Cúirt Uachtarach na hÉireann
Supreme Court of Ireland

2022 Annual Report

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Cúirt Uachtarach na hÉireann
Supreme Court of Ireland

2022
Annual Report

Table of Contents

Mr Justice Donal O'Donnell, Chief Justice

Foreword by the Chief Justice

I am pleased to present the fifth annual report of the Supreme Court which highlights the work undertaken by the Court both inside and outside the courtroom during 2022.

In 1778 in Federalist No. 78, Alexander Hamilton made the observation, much quoted in the almost two and a half centuries since then, that the judiciary lacking both force and will had only judgment, and was accordingly the least dangerous branch of government. The business of judging remains the core function of the Supreme Court of Ireland, and this report gives some sense of the many varied and difficult issues that occupied the Court in 2022. But this is also an opportunity to record and report upon the many other activities of a modern Supreme Court which has increasing obligations both within Ireland and on the international plane.

A year in the life of a Supreme Court is a busy one, and 2022 was no exception, particularly with the receding tide of the COVID-19 pandemic. As the need for restrictions became less acute, the Court could resume activities that had been curtailed by the pandemic. The Chief Justice's Summer Placement Programme, which which hosts law students from Ireland, the United States and Wales, resumed on an in-person basis and brought a welcome wave of enthusiastic students into the Four Courts and Criminal Courts of Justice, who benefitted from a detailed plan of interaction with members of the judiciary, lectures, discussions and much more. Furthermore, the easing of restrictions on travel facilitated the Court's engagement with apex courts from different jurisdictions which had been largely put on hold during the pandemic. Delegations from the Supreme Court met members of the UK Supreme Court (London, June), the German Federal Constitutional Court of Germany (Karlsruhe, November) and the Supreme Court of Canada (Dublin, July). These are important opportunities to exchange views on important issues which increasingly transcend national boundaries and the Irish Supreme Court is pleased to be able to contribute to this important conversation.

A particular highlight of the Court's international engagement in 2022 was a bilateral meeting with a delegation of senior members of the European Court of Human Rights (Dublin, October) led by President Robert Spano and designate President Síofra O'Leary. The exchange culminated in a public conference held in DCU, on the theme of human

rights in a time of change. The visit was, in and of itself, a historic event, but the significance of the visit went beyond historic impact alone; it was also an opportunity to celebrate the historic election of President O'Leary, the first Irish person and the first woman to hold this prestigious and important post. The detail and content of the exchanges were an important illustration of the long and mutually respectful relationship between the Irish State and courts and the ECtHR. In person exchanges like these can only increase mutual understanding and respect.

2022 was a significant year in another regard as it was the centenary of both the Irish Free State Constitution and of the occupation of the Four Courts by the Anti-Treaty forces prior to the commencement of the Civil War. The importance of both of these events was marked by guided tours of the Four Courts complex and a comprehensive commemorative programme. The Four Courts played host to a lecture series on a number of topics concerning that crucial time period, ranging for the battle of the Four Courts to the families who lived on site, the role of women, and the reconstruction of the building in the subsequent decade. Members of the Court participated in a number of events commemorating the drafting of the Constitution of the Irish Free State. In a similar manner to the visit of the ECtHR, the importance of reflecting on these events goes beyond their respective historical statuses; both events constitute fundamental building blocks in our legal and societal structures and commemorating them ensures that we have an opportunity to reflect on the significance of these events and consider the lessons that may be learnt for the future.

It is, of course, the case that none of these events could take place without considerable work and support from a great many parties in the Courts Service and beyond. One of the particular pleasures of the commemoration programme was the enthusiastic cooperation between staff in the Courts Service and members of the judiciary. In particular, I would like to acknowledge the work and contributions of my Executive Legal Officers in the Office of the Chief Justice, who are invaluable in the running of the Court and the organisation of all the events recorded in these pages.

The insights in Federalist No. 78 continue to be cited because they continue to resonate, particularly in those countries where the model he espoused of limited government under a constitution providing for judicial review has been adopted as it was in Ireland in 1922. The business of judgment remains a core function of the Supreme Court, but this Annual Report demonstrates how many other functions it is necessary for a Supreme Court to perform if it is to continue to play the vital role Hamilton envisaged in a modern vibrant and interconnected world.

Donal O'Donnell
Chief Justice
Dublin, 2023

John Mahon
Registrar of the Supreme Court

Introduction

By the Registrar of the Supreme Court
Mr. John Mahon

I am very pleased to be able to say that 2022 represented a return to more sustained normal working while at the same time we continued to utilise the best of the new procedures and technological innovations introduced during the Covid period.

The Court works most effectively when it can choose to use proven technologies to assist it in appropriate cases and when it can adopt the remote or hybrid hearing model where that meets the particular needs of the hearing and of the parties. Our developing experience during 2022 in the use of our court-based platforms resulted in plans being developed towards year end to upgrade the technology platform in the main courtroom. This upgrade will improve the experience for hearing participants and will allow for hybrid participation in appropriate cases.

The amount of work to be undertaken both before and after the oral hearing is also significant and technological support in this regard is also important. The Office of the Court supports it in this regard throughout the life of a case. The management and sharing of electronic documentation continues to be a significant area of work. The implementation of the new desktop technology for all of our staff in June represented a quantum leap to a modern office productivity toolset that will greatly improve how we communicate and share documentation with our colleagues for the coming years.

2022 saw a consolidation in the Court's business level post-Covid. The number of applications for leave to appeal filed (145) was on a par with 2021 and there was an increase in the total number of applications dealt with by the Court (148). By year end there were signs of an increase in business level and the Court is well placed to deal with this if it continues into 2023.

There was a significant increase in the number of direct applications for leave to appeal from the High Court and the number of such applications (60) returned to the level of such applications in the years prior to 2021. The jurisprudence as to the threshold to satisfy

the additional exceptional circumstances test for these direct applications and what justice requires in individual applications is developing. The balance between the level of applications for leave to appeal filed from the Court of Appeal and that of applications filed directly from the High Court has important implications for the administration of the Court's list and for that of the respective courts.

Implementation of the revisions made to Statutory Practice Direction SC 19 in October 2021 which formalised measures introduced during the pandemic continued during 2022. The refined case management procedures including the issuing of a Statement of Case, and potentially, a Request for Clarification in advance of the oral hearing have greatly assisted with the effectiveness of the oral hearing for parties and for the Court.

The Court had no backlog at year end and all scheduled hearings had taken place. The Court has been in a position during 2022 to fulfil the indicative timeline for the hearing of an appeal of between 13 and 16 weeks from the grant of leave as provided for in the revised SC 19.

I am grateful to the Chief Justice and other members of the Court for their continuing support and insightful engagement with me and with the Office which assists us to provide effective and efficient services to practitioners and to the public.

Towards the end of the year work began on the introduction of an online Office appointments system. I believe that the new system will prove very beneficial for practitioners in providing appointment certainty at a time and date that suits them. A walk-in service for urgent matters will continue to be provided. The new system will also benefit the Office in the management of its business and workflows, resulting, I believe, in a more efficient service to the public.

I would also like to thank our dedicated Office team for their continuing hard work, commitment and flexibility, particularly given that we experienced a higher degree of staff turnover during 2022 than we had in previous years.

I am sure that 2023 will be at least as challenging as 2022 and I believe that both the Court and the Office are in a strong position to meet the challenges to come.

John Mahon
Registrar of the Supreme Court
Dublin, 2023

Cúirt Uachtarach
Supreme Court

1 This figure is higher than the number of applications lodged (145) in 2022 as a result of the Court resolving three applications from 2021 in addition to those in 2022.

PART 1

About the Supreme Court of Ireland

The composition of the Supreme Court[2]

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

At the end of 2022, the Supreme Court comprised the Chief Justice, who is the President of the Court, and nine ordinary judges. In addition, both the President of the Court of Appeal and the President of the High Court are *ex-officio* (by virtue of their respective offices) members of the Supreme Court.

Appeals are usually heard and determined by five judges of the Court unless the Chief Justice directs that any appeal or other matter (apart from matters relating to the Constitution) should be heard and determined by three judges. Occasionally, the Supreme Court may sit as a composition of seven if the importance of the case warrants it. In instances where the Supreme Court is exercising its original jurisdiction,[3] 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.

2 As of 31st December 2022.

3 The Constitution confers on the Supreme Court an original jurisdiction in two instances: (1) where a Bill has been referred to the Court by the President of Ireland, in accordance with Article 26 of the Constitution, for a determination of whether that Bill (or certain provisions of it), as passed by both Houses of the Oireachtas, is incompatible with the Constitution, and (2) where the Court has been requested to determine, in accordance with Article 12.3 of the Constitution, whether the President of Ireland is incapacitated.

Journey of a typical appeal

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

Party dissatisfied with decision may file an Application for Leave to Appeal.

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

Once satisfied that both Application for Leave and Respondent's Notice(s) are in order, application will be listed for consideration.

Panel of three Supreme Court judges convene to consider application.

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

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

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

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

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

Court reserves judgment and begins its deliberations.

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

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

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

Members of the Supreme Court

Judges of the Supreme Court

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
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 retired from the Court on 25th November 2022.

Ms. 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.

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 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.

Ms. Justice
Iseult O'Malley

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

Born in Dublin, Ms. Justice O'Malley was educated at Trinity College Dublin and The Honorable Society of King's Inns.

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.

Ms. 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 and is chair of the Electoral Commission.

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.

Mr. Justice Woulfe was called to the Bar of Ireland in 1987 and to the Inner Bar in 2005.

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

Mr. Justice
Gerard Hogan

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

A native of Tipperary, Mr. Justice Hogan was educated at Franciscan College, 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 in 1989 and to the Inner Bar in 2002.

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[4]

Mr. Justice
Maurice Collins

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

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

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

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

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
David Barniville
President of the High Court

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

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

He was called to the Bar of Ireland in 1990 and to the Inner Bar in 2006.

Prior to his appointment as President, Mr Justice Barniville served as a judge of the High Court, principally assigned to the commercial list, from December 2017 until his appointment to the Court of Appeal in August 2021.

4 As of December 2022. Ms Justice Mary Irvine held the position of President of the High Court until her retirement in July 2022.

Appointment and retirements

Appointments

Mr. Justice
Brian Murray

Mr. Justice Brian Murray was appointed to the Supreme Court in February 2022. Prior to this appointment, Mr. Justice Brian Murray served as a judge of the Court of Appeal (2019-2022).

Mr. Justice
Maurice Collins

Mr. Justice Maurice Collins was appointed to the Supreme Court in December 2022. Prior to this appointment, Mr. Justice Maurice Collins served as a judge of the Court of Appeal (2019-2022).

Retirements

Ms. Justice
Mary Irvine

On 13th July 2022, Ms. Justice Mary Irvine retired as President of the High Court. Prior to her appointment to that position, Ms. Justice Irvine had served in all three Superior Courts: High Court (2007-2014), Court of Appeal (2014-2019) and Supreme Court (2019-2020). She was called to the Bar of Ireland in 1978 and to the Inner Bar in 1996. As a member of the Inner Bar, Ms. Justice Irvine specialised in medical law and was the legal assessor to the Fitness to Practise Committees of both the Medical Council and An Bord Altranais.

During her tenure as a judge of the High Court, Ms. Justice Irvine had charge of the Personal Injuries List and was responsible for the management and determination of all Garda compensation claims. Following the retirement of Mr. Justice John Quirke, Ms Justice Irvine chaired the Working Group on Medical Negligence and Periodic Payments established by the President of the High Court in 2010 to examine the system within the courts for the management of claims for damages arising out of alleged medical negligence and to identify shortcomings in that system.

Ms. Justice Irvine was appointed to the Court of Appeal on its establishment in 2014 and, in 2018, was appointed to chair the CervicalCheck Tribunal established by the Government to hear and determine claims made outside the courts process arising from alleged acts of negligence on the part of CervicalCheck as provided for in the Cervical Tribunal Act 2019. She was appointed to the Supreme Court in 2019, where she served until her appointment as President of the High Court in June 2020.

Paying tribute to Ms. Justice Irvine's time on the bench, Mr Paul Gallagher SC, Attorney General at the time of her retirement, commented that:

> *"...few important areas have been untouched by [Ms Justice Irvine's] insights and skills. And this contribution has been made with unfailing courtesy to, and understanding of, litigants and practitioners and with an unfailing commitment to do justice.*
>
> *[Ms Justice Irvine's] work as President...during the most challenging time in our history post the civil war for the judiciary during Covid kept the courts going. [Ms Justice Irvine] did so with immense personal drive, personal commitment, a work ethic that is unsurpassed and a determination to see that justice could be made available for as many people as required access to that justice."*

Speaking on behalf of the Law Society, Michelle Ní Longáin remarked that Ms Justice Irvine had been:

> *"...a tireless advocate for access to justice and [had] shared strong views on the need for increased judicial resources.*
>
> *[...] these reflect [Ms Justice Irvine's] genuine desire in the public interest and to advance and support the rule of law ... And that has been to ensure that all of those who need it, can have their case heard by a judge in a timely manner."*

Mr. Justice
John MacMenamin

On 25th November 2022, Mr. Justice John MacMenamin retired as a judge of the Supreme Court, having served as a member of the Court since 2012. Mr. Justice MacMenamin was called to the Bar of Ireland in 1975 and was admitted to the Inner Bar in 1991.

He was appointed to the High Court in 2004, dealing primarily with judicial review proceedings, cases with a constitutional or human rights dimension, the rights of asylum seekers, children in need of special care, and the treatment of prisoners. He took charge of the Minors' List for three years and was appointed to the Special Criminal Court in 2009. Mr. Justice MacMenamin was also, for three years, Ireland's representative on the Consultative Council of European Judges, an advisory committee to the Committee of Ministers of the Council of Europe.

Paying tribute on behalf of the Supreme Court, the Chief Justice, Mr. Justice Donal O'Donnell, acknowledged the enormous contribution made by Mr. Justice MacMenamin during his 18-year tenure as a judge, stating:

> *"Some of the many cases that John MacMenamin gave judgment in and which will undoubtedly be cited for many years to come are the Tristan Dowse case in the High Court on the position of a child adopted by Irish parents abroad; the Baby Ann case, one of the most traumatic cases a judges could encounter involving the future custody of a child placed with prospective adoptive [and where] the natural parents had revoked their consent; [...] Simpson v. Governor of Mountjoy Prison on the practice of slopping out in prisons; Luximon & Balchand on the right of a person who had come to Ireland under a scheme permitting long term work and study; [Mr Justice MacMenamin's] joint judgment in UCC v. ESB; his dissenting judgment in Zalewski v. WRC and many more. All of these judgments have in common an intense engagement with the facts and a distrust of bright line rules."*

The Chief Justice also remarked on Mr. Justice MacMenamin's extensive engagement with "out of court activity such as involvement in judicial education and outreach", commenting:

> *"[Mr. Justice MacMenamin] was always a key member of the Judicial Studies Committee and prepared to go anywhere to discuss the work of the courts in Ireland. In particular since his days on the Bar Council, if not earlier, he has been enthusiastic in establishing and building contacts in Northern Ireland first with practising lawyers and latterly with the judiciary. All of these engagements were facilitated by his good humour and extraordinary range of knowledge."*

The Chief Justice finished by paying tribute to Mr. Justice MacMenamin's commitment to the litigants at the heart of every case, noting:

> *"Perhaps, more than anyone else, he saw individual cases in human terms, with real people, real concerns, and to whom the outcome, rather than the legal principle, is the critically important thing..."*

PART 2

Statistics

Applications for leave to appeal

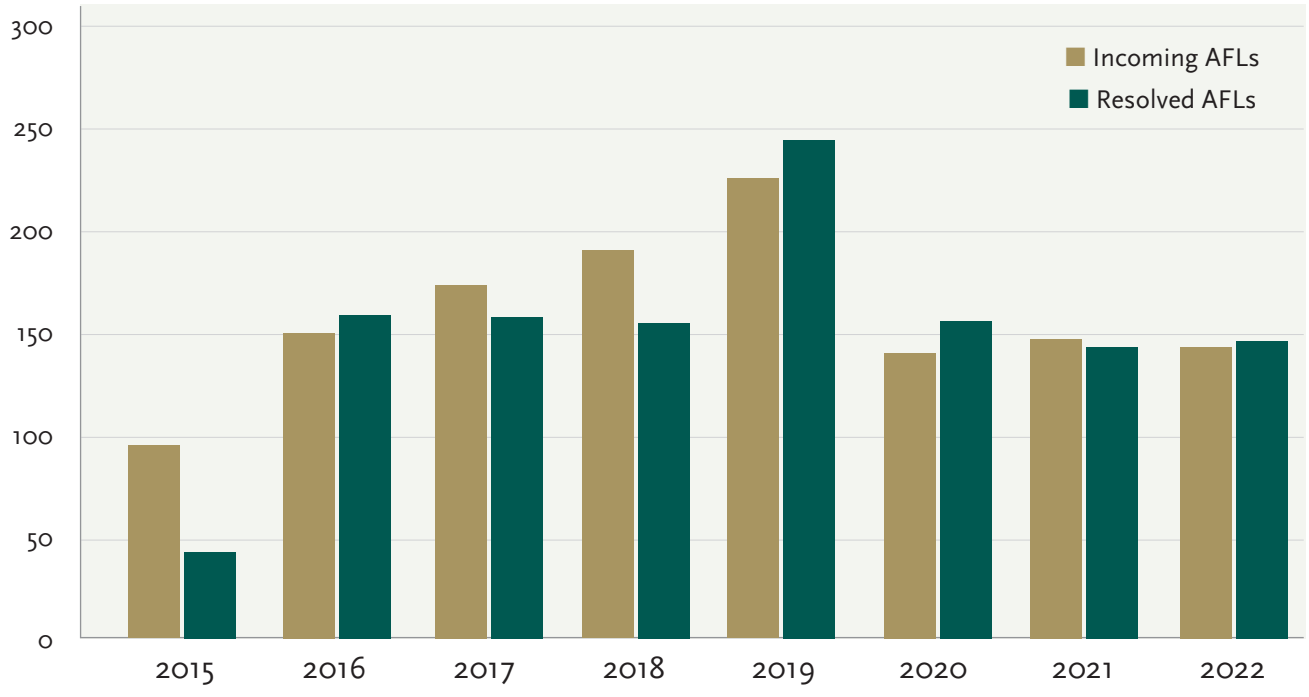
The Supreme Court resolved 148 applications for leave to appeal in 2022, and a total of 1,222 since the Court began to determine applications for leave to appeal under its reformed jurisdiction in 2014.[5]

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: 2015-2022'. Of the 148 applications for leave to appeal determined in 2022, the Court granted leave in relation to 46 applications (31%) and refused leave in relation to 97 (66%).[6] The remaining applications were withdrawn before determination.

The figure of 148 is on a par with the years since the COVID-19 pandemic. However, 2022 is the third year in which there has been a decrease in applications, with 3% fewer applications determined in 2022 than 2021.

This decrease may be explained by the continuing impacts of the COVID-19 pandemic and the associated restrictions placed on the courts during that time. While the knock-on effect of the disposal of fewer cases in the High Court and the Court of Appeal on the number of applications for leave to appeal brought to the Supreme Court was most acute in 2020, it had a continued impact in 2021, with knock-on effects to 2022.

Incoming and Resolved AFLs: 2015-2022



5 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.

6 145 applications for leave to appeal were lodged in the Supreme Court Office and five were withdrawn.

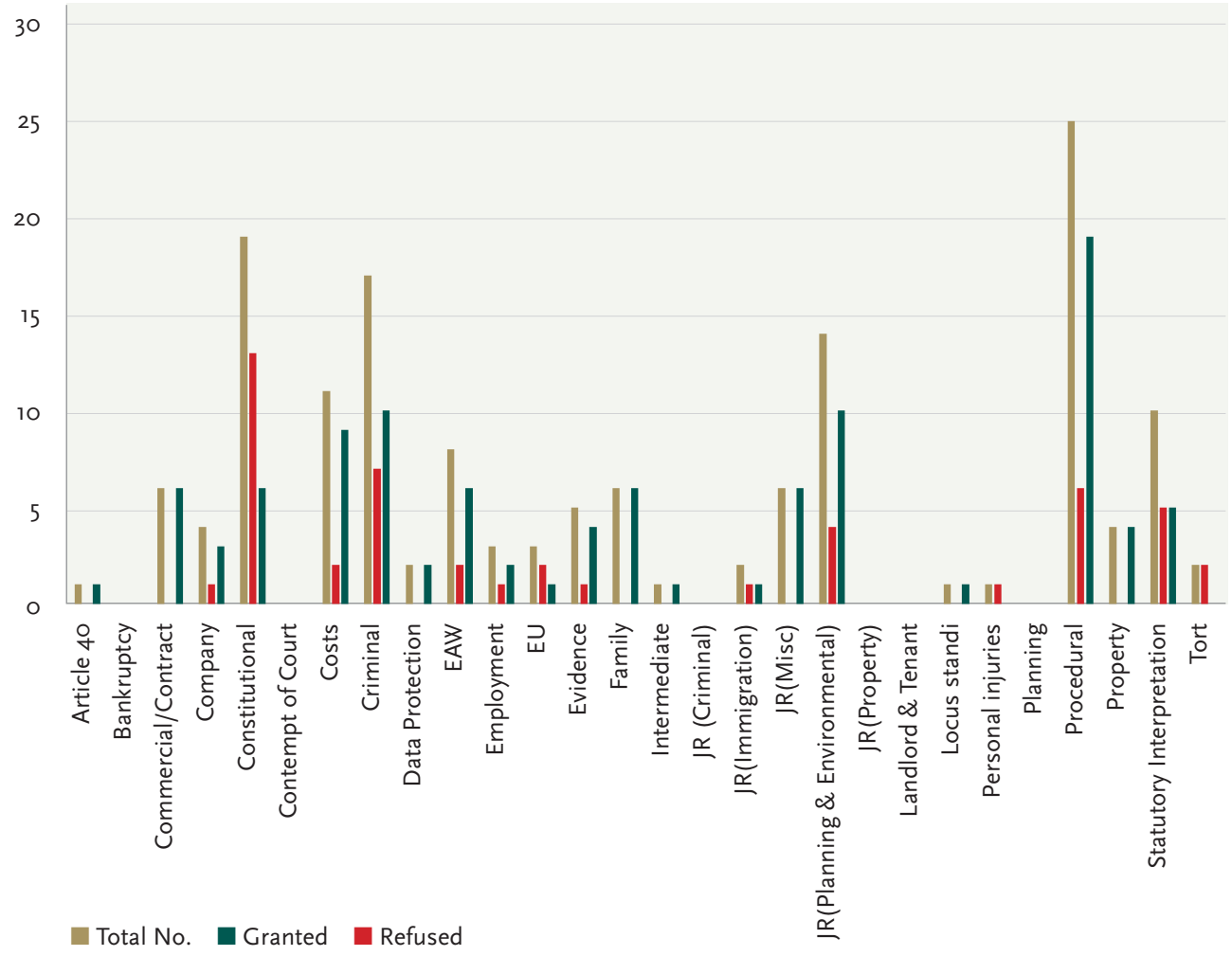
Categorisation of applications for leave to appeal

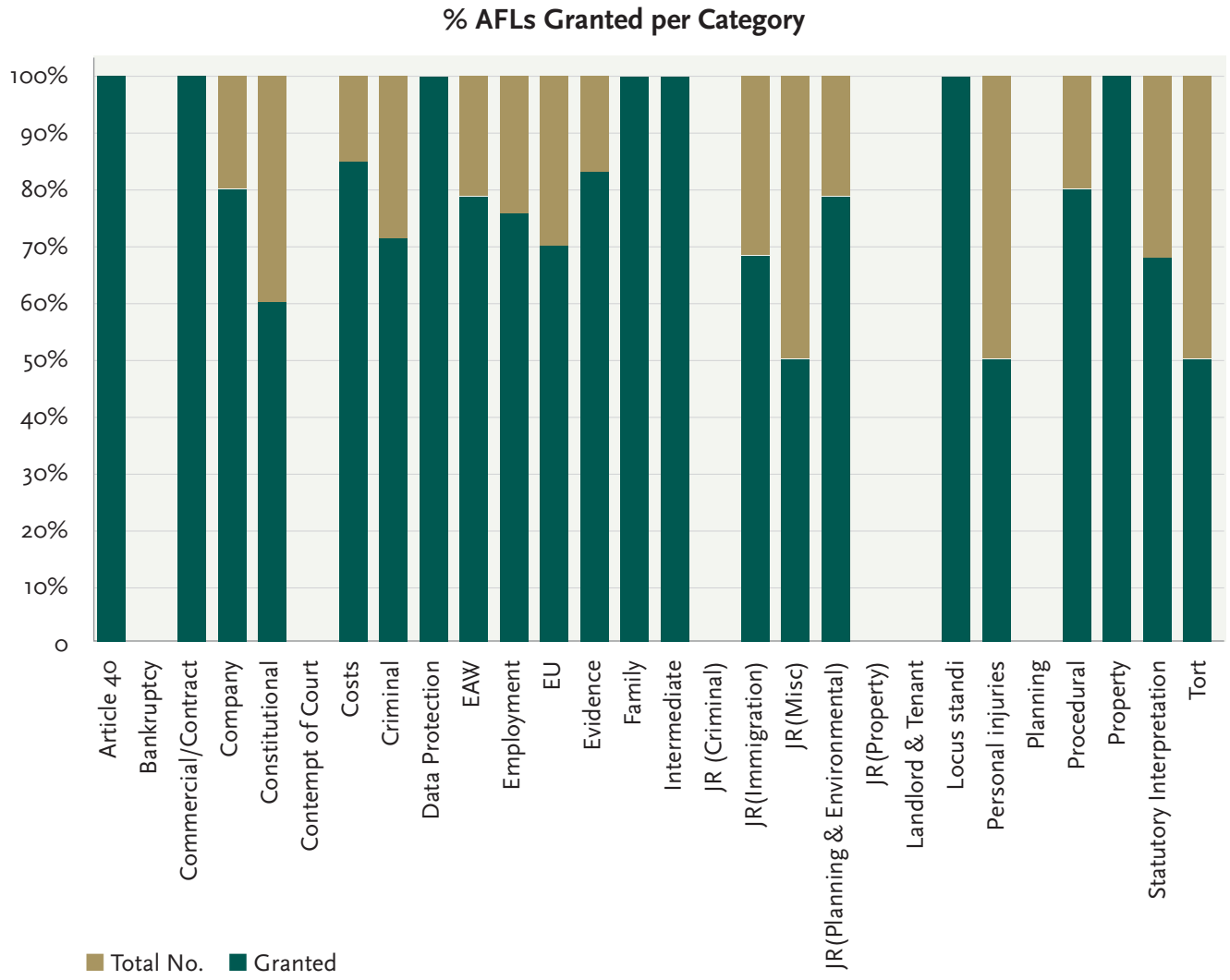
The chart below categorises all applications for leave to appeal brought from the High Court and the Court of Appeal to the Supreme Court in 2022 according to areas of law. It is important to keep in mind that many appeals involve issues which could potentially be categorised into several areas of law. 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 and in 2021, procedural issues gave rise to the highest number of applications for leave to appeal in 2022 (18% of applications). 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 2022 was constitutional law (14%). The next largest categories were as follows: criminal law (12%); judicial review ("JR") (planning & environmental) (10%); costs matters (8%); European Arrest Warrant ("EAW") matters (6%); and statutory interpretation matters (6%).

Of these areas of law, leave to appeal was granted in: 23% of the applications involving issues of procedure; 68% of the applications concerning constitutional law; 41% of applications involving issues of criminal law; 29% of applications in the area of judicial review (planning & environmental); 18% of the applications concerning costs matters; 25% in the category of European Arrest Warrants; and 50% of applications in the area of statutory interpretation.

Categorisation of AFLs 2022





Breakdown of applications for leave to appeal

The Constitution provides for an appeal from the Court of Appeal to the Supreme Court if the Supreme Court is satisfied: (a) 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.[7]

Article 34.5.3° of the Constitution.

The Constitution provides for a direct appeal from the High Court to the Supreme Court if the Supreme Court is satisfied that there are exceptional circumstances warranting a direct appeal, a precondition of reaching such a conclusion is the presence of either or both of the following factors:

i. the decision involves a matter of public importance;

ii. the interests of justice.

An appeal from the High Court is often referred to as a 'leapfrog' appeal.

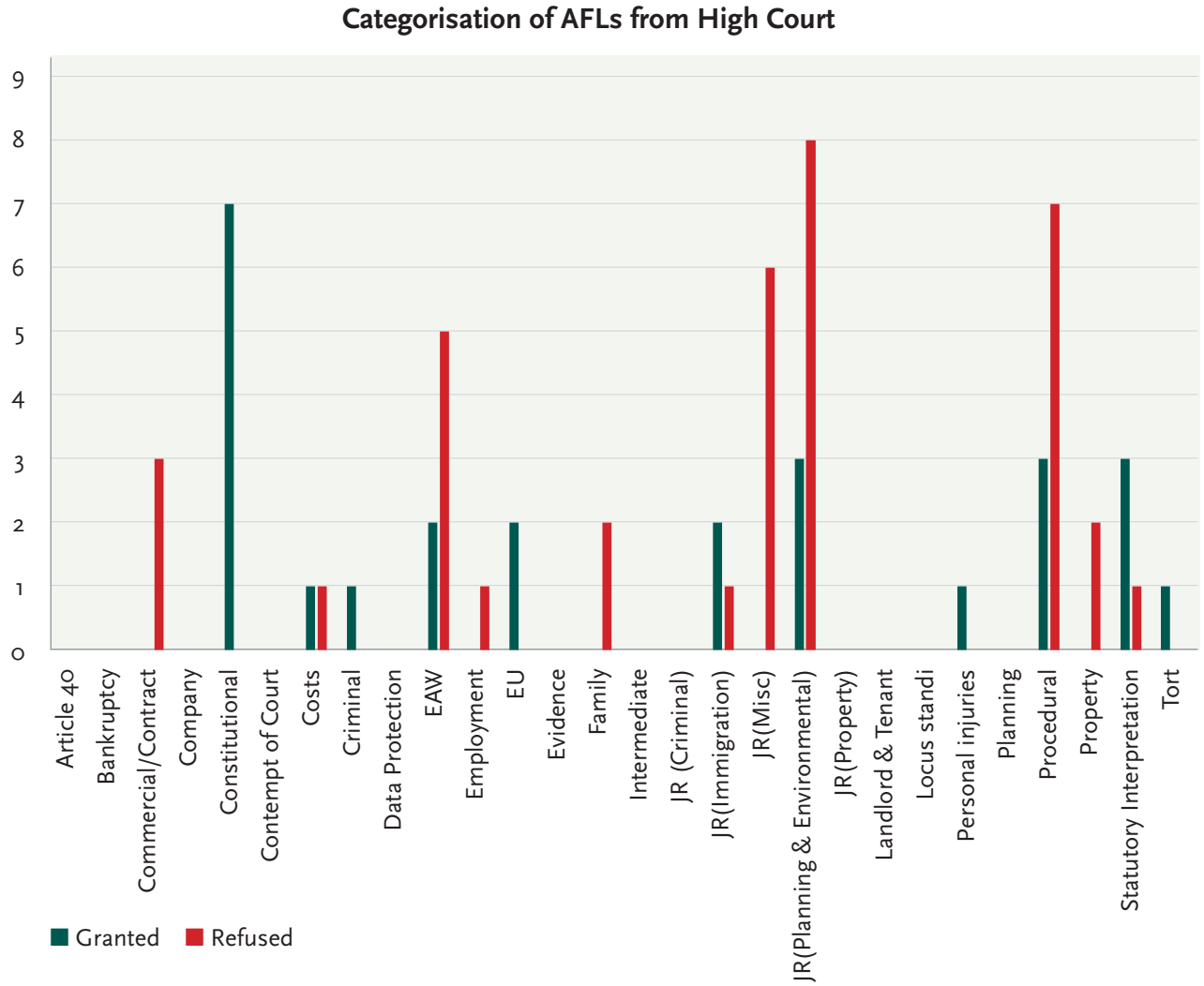
Article 34.5.4° of the Constitution.

7 As provided in Article 34.5.3°.

Appeals from the Court of Appeal

Of the 145 applications for leave to appeal (59%) that were lodged with the Supreme Court in 2022, 85 related to decisions of the Court of Appeal.

The largest categories in which applications were brought were constitutional and criminal matters, accounting for 7% each of the applications for leave to appeal from the Court of Appeal. The next largest category was procedural matters (4%), followed by statutory interpretation (3%). Leave to appeal from decisions of the Court of Appeal was granted in 1% each of applications concerning company law, costs matters, employment law, evidential matters, judicial review (planning & environmental) and tort.

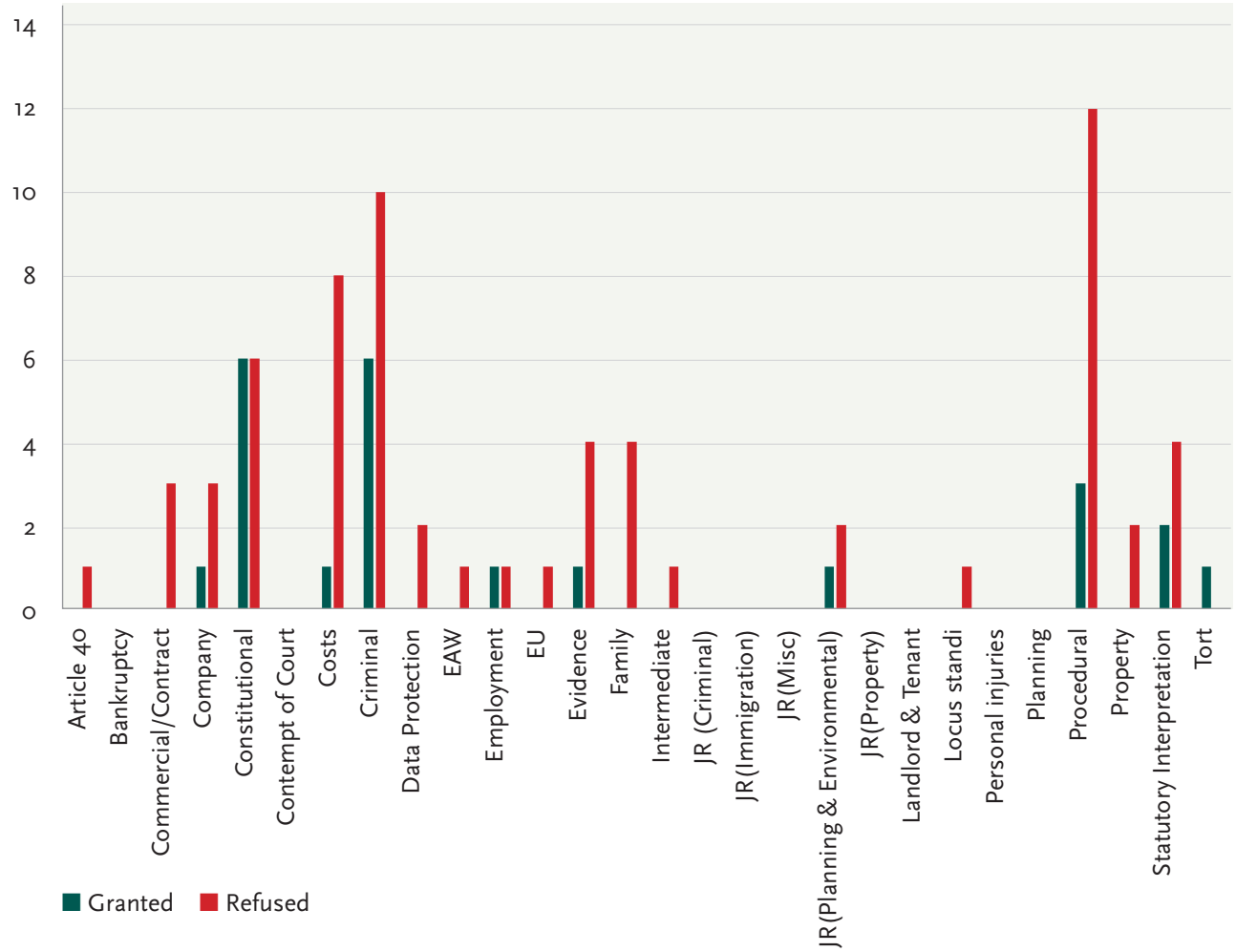


Appeals from the High Court

Of the 148 applications for leave to appeal determined in 2022, 60 (41%) were leapfrog appeals. This is an increase in comparison to 2021, where 29% of applications determined were leapfrog appeals. The Supreme Court granted leave to appeal in 23 of the 60 applications (38%) for leave to appeal directly from the High Court and refused leave in 35 (58%) of applications.

A categorisation of determinations in which applications for a leapfrog appeal were granted indicates that decisions involving constitutional matters accounted for the highest percentage of applications for which leapfrog appeals were sought (12%). The next largest categories, accounting for 5% of the applications for which leapfrog appeals were sought respectively, were: judicial review (planning & environmental); procedural matters; and matters of statutory interpretation. European Arrest Warrant matters and EU law matters attracted the next highest number of leapfrog appeals (3% each) followed by costs matters, matters of criminal law, judicial review (immigration), personal injuries and tort (2% each). Leave to appeal directly from the High Court was refused in all cases categorised as concerning employment matters and evidential matters.

Categorisation of AFLs from the Court of Appeal



Full appeals resolved

The Supreme Court resolved 66 'full' appeals in 2022, which was a slight decrease on the figure of 77 for 2021. 55 were appeals brought under the jurisdiction of the Supreme Court which came into effect on the establishment of the Courts of Appeal (down slightly from 59 in 2021). 11 were appeals known as 'legacy appeals', which were appeals under the previous jurisdiction of the Court still in the system due to procedural issues. The last of the 'legacy appeals' were heard in 2022.

Waiting times

The average waiting time from the filing of complete documents in respect of an application for leave to appeal to the issue by the Supreme Court of its determination of the application was 4.9 weeks.

The average length of time from the grant of leave to appeal to the listing of an appeal was 15.5 weeks.

Written judgments

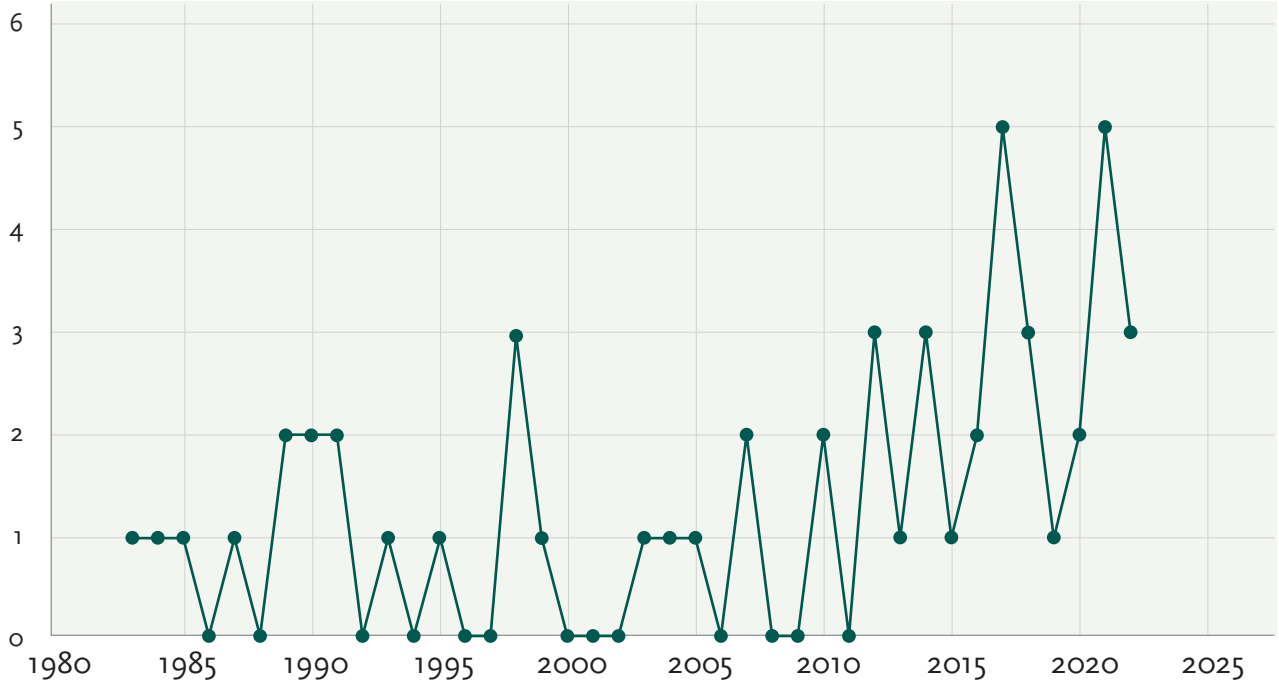
The Supreme Court delivered 80 reserved judgments in 2022, which was a decrease on the 101 delivered in 2021. Judgments are publicly available on the website of the Courts Service.

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

Article 267 of the Treaty on the Functioning of the European Union ('TFEU') provides a mechanism whereby national courts that apply European Union law in cases before them may refer questions of EU law to the Court of Justice of the European Union ('CJEU') where 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 52 cases since 1983, as depicted in the below graph. The Supreme Court made three references to the CJEU in 2022.

Requests for Preliminary Rulings 1983-2022



Minister for Justice & Equality v. Fassih [2022] IESC 10[8]

On appeal from: [2021] IECA 159

Headline

The Supreme Court today referred questions on the interpretation of Article 27 of the Council Framework Decision of 13th June 2002 (on which the European Arrest Warrant system is based) to the Court of Justice of the European Union pursuant to Article 267 of the Treaty on the Functioning of the European Union.

Composition of Court

MacMenamin, Charleton, O'Malley, Baker, Hogan JJ.

Judgments

O'Malley J. delivered the sole judgment on behalf of the Court.

Background to the Appeal

The appellant was surrendered to the Kingdom of the Netherlands on foot of three European arrest warrants issued by Dutch public prosecutors. Subsequently, the High Court of Ireland, as the executing judicial authority, received a request for consent to his further prosecution and imprisonment in relation to other, separate offences.

In the intervening period, the CJEU delivered its judgments in *OG and PI (Public Prosecutor's Office in Lűbeck and Zwickau)* (C-508/18 and C-82/19/PPU) ("OG and PI") and in *Criminal Proceedings against AZ* (C-510/19) ("AZ"). The effect of the judgments is that public prosecutors in the Netherlands cannot be considered to be "judicial authorities" within the meaning of the Framework Decision.

The appellant now wishes to rely upon those judgments for the purpose of arguing that consent to his further prosecution cannot be given, on the basis that the persons who issued the three original warrants did not, as a matter of EU law, have the status of "issuing judicial authorities". It is accepted by the appellant that he cannot reopen the original decision to surrender him as that matter is now res judicata. However, he argues that consent to further prosecution cannot be given if the warrants giving rise to that decision were not validly issued. Both the High Court and Court of Appeal held that the appellant was debarred from making such an argument by national procedural rules concerning issue estoppel.

Judgment

The Supreme Court ordered a preliminary reference to the Court of Justice of the European Union pursuant to Article 267 of the Treaty on the Functioning of the European Union.

Reasons for the Judgment

The answer to the question whether the appellant should now be permitted to rely upon an argument about the status of the original warrants depends upon the correct legal characterisation of the relationship between the surrender process and the consent process. **[141]**

Primarily, the issue is whether the two processes are so closely linked that a matter necessarily determined for the purposes of a surrender order must be taken as having been determined for the purposes of any subsequent request for consent to further prosecution and

8 Summary as published alongside the delivery of the judgment of the Supreme Court on 18th February 2022. The judgment and summary are available on www.courts.ie.

punishment, or whether they are separate and "stand alone" procedures. **[142]**

The definition of the legal relationship depends upon the correct interpretation of the Framework Decision, in the light of the judgments of the CJEU in *OG and PI* and AZ, and thus is a matter of EU law. The Court further considers that this matter is not *acte clair*. **[142]** In those circumstances, and as the Supreme Court is the court of final appeal in Ireland, it considers that it is obliged under the Treaty on the Functioning of the European Union to refer questions on the issue to the CJEU. **[143]**

Questions Referred

Should Article 27 of the Framework Decision be interpreted as meaning that a decision to surrender a person creates a legal relationship between him, the executing State and the requesting State such that any issue taken to have been finally determined in that decision must also be taken to have been determined for the purposes of the procedure for obtaining consent to further prosecution or punishment for other offences?

If the answer to Question 1 is that Article 27 does not require that interpretation, does a national procedural rule breach the principle of effectiveness if it operates so as to prevent the person concerned from relying, in the context of the consent application, upon a judgment of the Court of Justice of the European Union delivered in the period of time after the order for surrender?

Note

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.

Case History

2nd December 2021	Oral submissions made before the Court
[2021] IESCDET 108	Supreme Court Determination granting leave
[2021] IECA 159	Judgment of the Court of Appeal (judgment which was the subject of the appeal to the Supreme Court)
[2020] IEHC 369	Judgment of the High Court

Merck Sharp & Dohme v. Clonmel Healthcare Ltd [2022] IESC 11[9]

On appeal from: [2021] IECA 54/[2019] IEHC 814

Headline

The Supreme Court today referred the appeal of Merck Sharp & Dohme Corp to the Court of Justice of the European Union, finding that the legal position under Regulation (EC) No 469/2009 concerning the supplementary protection certificate for medicinal products and its effect on supplementary protection of combination products is not currently capable of a definite interpretation; it is not acte clair.

Composition of Court

O'Donnell CJ; MacMenamin, Dunne, Charleton & Woulfe JJ.

Background to the Appeal

The issues in this appeal centred on the validity of a Supplementary Protection Certificate (SPC) obtained by MSD. An SPC extends patent protection for up to five years post-patent expiry to compensate for the intermediary period between the granting of the patent and the obtaining of a marketing authorisation, following clinical trials. MSD was granted a patent in respect of the monotherapy ezetimibe, product title Ezetrol, in 1999, lasting 20 years from its filing date in September 1994. Ezetimibe lowers cholesterol by inhibiting its absorption into the bloodstream. The claims of the patent refer to the use of ezetimibe as a monotherapy and also in combination with a statin, specifically listing public domain medicine simvastatin, which lowers cholesterol levels by decreasing production in the liver. An SPC was granted in respect of Ezetrol in 2003, the monotherapy ezetimibe, extending patent protection until April 2018. A second SPC was subsequently granted in respect of ezetimibe and simvastatin in combination, product name Inegy, extending its patent protection until April 2019. Clonmel Ltd, after the expiration of the first SPC, and before the expiry of the second SPC, started producing ezetimibe and simvastatin in combination as a generic medicine. In response to infringement proceedings taken by MSD, Clonmel counterclaimed that the second SPC was invalid. This case centres around whether the second SPC for Inegy is invalid on the basis of Articles 3(a) and 3(c), which enables an SPC where "the product is protected by a basic patent in force" and "the product has not already" being granted an SPC.

McDonald J. in the High Court held that the SPC for Inegy was invalid on the basis of Article 3(a), interpreting the CJEU decision in Case C-121/17 *Teva UK and Others v Gilead Sciences Inc* [2018] as requiring that, for a product to be covered by a patent, it must come within the limits of the patent's invention to satisfy Article 3(a). In the Court of Appeal, Costello J. agreed; the combination product was not under the protection of the basic patent as it did not fall under the invention covered by the patent. While this invalidated the second SPC, both the High Court and Court of Appeal also considered that it followed that the SPC was also invalid on the basis of Article 3(c).

Judgment

The Supreme Court referred a series of questions relating to this appeal to the CJEU.

9 Summary as published alongside the delivery of the judgment of the Supreme Court on 21st February 2022. The judgment and summary are available on www.courts.ie.

Reasons for the Judgment

Charleton J., writing on behalf of the Court, highlights the significant controversy concerning the interpretation of the two relevant Articles. Similar cases in other EU Member States have led to diverging conclusions as to the combination SPC's validity. The correct application of Article 3 of the Regulation cannot be said to be *acte clair*. **[46]-[49] Judgment**

The difficulties arising in the interpretation of the Regulation are considered through an examination of CJEU case law. The Court analysed the decision in Case C-577/13 *Actavis Group Ptc EHV v Boehringer Ingelheim Pharma GmbH* [2015], noting that the judgment indicates that, on the one hand, a claim in a patent for an invention as a monotherapy may give rise to an SPC, so also may that medicine combined with other public domain medicines, meaning more than one SPC, and, on the other hand, that this may not occur. There is uncertainty involved in applying the tests outlined by the CJEU in Teva. There is confusion as to whether a mere mention of a product in the claims of a patent is sufficient to conclude that the patent covers that product for the purposes of Article 3(a), or whether a court must also look beyond the claims. The judgment highlights that there is no evidence of a requirement of having regard to the "core inventive advance" of the patent in this context, in the joined cases C-650/17 and C-114/18 *Royalty Pharma Collection Trust v GD Searle LLC, Sandoz Ltd v GD Searle LLC* [2020], either in the court's judgment, or the Opinion of Advocate General Hogan [2019]. **[23]-[26] Judgment**

A draft reference is appended to the Court's judgment, wherein the Court outlines the nature of the issue. If *Boehringer* is treated as a statement of general application, this lends strong support to Clonmel's argument that the court has to identify the "sole subject matter of the invention". MSD contends that subsequent case law has clarified that there is no separate test of inventiveness. It is unclear also whether this case applies generally or is limited to its facts where the combination claim was made later in time as a result of an amendment. The Opinion of Advocate General Wathelet in *Teva* provides support for MSD's claim, stating that the issue under Article 3(a) is simply identification of the product in the patent. Clonmel argues that the Grand Chamber's decision did not endorse this view. Reading [37]-[38] of that judgment, the Court finds that it does appear to adopt the same approach as the Opinion. **[25]-[32] Reference**

Advocate General Hogan, in his Opinion in *Royalty Pharma*, said that the test in *Teva* is clear: both parts must be satisfied before a product is deemed to be covered by a patent. There was no reference in that judgment to the requirement of "core inventive advance". **[36] Reference**

The conflicting interpretations of the CJEU's *Teva* decision in the Court of Appeal in this case, and the Court of Appeal of England and Wales in *Teva UK Ltd v Gilead Sciences Inc* [2019] EWCA Civ 227, points to the need for clarity. **[39]-[41] Reference**. Clarity may also be required as to whether a first SPC for a monotherapy makes a second SPC for a combination product invalid on the basis of Article 3(c). **[43]-[44] Reference**

Note

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.

Case History

8th and 9th December 2020	Oral submissions made before the Court
[2021] IESCDET 92	Supreme Court Determination granting leave
[2021] IECA 54	Judgment of the Court of Appeal, Costello J
[2019] IEHC 814	Judgment of the High Court, McDonald J

Friends of the Irish Environment CLG v. Government of Ireland & Ors [2022] IESC 42[10]

Headline

The Supreme Court has decided to refer to the Court of Justice of the European Union ("CJEU") three questions in respect of the interpretation of the SEA Directive. The questions relate to the two strands of Project Ireland 2040: the National Planning Framework and the National Development Plan.

Composition of Court

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

Judgment

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

Background to the Appeal

This appeal relates to the two strands of Project Ireland 2040 adopted by the Government of Ireland on 16 February 2018 and 29 May 2018: the National Planning Framework ("NPF") and the National Development Plan ("NDP"). The validity of the adoption of both plans is challenged on account of the alleged failure to meet the requirements of Directive 2001/42/EC of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, otherwise known as the Strategic Environmental Assessment Directive (the "SEA Directive"), transposed into Irish law by the European Communities (Environmental Assessment of Certain Plans and Programmes) Regulations 2004 (S.I. No. 435 of 2004) and the European Communities (Environmental Assessment of Certain Plans and Programmes) (Amendment) Regulations 2011 (S.I. No. 200 of 2011). In particular, it was contended that the treatment of reasonable alternatives, as required by the Directives, was not sufficient. A logically prior question arises as to whether the NPF and/or the NDP is a "plan or programme" within the meaning or scope of the Directive. The Court of Appeal upheld the High Court's decision dismissing the appellant's challenge to the plans.

Reasons for the Judgment

The first issue relates to Article 2(a) of the SEA Directive, which provides that a plan or programme "subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and — which are required by legislative, regulatory or administrative provisions" requires an environmental assessment. The Court concluded that the plan had been adopted by executive decision of the Government **[para. 67]**. By reason of certain legislative provisions, regard is to be had to the provisions of the NPF in the adoption by local authorities of a development plan or a local area plan, which in turn impacts upon decision-making at local level in applications for development consent for projects. The Court acknowledged that the jurisprudence of the CJEU supports a broad approach to the interpretation of the word "required" within the Directive, with a meaning more akin to "regulated", and that the word cannot be read as if it were a provision of national legislation. **[para. 94]**.

The Court took the view that the answer to the question concerning the scope of the SEA Directive is not *acte clair* in the light of the purpose of the Directive, together with the principles from Article 37 of the Charter of

10 Summary as published alongside the delivery of the judgment of the Supreme Court on 9th November 2022. The judgment and summary are available on www.courts.ie.

Fundamental Rights, which advocate a high level of environmental protection, and the objectives of improvement of the quality of the environment and the principles of sustainable development **[paras. 116-117]**.

The second issue concerns the treatment of the NDP, which describes itself as a "budget and financial plan" as it sets out how funding will be made available for certain projects considered essential to the achievement of the strategic outcomes identified in the NPF. "Financial or budget plans and programmes" are excluded from assessment requirements by Article 3(8) of the SEA Directive. The question that arises is whether the fact that the NDP was adopted to support the NPF is a sufficient basis to treat it as a plan or programme requiring SEA assessment, notwithstanding that it is a plan framed as a budgetary or financial plan **[para. 136]**. The correct approach to this question is likely to be influenced by the response to the request for clarification on the scope of the Directive, but a separate question arises as to the effect of the link or connection between the two plans.

The final strand of the appeal concerns the methodology engaged by the respondents in the assessment of the NPF, and whether it is in conformity with the SEA Directive. The issue concerning the assessment of reasonable alternatives addressed on the appeal concerns whether the reasonable alternatives were sufficiently identified, described and evaluated in the light of the analysis carried out on the preferred option. The issue presenting is whether, once a number of options were expressly found to be reasonable, they had to be assessed at the same level and on the same basis as the preferred option, or if the level of scrutiny will depend on the relevant stage of the process at which this is done. Having reviewed the text of the Directive, the Commission Guidance, and certain authorities from the Courts of England and Wales, the Court considered that, whilst the Directive did envisage an iterative approach to the selection of alternatives, the methodology to be engaged in the description and evaluation of the reasonable alternatives and the preferred option, and whether in particular an equally or broadly similar or comparable assessment was required to be performed in regard to the reasonable alternatives, was not *acte clair* **[paras. 209-212]**.

The question of the suitability of the matrices applied to the assessment, and the provision for monitoring were considered not to raise issues that required clarification from the CJEU.

A draft reference has been circulated to the parties and the questions to be referred to the CJEU will be finalised following consideration of observations from the parties.

References in square brackets are to paragraphs in the judgment Baker J.

Note

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document.

Case history

18-19 July 2022	Oral submissions made before the Court
[2021] IESCDET 22	Supreme Court Determination granting leave
[2021] IECA 317	Court of Appeal Decision under appeal
[2020] IEHC 225	High Court Decision

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'). Comhrá is an outreach initiative of the Supreme Court which allows secondary school students around Ireland to participate in live video calls with judges of the Supreme Court. The Comhrá programme benefits from the support of the Courts Service and the National Association of Principals and Deputy Principals.

The Chief Justice and Ms. Justice Baker participated in a Comhrá video call with Castletroy College in Limerick. Students asked a range of interesting questions spanning from the contrast between our judicial model and models in the EU, how best to improve access to justice in Ireland and the impact of the pandemic on court practice and procedure.

Students of St. Kevin's Community College, Wicklow, participated in a Comhrá call with Mr. Justice Peter Charleton and Ms. Justice Iseult O'Malley. Some of the interesting points of discussion included the process of becoming a judge, the seminal cases in the respective judges' careers and the impact of those careers on how judges see and interact with the world around them.

Comhrá - Castletroy College

Comhrá - St. Kevin's Community

Third level institutions

Members of the Supreme Court engage regularly with, and hold positions in, third level educational institutions. In September 2022, the Chief Justice was awarded the Praeses Elit award by the Trinity College Dublin Law Society. Mr. Justice MacMenamin is an Adjunct Professor of the National University of Ireland Maynooth and Mr. Justice Charleton is an Adjunct Professor of the National University of Ireland Galway. Ms. Justice O'Malley and Mr. Justice MacMenamin serve as Judges in Residence at Dublin City University. Ms. Justice Baker serves as an Adjunct Professor of University College Cork.

Publications and extra judicial speeches

The members of the Supreme Court continued to publish materials in legal publications throughout 2022.

The Chief Justice delivered the keynote speech at the launch of the UCD Student Legal Service Journal 2022 in April of that year. In addition, he delivered a paper entitled 'Our Collective Commitment: Ireland and its Relationship with the European Court of Human Rights and the European Convention' at a public conference which took place in DCU on the topic of 'Human Rights in a Time of Change: Perspectives from Ireland and from Strasbourg'. This public conference took place to mark the visit of the President and members of the European Court of Human Rights (ECtHR) to Dublin during Ireland's Presidency of the Council of Europe Committee of Ministers. In addition to the speech delivered by the Chief Justice, speeches were given by President Spano of the ECtHR, incoming President O'Leary of the ECtHR, and Ms Justice Iseult O'Malley, who spoke on the topic of 'Ireland and the European Convention on Human Rights'. All of these speeches were subsequently published in the Irish Judicial Studies Journal.

Mr. Justice Charleton is chair of the judicial editorial board of the Irish Judicial Studies Journal, a peer-reviewed legal publication interfacing between the judges, legal practitioners, and academics, and published in conjunction with the University of Limerick. Mr. Justice Charleton and Judicial Assistant Orlaith Cross co-authored a paper titled 'Special Protection Certificates – Extending patent

Decade of Centenaries Lecture

protection in the EU by administrative action: or is it something more' which was presented at the Fordham Intellectual Property Conference (held remotely) in April 2022.

Ms. Justice Baker gave the keynote address and officially launched the Legal Diversity Project in the Royal Courts of Justice in Belfast in October 2022. This event, which is intended to be the first in a series, aims to provide opportunities for legal professionals to present and exchange ideas on how to solve diversity issues within the legal profession.

Mr. Justice Hogan presented a number of papers in 2022. He delivered a paper entitled 'The Count Plunkett Habeas Corpus Application and the end of the Dáil Supreme Court' in April 2022 as part of the Four Courts 100 commemorations and delivered 'Alfred Thomson Denning: a 20th Century English Legal Icon Re-Examined' in association with the Denning Society of Lincoln's Inn at Lincoln's Inn in November 2022.

Mooting, mock trials and debating

Moot competitions and mock trials allow students to act as legal representatives and other participants

Brian Walsh Memorial Moot 2022

in simulated court hearings and trials. Debating and negotiating competitions also provide a platform for students to develop and enhance skills which are important to practising law.

Winners of the Adrian Hardiman Memorial Moot Competition 2022

In 2022, Mr. Justice MacMenamin chaired the final of the 13th annual National Moot Court competition, hosted by Dublin City University, and sponsored by A&L Goodbody.

Mr. Justice Woulfe was the judge for the final of the Cambridge v Trinity Intervarsity Mock Trial hosted by Trinity College Law Society in February 2022.

Mr. Justice Murray judged the final of the Brian Walsh Memorial Moot 2022, an internal mooting competition run by The Honorable Society of King's Inns. Mr Justice MacMenamin, Ms Justice Baker and Mr Justice Collins judged the Antonia O'Callaghan Exhibition Moot, also held by the King's Inns.

The final of the Bar of Ireland's Adrian Hardiman Memorial Moot Competition took place in the Supreme Court in July 2022 before the Chief Justice, Ms Justice Baker and Mr Justice Hogan.

Engagement with The Honorable Society of King's Inns

The Honorable Society of King's Inns is the institution of legal education with responsibility

Ms Justice Baker addressing incoming students at the King's Inns Induction Day

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. 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 serve on various King's Inns committees. 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 Court of Appeal and the President of the High Court 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 throughout 2022. Ms. Justice Baker delivered a lecture via Zoom on the Advanced Diploma in Data Protection Law and delivered the introductory lecture to incoming students undertaking the Barrister-at-Law degree programme. In addition, Mr. Justice Hogan delivered a lecture via Zoom to students on the Advanced Diploma in Quasi-Judicial Decision-Making.

Engagement with The Bar of Ireland

The Bar of Ireland is the representative body for the barristers' profession in Ireland and is an independent referral bar.

In July 2022, Mr. Justice Murray delivered a paper launching the Corporate and Insolvency Bar Association. Mr. Justice Hogan participated in a panel discussion on 'public interest law cases and the courts' at 'Law and Social Change: the Bar of Ireland voluntary assistance scheme conference 2022', delivered at the the Distillery Building on 30th September 2022. In November 2022, Mr. Justice Woulfe spoke at the 'Lawyer's Against Homelessness' conference on the topic of recent developments in planning and environmental law in the Supreme Court. Proceeds of the conference went to the Capuchin Day Centre.

Engagement with the Law Society

The Law Society is the educational, representative, and regulatory body of the solicitors' profession.

Ms. Justice Baker delivered a lecture on the Law Society's Diploma in Judicial Skills and Decision-Making in January 2022. In May 2022, the Chief Justice and Mr. Justice MacMenamin attended the Law Society of Ireland's Annual Dinner held Blackhall Place.

The Chief Justice's Summer Placement Programme for Law Students

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

The Programme returned on an in-person basis in June 2022 following its adoption of a remote format during the course of the Covid-19 pandemic. In total 25 students participated in the Programme, with two students nominated from six Irish universities; one student nominated from each from technical universities, and other colleges and higher-level institutions that offer a Level 8 NFQ Degree in Law or where law is a core subject. In addition to the 18 students nominated from Irish institutions, four students were nominated from Fordham University School of Law, New York with two students from Bangor University, Wales, and two from University of Missouri – Kansas City.

Certain events organised for the programme included a lunchtime Book Club Series involving conversations with various authors, including

Participants of the Summer Placement Programme 2022

Baroness Hale, Professor John Feerick, and Patrick Marrinan SC. A visit to the Drug Treatment Court provided an opportunity for students to observe that court and meet with the judge and coordinating team. In addition, there were careers talks, sessions with Judicial Assistants and the Legal Research and Library Services Department of the Courts Service and various tours of the Four Courts and Criminal Courts of Justice campuses.

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 2022, the lectures were delivered in-person in the Four Courts and in the King's Inns. They were open to all participating students, judges, judicial assistants, Courts Service staff, members of the Bar of Ireland and of the Law Society.

The 2022 series included:

- 'International Data Transfer post *Schrems* II' delivered by Ms. Eileen Barringston SC
- 'The plight of Afghan Female Judges' delivered by Judge Shireen Avis Fisher and female members of the Afghan judiciary
- 'The Art of Advocacy' delivered by Michael Collins SC
- 'The Problem of Newly Discovered Facts Post Conviction and Miscarriage of Justice' delivered by The Hon. Ms. Justice Una Ní Raifeartaigh
- 'The Pitfalls and Values of Expert Evidence' The Hon. Mr. Justice Peter Charleton
- 'The Trial of Roger Casement' delivered by The Hon. Mr. Justice Donal O'Donnell, Chief Justice
- 'The Art and Craft of Judgment Writing' delivered by The Hon. Mr. Justice Max Barrett

Decade of Centenaries

To commemorate the occupation of the Four Courts at the start of the Civil War and the enactment of the Irish Free State Constitution, the Courts Service, Judiciary, Office of Public Works and various volunteer partners created a programme of events. The programme was launched by the Chief Justice on the centenary of the occupation of the Four Courts on 14th April 1922, by opponents of the 1922 Anglo-Irish Treaty. He noted that the aim of the programme was "to commemorate the fascinating history of our courts and legal system, our rich heritage uniquely portrayed in the story of our buildings, and those affected by the occupation and bombardment". The programme encompassed a number of events, including:

- A lecture series delivered by judges, historians and academics;
- A photographic exhibition entitled 'The Four Courts – 1922' in the Round Hall of the Four Courts;
- Guided tours of the Four Courts led by members of the judiciary; and

Shelbourne Event October 2022

Shelbourne Event December 2022

- The launch of the 'Four Courts 100' app in addition to a dedicated Twitter count.

In October, the Chief Justice and other members of the judiciary attended an event to mark the signing of the 1922 Constitution at the Shelbourne Hotel. As part of this event there was a theatrical re-enactment of the proceedings of the 1922 Constitution Committee attended by President Michael D. Higgins and the then Taoiseach, Micheál Martin. In addition, in December 2022, a conference took place to mark the centenary, also in the Shelbourne, and included addresses from the Chief Justice, Mr Justice Hogan and Mr Justice Collins.

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, former Chief Justice Frank 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 in October 2021 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.

The Chief Justice presenting the report to Ms. Oonagh McPhillips, Secretary General of the Deparment of Justice

Launch of the Access to Justice Report

Chief Justice O'Donnell speaking at the launch of the report

Ms. Oonagh McPhillips speaking at the launch of the report

Mr Gary Lee, Chief Justice O'Donnell and Ms Oonagh McPhillips

The Working Group produced a report of the conference which was launched by Chief Justice O'Donnell in March 2022 at the Ballymun Civic Centre. Following introductory remarks by Mr. Gary Lee, who was then the Managing Solicitor at the Ballymun Community Law Centre, the Chief Justice formally launched the report. He stressed that it is "not enough to provide courtrooms and judges" yet to ignore the "many barriers that limit the capacity of ordinary citizens, or indeed, substantial businesses, to bring disputes to court and obtain a speedy and fair resolution of those disputes". While he acknowledged that there have been many improvements in access to justice over the years, it was still difficult to "avoid the impression that there is something of a mismatch between what goes on in a courtroom and the world outside, in that the disputes in the courtroom do not always reflect the disputes in the daily life of citizens". Without sufficient access to justice, he added, "the law becomes dangerously disconnected from the public it is meant to serve". He concluded by emphasising that a functioning legal system to which citizens have recourse is a "basic component in modern civilized society", which should not be left to the "patchwork of private enterprise, willing volunteers, and a legal aid system that has developed incrementally and haphazardly". The Chief Justice then presented a copy of the report to Ms. Oonagh McPhillips, Secretary General of the Department of Justice, who was representing the Minister for Justice, Helen McEntee.

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 arise. Such judgments are persuasive rather than binding. Under the European Convention on Human Rights Act 2003, courts in Ireland must have regard to the jurisprudence of the European Court of Human Rights in Strasbourg.

Outside of these formal legal channels, there is an increasing level of cooperation between the Supreme Court and other senior courts through, for example, bilateral meetings or through the membership of the Supreme Court of international bodies.

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 to discuss their work, the nature of their functions and the organisation of their systems and to promote dialogue between such courts.

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

ACA-Europe - An organisation comprising the Councils of State or the supreme administrative jurisdictions of each of the members of the European Union and the Courts of Justice of the European Union. Through ACA-Europe, the Supreme Court exchanges views and information with other member institutions on jurisprudence, organisation, and functioning, particularly with regard to EU law. In November 2022, Ms. Justice Baker participated in a working group on 'The Application of Principles and General Clauses in the Jurisprudence of Administrative Courts' held in Madrid.

Network of the Presidents of the Supreme Judicial Courts of the European Union - A network of the Presidents of the Supreme Courts of EU Member States with general jurisdiction (as opposed to constitutional courts or courts with final jurisdiction in particular areas of law, such as supreme administrative courts). Supreme Court Presidents, including the Chief Justice of Ireland, participate in meetings and exchange information through this network, which also consults with institutions of the EU. Following his appointment as Chief Justice in October 2021, Mr. Justice O'Donnell was elected a member of the Board (Vice-President) of the Network. In May 2022, the Chief Justice attended a colloquium titled 'Open Data and Artificial Intelligence' held in Stockholm, where he delivered a paper on 'Open Data and the Working Methods of the Supreme Court'. In October 2022, the Chief Justice attended a colloquium in Brno which focused on the topics of 'Judicial Ethics, Disciplinary Proceedings, and the Liability of Judges' and 'How Can Supreme Courts Contribute to Public Trust in the Judiciary'.

Conference of European Constitutional Courts ("CECC") - An organisation comprising 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 Moldova. In May 2022, the Chief Justice participated in the online reunion of the CECC and the Preparatory meeting of the XIXth Congress of the CECC.

Judicial Network of the European Union ("JNEU") - An association which was established on the initiative of the President of the Court of Justice of the European Union and the Presidents of the Constitutional and Supreme Courts of EU Member States at the Meeting of Judges 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 ("SCN") - 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. In June 2022, Ms Justice Ní Raifeartaigh of the Court of Appeal and Dr Rebecca Murphy (on behalf of the Supreme Court) participated online in the 5th SCN Forum, which included a case-law session on the topic of domestic violence and a know-how session on the topic of judicial communication.

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. However, these bilateral meetings resumed in-person in 2022.

Bilateral meeting with the Supreme Court of the United Kingdom

Members of the UK and Irish Supreme Courts

The Right Hon. The Lord Reed of Alllermuir, President of the UK Supreme Court, and the Hon. Mr Justice Donal O'Donnell, Chief Justice of Ireland

In June 2022, members of the Supreme Court travelled to London to meet with The Rt Hon. The Lord Reed of Allermuir and other members of the Supreme Court of the United Kingdom. A number of roundtable talks took during which papers were delivered by members of the Irish and UK judiciaries on a range of topics including the use of technology in the courts; modernisation and the pandemic experience; human rights, constitutional boundaries and the separate of powers; and contemporary issues in the law of torts.

Bilateral meeting with the Supreme Court of Canada

In July 2022, The Rt. Hon. Richard Wagner, P.C., Chief Justice of Canada, The Hon. Sheilah L. Martin and The Hon. Nicholas Kasirer of the Canadian Supreme Court visited the Supreme Court of Ireland. This meeting involved a briefing at the Embassy of Canada and a dinner hosted by H.E. Ms. Nancy Smyth, Ambassador of Canada to Ireland. Three bilateral sessions were held on the topics of judicial independence and modernisation at the Supreme Courts, equality rights and constitutional proportionality analysis, and bilingualism and comparative law. A number of members of both the Irish and Canadian judiciaries made presentations in each session.

The Rt. Hon. Richard Wagner, Chief Justice of Canada, with the Hon. Mr Justice Donal O'Donnell, Chief Justice of Ireland

Members of the Irish and Canadian Supreme Courts

The Rt. Hon. Richard Wagner, P.C., the Hon. Nicholas Kasirer and the Hon. Mr Justice Donal O'Donnell

Members of the Irish and Canadian Supreme Courts

Bilateral meeting and conference with the European Court of Human Rights

In October 2022, the Chief Justice and senior members of the Irish Judiciary welcomed Judge Robert Spano, President; Judge Síofra O'Leary, Vice-President; and other senior members of the European Court of Human Rights to Dublin. The visit coincided with Judge O'Leary's recent election as the next President, and first Irish President, of the Strasbourg Court. The visit, supported by the Courts Service and the Department of Foreign Affairs, took place as part of a wider programme of events coordinated by the Department of Foreign Affairs for Ireland's Chairmanship of the Committee of Ministers of the Council of Europe which commenced on 20th May 2022.

Members of the Irish Judiciary and of the European Court of Human Rights

Judge O'Leary, Chief Justice O'Donnell and President Spano

Speaking ahead of the visit, the Chief Justice remarked:

"This visit of President Robert Spano, President-Elect Síofra O'Leary and senior members of the European Court of Human Rights to Dublin during Ireland's Presidency of the Council of Europe is a truly historic event. There is a strong relationship of respect and cooperation between the Irish courts and the European Court of Human Rights. The bilateral meetings and ancillary events will be an excellent opportunity to discuss issues of mutual interest to senior members of the Irish Judiciary and the Strasbourg Court, to deepen our understanding of the work of our respective courts and to share thoughts and experiences in a time where the protection of rights is if anything more pressing than it was almost 70 years ago when Ireland ratified the Convention.

A public conference at DCU will provide a forum for a wide audience to hear contributions from speakers on the important topic of Human Rights in a Time of Change, at a significant time for Europe. The visit is particularly welcome as it comes soon after the announcement of the election of Judge O 'Leary as President of the European Court of Human Rights. Judge O Leary is both the first woman and the first Irish person to be elected President of an institution which has jurisdiction in respect of 46 member states with a population of 675 million. This an extraordinary honour, but one which is richly deserved. Judge O 'Leary is held in the highest respect and indeed affection by all in the judiciary and the wider legal community who know her, or are familiar with her work, and we take pride in her success. It will therefore be a particular pleasure to be able to welcome her and her colleagues to Ireland and I look forward to the visit, which will I believe only strengthen the bonds between our courts and reinforce the cooperative and warm relationship between us."

The visit involved a bilateral meeting between members of the ECtHR and the senior members of the Irish judiciary on topics of mutual interests, including data protection and the investigation and prosecution of serious crimes; the advisory opinion procedure; and the Irish Courts and the ECtHR. This was followed by a dinner hosted at Iveagh House by Minister Simon Coveney TD, then Minister for Foreign Affairs.

In addition to the bilateral sessions, there was a public conference which took place in Dublin City University on the topic of 'Human Rights in a Time of Change: Perspectives from Ireland and Strasbourg'. Speakers at the conference included: Mr Justice Donal O'Donnell, Chief Justice; Roderic O'Gorman, Minister for Children, Equality, Disability, Integration and Youth; Judge Robert Spano, President of the ECtHR; Judge Síofra O'Leary, Vice-President and President-Elect of the ECtHR; Ms. Justice Iseult O'Malley, Judge of the Supreme Court; and Colm O'Cinneide, Professor of Constitutional and Human Rights Law at University College London. During the conference, Minister for Children and Equality, Roderic O'Gorman, publicly launched the first Irish translation of the European Convention on Human Rights and Fundamental Freedoms.

Judicial Assistants with Chief Justice O'Donnell, Judge O'Leary and President Spano

Bilateral meeting with the Federal Constitutional Court of Germany

In November 2022, the Chief Justice and Ms Justice Dunne, Ms Justice O'Malley, Ms Justice Baker, Mr Justice Hogan and Mr Justice Murray travelled to Karlsruhe, Germany, to meet with Justices of the German Federal Constitutional Court. A number of working sessions took place on the topics of our common Weimar heritage, freedom of speech and its limitations, and Grundnormen and national constitutional identity. A number of members of both the Irish and German judiciaries made presentations in each session.

Members of the Irish Supreme Court participating in working sessions

Members of the Irish Supreme Court arriving in Karlsruhe

Members of the Irish Supreme Court with Prof. Dr. Stephan Harbarth, President of the Federal Constitutional Court of Germany

President Harbarth and Chief Justice O'Donnell

Members of the Irish Supreme Court and Federal Constitutional Court of Germany

President Harbarth, Ms Justice Baker and Chief Justice O'Donnell

Members of the Irish Supreme Court arriving in Karlsruhe

Judges participating in bilateral session

Other international engagements of the judges

Heads of the Supreme Courts of the Council of the European Union Member States

In February 2022, the Chief Justice attended a conference of the Heads of the Supreme Courts of the Council of the European Union Members States organised by the Constitutional Council, the Council of State and the Cour de Cassation in Paris as part of the French presidency of the Council of European Union. Throughout the conference, a number of workshops took place which were centred on the following titles: (i) courts faced with new public health, technological and environmental challenges; (ii) judge and time – judge of the moment and judge of the long term; and (iii) the protection of fundamental rights – the challenges of the articulation of national law and European laws.

High-level Conference with the Constitutional Jurisdictions of the EU

In October 2022, the Chief Justice attended a high-level conference in Brussels which brought together the constitutional jurisdictions of the EU. The conference focused on the contribution of constitutional jurisdictions to the protection of the rule of law in the EU and included discussion on bilateral and multilateral relations (best practices) between constitutional jurisdictions in the EU, in view of more regular dialogue into the future.

Judicial Exchange Programme

In November 2022, the Supreme Court hosted a judicial exchange programme under the auspices of the various international judicial networks. Four judges in total were involved in the exchange: two from the Supreme Court of the Netherlands, Ms. Tanja van den Broek and Mr. Edgar du Perron; one judge from the Supreme Administrative Court of Italy, Mr. Hadrian Simonetti; and one judge from the French Conseil d'État, Ms. Ophelie Champeaux.

Judge Edgar du Perron from the Supreme Court of the Netherlands provided the following reflection on his time during the exchange:

Visiting judges in discussion with members of the Supreme Court support team

Judge Edgar du Perron (Netherlands), Judge Tanja van de Broek (Netherlands), Judge Hadrian Simonetti (Italy) and Judge Ophelie Champeaux (France)

"A French judge, an Italian judge and two Dutch judges visit the Four Courts. Not the start of a bad joke, but of a wonderful and enlightening fortnight in Dublin, as part of the European exchange programme for supreme court judges.

The Irish Supreme Court staff provided us beforehand not only with an indispensable map of the building and an extensive programme but also with introductions on the Irish legal system and court system. We arrived well prepared.

My colleagues and I had many captivating meetings with judges, the registrar, judicial assistants, barristers and others. The subjects of these talks went from the lessons to be learned about a legal system and culture from TV detective series to the intricacies of the Irish law on limitation periods. We learned the lay-out and history of the Four Court's Building, got a tour of the Central Criminal Court and even visited the Green Street Courthouse. It was wonderful, and greatly appreciated, how much time everybody was willing to spend to receive and inform us.

An important difference between Irish and Dutch procedure is the focus on oral argument. I have spent more time in a courtroom during my two weeks in Dublin than in six years at the Dutch Supreme Court. This is not to say that there are no hearings in The Netherlands, particularly at the court of first instance. A major problem is that there are not enough staff members to write reports of these sessions. These reports are often only drawn up if there is an appeal, long after the session took place. It would be great to have a system like the Irish DAR in the Netherlands.

In the Dutch Supreme Court, a single judgment is given by majority decision (in changing panels of five or three judges), although we strive for consensus. All cases are discussed with all judges of the relevant division (tax, criminal or civil, with 12 judges in the civil division) present, the non-panel members in an advisory role, to prevent divergence between different panels. Judges' assistants and other judges who do an internship at the court, can also be present. We learned this would be impossible in Ireland because only the members of the panel are allowed at the discussion of the case.

My colleagues and I experienced firsthand the different way judgments are delivered in Ireland. We were present at the end of the Costello Case ([2022] IESC 44) in which there were seven judgements, and one needed a matrix to understand the outcome. Much can be said about the pro and cons of both systems, but one thing is clear to me: individual opinions make for far better reading.

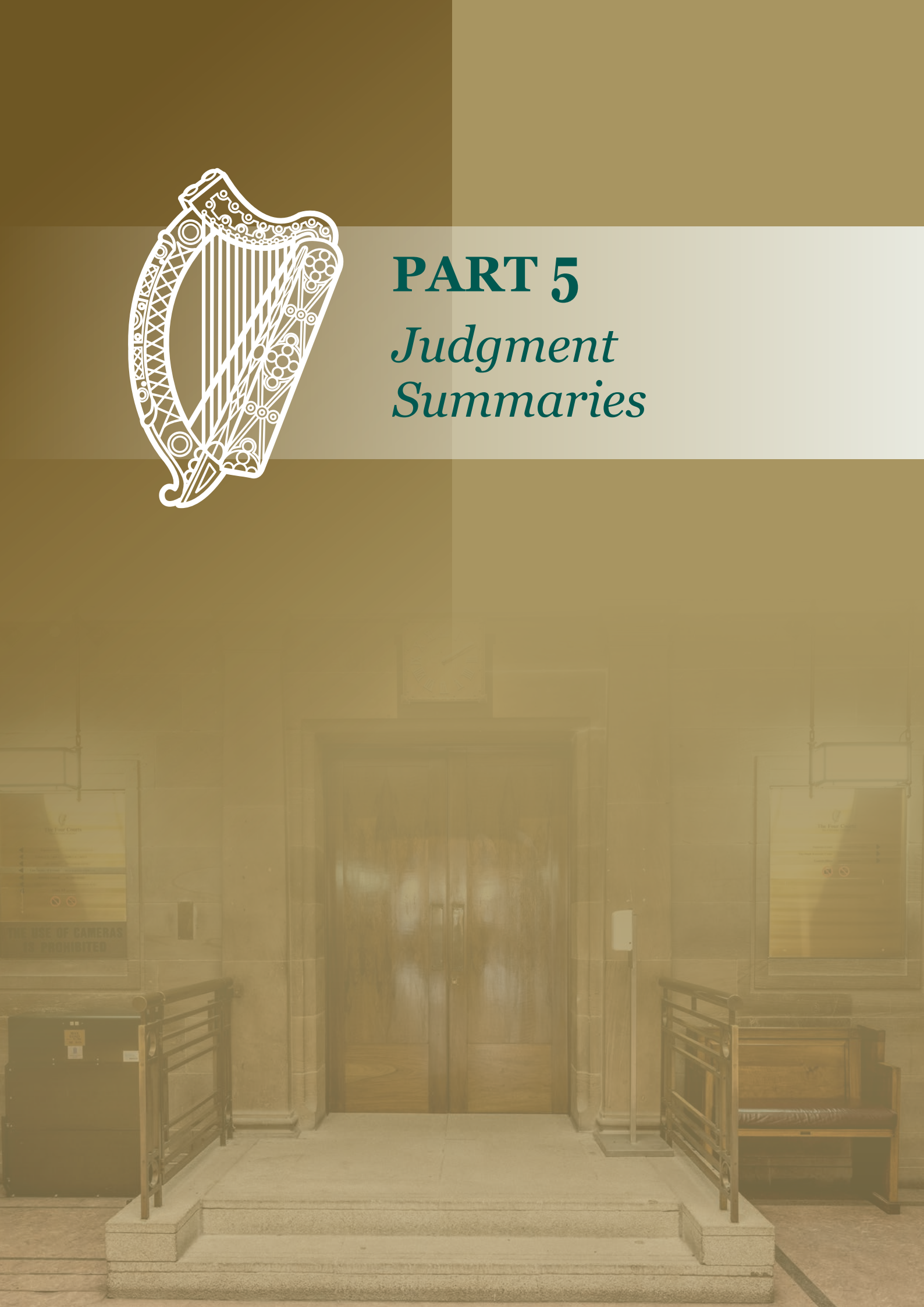
To manage the case load at the Dutch Supreme Court, Dutch law allows us to decide cases with "abbreviated reasoning", which boils down to stating that no reasons have to be given to reject the appeal. However, we still have to study the case, to decide whether the appeals should be rejected or not. A leave-to-appeal-system would solve this, but from the registrar of the Irish Supreme Court and judges we learned about its complications. I am still a proponent of its introduction in the Netherlands, but we should use the Irish experience to guide us in its implementation – if it ever comes to that.

On my final day of the exchange, I was allowed to participate in the judges' conference at Dublin Castle. It was remarkable to have lunch and dinner in the stately room where I had been as a tourist a few days before. Among the many highlights of the day [included] a session with Ukrainian judges, followed by a standing ovation, and a though-provoking lecture by Professor Conor Gearty on threats to the rule of law.

I have learned much in Dublin but [I] have [been] most impressed by the people I have met. I left Ireland with the longing to return and regret that I did not come sooner."

PART 5

Judgment Summaries



Case Summaries

The following ten case summaries have been included to provide a sample of some of the cases considered by the Supreme Court in 2022. 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.

Burke v. The Minister for Education, P v. The Minister for Education [2022] IESC 1

On appeal from: [2021] IECA 67

Headline

The Supreme Court today held that the decision of the Calculated Grades Executive Office ("CGEO"), a non-statutory executive office in the Department of Education and Skills, made on the 29th July, 2020, that it would not be possible to award the applicants with calculated grades under the Calculated Grades System introduced during the Covid-19 pandemic for the Leaving Certificate of 2020 was an impermissible interference with the constitutional freedom of the family to provide education in the home as provided for in Article 42.2. The decision clarifies the test to be applied when it is alleged that an exercise of executive power has infringed a guaranteed personal right of an individual, and also discusses the question of whether there is a derived right protected by Article 40.3 of the Constitution for an individual receiving home-schooling to have reasonable account taken of his or her situation when educational policies are being implemented by the State.

Composition of Court

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

Judgments

O'Donnell C.J. (with whom MacMenamin, Dunne and O'Malley J. agreed); Charleton J. concurring as to result.

Background to the Appeal

The plaintiff in both proceedings were students preparing to sit the Leaving Certificate in June 2020 when a decision was made by the Government, in response to the crisis created by Covid-19, to postpone the holding of the examination and establish a system for the awarding of estimated marks to students. The issues in this appeal arise from the decision of the CGEO in respect of the Leaving Certificate 2020 that it would not be possible to award the applicants calculated grades under the Calculated Grades Scheme ("CGS") in circumstances where their respective providers of homeschooling were a parent (and thus fell foul of the conflict of interest provisions in the Scheme), and unregistered teachers (who were also precluded from providing estimated marks), and where the Scheme did not provide an alternative route whereby the applicant students might be able to receive estimated marks. The High Court held that the decision of the 29th of July was arbitrary, unfair, unreasonable, and contrary to law and made an order of certiorari quashing said decision. The Court of Appeal upheld the orders made by the High Court, holding in addition, however, that the decision was an impermissible interference with an unenumerated constitutional right of a home-schooled child to have reasonable account taken of his or her situation when education policies are being implemented by the State. The State appealed this decision.

The issues to be determined in this appeal were fivefold. Firstly, whether the CGS was an exercise of the executive power of the State. Secondly, whether the test to be applied by the Court to the decision to implement the CGS was that it was a "clear disregard" of the Constitution. Thirdly, whether there was a constitutional right, derived or otherwise, which was interfered with by the CGS. Fourthly, whether the applicants were not held equal before the law contrary to Article 40.1 of the Constitution. Finally, whether, in light of the answers to the issues above, the CGEO's decision that it would not be possible to provide estimated marks to the applicants was invalid.

Reasons for the Judgment

In addressing the first issue, O'Donnell C.J. held that the CGS was clearly an exercise of the executive power of the state for a number of reasons. Firstly, he noted that the decision to implement the CGS expressly stated that it was to be delivered through a "non-statutory executive office". Secondly, he held that there was no reason to doubt such a description, as the power to set up a body to implement the scheme, to set the terms of the scheme and to fund the operation of its implementation all flowed "almost self-evidently" from the executive power. **[23-26]**

Regarding the second issue, O'Donnell C.J. held that whether the CGEO had acted in "clear disregard" of the constitutional rights of the applicants in initially excluding them from the CGS was the incorrect test to apply. O'Donnell C.J. distinguished between proceedings in which an individual contends that an executive decision or action infringes provisions of the Constitution protecting the fundamental personal rights of the citizen and proceedings in which an individual seeks to argue that the Government has exceeded the limits set by the Constitution in respect of executive power. Regarding the latter proceedings, he held that where the Constitution confers executive power and a party seeks to argue that the exercise of such power exceeds an express or implied limitation set by the Constitution on the exercise of that power, then it is appropriate and consistent with the Constitution that, in order to succeed in any such challenge, a plaintiff should establish that the Government had acted in "clear disregard" of any such limitation. However, he held that in circumstances where it was claimed that the personal rights of the citizen are infringed by the executive, there was no justification for applying a clear disregard test: the courts must uphold the Constitution by applying the same standards as would apply in cases where it is alleged that those rights had been infringed by the actions of the legislative branch of government. That was the case here. **[27-61]**

On the third issue, O'Donnell C.J. discussed the precise constitutional right at issue. He rejected the proposed right which was argued by the applicants to be derived from Article 42.4. The asserted right neither followed from the protection envisioned by Article 42.4, nor was it necessary in circumstances where home-schooling is specifically contemplated by Article 42.2. In these circumstances, it was held that the correct approach was to ask whether or not the exclusion of the applicants from the CGS was an impermissible interference with the express right of parents to provide education in the home and the consequent right of children to receive it. **[62-74]**

O'Donnell C.J. rejected the appellant's contention that any interference with a family decision in relation to home-schooling would be an impermissible one. For example, it would not be the case that if a parent decided to ignore the Leaving Certificate curriculum entirely in the course of homeschooling their child that they could then require the State to design a bespoke examination system for that child. However, this was not what occurred here. Both Mr. Burke and Ms. Power had been following the Leaving Certificate curriculum with a view to sitting the exam in-person in June 2020. The decision to exclude them from the CGS meant that they would be required to sit the postponed in-person examination at a later date, with the consequence that they could not enter third-level education in that year as this

would occur after the offering of college places. In these circumstances, there was an undoubted interference in the constitutional rights of the applicants and the question then became the justification offered by the Department for such interference. The reason offered by the Department, that it would be unfair to other students if students in the position of Mr. Burke and Ms. Power received a form of individualised assessment, was an insufficient justification for the degree of interference with the plaintiffs' constitutional rights, and the decision was therefore a disproportionate interference with the constitutional rights of the plaintiffs. **[75-102]**

Fourthly, O'Donnell C.J. held that the decision to exclude the applicants from the CGS was not a decision based on any intrinsic aspect of human personality and consequently did not breach the Article 40.1 guarantee of equality. He would leave to another case, in which the issue arose, the question of the application of the equality guarantee where there was no question of a discrimination on the basis of human personality and where a fundamental right was involved but not breached. **[103-106]**

Fifthly and finally, O Donnell C.J. found that in the light of his conclusions on the above issues the decision of the CGEO that it would not be possible to award the plaintiffs calculated grades was invalid.

Charleton J., concurring as to result, held that there must be a distinction between mere administration and the exercise of executive power. The decision of the Government to postpone the Leaving Certificate examination was an exercise of the executive power, while the decision of the CGS not to award marks to the student applicants was an administrative act. He considered that there must be no "blurring of [the] lines" delineating the responsibilities of each branch of government, and that to adopt a case-by-case analysis, such as that adopted in the Court of Appeal, would be to treat those lines as elastic. This flexibility, he held, would be incompatible with the demarcation of power between the branches of government. Therefore, Charleton J. considered that the clear disregard test must apply to the decision of the Government in this case. In applying the tests to the respective exercise of executive power and the administrative decision to refuse to award estimated marks, Charleton J. held that the former did not fall foul of the clear disregard test but, when applying an analysis derived from administrative law, the latter was held to exceed the jurisdictional limits of the Constitution by leaving the applicants with no available entry to third-level education, and therefore concurring with the result of the majority judgment. Charleton J. held that the decision of the CGEO was invalid.

Clare County Council v. McDonagh & Anor [2022] IESC 2

On appeal from: [2020] IECA 307

Headline

The Supreme Court has today allowed an appeal brought against a decision of the Court of Appeal to affirm High Court orders made which required the appellants to remove, without delay, their caravans, property and associated vehicles from land owned by the respondent County Council. The effect of today's decision is to discharge the mandatory interlocutory orders granted by the High Court.

Composition of Court

Dunne, O'Malley, Baker, Woulfe, Hogan JJ.

Judgment

The Supreme Court allowed the appeal, with all of the judges agreeing that the High Court and Court of Appeal had erred in holding that the appellants had not raised a fair case in the context of an interlocutory injunction.

Background to the Appeal

The appellants are members of the Traveller community who have been subject to numerous proceedings brought by the respondent County Council in respect of the unlawful occupation of various sites owned by the County Council. The appellants had previously resided as tenants of the respondent County Council in a Traveller-specific housing development known as Ashline between March 1998 and November 2012. After a fire destroyed the Ashline site, the appellants lived in privately-rented accommodation until September 2017. The appellants thereafter lived on certain lands owned by the respondent on and around the Ashline site. The site subject to these proceedings is situated in Folio 50734F at Cahercallamore.

The High Court granted the respondent's application for interlocutory relief. The Court of Appeal dismissed the appellants' subsequent appeal. The Court of Appeal held that the appellants had not shown that their caravans, vehicles and associated property constituted a "home" within the meaning of Article 8 of the European Convention on Human Rights so that a judicially-conducted proportionality analysis was not required. The Court placed particular emphasis on the fact that the caravans had not been in their current location sufficiently long to satisfy the "close and continuous links" test set out in the European Court of Human Rights decision in *Winterstein v. France* [2013] ECHR 984.

Reasons for the Judgment

In the only judgment in this appeal Hogan J first considered the fact that the appellants had exclusively relied on Article 8 ECHR (which guarantees "respect" for the home) before the High Court and Court of Appeal. Hogan J held that the High Court and the Court of Appeal were not entitled to approach this matter without regard to and engaging with the corresponding constitutional provision, Article 40.5, which guarantees the "inviolability" of the dwelling. This is because the ECHR does not enjoy the same status enjoyed by EU law in domestic law by reason of Article 29.4.6 of the Constitution. Hogan J drew attention to earlier case-law of the Supreme Court which had held that the ECHR does not enjoy direct effect in Irish law and that it had been enacted at sub-constitutional level by the European Convention of Human Rights Act 2003. So far as the present appeal was concerned, Hogan J held that this meant that Article 40.5 could not "be treated as if it did not exist": it must be "properly considered and addressed." Any other conclusion would mean, in effect, that the courts had yielded a sort of constitutional primacy to the ECHR so that it thereby acquired a form of quasi-constitutional status which it has never been accorded.

Hogan J considered next whether the appellants had raised a fair case as to the existence of a "dwelling" for the purposes of Article 40.5 of the Constitution or a "home" for the purposes of Article 8 ECHR. In the first instance Hogan J emphasised that while a "home" under Article 8 ECHR requires an occupier to show "close and continuous links" with a specific place, it is sufficient in respect of a "dwelling" under Article 40.5 for a person simply to show that they reside in a specific place. In the present appeal Hogan J held not only that the caravans and mobile homes occupied by the appellants were clearly "dwellings" for the purposes of Article 40.5, since it is a place where, as a matter of fact, they actually reside, but also that the Court of Appeal was wrong to consider that the appellants had not also raised a fair question as to whether the caravans and mobile homes constitute a "home" under Article 8 ECHR. On this latter point Hogan J noted that the current site of the appellants' caravans and mobile homes is only about 1 km away from the Ashline site where the appellants had previously resided for some years. In these circumstances Hogan J held that it is least arguable that the appellants can satisfy the "specific and continuous links" test articulated by the European Court of Human Rights in *Winterstein*.

Hogan J then considered whether the appellants had an arguable case that the removal of their caravans mobile homes, and associated property by mandatory interlocutory order would be disproportionate in the circumstances, a question a court is obliged to consider in circumstances where the loss of one's "dwelling" or "home" is at stake. From the outset it is recognised that the determining question is the extent to which those who unlawfully occupy land can enjoy either constitutional or ECHR protection. On this critical issue Hogan J held that, following the decision of the Supreme Court in *Meath County Council v. Murray* [2017] IESC 25, it can be said that those who unlawfully occupy land or engage in unauthorised development can still enjoy constitutional (and, following *Winterstein*, ECHR) protection. He pointed out, however, that in such circumstances the force of that protection is greatly diluted, such that there very much remains a presumption in favour of enforcement of planning laws and the granting of an order pursuant to s. 160 of the Planning and Development Act 2000 restraining unauthorised use of those lands. This being so the next question considered by the Court was whether this presumption may be discharged in the particular circumstances of this case, particularly in light of the decision of the European Court of Human Rights in *Winterstein*, which was not referred to in *Murray*.

The first point that was emphasised is that this case involved an application for a mandatory interlocutory injunction, a kind of relief that should be a stepping stone towards a trial and not, in practice, treated as a means of obtaining a summary judgment. In conducting a proportionality analysis, therefore, in the context of a mandatory interlocutory order, a court need only be persuaded that there are factors that exist that raise a fair question as to whether such an order would be disproportionate. In this case Hogan J considered that there were several such factors. The first was that the application concerned the rights of a vulnerable minority group who have struggled for recognition of their cultural identity and way of life, particularly as it fits in with planning law and land use. The second critical factor was that this case concerned an application brought by a Council in its role as a landowner and planning authority. In this respect it is noted that the appellants raised an

arguable point that the Council had failed in its duty as a housing authority to offer suitable accommodation to the appellants, having regard in particular to Ms. McDonagh's medical needs and the fact that accommodation previously offered had raised "compatibility issues". The final factor emphasised by Hogan J was that if a mandatory interlocutory injunction were to be granted, the appellants would have nowhere else to go without necessarily trespassing on the lands of another party.

Drawing the threads of these points together, Hogan J concluded that while a Council would normally be entitled to orders restraining trespass and/or the unauthorised use of their lands under s. 160 of the 2000 Act, in the particular circumstances of the present appeal, the appellants had raised fair arguments by way of defence at this juncture. He accordingly held that a mandatory interlocutory injunction should not be granted. Hogan J, however, also noted that this decision might have been different had the unlawful occupation and unauthorised development posed any immediate threat to the amenities of others, public safety or any other similar pressing consideration. He also noted that if the situation had involved a purely private party, as opposed to a public authority, then the case for granting interlocutory relief would have been almost unanswerable. The County Council, however, was not such a party, and therefore different considerations had to be taken into account in determining whether to grant such relief.

Minister for Justice & Equality v. Pal [2022] IESC 12

On appeal from: [2021] IECA 165

Headline

The Supreme Court today upheld the decision of the Court of Appeal to order the applicant's surrender to Romania to stand trial for a murder alleged to have been committed in Ireland in 2014.

Composition of Court

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

Judgments

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

Background to the Appeal

On April 10th 2014, a group of men attacked Virgil Busa at his flat in Navan, Co. Meath, with Mr. Busa ultimately dying a few days later. The appellant in this case was one of a group of men sought by Romania for prosecution for the murder.

The appellant relied on s. 44 of the European Arrest Warrant Act 2003 ("the EAW Act") as precluding his surrender. Under this section, Ireland is not obliged to surrender persons where the EAW relates to an offence alleged to have been committed outside the issuing state, and where that offence, by virtue of having been committed outside Ireland, would not be an offence in Irish law. The appellant argued that "the offence" meant the exact facts of the offence – including that the appellant was a non-national.

In the High Court, McDermott J. rejected this, relying on the judgments of Denham C.J., Murray and Fennelly JJ. in *Minister for Justice & Equality v. Bailey (No. 1)* [2012] 4 I.R. 1 which had held that a test of "factual reciprocity" was necessary in considering challenges under s. 44. This factual reciprocity, he held, involved reversing the relevant facts – once these facts were reversed in this case, McDermott J. held that Ireland would exercise jurisdiction in such a case, and thus surrender was not precluded by s. 44.

On appeal to the Court of Appeal, the Court (judgments of Donnelly & Collins JJ.; Ní Raifeartaigh J. concurring with both) upheld the judgment of McDermott J., holding that the majority approach of the Supreme Court in *Bailey* (No. 1) had been correctly applied in the High Court.

Reasons for the Judgment

Giving the unanimous judgment of the Supreme Court, O'Donnell C.J. noted that "factual reciprocity" was one of the three approaches taken to s. 44 in *Bailey No. 1*, lying between the more restrictive "shared basis" approach of Hardiman J. and O'Donnell J.'s more expansive approach of "category reciprocity". Every case which satisfied the "shared basis" approach – that the legal basis on which the issuing state sought surrender was one on which the executing state could also exercise jurisdiction – satisfied the broader test of "factual reciprocity". Similarly, every case within "factual reciprocity" satisfied the "category reciprocity" test, as all factual reciprocity cases involved the same type of offence as specified in category reciprocity. As in this case the appellant satisfied the shared basis approach (and therefore the factual reciprocity and category reciprocity approaches) the Court held that appellant's interpretation of s. 44 was implausible and therefore that – whichever of

the approaches from *Bailey No. 1* were adopted – his surrender was not precluded by the terms of s. 44. **[39-41]**

Further, the reversal of the location contended for by the appellant would not be relevant or applicable in cases where the applicant is alleged to have committed an offence in a country other than either the issuing or executing state and which come [within] s.44 and Article 4.7(b). Contrary to the appellant's contention, the relevant fact in *Bailey No. 1* was not that Mr. Bailey was not Irish, but rather that he was not French. France in that case sought surrender of a non-French national for the murder of a French citizen outside France. It was necessary to ask then if Ireland would try a non-Irish national for the murder of a Irish citizen outside Ireland. **[45-46]**

In addition, the Court rejected the appellant's submission that his interpretation of s. 44 – and by extension of Article 4.7(b) of the Framework Decision which the EAW Act sought to transpose – was sufficiently plausible to require a reference to the CJEU, for numerous reasons, including its contradictions and the fact that it contravened the purpose of the Framework Decision to facilitate surrender between member states. **[47-52]**

Finally, O'Donnell C.J. also considered the potential impact of public international law on the case, and in particular the impact of the principle that states are entitled to refuse requests for surrender in cases of exorbitant jurisdiction. This, the Court held, informed the interpretation of s. 44 which could not be interpreted in a manner which would result in the refusal of a request made in respect of the exercise of jurisdiction recognised in international law and which Ireland itself exercised. **[53-58]**

Higgins v. Irish Aviation Authority [2022] IESC 13

On appeal from: [2020] IECA 157

Headline

The Supreme Court today has allowed the appeal of the plaintiff, substituting the Court of Appeal's award in damages for defamation with its own, higher figures, while maintaining the 10% discount under the Offer to Make Amends procedure set out in s. 22 of the Defamation Act 2009.

Composition of Court

MacMenamin, Dunne, Baker, Woulfe, Hogan JJ.

Judgments

MacMenamin J. (for the majority); Dunne J. (concurring); Baker, Woulfe JJ. (concurring, in part and as to the orders proposed); Hogan J. (dissenting).

Background to the Appeal

The background to the appeal arises from emails sent by the IAA, insinuating that the plaintiff had flown a microlight aircraft unauthorised and would not get away "Scot free", despite the plaintiff having acted entirely correctly. The plaintiff launched defamation proceedings, and some years later, the defendant admitted liability and offered to make an apology and to make amends.

The case came before the High Court for assessment of damages. The jury awarded €300,000 in respect of general damages, €130,000 in respect of aggravated damages, and discounted that gross figure by 10% in view of the offer of amends.

The IAA appealed to the Court of Appeal who lowered the awards to €70,000 for general damages and €15,000 for aggravated damages. The Court of Appeal maintained the 10% discount.

Reasons for the Judgment

The issues in this appeal include how the offer of amends procedure should operate; what guidance should a trial judge give to a jury to assist the jury in determining damages in defamation; and the proper circumstances in which an appellate court should set aside the jury's award.

MacMenamin J. considers s.13 of the 2009 Act which provides for an appellate court to substitute damages awarded by the High Court with "such amount as it considers appropriate". The Courts of Justice Act, 1924, s.96 empowered an appellate court to enter its own verdict as the court considered "proper". MacMenamin J. holds that "proper" and "appropriate" have the same meaning, and that no legislative intention to alter the pre-existing judicial practice of deference to jury awards can be evinced from the 2009 Act **[15-21]**.

Responding to Hogan J.'s observations on free speech vs defamation, MacMenamin J. comments that, as the defamatory comments were not true, nor based on belief, they are not subject to the same constitutional protection as expressions of conviction or opinion **[111-114]**.

MacMenamin J. sets out relevant case law on awards in defamation which have the most bearing on the present case so as to provide a detailed picture of what a reasonable award has been shown to be. He points out that it was not argued that the decisions in *Leech*, *de Rossa*, *O'Brien* or *McDonagh* were wrongly decided **[120-122]**.

He concludes, following an examination of prior case law, that in awarding €300,000 by way of general damages, the jury had substantially departed from the appropriate parameters of the case, and that it was not defamation in the highest range of cases such as Leech or de Rossa, or other cases where the defamation was less serious but where the publication was wide **[138-139]**. MacMenamin J. finds that the allegations and conduct of the defendant in its defence aggravated the injury; holding that the strategy adopted by it warrants a figure of €50,000 for aggravated damages **[164-179]**.

Turning to the discount to be applied following an offer of amends, MacMenamin J. suggests that a court should take account of the "timing, content of the offer, and the conduct of the defendant", and that it should operate on a scale of discount from 0% to 50%, with 50% discount being a "gold standard". He points out that any inadequacy in the offer should go to the question of discount percentage, not to aggravated damages **[180-187]**.

MacMenamin J. holds that though the award should be set aside, it should not be remitted to be assessed by jury again, and that a court should not stand in the way of the public interest in concluding a case **[140]**.

Though defamation cases cannot be easily categorised, and while there will always be exceptional cases, he draws from case law to illustrate that cases tend to fall within four "*general categories or brackets*". He finds that the Court of Appeal was wrong to cut general damages to €70,000 for a "very serious defamation" and instead locates the appropriate figure for general damages in the "third category" at €175,000 **[155-163]**.

MacMenamin J. stresses the need for trial judges to give specific guidance to juries by reference to a range of cases, and that going forward, trial judges might request the jury to place the case within the appropriate range or bracket **[191-198]**.

Dunne J. agrees with MacMenamin J.'s judgment in relation to both general and aggravated damages [1]. She disagrees with Hogan J.'s view that s.13 of the 2009 Act was intended as a direction that the pre-existing judicial practice of deference to jury awards in defamation should be changed. She sees s.13 instead as seeking to change the practice of appellate courts directing a retrial instead of substituting their own award. She notes, however, that a court still has discretion over remittal or substitution **[18-23]**.

Dunne J. observes that the reluctance to interfere with a finding by a trial judge as to damages is not confined to the area of defamation alone, and extends also to personal injury actions. Dunne J. states that the fact that jury trials have been retained for defamation, despite being abolished for most civil actions in 1988 is of significance, and recognises the importance of juries in this area **[2425]**. She agrees with MacMenamin J. that this is an appropriate case for the court to substitute its own award rather than remitting it back to the High Court for a retrial **[27]**.

Baker J. disagrees with Hogan J.'s analysis of s.13 of the 2009 Act, holding that it does not demonstrate an intention to depart from the established jurisprudence that an appellate court should afford a high degree of deference to a jury award, interfering only where the award of the jury was disproportionate, such that no reasonable jury would have come to that figure **[8-17]**. She is not convinced that the jury

award was so disproportionate as to warrant this Court substituting its own award **[31]**. Though she does not believe that the jury award should be interfered with, she accepts that she and Woulfe J. are in the minority on this point, and hence is prepared to agree with the figure for general damages arrived at by MacMenamin J. in light of the clear wish expressed by the plaintiff and defendant that this litigation be brought to an end. Baker J. also agrees with the figure for aggravated damages proposed by MacMenamin J. **[35-36]**.

Woulfe J. is in agreement with MacMenamin, Dunne and Baker JJ.'s analysis that s.13 of the 2009 Act does not change the practice of judicial deference to jury awards in defamation **[2]**. He considers that given a jury has had the advantage of seeing and hearing the witnesses, there is "compelling logic and common sense underlying such judicial deference" **[3]**. He comments that MacMenamin J's suggestion that general damages can be located within four brackets requires caution, and agrees with MacMenamin J.'s words that such guidelines cannot be applied rigidly **[4]**.

Woulfe J. agrees with Baker J. that the jury award for general damages in this case was not so disproportionate as to justify an interference, highlighting the gravity of the statements, the conduct of the defendant, and the fact that the IAA is a regulatory authority. He agrees with MacMenamin J. as to aggravated damages **[9-13]**. Given that he and Baker J. are in the minority in their views that the jury award for general damages should not be disturbed, he proposes agreeing with the figure arrived at by MacMenamin J. so as to put an end to the litigation, and in light of the fact that MacMenamin J.'s figures best reflect a median within the spectrum arrived at **[15]**.

Hogan J. disagrees with the majority's reasoning as to the role of appellate courts in respect of jury awards. He states that the law has moved on from the prior position that appellate courts should be slow to interfere with jury awards in defamation, which he says reflects the importance of the right to free speech under the Constitution. He considers that the effect of s.13(1) of the Defamation Act 2009 was that appellate courts were empowered to substitute their own view of what the appropriate level of damages should be **[10-33]**. Hogan J. notes that the 2009 Act, and in particular ss.13(1) and 31, shows that the Oireachtas intended the judiciary to have a greater role in determining damages. He stresses that the wording of s.13(1) is more particular than the wording of s.96 of the Courts of Justice Act 1924 and is directed to the very issue at hand **[15]**. Hogan J. concludes that, as a matter of practice, appellate courts may set aside an award when it deviates by more than 25% from its own assessment of appropriateness, but should otherwise defer to the jury's assessment reflecting the fact that the jury had the advantage of seeing the witnesses and hearing the evidence **[35-37]**.

Hogan J. conducts a review of the case-law and past awards on appeal, in both defamation and personal injuries **[38-68]**. He concludes that the defamation here fell into the "intermediate" category of defamation cases, such that an award of €100,000 for general damages is more appropriate **[70-74]**. He also considers that while the Personal Injury Guidelines have no direct connection to defamation awards, it would be difficult to stand over the jury award of €300,000 for general damages given that a similar sum would be awarded to a double amputee **[63-66]**. Finally, Hogan J. also dissents from the majority on the issue of aggravated damages, such that had the IAA

appealed on this issue, he would have reduced the award under that heading to nil. He considers that the IAA's conduct related to the effectiveness of the offer to amends procedure and was "standard fare" in defamation cases. Hogan J. considers that the proper recourse in such circumstances is not to grant an award of aggravated damages, but rather to reduce the discount figure for the offer of amends **[75-86]**.

Right to Know CLG v. Commissioner for Environmental Information & Ors [2022] IESC 19

On appeal from: [2020] IEHC 273

Headline

The Supreme Court found that the immunity conferred on the President from Article 13.8.1° excludes the President and his officials, as well as the Council of State, from the obligations of disclosure and the enforcement mechanisms provided by the European Communities (Access to Information on the Environment) Regulations 2007-2018 ("the AIE Regulations").

Composition of Court

O'Donnell CJ, MacMenamin, O'Malley, Baker, Hogan JJ.

Judgments

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

Background to the Appeal

This is an appeal of the State parties, and a cross appeal from Right to Know CLG from the High Court judgment [2021] IEHC 273, in a statutory appeal from the refusal of the Commissioner for Environmental Information of requests made by Right to Know CLG for two categories of information and documents under the European Communities (Access to Information on the Environment) Regulations 2007-2018 (the AIE regulations): these documents were first, in relation to two speeches made by the President; and the second in relation to records held by or on behalf of the Council of State concerning consultation with the President for the purpose of considering whether to refer the Planning and Development Bill 1999, and s. 24 of the Housing (Miscellaneous Provisions) (No. 2) Bill 2001 to the Supreme Court under Article 26 of the Constitution. The High Court held that information related to the two speeches ought to be disclosed, but information held by the Council of State falls under the legislative exception to the AIE regulations, and were not subject to an obligation to release.

Reasons for the Judgment

Baker J. delivered the unanimous judgment of the Court. She held that the notice party, the Office of the Secretary General to the President, does not have a separate legal identity, and the President's Secretary cannot be said to hold papers on his or her personal behalf independent from the President. The Council of State equally has no separate function by which it would independently hold information that might be the subject of a request for disclosure as its function is to assist the President in the performance of his or her constitutional role **[para. 75][120]**. The President can be said to be "above politics", as the constitutional functions of the President are in no sense decision-making or policy-making functions, but rather operate at a constitutional level and as a reflection of domestic values and principles **[77]**. The making of a reference to the Supreme Court under Article 26 could not be called the exercise of a "legislative function", and Baker J. held that the High Court was incorrect to so determine.

The consistent approach of the courts has been to decline to adjudicate upon any challenge to the President in the performance of his or her functions and the immunity from legal sanction or order is a constitutional prohibition on the jurisdiction of the courts to analyse, challenge, adjudicate upon, or make an order in relation to, the performance of the President's functions **[93]**. The only means by which a President can be called to account is by the impeachment

process provided for under Article 12.10 of the Constitution. This reflects the fact that the President has no power to affect, limit or enhance the rights of individuals or legal persons, and the President does not need to be answerable to the judicial branch of government, precisely because he does not have such power **[97]**.

The powers of the Commissioner for Environmental Information to invoke the court process is inextricably linked with the judicial process, and any review in the High Court or on appeal to this Court or to the Court of Appeal would be an indirect or collateral attempt to make the President answerable for a refusal to disclose information or otherwise respond to the Commissioner. The Presidential immunity precludes the President making a choice to submit to the Commissioner and/or to a court, as the immunity must be seen as absolute in the sense that it has the effect of limiting scrutiny by the courts and is not a voluntarily assumed privilege but one inherent in the constitutional order [108]. Thus, to compel either the Council of State or the Secretary to the President to engage with a request from the Commissioner, and thereafter to permit the invocation of court scrutiny of that request by the various means available from the AIE Regulations, would involve scrutiny of an answer by those bodies who act at all times on behalf of the President **[123]**.

Baker J. rejected the argument of Right to Know that the supremacy of EU law requires that the President be subject to a request for environmental information under the AIE Directive, and ipso facto to the jurisdiction of the Commissioner, and thereafter on appeal or for the purposes of enforcement, to the courts. She held that EU law permits the exclusion of a power of review where the Member State's constitutional order so requires, and therefore does not necessitate that the clear constitutional immunity of the President be abrogated for the purpose of the AIE Directive **[152]**. Given the clarity of the constitutional prohibition on making the President answerable to any legal or administrative process (other than that specified by Article 13.8.2°), it would have been "superfluous" or unnecessary to make express provision for any such exemption in the national implementing measure **[154]**.

With regard to the exclusion in Art 3(2) of the Directive, Baker J. held that the President or the Council of State do not act in either a judicial or legislative capacity and therefore the exclusion is not applicable. The President is not a "public authority" because he or she is acts outside the policy and decision-making realm **[182]**. The power to make decisions which affect or are capable of affecting the environment, or policy on the environment, is the key institutional and functional test to determine if a body is a "public authority". Functionally, the President's powers are constitutionally defined and are constrained to those ceremonial, symbolic and limited reserved or discretionary powers, none of which involve the President in any decision-making role and in no case does the President exercise any role as decision maker in the realm of the environment nor does the exercise of their role impact on policy or the rights of any individual **[187]**.

The People (Director of Public Prosecutions) v. F.N. [2022] IESC 22

On appeal from: [2021] IECA 238

Headline

The Supreme Court has today dismissed an appeal brought by FN against a decision of the Court of Appeal which had upheld the conviction of FN for sexual assault. The Supreme Court held that there is no requirement on the prosecution in sexual assault cases to prove a sexual element in the offence on the part of the accused.

Composition of Court

Charleton, O'Malley, Woulfe, Hogan, Murray JJ.

Judgments

Charleton J. (with whom O'Malley and Murray JJ. agreed); Woulfe and Hogan JJ. (dissenting)

Background to the Appeal

This appeal centres on the nature of the offence of sexual assault, particularly whether there is a requirement not only for the assault to take place in circumstances of indecency but also, for some cases including, on the appellant's submissions, this one, that a sexual motive in or sexual element to the assault must be established. The appellant, aged 14 years at the time of the offence, was found guilty of sexually assaulting the 6-year-old victim. The circumstances arose after the two children were playing in a field near their family homes, during which the accused pulled down the victim's trousers and underpants and hit him on his bare buttocks "nine times", as clarified after counting by the victim on his fingers.

The issue of law of general public importance determined by this Court in its determination is whether the prosecution is required to prove an intention to commit an assault, as well as the intention to commit an indecent one with the included element of sexual motive in circumstances where there is ambiguity in the circumstances of the alleged sexual assault. The Court of Appeal upheld the trial judge's view as to the appropriate legal test for sexual assault.

Reasons for the Judgment

Writing for the majority, Charleton J. dismisses the appeal, holding that there is no requirement for the prosecution to establish that there had been a sexual element to an assault committed. In analysing the offence of sexual assault, the judgment sets out three elements to the offence: that the accused intentionally assaulted the victim, that the assault or the circumstances accompanying the assault, are proven to be indecent on an objective standard, and that the accused's purpose was to assault in these indecent circumstances. **[9]**

Considering the additional element of sexual purpose advocated for by the appellant, it is held that the introduction of such an element would constitute an impermissible alteration of the offence and would fundamentally alter criminal law. Motive is not ever a component of crime, but may be evidence which may help prove a crime or undermine proof of that crime. Charleton J. distinguishes this from the case of *The People (DPP) v McNamara* [2020] IESC 34, in which the defence of provocation was corrected and clarified in order to ensure its conformity with other common law defences such as duress. **[14-17]** Charleton J. proceeds to examine the level of objective indecency for the offence in question - that the circumstances of the external commission of the offence "must be an affront to ordinary

modesty". Rejecting the submission of the appellant that an additional sexual motivation element is required for an assault to constitute a sexual assault, Charleton J. finds that the test is entirely objective, requiring only "non-consensual touching of a sexual nature which creates indecent circumstances". **[19-21]**

Charleton J. further refers to the doctrine of lesser included offence, stating that this "was never a case where a lesser offence might be found". While the motivation of the assault may be relevant to the sentence following the delivery of the jury verdict, it cannot be relevant in determining the type of assault that took place. As the definition of the offence is clear, requiring that the external circumstances be indecent and that the accused intended to bring about the assault in such circumstances, it is a matter of law as to whether the external facts proven by the prosecution meet the definition. **[23-27]** It is noted by Charleton J. that the definition of sexual assault was not altered upon its change of name from the common law offence of indecent assault. The judgment also states that a codification of sexual offences would assist significantly in reducing the potential for serious error in trials of this kind. **[29-31]**

In his dissenting judgment Hogan J. disagrees with the majority's view that in the circumstances of this case the prosecution is not required to establish that there is a sexual element to the assault committed by a defendant. Hogan J. considers that, viewed objectively, the circumstances of this case do not give rise to the irresistible inference that the defendant committed an assault in circumstances of indecency and, indeed, Hogan J. notes that as much was noted by the trial judge. Hogan J. holds that where the circumstances of indecency are ambiguous, as in the present case, it is necessary for the prosecution to point to other evidence from which an intention to commit a sexual assault can be inferred. **[44]**

The basis for this conclusion rests in part on an examination of the relevant statutory developments in respect of the offence of sexual assault. **[23-37]** Hogan J. notes that the offence of sexual assault derives from the common law offence of indecent assault which itself was carried over into Irish law by Article 50.1 of the Constitution. Hogan J. observes that since the offence of indecent assault was re-named as the offence of sexual assault following the enactment of s.2(1) the Criminal Law (Rape) (Amendment) Act 1990, the Oireachtas has established a special post-conviction regime that applies automatically to all persons convicted of sexual assault save for certain exceptions not relevant to this case (see s.3(1) of the Sex Offenders Act 2001). In Hogan J.'s view these statutory developments have such a fundamental bearing upon a person convicted of the offence of sexual assault (including the stigma and the consequences under the special post-conviction regime) that the Oireachtas must have intended that where the circumstances of indecency are ambiguous a sexual element must be established. **[24, 32-37]**

Hogan J. also considers that his conclusion is supported by the House of Lords decision in *R v. Court* [1989] AC 28. Hogan J. accepts that this decision concerned the admissibility of evidence and not the proofs required of a prosecution. **[46]** Nevertheless, he holds that there must be a requirement of sexual motive in ambiguous cases particularly in a case such as the present in which it has been accepted that

there was no sexual element to the defendant's conduct. **[47]** Hogan J. thus concludes that since the prosecution did not adduce any evidence in this respect, the defendant's conviction for sexual assault should be set aside and substituted for a conviction of assault for the purposes of s.2(1) of the Non-Fatal Offences against the Person Act, 1997. **[49]**

In a second dissenting judgment, Woulfe J. disagrees with the conclusions reached in the majority judgment, preferring the alternative conclusions arrived at in the judgment of Hogan J. **[3]** Woulfe J. also thinks the reasoning of the majority judgments in *Court* was very helpful. **[4]** As regards the present case, he agrees that this is a case where, in Lord Ackner's words "the circumstances of the alleged offence can be given an innocent as well as an indecent interpretation". For Woulfe J. also the particular context of the conduct in question and the circumstances were absolutely crucial, and, in this case the facts disclose children playing together in the fields, and the smacking appears to have occurred after some form of childish altercation or misunderstanding. In terms of the ages of the children, the older accused boy was still only fourteen years of age and, significantly in Woulfe J.'s opinion, the mother of the complainant described him in her evidence as coming across as younger and as being immature for his age, more like a nine or a ten year old. Woulfe J. cannot see how these circumstances could possibly lead to the type of "irresistible inference" referred to by Lord Ackner in *Court*, i.e. an irresistible inference that the defendant not only intended to commit an assault upon the younger boy, but an assault which was indecent. **[5]**

Woulfe J. also agrees with Hogan J. that the statutory developments in this jurisdiction do have a bearing on the issue arising. Woulfe J. refers to certain principles of statutory interpretation which, in his opinion, support the view of Hogan J. that the name change effected by the 1990 Act is not just simply a matter of nomenclature, which has no implications for the substantive law, and that the Oireachtas must thereby be taken to have intended that the offence of sexual assault must have some clear sexual element to it or, at least, conduct from which such sexual element could irresistibly be inferred. **[6]** As regards the 2001 Act, Woulfe J. agrees with Hogan J. that it is surely relevant that the Long Title of the Act declares that it applies to "persons who have committed certain sexual offences". It appears to Woulfe J. very harsh and unfair that a young person in the position of F.N. would be automatically made subject to the sex offenders regime as provided for in the 2001 Act, in the absence of the prosecution demonstrating he had intended to commit not simply an assault, but a sexual assault. **[9]**

Woulfe J. agrees with Hogan J. that the conviction for sexual assault should be set aside and substituted by a conviction for assault pursuant to s.2(1) of the Non-Fatal Offences against the Person Act, 1997. **[11]**

O'Doherty & Anor v. The Minister for Health & Ors [2022] IESC 32

On appeal from: [2021] IECA 59

Headline

The Supreme Court dismissed this appeal, holding that, as a general rule, the absence of expert or technical evidence cannot, in and of itself, be the basis for a refusal of leave to seek judicial review if challenging the validity of legislation. However, where legislation recited circumstances giving rise to the necessity for it, that basis was supported by sworn evidence and the case sought to be made challenged the truth and/or and correctness of the basis upon which the legislation enacted, then evidence was required and had not been adduced. In addition, the Supreme Court rejected the contention that, where an applicant shows that legislative measures interfere with constitutional rights, the burden of justifying such an interference falls onto the State.

Composition of Court

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

Judgments

O'Donnell C.J. (with whom Irvine P., MacMenamin, O'Malley, Baker and Murray JJ. agreed); Hogan J. dissenting in part.

Background to the Appeal

The appellants sought leave to bring judicial review of Acts and Regulations passed by the Government in order to combat the spread and severity of the COVID-19 pandemic on the grounds that they were repugnant to the Constitution, particularly the constitutional rights to liberty, free movement and travel (Articles 40.3.1° and 40.4.1°), the inviolability of the dwelling (Article 40.5) and freedom of association (Article 40.6). Specifically, the appellants challenged the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act, 2020 and the Emergency Measures in the Public Interest (COVID-19) Act, 2020. In addition, the appellants challenged the following statutory instruments: S.I. No. 121/2020 – Health Act, 1947 (Section 31A – Temporary Restrictions) (COVID-19) Regulations, 2020 and S.I. No. 128/2020 – Health Act, 1947 (Section 31a – Temporary Restrictions) (COVID-19) (Amendment) Regulations, 2020. Meenan J. refused leave to bring judicial review of these Acts and Regulations, holding that the applicants had failed to meet the threshold for leave as set out in *G. v. DPP* [1994] 1 I.R. 374 because, *inter alia*, the applicants were required to put on affidavit "some facts which, if proven, could support a view". This decision was affirmed by the Court of Appeal. The core question on appeal to this Court concerned whether the appellants should have been granted leave in the first instance. In order to answer this question, this Court, in its determination granting leave to appeal, posed three interrelated questions. Firstly, was expert evidence required to be put forward by the applicants in order for leave to be granted? Secondly, if the Acts and Regulations have an impact on constitutional rights, does the onus shift to the State to justify that impact? Thirdly and finally, did the Acts and Regulations on their face have such a significant impact upon the constitutional rights of citizens that leave should have been automatically granted?

Reasons for the Judgment

Regarding the first question, O'Donnell C.J. noted that, as it is necessary to establish standing to challenge legislation, it must be shown in any case that the challenged measures affect the challenger's interests. Similarly, in the

case of seeking leave to bring judicial review, a plaintiff is required to meet the threshold set out in the case of *G. v. DPP*, and while this is a low threshold, it is not a non-existent one. However, it does not follow from this that more by way of evidence is required – in certain cases, meeting this threshold may even be apparent from the provision in question. O'Donnell C.J. held, citing *Molyneux v. Ireland* [1997] IEHC 206, [1997] 2 I.L.R.M. 241, that if legislation can be defended without evidence and solely based on argument, analysis, inference and logic, the same must hold true for a challenge to the same legislation. Ultimately, he held that, while it may be as a matter of fact that cases are strengthened by evidence, as a matter of law, the absence of expert or technical evidence could not, in and of itself, be the basis for a refusal of leave to seek judicial review if challenging the validity of legislation. **[39-45]**

Regarding the proportionality issue, O'Donnell C.J. examined the question of whether, once it is shown that Acts or Regulations have a significant impact on the constitutional rights of citizens, the burden of justifying such an impact shifts to the State. He noted that the term 'proportionality' does not appear in the text of the Constitution itself, rather the concept was introduced to constitutional analysis by Costello J. in the High Court in *Heaney v. Ireland* [1994] 3 I.R. 593. Proportionality in *Heaney* was used as a tool to analyse legislation and the extent to which it can affect or interfere with rights. O'Donnell C.J. held, however, that simply because the test applied by Costello J. in *Heaney* was drawn from Canadian authority, which itself could be traced back to a decision of the Canadian Supreme Court (*R v. Oakes* [1986] 1 SCR 103) where there exists such an onus on the State, it did not follow that the same approach should apply here. Firstly, he cited two decisions in which the Irish courts had specifically distinguished the Canadian approach from the Irish approach: *P.J. Carroll & Company Ltd v. Minister for Health and Children* [2006] IESC 6, [2006] 3 I.R. 431 and Fleming v. Ireland [2013] IESC 19, [2013] 2 I.R. 417. Secondly, he held there are legal, institutional and procedural differences between the jurisdictions of Canada and Ireland that make simply transplanting the Canadian test into the Irish system inappropriate. Thirdly, he held that it was also clear, both from the judgment of Costello J. in *Heaney* and from his extra-judicial writings that it was never his intention to tie Irish law to developments in Canada or any other jurisdiction. Finally, he held that it would seem extremely unlikely given the structure of the Irish Constitution, the presumption of constitutionality and the place of the separation of powers in the Irish system that it was the Canadian model which was intended when the proportionality test was set out in *Heaney*. Consequently, he held that where Acts or Regulations have a significant impact on constitutional rights, it is not the case that the onus of justifying such an impact 'shifts' to the State. **[47-65]** Having dealt with the issue of proportionality, O'Donnell C.J. considered whether, given the impact the Acts and Regulations had on the appellants' constitutional rights, leave should have been automatically granted. He noted that there was some confusion about what case exactly had been made before the High Court; however, he held that the Court was satisfied that the test applied by the High Court judge required evidence as to the justification for the Acts and Regulations and alleged lack of proportionality for the grant of leave for judicial review. O'Donnell C.J. held, as he outlined in relation to the first question, that this was the incorrect test to apply and that there was no absolute or general rule that expert evidence or evidence in relation to policy

must be provided in order to challenge the constitutional validity of legislation. However, he held that the appellants challenge was a challenge to the State's assessment of the public health situation i.e., they claimed that the measures taken were disproportionate because the State overestimated the severity of the pandemic. In these circumstances, in order to succeed, the applicants' case required some plausible evidence in order to establish an arguable case that the State's assessment was beyond any permissible view of the relevant situation. It may have been possible, O'Donnell C.J. noted, to make an arguable case that the State's measures were disproportionate, even accepting its assessment of the severity of the COVID-19 pandemic. Such a case would only have required evidence of impact of the measures on the applicant and thereafter analysis of the measures and the Constitution. However, it was not possible to make an arguable case that the State were completely wrong in this assessment without putting forward some evidence to that effect. In other words, while expert evidence as a general rule is not required in order to secure leave for judicial review, in this particular case an arguable case had not been made, in part because of the lack of evidence to contradict the State's assessment of the pandemic when that was the case being made by the applicants. **[70-83]**

Having addressed the questions relating to evidence and shifting of the onus of proof, O'Donnell C.J. turned to the issue of whether or not the appellants should have been given leave in the first instance. O'Donnell C.J. noted that while the appellants did make reference to a disproportionate interference with the inviolability of the dwelling, freedom of assembly, the practice of religion and the liberty of the citizen, this was a small part of a much broader case advanced by them. The core of their case was the claim that the Acts and Regulations were part of a global conspiracy to undermine the rights of citizens and the administration of justice. In order to make this specific type of claim, he held, some plausible foundation in evidence was required. He held that the High Court was correct to refuse leave for judicial review on that basis and furthermore that it would be inappropriate for leave to be granted on another, alternative basis, as suggested by Hogan J., which would involve making a different case in respect of different provisions applicable at a different time and by reference to circumstances and scientific knowledge which had not been adduced in evidence. To the extent that the appellants' claim made a reference to interference with the right to protest (and free exercise of religion) those references were themselves inadequate to permit leave to be granted to make a case, particularly since such a case, insomuch as it involved an acceptance of the State's assessment of the scientific position, was contrary to the core case advanced by the appellants. **[84-115]**

Hogan J. agreed that evidence is not a necessary condition for the grant of leave for judicial review in a case presenting a constitutional challenge on proportionality grounds, and that the onus of proof did not shift to the State to justify measures once an impact on a constitutionally protected right had been established, but otherwise dissented in part. While he agreed with the majority of the Court that no leave should have been granted in respect of the claim that the Acts and Regulations were unconstitutional on the basis that no real threat was posed by the emergence of COVID-19, he held that there was a second element of the appellants' case on which leave should have been granted. This second element, he held, was predicated on the acceptance of COVID-19 posing a real

and grave public health emergency but that the Acts and Regulations were nevertheless disproportionate and unconstitutional **[17]**. He emphasised the far-reaching impact of the Acts and Regulations on core fundamental rights, noting in particular that in the history of the State there has never been a general prohibition on peaceable assembly and public protest, a general restriction on movement and travel, nor general controls on the number of visitors to citizen's houses **[50]**. In light of this, he held that the Acts and Regulations called for the closest judicial scrutiny **[38]**. Consequently, he held that leave should have been granted as a result of the impact of the regulations on a number of constitutional rights and provisions as he was satisfied that the threshold set down in *G. v. DPP* had been met.

First, focusing particularly on the impact of S.I. No. 206 of 2020 on the right to protest, Hogan J. held that the appellants should have been granted leave in circumstances where the Regulations effected a "complete and total ban" on the organisation of or participation in a public protest **[55-89]**. Second, he held that leave should have been granted as a result of the Acts and Regulations disproportionately infringing personal liberty by, for example, confining people to their own homes and stipulating a 2km radius around one's home in which recreational exercise was permitted. In particular, he noted that the Oireachtas should have kept such restrictions under active review as knowledge of the pandemic and how COVID-19 spread developed, and that there was an arguable case that keeping the measures in place after 1 July, 2020 were disproportionate **[90-104]**. Finally, Hogan J. held that it was arguable that the Acts and Regulations infringed the guarantee of the inviolability of the dwelling insofar as they sought to control or regulate the presence of visitors to people's homes. While he noted that this may not have posed a constitutional issue in the short-term, he held that it would not be possible for such a measure to exist in the long-term, and again after 1 July, 2020 **[105-112]**. Consequently, Hogan J. held that limited leave should have been granted in the first instance for the reasons set out in his judgment.

Dowdall v. Director of Public Prosecutions & Ors, Hutch v. Director of Public Prosecutions & Ors [2022] IESC 36

On appeal from: [2022] IEHC 81

Headline

The Supreme Court rejected this appeal. In doing so, it held that the Offences Against the State Act, 1939 ("the 1939 Act") does not contain a test of 'permanence' by which to gauge the lawfulness of the existence of the Special Criminal Court – rather the test of lawfulness is contained within the statute itself: whether or not the Government is of opinion that the ordinary courts are adequate to secure the administration of justice and the preservation of public peace and order. In addition, it held that no duty attaches to Dáil Éireann to continuously review the necessity of the Special Criminal Court, and while such a duty attaching to Government is implied by the statute, this does not require the kind of formal review process contended for by the appellants and in any event, any such duty had been complied with. Finally, the Court reviewed the principles on which an amicus curiae is permitted joinder to proceedings and held that the Irish Human Rights and Equality Commission ("the Commission") had not met the requirements therein.

Composition of Court

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

Judgments

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

Background to the Appeal

Both Jonathan Dowdall and Gerard Hutch ("the appellants") were brought before Special Criminal Court No. 1 on separate dates and charged with the murder of David Byrne at the Regency Hotel, Swords Road, Whitehall, Dublin 9. In each hearing the Director of Public Prosecutions ("the DPP") informed the Court that she had certified, pursuant to s. 47(2) of the 1939 Act that the ordinary courts were inadequate to secure the administration of justice and the preservation of public peace and order and that it was intended to try the appellants before the Special Criminal Court. The appellants challenged this decision in the High Court, were unsuccessful, and were subsequently granted leave to appeal directly to the Supreme Court in what is referred to as a 'leapfrog appeal'.

Two broad issues arose on appeal. First, it was contended that when the Government made the proclamation in 1972, pursuant to the 1939 Act, bringing the current Special Criminal Court into existence, it intended that the Court be temporary, and that this was contemplated by the Act, but the Court was in fact operating on a permanent basis and this rendered it unlawful. Secondly, counsel for the appellants claimed that the 1939 Act imposes a duty on both the Government and Dáil Éireann to keep the need for the Special Criminal Court under review and that they have failed to meet this duty. In addition, the Commission sought to join the hearing as an *amicus curiae*, and were permitted to make submissions on a provisional basis, the Court reserving to the decision in the case the question of whether the joinder of the Commission was permitted in accordance with the principles applicable to the joinder of an *amicus curiae*.

Reasons for the Judgment

Regarding the first issue, O'Donnell C.J. held that the interpretation of the 1939 Act contended for by the appellants – whereby the current Special Criminal Court moved from being a lawful,

temporary court and became an unlawful, permanent court at some undefined point – would, if correct, be surprising. He held that it would be unusual for the Oireachtas, in passing legislation permitting for the establishment of a Special Criminal Court, itself contemplated by the Constitution, to construct the Court on such a precarious foundation. Furthermore, he held, this test of 'permanence' to gauge the legality of the Special Criminal Court would be at odds with the actual test provided for in the statute and by the Constitution: the necessity created by certain circumstances in which the ordinary courts were considered inadequate to secure the administration of justice and to secure public peace and order. Consequently, it would not be for the Courts to determine by reference to a suggested test of 'permanence' the legality of the Special Criminal Court. That said, O'Donnell C.J. noted, it would not be the case that the actions of the Government in making a proclamation to bring Part V into effect or to make a subsequent proclamation to take it out of effect is non-justiciable, as was suggested in the High Court. He held that the decision was justiciable; for example, the Courts would be entitled to review whether the Government had complied with the requirements of s. 35(2) of the 1939 Act. Finally, he held that it was incorrect to regard the decision of the Government pursuant to either s. 35(2) or s. 35(4) as an exercise of executive power – it was indeed a power entrusted by statute to the Executive but was not by virtue of that fact part of the executive power of the State exercisable by the Government under Article 28.2 of the Constitution. Consequently, O'Donnell C.J. rejected the appellants' contention that the current Special Criminal Court was operating ultra vires of the 1939 Act because it was now alleged to be operating as a permanent court by rejecting the premise that this was in itself a condition of legality in the first place. **[26-41]**

Regarding the second issue, the question of review of the necessity for the Special Criminal Court by the Government and Dáil Éireann, O'Donnell C.J. dealt firstly with the latter party. He held that the Dáil was not under a statutory duty enforceable by court action to review the necessity for the Court in order to exercise its functions under s. 35(5) – indeed, the language of the statute placed no restrictions on the power of the Dáil to annul a proclamation made by the Government pursuant to s. 35(2). Regarding the Government, he held that whenever the Government makes a proclamation under s. 35(4), it must do so in good faith, and this implied that the Government must review the circumstances in the country in order to be in a position to do so. However, that does not require a formal review procedure or any periodic review. In any event, O'Donnell C.J. was satisfied that the trial judge was correct to conclude that the Government had met this duty and, indeed, had surpassed what was required. **[42-44]**

Finally, regarding the role of the Commission as amicus curiae, O'Donnell C.J. noted that while at one level, it might be of some benefit to have further analysis and argument on the law, it is not the practice of the courts to allow parties to seek joinder as *amicus* simply on this basis. This was for a multitude of reasons, including practicalities of cost and time, but also because proceedings arise between the parties in dispute and any addition to that must be justified. Consequently, it must be the case that the function of any *amicus curiae* is that it assists the Court in resolving the case before it. It follows that it is not the function of an amicus curiae to seek to address matters not relevant to the determination of the dispute. In this case, he held, the Commission's submissions

were entirely different to the claim made in these proceedings, and indeed ran contrary to aspects of the case made by the appellants. As a result, O'Donnell C.J. held that the application made by the Commission to be permitted joinder to the proceedings did not satisfy the general principles on which an amicus may be permitted to participate in an appeal. **[45-53]**

In his concurring judgment Hogan J. first provided some historical context to the development of the Special Criminal Court. He noted, in particular, how the operation of the Court is carefully prescribed by ss. 46 and 47 of the Offences against the State Act 1939 as required by Article 38.3.1 and 38.3.2. of the Constitution, unlike its predecessor – established under Article 2A of the Constitution of the Irish Free State (as inserted by Constitution (Amendment No. 17) Act 1931) – which was described as a "complete departure from legal methods" in use in ordinary courts. **[1-8]**

Hogan J. then turned to consider the wording of s. 35(2), s. 35(4) and s. 35(5) of the 1939 Act itself. He agreed that while s. 35(2) provides that the Government may make a proclamation when it forms the view that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order, under s. 35(4) the Government is not at large when it comes to rescinding any such proclamation: the Government may only rescind a Proclamation when it is satisfied that the ordinary courts are in fact adequate to secure the effective administration of justice and the preservation of public peace and order. Hogan J. pointed out that this is quite different from the position which obtains with respect to either the powers of Dáil Éireann under s. 35(5), or the powers of the Government under the old Article 2A of the Irish Free State Constitution. This, Hogan J. reasoned, indicated that a Proclamation made under s. 35(2) of the 1939 Act subsists and remains in operation *unless and until* the Government makes a further Proclamation under s. 35(4) to the effect that it is satisfied as to the adequacy of the ordinary court to secure the effective administration of justice and the preservation of public peace and order. Given the Government has not made such a proclamation here, Hogan J. agreed that the appellants appeal should be dismissed **[13-21]**.

Glann Mór Céibh Teoranta & Eile v. An t-Aire Tithíochta & Eile (English) [2022] IESC 40[11]

On appeal from: [2021] IEHC 363

Headline

The Supreme Court held that the constitutional obligation to ensure copies of legislation are available in both official languages (English and Irish), which derives from Articles 8 and 25 of the Constitution, extends not only to Acts of the Oireachtas, but also to statutory instruments which were made under s. 3 of the European Communities Act 1972 ("the 1972 Act") insofar as they amend Acts of the Oireachtas. These statutory instruments, giving effect to EU legislation, were held to be of a special kind: insofar as they amend and update the primary law of the State, they are taken to have the practical effect of statutes, as s.4(1) of the 1972 Act declares them to have statutory effect. This same specific obligation did not, however, extend to statutory instruments more generally (i.e., to statutory instruments not made under s. 3 of the 1972 Act), and absent special circumstances, there is no obligation to translate them.

Composition of Court

MacMenamin, O'Malley, Baker, Woulfe, and Hogan JJ.

Judgment

Hogan J. (with whom MacMenamin, O'Malley, Baker, and Woulfe JJ. agreed).

Background to the Appeal

On November 8th, 2018, or thereabouts, certain lands in Sruffaun Pier, Carraroe, County Galway were acquired by Irish Water by way of Compulsory Purchase Order. The original landowners (the respondents in this Court) contested this order before An Bord Pleanala ("the Board"), who decided on March 13th, 2019 to hold an oral hearing to resolve the matter. It was decided on November 4th, 2019, that this hearing would be heard in Irish in accordance with the provisions of s. 135(8)(b) of the Planning and Development Act 2000.

A variety of of statutes and statutory instruments considered to be necessary to the proceedings, however, did not have Irish language translations available. On November 27th 2019, the original landowners applied for leave to the High Court for judicial review, seeking a declaration that there was a constitutional obligation on the Minister for Housing, Planning and Local Government, the State and the Attorney General ("the appellants") to provide translations of 29 (since reduced to 24) statutes and statutory instruments, approximately 600 pages in length, which it was said would be necessary for the Board hearing to take place in a timely fashion. The respondents asserted that the non-availability of the instruments prevented the adequate preparation for, and effective participation in, the hearing.

O'Hanlon J. delivered the judgment of the High Court on the 19th of May 2021, finding for the applicants (the respondents in this Court). On October 8th 2021, the State applied for leave to the Supreme Court. Leave for a 'leapfrog' appeal under Article 34.5.4° of the Constitution was granted by this Court on the 28th of February in order to address a matter of public importance: determining whether there was a constitutional obligation on the State to provide translations of statutory instruments, and if

11 English and Irish versions of the judgment available on www.courts.ie. Leagan Béarla agus Gaeilge den bhreithiúnas ar fáil ar www.courts.ie.

there was, the extent of the duty to so translate. In doing so, the Court sought to answer questions as to the correct interpretation of Articles 8 and 25 of the Constitution. The issues before the Court on appeal were: whether the State had unreasonably delayed in producing a translation of the Planning and Development (Amendment) Act 2018, whether there was a constitutional obligation to make available translations of statutory instruments, and whether there was a difference between the obligation to make translations available between statutory instruments made under s. 3 of the 1972 Act and statutory instruments more generally.

Reasons for the Judgment

Regarding the first issue, the translation of Acts of the Oireachtas, Hogan J. held that the delay of the translation of the Planning and Development (Amendment) Act 2018 becoming publicly available of 20 months from the day of the Act having been signed by the President, was excessive and unreasonable. Hogan J. accepted that in other cases, a satisfactory explanation for delay may possibly be given, and in that case, the obligation to translate becomes that of 'to carry out the obligation as soon as possible'. He held, nevertheless, that such circumstances did not arise here insofar as it was unclear whether the State had made efforts to secure more lawyer-linguists or develop policies to deal with the difficulties of securing such staff, despite somewhere between 9-10 years of arrears of translated statutes existing as of February 2021, with about 40/50 new Acts being signed by the Oireachtas every year. The Court stated that such delays were a manifest noncompliance with the State's constitutional obligations. However, as the translated Act had been published by the time of the High Court hearing, the Court held that relief beyond the granting of such a declaration was unnecessary. **[58-67]**

Regarding the second and third issues, Hogan J. held that the appellants were only constitutionally obliged to translate those statutory instruments which were made under s. 3 of the European Communities Act 1972, and that they were only so obliged insofar as those instruments amended and updated the primary law of the State, which must be available in both English and Irish. Hogan J. concluded that if it was said there were no obligation to have translations of these instruments, this would lead to the absurd or illogical result that there is no obligation to ensure that a correct and updated text of the primary law of the State is available, which would be to directly contradict the obligations stated in Article 25.4.4° of the Constitution. The Court clarified, however, that this is only the case for those statutory instruments made under s. 3 of the 1972 Act, as they are of a special kind which, under s.4(1) of the Act, are given statutory effect, and for all practical purposes operate as though they were statutes themselves. In relation to statutory instruments more generally, the Court allowed an appeal from this aspect of O'Hanlon J.'s judgment in the High Court.

Hogan J. held that the decision in *Ó Murchú v. An Taoiseach* [2010] IESC 26, [2010] 4 I.R 484 ("*Ó Murchú*") is to be understood to say that there is no general obligation to effect the translation of statutory instruments, where they do not amend the primary law of the State and/or where it does not impinge on the administration of justice and a party's constitutional right to appropriate access to the courts through the officially recognised language of their choice. The Court held that the effect of *Ó Murchú* was to provide Irish translations in order to ensure that no party would be prejudiced or placed at

a disadvantage by the non-availability of such translations. There was no general obligation to produce such materials at all times, as to do so would place too great a burden on the stretched translation resources of the State. **[69, 78, 80-85]**

The Court held that the State was to provide translations of the statutory instruments made under the special provisions of s. 3 of the 1972 Act in a timely manner. Hogan J. stated that in any future cases relating to the breach of such constitutional duties by the State, it would be sufficient for the Court to grant no more than a declaration of this kind in the absence of clear and compelling evidence of prejudice on the part of any applicant. In the circumstances, there was no need to grant any relief in the nature of an injunction or a stay so far as the oral hearing before the Board was concerned. **[78]**

Costello v. The Government of Ireland & Ors [2022] IESC 44

On appeal from: [2021] IEHC 600

Headline

The Supreme Court by a majority of 4-3 (Dunne, Charleton, Baker and Hogan JJ.; O'Donnell C.J., MacMenamin and Power JJ. dissenting) holds that the Constitution of Ireland precludes the Government and Dáil Éireann from ratifying the EU-Canada Comprehensive Economic and Trade Agreement ("CETA") as Irish law now stands.

The Court by majority 6-1 (O'Donnell C.J., MacMenamin, Dunne, Baker, Hogan and Power JJ.; Charleton J. dissenting), also holds that certain amendments of the Arbitration Act, 2010 (as detailed in Part XIII of the judgment of Hogan J.) would, if effected, permit ratification without breaching the Constitution.

Composition of Court

O'Donnell C.J., MacMenamin, Dunne, Charleton, Baker, Hogan and Power JJ.

Judgments

O'Donnell C.J., MacMenamin, Dunne, Charleton, Baker, Hogan and Power JJ.

Background to the Appeal

The EU-Canada Comprehensive Economic Trade Agreement ("CETA") was entered into between Canada and the European Union and its Member States on 30 October, 2016. Certain provisions of CETA have already provisionally entered into force with effect from September, 2017, but the full agreement will not enter into effect until the ratification of CETA by all Member States. It is the proposed ratification of CETA by the Government of Ireland and Dáil Éireann by means of an Article 29.5.2° resolution that forms the subject of these proceedings. To understand the precise nature of this challenge, it is necessary to set out the essence of CETA in addition to some of its more contentious provisions.

CETA is a trade agreement setting the conditions of trade between Canada, and the EU and its Member States in respect of a large number of goods and services. It is, however, the provisions relating to investor protection and dispute resolution which have been the focus of debate in these proceedings. CETA is an example of an investor-state dispute settlement ("ISDS") treaty. ISDS treaties have become a common feature of international law and practice, in place between nations on both bi-lateral and multi-lateral bases. Broadly defined, under CETA, the Parties agree that "measures" (defined to include legislation, administrative action, and judicial decisions) will not offend against certain principles set out in the Treaty. These principles of equal treatment, non-discrimination, and fair and equitable treatment are to apply to covered investments made within the territory of one of the Parties to the Treaty by investors who are nationals of, or established in, another Party to the Treaty.

In the case of the CETA, the most important of these provisions for these proceedings are set out in Article 8.10 of the Treaty. This provides that a Party breaches the obligation of fair and equitable treatment if a measure constitutes "(a) a denial of justice in criminal, civil or administrative proceedings; (b) fundamental breach of due process in judicial and administrative proceedings; (c) manifest arbitrariness; (d) targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; (e) abusive treatment of investors such as coercion, duress, and harassment; or (f) a breach of any further

elements of the fair and equitable treatment obligation adopted by the Parties in accordance with [a procedure established under] paragraph 3 of this Article". This procedure allows for a specialist committee to review the content of the obligation to provide fair and equitable treatment and develop recommendations for submission to the CETA Joint Committee, which is in turn empowered to issue binding interpretations of the Treaty obligations. There are further relevant provisions of CETA and recourse should be had to the judgment of Dunne J. for a more thorough explanation of the relevant terms.

CETA also provides for an arbitral process to make determinations in respect of disputes. CETA permits claims to be made by individual investors for compensation in respect of loss suffered by them in circumstances where a measure adopted by a Party is alleged to have breached the provisions of CETA. Chapter 8, Section F of CETA provides for the creation of a standing panel of arbitrators (5 from Canada, 5 from the EU and 5 from third countries, all of whom shall satisfy the standards set for appointment of judges in their respective countries) and a further appellate body staffed by members similarly qualified who are empowered to review the decisions of a CETA Tribunal. This is as opposed to the standard model in ISDS treaties, whereby disputes between foreign investors and host states have been settled by *ad hoc* arbitral tribunals constituted for the specific dispute. Article 8.29 also provides that the Parties to CETA agree to pursue the establishment of a permanent multilateral investment tribunal. Furthermore, Article 8.22(1)(f) and (g) of CETA establishes what is known as a "fork in the road" provision and provides that an investor, prior to commencing proceedings before the CETA Tribunal, must withdraw or discontinue any existing proceedings in domestic or international law and also waive their right to initiate any future claim or proceeding regarding the measure alleged to constitute a breach of CETA.

Under the provisions of Article 8.23, claims under CETA may be submitted under the rules of the United Nations Commission on International Trade Law ("UNCITRAL") Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ("New York Convention"); the International Centre for Settlement of Investment Disputes ("ICSID") Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965 ("Washington Convention") or any similar rules. Both Conventions have been ratified by Ireland and awards made in arbitrations under the New York or Washington Conventions are enforceable in Irish law under the provisions of the Arbitration Act, 1980 and 2010, to which the respective Conventions are annexed.

The Constitution envisages that the State may enter into international agreements and Article 29.4.1° confers upon the Government the executive power of the State to do so. However, this power is not without limit, and the appellant in this case contends that the ratification of CETA by the Government is beyond the Article 29.4.1° power unless the matter is first put to the People by way of referendum. The overarching theme of the appellant's arguments concerns the concept of sovereignty. It is contended that CETA is a breach of the internal sovereignty of the State in two principal respects: firstly, the legislative sovereignty and secondly, the juridical sovereignty of the State.

In what may be referred to as the "legislative argument", the appellant contended that the Government is not entitled to accept the "the

legal framework established by CETA" without there being a domestic legal framework in place. Article 29.6 of the Constitution provides that no international law shall become part of the domestic law of the State, save as determined by the Oireachtas. The appellant argued that, if the Government were to ratify CETA, this would be effectively allowing CETA to become domestic law without having formally made it so, pursuant to Article 29.6. In addition, the appellant argued that this would also mean that a body of laws made other than in accordance with Article 15.2.1° would determine disputes against the State and be enforceable within the State. This, it was argued, would be unconstitutional, as the sole and exclusive power of making laws is vested in the Oireachtas. Finally, the appellant argued that the ratification of CETA could induce what was termed as a "regulatory chill" on the operation and application of Irish law and policy development. In other words, it was argued that the ability of the CETA Tribunal to make monetary awards against the Irish State may deter the Oireachtas from enacting laws likely to attract such awards. The appellant was particularly concerned about the application of this effect to law and policy in the sphere of environmental regulation. Secondly, in what may be referred to as the "juridical argument", the appellant submitted that the ratification of CETA would fall foul of Article 34 of the Constitution, which provides that justice shall be administered in courts established by law by judges appointed in the manner prescribed by the Constitution. It was contended that, because the CETA Tribunal is given the power to determine a dispute as to whether an act or omission of the State within Ireland breached CETA, and can award monetary damages against the State on that basis which are enforceable within Ireland, the CETA Tribunal is effectively acting as a court but not one established pursuant to Article 34 nor one permitted under Article 37.

The State respondents argued that the CETA agreement is an international treaty which operates at the level of international law and as such, does not constitute the making of law for the State contrary to Article 15. Furthermore, they argued that the determinations of a CETA tribunal would not constitute the administration of justice reserved to courts under Article 34 or bodies constituted under Article 37 of the Constitution. In this regard, the respondents noted a number of international agreements already in existence which permit individual complaints and provide for arbitration and determination by a tribunal, most notably the European Convention on Human Rights which has significant effects within the State, notwithstanding final determinations made by Irish courts, and does not offend the Constitution. Finally, the respondents argued that the fact that CETA awards are enforceable in Irish law was not a consequence of CETA, but rather the provisions of Irish legislation, such as the Arbitration Act, 2010, which is constitutional, and has not been challenged here.

The High Court (Butler J.) dismissed the appellant's challenge, considering that the provisions of CETA did not amount to a law required by Article 15.2 to be the sole and exclusive domain of the Oireachtas, and the determinations of the CETA Tribunal did not constitute the administration of justice reserved to courts under Article 34, or court-like bodies under Article 37.

Reasons for the Judgment

The Supreme Court held:

(1) (Unanimously) the ratification of CETA

is not an obligation "necessitated" by membership of the EU for the purposes of Article 29.4.6° of the Constitution and is thus not immune from constitutional challenge;

(2) (Per Dunne, Charleton, Baker and Hogan JJ.) the ratification of CETA would breach Article 34 because it would infringe Irish juridical sovereignty by permitting an international tribunal to make binding decisions enforceable in Irish law;

(3) (Per Charleton, Baker and Hogan JJ.) ratification of CETA would offend Article 5 and the democratic nature of the State by permitting the interpretation and therefore amendment of CETA by the CETA Joint Committee without democratic oversight;

(4) (Per Charleton and Hogan JJ.) ratification of CETA would constitute a breach of the legislative sovereignty of the State (per Hogan J.) by providing for damages awards against the State based on strict liability in respect of laws enacted by the Oireachtas, or (per Charleton J.) by permitting laws to be made for the State otherwise than in accordance with Article 15.2;

(5) (Per O'Donnell C.J., MacMenamin and Power JJ. *dissenting*) ratification of CETA would not infringe the legislative sovereignty of the State (Dunne and Baker JJ. concurring in this respect); and

(6) (Per O'Donnell C.J., MacMenamin and Power JJ. *dissenting*), ratification of the provisions of CETA would not constitute a breach of juridical sovereignty, and (per MacMenamin J. dissenting) the challenge to CETA on grounds of an interference with the jurisdiction of courts under Article 34 of the Constitution was premature.

Held further by the Supreme Court:-

(7) (Per O'Donnell C.J., MacMenamin, Dunne, Baker, Hogan and Power JJ.) that the Government and Dáil's ratification of CETA by way of Article 29.5.2° resolution would not offend the Constitution if the provisions for enforcement of awards of the CETA Tribunal under the Arbitration Act, 2010 were amended by the Oireachtas in the manner suggested by Hogan J. in Part XIII of his judgment, although this would be a matter for the Oireachtas;

(8) (Per Charleton J. *dissenting*) that this course was not permissible under the Constitution, as it would contradict the terms of CETA fundamentally and even a protocol to the Treaty enabling this step would be contrary to the Vienna Convention on the Law of Treaties, 1969. This course, furthermore, would not be effective as, on ratification, enforcement of CETA Tribunal awards would become a legal obligation under EU law which would override any domestic legislation.

Notes

Notes

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

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Supreme Court of Ireland

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