, and the direct impact on the future working life of the appellant in this case. In analysing the operation of s. 43 of the 2015 Act, it was held that, in preventing a judge from hearing evidence from the employer and compelling them to consider submissions from only one side of the case, such an approach offended the Constitution, was incompatible with a fair and impartial hearing and could not be saved through any construction that did not do violence to the plain words of the legislation. Charleton J. went on to set out three criteria to determine what could be deemed to limit functions and powers of a judicial nature in this context, namely, technical matters, findings which do not have any result other than the public expression of an opinion with no consequent order and provisional orders and findings subject to immediate appeal which are so limited until confirmed by a court as to have no lasting effect. A distinction was also drawn between an appeal which enables the judicial function under Article 34, and one which utilises a court as a 'rubber stamp' or disables its effectiveness through partialness. It was held that, dissenting from the majority, judicial review was not appropriate in this context, as such a remedy cannot remove a bad judicial decision and replace it with a fair hearing as to fact leading to a correct factual analysis. In summary, it was held that a claim for unfair dismissal involves the administration of justice, which carries with it a degree of moment outside of the limited range of decisions that could be regarded as technical or administrative and the 2015 Act was deemed to completely deprive a justiciable controversy of a judicial determination, which is a constitutional wrong. Judicial review, held by the majority to be a sufficient method of ensuring a determination in this case, was held to be centred on procedure, jurisdiction and reasonableness, and therefore unable to substitute for a wrong-headed analysis by an administrator.

References in square brackets are to paragraphs in the judgment of O'Donnell J.

DPP v. Hannaway; DPP v. O'Brien; DPP v. Nooney; DPP v. Hannaway; DPP v. Shannon [2021] IESC 31

On appeal from:

[2019] IECA 38

Headline

The Supreme Court held that the handling of surveillance evidence was lawful under the correct interpretation of the Criminal Justice Surveillance Act 2009.

Composition of the Court

Clarke C.J., Mac Menamin, Charleton and O'Malley JJ.

Judgments

O'Malley J. (with whom Clarke C.J., Mac Menamin, Charleton and Baker JJ. agreed).

Charleton J. (with whom Clarke C.J., Mac Menamin, O'Malley and Baker JJ. agreed).

Background to the Appeal

This appeal raised questions regarding the handling of surveillance evidence and regarding the correct interpretation of the Criminal Justice Surveillance Act 2009 ("the 2009 Act"). The appellants had been convicted of assisting the Irish Republican Army ("the IRA") in the interrogation of other members in 2015. The Gardaí had relied on recordings gathered from listening devices as key evidence in the trial. The Garda National Surveillance Unit had set up these devices in a Castleknock property and captured recordings of an internal IRA enquiry into a failed operation. The authorisation for these listening devices was issued by the District Court under the provisions of the 2009 Act.

The appellants contended that certain provisions of the 2009 Act were not complied with. It was argued that this caused a breach of rights as a result of which, evidence resulting from the surveillance was not lawfully admissible. The Special Criminal Court and the Court of Appeal held that the evidence was obtained lawfully. Therefore, even though this evidence had been stored, accessed, and handled in a manner which breached s. 10 of the 2009 Act due to the absence of Ministerial authorisation for such storage, access or handling, such evidence would not be excluded. The Special Criminal Court convicted the appellants of membership of an unlawful organisation (the IRA) and the Court of Appeal upheld the convictions.

The question for the Supreme Court to consider was whether a true distinction could be drawn between the gathering of surveillance evidence as opposed to the storage of and access to same.

Reasons for the Judgment

O'Malley J., in delivering the lead judgment of the Court, dismissed the appeals and held that there had been no breach of s. 10 of the 2009 Act. The section cannot be read as conferring an exclusive power to the Minister to authorise access to surveillance evidence either on an *ad-hoc* basis or by way of regulations for the purpose of an investigation or trial. [**107**] It was also held that in any event, s. 10 has no relevance to the investigation process or the trial of offences. [**133**]

The Court held that the interpretation of s. 10 by the previous courts was incorrect, insofar as it appeared to give to the Minister a role in the investigation and prosecution of criminal offences. The Court held that this could not have been intended by the legislature and such an interpretation would have constitutional implications. [**133**]

Concurring with O'Malley J., Charleton J. held that, for practical purposes, the bugging devices referred to in the 2009 Act were required to make recordings generally and that s. 9 permitted such recordings to

be gathered in the process of surveillance. This was deemed necessary on the basis that the usefulness of surveillance was the recording capability in audio or visual format for use in trial. Therefore, the purpose of the legislation was held to be the enabling of officers to covertly enter a premises, plant a recording device, observe and record using the device and later remove such bugging devices. In the absence of recording, this surveillance would often be rendered a pointless operation, and the legislation was held to authorise by necessary implication the use of such recordings. [**1**]-[**4**]

Charleton J. emphasised the significance of statutory context and legislative and historical background in ascertaining the purpose and construction of a provision, noting that the backdrop of legislation could inform meaning and the intended parliamentary reality. The existing context in which Garda investigations were conducted was considered, with powers prior to the introduction of the 2009 Act outlined. The lawful seizure of items as evidence in a criminal investigation was said to imply their examination and preparation for court, among other steps, with the use of evidence being rendered largely ineffective or, at worst, impossible, were an alternative interpretation applied. An alternative interpretation would require juries to hear hours of repetitive to and fro dialogue – a requirement not seen in the case of more traditional evidence, with Charleton J. citing *Nash v Director of Public Prosecutions* [2017] IESC 51 as an endorsement of the practice of sending evidence abroad to facilities with more advanced testing. [**6**]-[**13**]

It was held that the argument made by the accused in this case would lead to a radical change to the legislation that would be contrary to the constitutional order, requiring the courts, by way of statutory interpretation, to prevent the Oireachtas, as the body with the sole and exclusive power of making laws for the State under Article 15.2, from introducing a new form of evidence to the Irish courts. Separating evidence from recordings of that evidence obtained by way of surveillance was deemed untenable, with the scheme of the 2009 Act enabling all the relevant powers over seized items to also apply to seized data by way of surveillance, rendering the evidence obtained and processed in this case lawfully obtained. [**14**]-[**17**]

References in square brackets are to paragraphs in the judgments of Charleton and O'Malley JJ.

Náisiúnta Leictreaech Contraitheoir Éireann Cuideachta Faoi Theorainn Ráthaíochta (NECI) v. The Labour Court, The Minister For Business Enterprise and Innovation, Ireland And The Attorney General [2021] IESC 36

On appeal from:

[2020] IEHC 303

Headline

The Supreme Court set aside part of the High Court judgment ([2020] IEHC 303), ruling instead that Chapter 3 of the Industrial Relations (Amendment) Act, 2015 was *not* an unconstitutional delegation of legislative power to the Labour Court. It upheld the High Court on the issue as to the *ultra vires* nature of the Labour Court's recommendation for the Sectoral Employment Order (SEO), holding that insufficient reasons were provided by it when deciding against NECI's submissions.

Composition of Court

Clarke C.J., O'Donnell, MacMenamin, Dunne, Charleton JJ.

Judgments

MacMenamin J. (with whom Clarke C.J., O'Donnell and Dunne JJ. agreed).

Charleton J. (with whom Clarke C.J., O'Donnell and Dunne JJ. agreed).

Background to the Appeal

Chapter 3 of the 2015 Act allows trade unions or employers' organisations to request the Labour Court to examine terms and conditions relating to employment within a particular sector of the economy. The Labour Court may then make a recommendation to the Minister to create an SEO that sets out minimum pay rates, as well as pension and sick pay schemes. The background to these proceedings emerges from an application made by workers and employers in the electrical contracting sector for an SEO. NECI, a company representing small and medium sized electrical contractors, opposed the SEO and brought judicial review proceedings seeking to quash the recommendation of the Labour Court.

In the High Court, Simons J. held that, in enacting Chapter 3 of the 2015 Act, the Oireachtas had abrogated its constitutional role as the sole legislator of the State as vested to it by Article 15.2.1° of the Constitution. Though recognising that the principles and policies test, as addressed in *Cityview Press v. An Comhairle Oiliúna* [1980] IR 381, allows for the Oireachtas to delegate limited legislative functions to subordinate bodies, Simons J. concluded that the terms of Chapter 3 were too vague and failed to provide sufficient guidance or limitation on the power of the Labour Court. He held that the range of choices delegated was so broad, that it could not be seen as a delegated power and was, instead, legislative in nature, thus violating Article 15.2.1°.

On the statutory vires issue, Simons J. held that in purporting to carry out the procedures laid down in s. 16 of the 2015 Act (which provides that the Labour Court shall provide a recommendation on an SEO to the Minister, having regard to matters such as impact on employment etc.), the Labour Court had failed to give adequate reasons for its recommendation. Alongside this, the pension scheme envisaged in its recommendation was a double delegation of power by the Labour Court to the trustees of the Construction Workers' Pension Scheme ("CWPS") who, under the scheme, could determine rates of contribution. This infringed the principle that a delegate may not itself delegate.

Reasons for the Judgment

MacMenamin J., writing for the Supreme Court, considered first the historical context that led to the enactment of the 2015 Act, including the decisions in *Ryanair v. The Labour Court* [2007] 4 I.R. 199, *John Grace*

Fried Chicken Ltd v. Catering Joint Labour Committee [2011] 3 I.R. 211, and *McGowan v. The Labour Court* [2013] 3 I.R. 718. In *McGowan*, the Supreme Court considered a constitutional challenge made against s. 27(3) of the Industrial Relations Act, 1946 which provided for the creation of Registered Employment Agreements ("REAs"). These allowed trade unions and employers to create binding agreements regulating working conditions across a whole economic sector, of whom the parties were substantially representative. The Supreme Court found that s. 27(3) violated 15.2.1° of the Constitution. The 2015 Act was therefore a legislative response to the decision in *McGowan*, but reflects also evolutions in EU and ECHR law, viz. posted workers and collective bargaining. **[17-32]**

Turning to the principles and policies test, MacMenamin J. considered this not as an independent test with constitutional footing, but instead as "indispensable foundation-stone" to help determine whether the Oireachtas has failed to act as sole legislator, by asking whether the Oireachtas has sufficiently laid out the principles and policies in primary legislation, so that subordinate bodies can give effect to them. Approving of the earlier Supreme Court decisions in *Bederev v. Ireland* [2016] 3 I.R. 1 and *O'Sullivan v. Sea Fisheries Protection Authority* [2017] 3 I.R. 751, MacMenamin J. considered that legislatures in democratic societies cannot be expected to predetermine every choice made by subordinate bodies. Rather, it is necessary that the Oireachtas lays down basic, discernible rules of conduct or guidelines which the subordinate body must observe. **[57-70]**

MacMenamin J. analysed Chapter 3 of the 2015 under the light of this domestic and US jurisprudence. He held that the term "economic sector" was sufficiently precise, and that a question as to how the term is applied to a given situation, does not mean the definition is deficient. MacMenamin J. regarded s. 15 and s. 16 as imparting discernible intelligible policies, and that the concerns raised by Simons J. as to their merit or far-reaching consequences did not translate to the Labour Court's decision-making becoming legislating. He held that the position under the 2015 Act was entirely different to the situation which gave rise to the finding of unconstitutionality in *McGowan*. **[72-92]**

MacMenamin J. discussed the concern raised by Simons J. as to whether an SEO could accord with EU or domestic competition law**.** Pointing to s. 19 and the tenor of the Act as a whole, he concluded that one of the principles of the Act was to protect against the issue of social dumping, reflecting an evolution of EU law that is characterised through four CJEU judgments namely *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet & Others*, Case C-341/05; *International Transport Workers' Federation & Anor. v. Viking Line ABP & Anor.*, Case C-438/05; Case C-319/06, *Commission v. Luxembourg* [2007] ECR I-4323; Case C-346/06, and *Rüffert v. Land Niedersachsen* [2008] ECR I-1989, and the need to conceptualise them in light of Articles 27 and 28 of the Charter of Fundamental Rights and the amended Posted Workers Directive 2018/957/EU. **[104-114]**

MacMenamin J. next considered the statutory safeguards provided for in the 2015 Act, whereby first, under s. 16(3)(b), the Minister has to be satisfied that the Labour Court has complied with the provisions of Chapter 3, before the recommendation is then reviewed before each House of the Oireachtas (s. 17(4)). He held that Simons J. failed to give due weight to the extent of the protections or safeguards in the Act, and concluded that Chapter 3 of the Act does not offence Article 15.2.1° of the Constitution. **[120-138]**

The judgment then considered the statutory *vires* issue through an examination of caselaw on the duty to give reasons. He cited *Balz & Anor. v. An Bord Pleanála* [2019]

IESC 90 as authority that decision-makers must engage with significant submissions, and that bald statements that consideration was given is not enough. He found that what was absent from the recommendation and accompanying report was a full description as to the reasons how or why the Labour Court had reached its conclusions. **[153-169]a**

Finally, MacMenamin J. addressed the 'double delegation' argued to be present in the terms of the pension agreement. The pension scheme was set out to be "with no less favourable terms than those set out in the Construction Workers' Pension Scheme". Preferring a narrower approach than that taken by Simons J., MacMenamin J. held that the words "no less favourable" did not comply with what is required by s. 16(5)(f) of the 2015 Act. **[185]**

Mr. Justice MacMenamin ordered that the part of the High Court judgment which held that Chapter 3 of the 2015 Act was repugnant to the Constitution be set aside and upheld the High Court judgment in relation to the statutory *vires* and pension scheme issues, directing that the matter be remitted to a different panel of the Labour Court to prepare and furnish a recommendation giving reasons **[186].**

Concurring Judgment of Mr. Justice Charleton

Charleton J., concurring with the judgment of the Court, held that the purpose of Article 15, stemming from Article 12 of the 1922 Constitution, was to preserve the delegation of legislative powers to government minister and local authorities, noting that at the time of drafting of the 1937 Constitution, legislation was significantly less complex, and quasi-judicial decision making was sparsely resorted to as a societal structure. **[1-3]** Charleton J. also outlined a number of ways in which delegated legislation can be subject to democratic scrutiny by the Oireachtas, with the most common mechanism operating by requiring one or both Houses of the Oireachtas for a positive consideration of subordinated legislation prior to the statutory instrument achieving the force of law. Whether subordinated legislation has been returned to the Oireachtas for express or tacit approval has been held to be a factor to be considered as to whether the Oireachtas has unconstitutionally abdicated the powers granted to them under Article 15. **[5-11]**

The possibility, as noted in *Maher v. Minister for Agriculture and Food* [2002] 2 IR 139, that European legislation may reduce policy decisions on a national level to such an extent as to enable its implementation through subordinate legislation, was accepted by Charleton J. The decision of Mr Justice Simons in the High Court to hold that there was no evidence in the 2015 Act suggesting that it the Oireachtas had adopted Directive 96/71/EC as a legislative background to be used in setting limits to any subordinate action was supported, but it was held that any necessary legislative and historical background to the enactment must be considered as a part of informed interpretation. Contrary to the view from the High Court, it was held that an Act of the Oireachtas is not shorn of the factual situation which motivates its passing. In the case of the 2015 Act, Charleton J. held that it was part of the necessary background to the construction of the Act that the State had moved to action against the exploitation of non-national workers. In considering the proper boundaries of subordinate legislation, it was held that the Oireachtas may only delegate those powers which arise by necessary implication of the entirety of the statute, citing *Bederev v Ireland* [2016] IESC 34. Furthermore, the Oireachtas is presumed not to intend "unjust and tyrannous abuse", per *Burke v Minister for Labour* [1979] IR 354 at 362, and so delegated legislation must be confined to the power given and for the purpose given – any results which are arbitrary, unjust, or partial can never be intended. **[12-17]**

The significance of ensuring that any delegation be done in such a way as to preserve the control of the Oireachtas over what is done subordinately was highlighted by Charleton J. as the fundamental rule of subordinate legislation. While an abdication of democratic responsibility on the part of the Oireachtas through delegation would be contrary to the Constitution, it was held that, where reconsideration and either the absence of objection or a positive affirmation on the part of the legislature was required, such a system would be democratic and in line with the obligations of the Oireachtas. Limited delegation is permissible where it is for an express purpose and with sufficient guidance to an assured outcome, or an outcome within a defined and limited range, or discretion within a limited assessment. **[21-26]**

In considering the factors to be assessed when determining the validity of legislative delegation, it was held that difficulty in framing legislation could not constitute a valid defence on the part of the Oireachtas. The nature of the body to which the authority was delegated was deemed to be less significant as such a body would be exercising a public law function, and therefore would be amendable to judicial review. The doctrine of separation of powers was held to not deny the Oireachtas the power to direct that an administrative body, properly designated for that purpose, and properly delimited as to its task, should have a latitude within which it is to ascertain the conditions which the Oireachtas has made prerequisite. **[29-34]**

References in square brackets are to paragraphs in the judgments of MacMenamin and Charleton JJ.

Minister for Communications, Energy and Natural Resources and Michael O'Connell v. Wymes [2021] IESC 40

On appeal from:

[2020] IECA 182

Headline

The Supreme Court held that a debtor could not be adjudicated bankrupt while he or she had made a challenge to the bankruptcy summons, however, an act of bankruptcy could still occur while a debtor had made a challenge to the bankruptcy summons.

Composition of Court

O'Donnell, Dunne, Charleton, O'Malley, Baker JJ.

Judgment

Baker J. (with whom O'Donnell, Dunne, Charleton and O'Malley JJ. agreed).

Background to the Appeal

The issue for determination in the appeal was net: whether a debtor can commit an act of bankruptcy when he or she has challenged the bankruptcy summons relied on by the creditor. The issue arose owing to a complex factual history. Mr. Wymes owed a finally determined debt of €4,881,012.86 (he had made no payment on the debt). A bankruptcy summons issued to Mr. Wymes and he sought to challenge this summons. That challenge failed and an appeal was unsuccessful. The petition issued in 2010, after the decision dismissing the challenge to the summons but before the decision of this Court on appeal. The respondent had been restrained from acting on the petition pending the conclusion of the appeal process and was heard by Meenan J. in 2018 who adjudicated Mr Wymes bankrupt. Mr Wymes then sought to bring a post-adjudication challenge by Notice to Show Cause pursuant to s. 16 of the Bankruptcy Act 1988, as amended, ("the Act of 1988") *inter alia* on the ground that no act of bankruptcy had occurred in the three months preceding the petition, and his argument was that he could not have committed an act of bankruptcy whilst the validity of the bankruptcy summons had yet to be finally adjudicated. The argument raised was that an act of bankruptcy, required under the Act of 1988, could not occur when a challenge was taken to the bankruptcy summons. An act of bankruptcy occurs when a debtor does not make payment demanded in a bankruptcy summons in a 14-day period following the issuing of a bankruptcy summons. The appellant argued that the running of time in which an act of bankruptcy occurs is stayed or suspended following a challenge to the summons under the Act of 1988. The Supreme Court dismissed the appeal.

Reasons for the Judgment

The question arising in the appeal was one of statutory interpretation of the Bankruptcy Act 1988: whether a debtor can commit an act of bankruptcy when he or she has challenged the bankruptcy summons relied on by the creditor. Baker J. analysed the authorities and concluded that the "the service of a bankruptcy summons is not a matter of shame or stigma, any more than a service by a creditor of a demand for payment in the ordinary course. The notice acts rather in two ways: as a warning to the debtor that the creditor is contemplating the presentation of a petition, and which the debtor is afforded an identified time to pay. The deeming provision operates as a precondition to the presentation of a petition, but also as the identification of an essential proof and how that is to be met." Baker J. held that the clear language of the Bankruptcy Act 1988 provides for statutory time limits and provide the steps that must be taken by both creditor and debtor to engage the bankruptcy process. Baker J. held that the statute provides a definition of an act of bankruptcy and deems certain happenings to be an act of bankruptcy. The act of bankruptcy is under the statutory scheme the failure to pay on foot of a summons. Baker J. concluded that a debtor could not be adjudicated bankrupt whilst the challenge to the summons remained undetermined, however an act of bankruptcy can occur by failure to satisfy a bankruptcy summons, notwithstanding challenge under s. 8(5).

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Fox v. Minister for Justice and Equality, Ireland and the Attorney General [2021] IESC 61

On appeal from:

[2020] IECA 141

Headline

The Supreme Court held that there is no constitutional obligation to conduct an investigation into the failings of a previous investigation. The Court further held that the critical date from which obligations may fall on the State under the ECHR is 31st December 2003, when the ECHR Act 2003 came into force. The Court was not satisfied that the ECHR imposes an obligation on the State to conduct an investigation into the failings of a previous investigation.

Composition of Court

Clarke C.J., O'Donnell, MacMenamin, Dunne, Charleton O'Malley, Baker JJ.

Judgment

The Court

Background to the Appeal

Seamus Ludlow was murdered on 2nd May 1976 near Dundalk, Co. Louth. It was suggested by his family that Mr. Ludlow, a forestry worker with no connection to any paramilitary groups, may have been mistaken for a senior member of the IRA, and that loyalist paramilitaries and the British State Security Services may have been involved in his murder. Further, it was suggested that members of An Garda Síochána might have been ordered to not carry out an appropriate investigation.

No person has ever been charged in relation to the murder of Mr. Ludlow and Thomas Fox, his nephew, has campaigned for many years seeking a public inquiry into the initial Garda investigation which he argues was flawed. Mr. Fox commenced proceedings seeking that the Minister for Justice and Equality establish two Commissions of Investigation under the Commission of Investigation Act 2004, the first to investigate the Garda handling of the original investigation into Mr. Ludlow's murder and the second to investigate missing garda documents. Those proceedings were unsuccessful in the High Court and the appeal to the Court of Appeal was dismissed.

The appeal can be grouped into Constitutional and ECHR issues. First, whether the Constitution provides for a requirement to carry out an investigation into deaths under Article 40.3 of the Constitution, and the extent of such a constitutional obligation. Second, a question arose to the extent of Ireland's procedural obligation to conduct an investigation into certain deaths under Article 2 of the European Convention of Human Rights and, whether that obligation applied in Mr. Ludlow's case.

Reasons for the Judgment

Clarke C.J. stated that in the course of argument it became clear that what was sought by the appellant was not so much an inquiry into the circumstances surrounding the murder of Mr. Ludlow but rather a further inquiry into the established inadequacies of the original investigation into his murder by An Garda Síochána involving a failure to follow up, in 1979, on important intelligence received from the Royal Ulster Constabulary.

On the question of whether there was an obligation under the Constitution arose to conduct an appropriate investigation into certain types of deaths, Clarke C.J. determined that the question arising in this case was limited to whether there is an obligation to investigate any failure of an appropriate initial investigation. While he was prepared to accept that there may be circumstances where the State bears a constitutional

obligation to have in place appropriate mechanisms to investigate certain types of deaths precisely because the express constitutional right to life may be enhanced by such measures, he was not satisfied that there was sufficient exploration of the approaches in other jurisdictions to establish such a right in the present case, and he did not believe that the ECHR interpretation of the right could simply be applied.

Clarke C.J. was satisfied that the ground had not been laid for pushing the scope of the right to life under the Irish constitution to the extent of not only requiring the State to investigate certain deaths but going further and imposing an obligation to investigate of what is said to have been an inadequate initial investigation.

On the question of the applicability of Article 2 of the ECHR to this case, there was a preliminary issue to be determined. Mr. Ludlow's murder occurred prior to the ECHR becoming part of domestic law in the ECHR Act 2003 ("the 2003 Act"), a question arose as to whether Ireland's obligations under the ECHR might extend to events that occurred prior to that date or whether a fresh obligation to properly investigate the murder might have arisen after the coming into force of the 2003 Act. Clarke C.J. examined Ireland's approach to the incorporation of international law into domestic law, he determined that the critical date for the purposes of the effectiveness of the ECHR was 31 December 2003 the date when the 2003 Act came into force. Clarke C.J. confirmed that there are no retrospective effects of the 2003 Act and international law does not have direct effect.

The appellant argued that, notwithstanding the conclusion on the critical date, in circumstances where most of the procedural steps occurred after the critical date, along with a number of other criteria relating to the ECtHR jurisprudence, obligations in domestic law could apply to matters that occurred before the critical date. The appellant argued that this applied in the instant case as the majority of the investigation occurred after 2003.

Clarke C.J. examined the ECtHR jurisprudence on the Article 2 procedural obligation, but was not satisfied that the ECHR imposes an obligation on the State to conduct an "investigation into an investigation", at least where it has not been shown that there is a realistic possibility that the conclusions reached by such an investigation may in fact cast further light on the circumstances surrounding the death in question and/or increase the possibility of a credible prosecution being capable of being brought.

PMcD v. The Governor of X Prison [2021] IESC 65

On appeal from:

[2018] IEHC 668

Headline

The Court dismissed the appeal and rejected the appellant's claim for damages and declaratory relief.

Composition of the Court

Clarke C.J., O'Donnell, Mac Menamin, Dunne and Charleton JJ.

Judgments

O'Donnell J. (with whom Clarke C.J agreed).
Mac Menamin J.
Dunne J.
Charleton J.

Background to the Appeal

The plaintiff ("the appellant") in this case had sought damages and a declaration that the Governor of X Prison ("the respondent") had breached the terms of the Irish Prison Service Prisoner Complaints Policy Document ("the policy document") in the High Court. The appellant was a prisoner with serious psychiatric and other mental health diagnoses, who also had a history of self-harming and food refusal. The appellant had previously requested to be placed in an isolation regime, as he was worried that other prisoners would harm him. Leading up to the initiation of proceedings, the appellant experienced difficulties with his prison conditions, which, to him were of extreme importance. He began to write letters of complaint pursuant to the policy document but received no response to his complaints within the time stipulated in the document. He commenced a hunger strike in response to the failure of the respondent to address his concerns but was persuaded to end it shortly after a High Court judgment (not the subject of this appeal) determined that he did have capacity to decline resuscitation.

In the High Court, the appellant was awarded damages of €5000 "*in respect of a matter for which the plaintiff [was] primarily responsible, but where the inaction of the defendant led to circumstances becoming far more grave and dangerous than those even the plaintiff himself intended in the early days of the hung strike*". The High Court judge noted that there had been a delay of six weeks in dealing with the appellant's complaints and no explanation was forthcoming for this delay. She also granted a declaration that the respondent had breached the terms of the policy document.

The respondent appealed to the Court of Appeal which was asked to consider whether the trial judge was right to award damages and a declaration. The Court of Appeal noted that the High Court judge had accepted that a breach of the Prison Rules was not actionable, and it held that the adoption of the policy document, intended as a general framework, could not be said to mean that the respondent has assumed a duty of care, nor established a relationship of proximity. Such a liability, the Court of Appeal concluded, would have to arise on a basis specifically rejected by the Supreme Court in Glencar Explorations plc and Anor. v. Mayo County Council (No. 2) [2002] 1 I.R. 84. The Court of Appeal found that in circumstances where no breach of a justiciable right was found to have been committed by the respondent, it was not permissible to grant a declaration or award damages and it set aside the reliefs granted by the High Court.

Reasons for the Judgment

On appeal to the Supreme Court, MacMenamin J., writing for the Court, dismissed the claim for damages. MacMenamin J. dissented from the majority on the matter of the declaratory relief sought, however, holding that he would grant a declaration to the effect that the

respondent did not comply with the requirement to provide an effective complaints system in the case of the appellant.

MacMenamin J. confirmed that the issue of negligence must be decided in light of the judgment in *Glencar*. The four tests set out in *Glencar* were (i) whether the damage (or injury) was foreseeable; (ii) the proximity of the relationship; (iii) whether there existed a countervailing policy consideration; and (iv) whether it would be just and reasonable to impute a duty of care on the facts of the case **[37].** He considered also the case law put forth by the appellant on duties of care in prison contexts, including *Reeves v. Commissioner of Police for the Metropolis* [1999] 3 W.L.R. 363 and *Butchart v. The Home Office* [2006] 1 W.L.R. 1155, but found these not to be helpful to the appellant's case.

Returning to *Glencar* and the Court of Appeal's findings on each of the tests, MacMenamin J. held that the *causa causans* of the hunger strike was the respondent's refusal to acquiesce to the appellant's requests, not his failure to respond to the appellant's requests in time. The respondent was under no obligation to provide the appellant with the exact prison conditions he desired, and hence, no causation could be identified to link the failure to respond to the appellant's injuries **[53]**.

As to proximity and foreseeability of injury, MacMenamin J. held that the situation was created by the appellant's own autonomous decision to go on hunger strike, and that, as a person of sound mind, he was able to foresee the consequences of his own course of action **[55]**. As to whether there were countervailing policy considerations, MacMenamin J. noted that courts will be cautious in imposing duties of care where to do so might unnecessarily inhibit public authorities in discharging their functions **[56]**. On the 'just and reasonable' heading, MacMenamin J. agreed with the Court of Appeal that it would not be in the interests of prisoners as a whole for a duty of care to be imposed **[60].**

References in square brackets are to paragraphs in the judgment of MacMenamin J.

Director of Public Prosecutions v. District Judge Elizabeth McGrath [2021] IESC 66

On appeal from:

[2019] IECA 320

Headline

The Supreme Court dismissed the appeal, upholding the original costs order made against the Director of Public Prosecutions ("DPP"). held that the exclusion of the DPP and Gardaí prosecuting on their behalf from the possibility of an award of costs is *ultra vires* the power of the District Court rule-making committee.

Composition of Court

Clarke C.J., O'Donnell, Charleton, O'Malley and Baker JJ.

Judgments

O'Donnell J. (with whom Clarke C.J., Charleton, O'Malley and Baker JJ. concurred)

Background to the Appeal

The core issue in this appeal was the validity of a costs order made by the respondent District Judge against the DPP. The order was made following the withdrawal of prosecutions against two men for assault by the DPP. The DPP then applied for judicial review of this order, on the grounds that O. 36, r. 1 of the District Court Rules of 1997 precluded the making of an order for costs against the DPP or any member of An Garda Síochána prosecuting on his or her behalf. In the High Court, Hanna J. made an order of *certiorari* quashing the order for costs of the 16th of September, 2009. The Court of Appeal (Edwards J.; Birmingham P. and McCarthy J. concurring) allowed the appeal. By a determination of the 9th of February, 2021 ([2021] IESCDET 17), a panel of this court granted leave to the DPP to appeal to this court against the decision of the Court of Appeal.

The question of the validity of this order involved a complex history of various legislative provisions and District Court rules concerning the ability of a District Judge to make costs orders. Section 59 of the Dublin Police Act, 1842 ("the 1842 Act") provided for the ability of "any divisional justice" to award costs to or by either of the parties to a proceeding. This jurisdiction was then transferred to the newly created District Court by s. 78 of the Courts of Justice Act, 1924 ("the 1924 Act") and subsequently to the District Court created by the Courts (Establishment and Constitution) Act, 1961 by s. 33 of the Courts (Supplemental Provisions) Act 1961 ("the 1961 Act"). Both the 1924 Act and the 1961 Act contained provisions permitting the making of rules by the District Court, including rules relating to questions of costs and the adaptation or modification of any statute necessary for those purposes. One such rule created pursuant to this power was Rule 37(a) of the 1926 Rules, which provided that no order of costs could be made against either the Attorney General or a prosecuting Garda, although sub-rule (b) created an exception where the proceedings related to taxes or duties under the management of the Revenue Commissioners. A similar rule and sub-rule was created as part of the new District Court Rules in 1948 (S.I. 431 of 1947). These rules were then adapted to the newly established District Court by s. 48 of the 1961 Act, which also had the effect of continuing the power of the District Court Rules Committee to make rules for the District Court. The District Court Rules in force when these proceedings were commenced provided in Order 36, rule 1 that the Court could not award costs against the D.P.P. or a member of An Garda Síochána acting in discharge of their duties as a police officer.

Importantly, the original 1842 Act only applied to proceedings within the Police District of the Dublin Metropolis. The Petty Sessions (Ireland) Act 1851 Act ("the 1851 Act") governed summary proceedings in the country outside that area and contained no limitation as to whom costs may be awarded against (s. 22(9)). The 1924 Act created a single District Court which included both the powers exercised by a Justice of the Peace sitting at Petty Sessions (s. 77) and those exercised or capable of being exercised by the Divisional Justices of the Police District of Dublin Metropolis (s. 78). However, as discussed above, each jurisdiction had different rules on the ability of the respective judges to award costs which were not resolved on the creation of the new

District Court. While s. 22(9) of the 1851 was repeated by s. 9 of the Courts (No. 2) Act 1986, s. 59 of the 1842 Act was never addressed.

Consequently, the issue to be resolved on appeal was as follows: the original costs order would be unlawful as a result of being contrary to Order 36 (carving out the exception relating to the D.P.P.) and must be quashed unless it could be established that the rule itself is invalid by reference to the provisions of s. 59 of the 1842 Act.

Reasons for the Judgment

O'Donnell J. (as he then was) considered several decisions concerning the intersection of the outlined legislation and rules, particularly the rules containing provisions permitting the making of rules by the District Court, including those relating to questions of costs and the adaptation or modification of any statute. He began by rejecting the argument that early decisions could be distinguished on the basis that there was a difference between the provisions of the Free State Constitution and Bunreacht na hÉireann. Furthermore, he discussed a case which had featured heavily both in the Court of Appeal and in the submissions before this Court, *Sweetman v. Shell E. & P. Ireland Ltd.* [2016] IESC 58, [2016] 1 I.R. 742 ("*Sweetman*"), which related to the then-new rules on costs in environmental proceedings. He held that it was an error to map the language used in statutory interpretation directly onto statutory provisions referring to practice and procedure to argue that "procedure" cannot include costs. The decision in *Sweetman* could not be understood as making a general determination that the jurisdiction in respect of costs is substantive and not procedural, especially where the statutory language says explicitly that costs issues are considered as coming within matters of practice and procedure. **[15-42]**

O'Donnell J. next considered the limit of the range of decisions in respect of costs which could be made by the rule-making authority under the 1924 and 1961 Acts in order to consider whether O. 36 of the District Court Rules is within the scope of rule-making permitted by those statutes and consequently whether it is an impermissible amendment of s. 59 of the Act of 1842. In order to do this, he examined the meaning of the terms 'modification' and 'adaption' as contained within the rule-making powers in the 1924 and 1961 statutes, particularly by reference to the historical context of the legislation given the transition to independence. He held that the best approach to this case (given the uncertainty regarding the precise legal position under the 1842 Act and prior to 1922) was to determine whether the respective Rules exceeded any permissible are of rule-making authority permitted by Article 15.2.1°. In order to answer this question, the test in *Cityview Press Ltd. v. An Comhairle Oiliúna* [1980] I.R. 381 was considered, which states "the test is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself". O'Donnell J. remarked that this approach was helpful but could not be considered an infallible guide and held that a useful approach in this case would be to ask whether what was permitted by the primary legislation was an abdication of the power or the duty of the Oireachtas, or whether what was done was an impermissible encroachment on an area consigned by the Constitution to the Oireachtas. Applying this to the facts at hand, he held that it was not the case that the Oireachtas had a general view about the content of the Rules set out in the legislation, leaving only details to be filled in, rather it envisioned the content of those Rules to be decided by a body with expertise not within the jurisdiction of the Oireachtas. Consequently, he held that the terms of O. 36 were not within the area of permitted delegation and furthermore intruded on an area of decision required to be made by the Oireachtas. As a result, it was held that the exclusion of the D.P.P. and Gardaí prosecuting on their behalf from the possibility of an award of costs is *ultra vires* the power of the rules making committee. **[43-80]**

References in square brackets are to paragraphs in the judgment O'Donnell J.

O'Callaghan v. Ireland and the Attorney General [2021] IESC 68

On appeal from:

[2020] IECA 180

Headline

The Supreme Court allowed the appellant's appeal from the Court of Appeal and granted him a declaration to the effect that the delay in securing him a hearing for his criminal appeal infringed his constitutional right under Article 38.1 of the Constitution. The Supreme Court also awarded €5000 in damages in recognition of the breach of his Constitutional rights.

Composition of Court

Clarke C.J., O'Donnell, MacMenamin, Dunne and Baker JJ.

Judgment

MacMenamin J. (with whom Clarke C.J., O'Donnell, Dunne and Baker JJ. agreed)

Background to the Appeal

The appellant was charged with robbery and was found guilty following a trial in February 2011. He was sentenced to 10 years' imprisonment. He sought to appeal his conviction days after his sentencing, and his appeal was ultimately heard by the Court of Criminal Appeal on 18th April 2013. By judgment dated 31st July 2013, his conviction was quashed. This time period was before the creation of the Court of Appeal, and a lack of judges and insufficient resourcing had led to large backlogs in many cases. The appellant launched proceedings alleging systemic delay in the High Court in February 2015. The High Court judge held that the claim should be dismissed on the grounds that, though the delay was significant, it was not inordinate. She noted that there were means available to the appellant to expedite his hearing, including an application for bail and an application for priority, of which he had not availed ([2019] IEHC 782).

On appeal to the Court of Appeal, that Court held that the constitutional right to a trial with due expedition falls to be considered in light of ECtHR jurisprudence, though observed that when dealing with a breach of a constitutional right in a criminal process rather than a 'Convention right', that comparisons with ECtHR case law might not always be helpful, as cases are highly fact-specific. The broad framework within which to bring and consider such a constitutional action was outlined in *Nash v. DPP* [2017] 3 I.R. 320. Drawing together domestic and ECtHR jurisprudence, the Court of Appeal laid out a general framework of factors that a court should have regard to when considering whether a person's right to a trial with due expedition has been infringed.

The Court of concluded that the proceedings took a little over four years across two levels of jurisdiction, rendering it a 'borderline case' in ECtHR terms. It held that there were three countervailing factors which argued against a finding of a breach of the appellant's constitutional rights. These factors were i) that the appeal was not ready to obtain a date for trial until the grounds of appeal had been amended (some 6-7 months after the appellant had received the transcript); ii) that the appellant had failed to make a bail application which might have released him from custody pending the appeal; and iii) that there was an absence of comparator evidence which would permit an assessment of what was reasonable or not.

Reasons for the Judgment

The appellant appealed to the Supreme Court and the decision of the Court of Appeal was overturned.

MacMenamin J. outlined the history and law relating to systemic delay in proceedings, emphasising that the delay was the failure of the State to provide sufficient

resources, not a delay caused by judges. He described the extent of the problem that existed within the Irish courts system by reference to the Report of the Working Group on a Court of Appeal ("the Report"), noting that by the time the Court of Appeal was established in 2014 there were 3000 civil and 660 criminal appeals pending. He referred also to the evidence given by the Registrar of the Court of Criminal Appeal at the High Court hearing. **[8-15]**

MacMenamin J. traced the evolution of ECtHR jurisprudence under Article 6(1), which guarantees a fair trial within a reasonable time. Recalling that though this case was to be considered under the Constitution, the ECtHR judgments could still assist in identifying relevant factors or steps to consider in deciding whether there was unreasonable delay. These were the commencement and conclusion dates of the proceedings, taking into account i) the complexity of the case; ii) the behaviour of the applicant; iii) the behaviour of the national judicial authorities; and iv) whether there was a special reason for diligence. **[39-48]**

Next, MacMenamin J. discussed the case law on systemic delaying involving this State, including *McFarlane v. DPP* [2008] 4 I.R. 117 which explicitly held that there was no qualitative difference between prosecutorial and systemic delay, and that the Constitution allowed for a right to damages for systemic delay. In the ECtHR judgment in *McFarlane v. Ireland,* the majority decided to consider the complaints under Article 13 (absence of effective remedy in national law), concluding that an application only had to exhaust those remedies that were "available, sufficient and certain in theory and practice, and holding that the State had failed to establish such. The minority judgments argued that the Supreme Court in *McFarlane* had confirmed the existence of a constitutional right. Of relevance also were the ECtHR judgments in *Healy v. Ireland* (App. No. 27291/16) *and Keaney v. Ireland* (App. No. 72060/17).

The recent Supreme Court judgment in Nash v. DPP clarified domestic law, confirming the existence of a constitutional right to a timely trial. In order for there to be a claim in damages, Clarke J. (as he then was) held that it would be necessary to demonstrate a "sufficient level of culpability on the part of the State", and that the matter could not be considered in a vacuum but with awareness of all the circumstances of the case. **[49-82]**

In considering the case before him, MacMenamin J. stated he had no hesitation in adopting the framework suggested by the Court of Appeal. This involved determining the overall time period and the sub-periods within the timeframe which could be excluded as reasonable, such as the preparation of the reserved judgment. Next was to determine whether the State was responsible for any of the periods of time. The period of inactivity in a list to fix dates was caused by systemic delay and was hence the responsibility of the State. **[91-95]**

MacMenamin J. next assessed the three factors held by the Court of Appeal to lead to a finding against the appellant. That the appellant had amended his grounds of appeal did not add to the delay in obtaining a hearing date, according to the evidence of the Registrar in the High Court hearing. Regarding the appellant's failure to apply for bail, MacMenamin J. held the question was whether there was evidence that it was probable that the appellant would actually have been granted bail and found that was unlikely in this case. Furthermore, had bail been granted, that might have actually caused further delay to his appeal as he would have lost priority as a custody case. As to the absence of comparator evidence, MacMenamin J. noted that a delay of up to two years in each level of jurisdiction is acceptable in ECtHR jurisprudence on civil cases; however, this was a criminal case. He suggested that a comparison might also be the speed with which criminal appeals are now dealt with by the Court of Appeal. **[96-104]**

Moving on, MacMenamin J, considered the impact on the appellant, which was significantly greater because he was in custody. This did not mean that any award of damages was granted on the basis that the appellant should not have been in custody. The next factor, complexity, did not have any bearing on the delay in this case. **[106-109]**

Reaching his finding, MacMenamin J. held that the significance of the three factors identified in the Court of Appeal judgment had diminished, and that, while marginal, the evidence in this case had crossed the threshold for a finding that there was a violation of the appellant's right under Article 38.1 of the Constitution. **[110-112]**

Regarding remedies, MacMenamin J. considered the award of €7,500 granted in *Simpson v. Mountjoy Prison* [2019] IESC 81, where the prisoner had been detained for 7.5 months in inhuman and degrading conditions. In this case there had been no evidence of misconduct on the part of the State and proposed that €5000 be awarded by way of damages for violation of his constitutional right. **[113-117]**

References in square brackets are to paragraphs in the judgment of MacMenamin J.

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