Cúirt Uachtarach na hÉireann
Supreme Court of Ireland

2020 Annual Report

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An tSeirbhís Chúirteanna
Courts Service

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Cúirt Uachtarach na hÉireann
Supreme Court of Ireland

2020
Annual Report

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The composition of the Supreme Court

as at 31st December 2020

The Supreme Court of Ireland is at the apex of the courts system in the State and is the final arbiter and interpreter of Bunreacht na hÉireann, the Constitution of Ireland, which is the basic law of the State.

Pursuant to Article 34.5.1° of the Constitution, "[t]he Court of Final Appeal shall be called the Supreme Court." As an apex court, the Supreme Court enjoys both an original and appellate jurisdiction which has been conferred on it by the Constitution itself.

The establishment of the Court of Appeal in 2014 recast the appellate jurisdiction of the Supreme Court, with Article 34.5 prescribing the constitutional threshold that a case must meet in order to be considered by the Supreme Court. This means that, in principle, a party may bring before the Court an appeal in respect of any type of case, including a civil or criminal law case, provided that the case meets the threshold which the Constitution sets out.

As a constitutional court, the Supreme Court, along with the other Superior Courts, has a role in ensuring that the laws which the Oireachtas (Irish Parliament) enact are upheld and interpreted in light of the Constitution and the subsequent jurisprudence that has developed since Bunreacht na hÉireann came into force in 1937.

In addition to being an apex and a constitutional court, the Supreme Court has a role in the implementation of the law of the European Union.

As the court of final appeal in Ireland, the Supreme Court is obliged under the Treaty on the Functioning of the European Union to refer questions regarding the interpretation of European Union law to the Court of Justice of the European Union where the interpretation is not clear and clarification is necessary in order for the Supreme Court to decide a question which has been put before it.

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

The Supreme Court, through its decisions, brings finality to the appeals brought and heard before it.

Mr. Justice Frank Clarke
Chief Justice

Foreword by the Chief Justice

In a truly unprecedented year, the Supreme Court moved quickly to conducting its work remotely, ensuring continuity in the Court's core function - the determination of cases that come before it.

It gives me great pleasure to present this third annual report of the Supreme Court of Ireland, which highlights the work undertaken by the Court both inside and outside the courtroom in what was truly an unprecedented and challenging year.

It has become something of a cliché to describe the last 12 months as being like no other. Cliché or not, 2020 has, for the Supreme Court, turned out to be very different from what might have been anticipated when the Annual Report for 2019 was formally launched during the sittings of the Court in Waterford and Kilkenny. At that time Ireland had not yet had its first case of COVID-19, although the seriousness of the situation was beginning to become apparent in other European countries.

However, within a month, things had changed radically. As it happens, the last ordinary sitting of the Supreme Court to hear an appeal physically in the Supreme Court courtroom was on the 12th March, 2020, which was the very same day that the then Taoiseach, Leo Varadkar T.D., spoke to the nation from the steps of Blair House in Washington. The panel due to hear an appeal that day listened to that speech on the radio as it was preparing to go into court. It was immediately apparent that the Court would need to conduct its business in a very different way.

Initially it was indicated that all appeals would be adjourned unless there was a matter of particular urgency. An immediate decision, in conjunction with the Courts Service, to explore the possibility of remote hearings was made in the following days with trial hearings being conducted within a matter of weeks and the Court conducting all its business through remote hearings not long after.

For the remainder of 2020, all apart from one appeal occurred by remote hearing. The exception was the *Friends of the Irish Environment* climate change case which was conducted before a court of seven sitting in the hall in King's Inns which was large enough to accommodate the hearing and a reasonable number of members of the public while complying strictly with social distancing measures. It is envisaged that almost all hearings over the coming months will also be conducted remotely.

Other innovations were also adopted. All judgments were delivered electronically with most post-judgment issues (such as questions which can arise in some cases about the precise form of the required court order and issues concerning costs) being the subject of agreement by the parties or the filing of written submissions and, in such cases, an agreement by the parties that there would be no need for an oral hearing with the Court delivers a further ruling on any matters that could not be agreed. Such rulings are again delivered electronically and published on the Courts Service website.

Like all remote hearings across our courts, the requirement that justice be administered in public is met by the placement of a large screen in the Supreme Court courtroom on which anyone in attendance can view the proceedings on exactly the same basis as someone who is participating in the remote hearing.

A further procedure was also introduced in that the Court almost invariably now issues, in advance of the hearing of substantive appeals, a statement of case which sets out the understanding of the Court of the background and issues involved in the appeal. The statement of case is often accompanied by a request for clarification which allows the Court to better understand the precise matters on which the parties truly differ and which, therefore, the Court will be required to decide. This procedure had been in contemplation for some time but was expedited because of the need for greater focus given the limitations of remote hearings.

The ability to introduce these measures stemmed at least in part from the fact that the Court had, by the beginning of 2020, more or less completely dealt with all but a small handful of legacy cases which pre-dated the establishment of the Court of Appeal (the remaining cases all had difficulties of one type or another in being brought to hearing). The Court had also concluded its assistance to the Court of Appeal in dealing with some of the cases which had been transferred to that court on its establishment which were returned to the Supreme Court under the procedure envisaged in the transitional Article 64 of the Constitution.

Save for a very small number of outstanding matters, the business of the Court in 2020 and, indeed, from now on, will consist exclusively of dealing with appeals which have come to the Supreme Court through the new constitutional architecture established by the 33rd Amendment. This development has enabled the Court to give more time to cases for which time is required and facilitate the ability to frontload some of the work on appeals by adopting procedures such as the statement of case and request for clarification. If the Court had still been handling its share of the legacy problem which had built up before the establishment of the Court of Appeal, it would have been difficult to introduce those innovations.

As appears in this report, the number of applications for leave to appeal brought to the Supreme Court reduced by approximately 38% in 2020 in comparison with the figure for 2019. The reduction in respect of applications for leave to appeal directly from the High Court was much more significant than the reduction in applications to appeal from the Court of Appeal. This may reflect the fact that the High Court was more significantly impacted in its work than the Court of Appeal as a result by the restrictions required to meet the dangers of the pandemic.

However, it may be anticipated that these reductions will largely correct themselves in 2021 in that, with the expansion of the use of remote hearings in the High Court (not least in the type of cases, such as European arrest warrants, immigration and environmental cases) which most frequently come to the Supreme Court, it is reasonable to assume that the number of applications for leave to appeal will increase. In addition, the throughput in the Court of Appeal on the criminal side is back to normal and this area provides the Supreme Court with its largest single group of appeals. All in all, I would anticipate that applications for leave to appeal will return to more or less normal in the second half of 2021.

However, it is true that the significant reduction in applications for leave to appeal has had the inevitable consequence that the number of new appeals to the Supreme Court has also been

reduced. The Court has taken the opportunity of that phenomenon to bring its work very much up to date. Under section 46 of the Courts and Courts Officers Act 2002, it is necessary for each court, on a regular basis, to list for mention all cases where judgment has been reserved for more than two months and where a date for the delivery of judgment has not yet been fixed. Typically, in the past, such lists in the Supreme Court featured between 10 and 15 cases. However, the final list of 2020, which occurred at the beginning of December, had only one case. It is hoped that, taking advantage of procedural innovations such as the statement of case, it will be possible to ensure that the time between the hearing of an appeal and the delivery of judgment will remain relatively short, accepting, of course, that there will be cases of such complexity and potentially involving different views that a proper resolution of the appeal may take some time.

One final observation on the effect of remote hearings. I consider that they provide an acceptable hearing of almost all appeals. However, they are not, both in my view and in the view of my colleagues, as effective as the traditional model of physical hearings. The ability to interact fully with counsel is reduced, thus leading to most questions being deferred until the end of counsel's submissions or a suitable gap in proceedings. It has also been found necessary to arrange for a break in the course of the hearing because it was found difficult to sustain the argument on a remote platform for the lengths of time that were readily allocated during physical hearings. It has also led to more matters being dealt with on paper. It is again the considered view of the members of the Court that suggestions that dealing with matters of any complexity on paper might save time and costs is misconceived. A brief period of effective questioning in a live courtroom (even one which is being conducted remotely) has been shown to bring much greater clarity to issues than a written procedure and to reduce the overall judicial time required to dispose of appeals. The time taken outside court to digest, discuss and determine issues is, in our view, significantly increased when there is no oral hearing. While dealing with matters on paper might reduce the court hearing, it will not reduce the amount of judicial time required to resolve the case. Furthermore, by expanding the need for more detailed written accounts, it will not reduce the work of legal teams representing the parties and, thus, the costs.

These reservations, both about remote hearings and dealing with matters on paper, do not mean that both may not have a future in the post-pandemic world. There are many matters of management or straightforward interlocutory issues which can more efficiently be dealt with remotely. Simple and straightforward questions may well be capable of being dealt with effectively on paper. When the Court comes to review where it stands when the main restrictions imposed to meet the pandemic have been removed, it will undoubtedly give serious consideration to retaining both remote hearings and dealing with specific issues on paper where it is considered that there is no added value in dealing with such matters otherwise.

Mr. Justice Frank Clarke
Chief Justice

Dublin
April 2021

Mr. John Mahon
Registrar

Introduction

by the Registrar of the Supreme Court

It is a testament to all concerned that Supreme Court hearings were not delayed significantly during the year and that a backlog of hearings has not been allowed to develop. We look forward hopefully and we will bring with us the best of what we have learned to enable us to build on the continuing improvement in the services that we deliver to the Court, to practitioners and to the public.

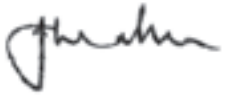
I am very pleased to introduce this third annual report covering a year which brought with it unparalleled challenges necessitating significant changes in our daily work and at a pace which, I would say, was also unparalleled. Over a very short period the Court moved to conduct hearings by video conference and judges and the staff who support them developed processes and procedures to ensure that this move was effected in a just, efficient, and safe way.

The Chief Justice has referred to the new procedures and guidance documentation which were developed to manage Court hearings and to track the filing of the electronic documentation necessary for their determination. The office is the conduit for all documentation and communication, whether electronic or in hard copy, from parties to the Court and it falls to it to ensure that it is processed in a timely and effective manner. This it has done during 2020.

It is a testament to all concerned that Supreme Court hearings were not delayed significantly during the year and that a backlog of hearings has not been allowed to develop. At year end all scheduled appeals have had a hearing. Litigants at final appellate level where leave has been granted in the current term can still ordinarily expect a hearing during the next term.

Once again I am grateful to the Chief Justice and to the other members of the Court for their continuing support and engagement. The Court has worked hard, in particular, to adopt technologies that have allowed hearings to take place while at the same time ensuring litigants, practitioners and staff have the required level of protection.

I am very grateful to Office staff for the manner in which they have responded to the changes necessary as a result of the pandemic and for the fortitude that they have shown throughout what has been a very difficult year. Members of staff have had to pivot in a quickly changing environment and this bodes well for the future. Whether working from home or on site they have responded positively at all times. We look forward hopefully and we will bring with us the best of what we have learned to enable us to build on the continuing improvement in the services that we deliver to the Court, to practitioners and to the public.



John Mahon
Registrar of the Supreme Court
April 2021

Cúirt Uachtarach
Supreme Court

2020 at a Glance

142
Applications for Leave lodged.

158
Applications for Leave resolved.

25%
Of Applications for Leave granted.

34%
Of Determinations in which leapfrog appeal granted.

65
Appeals resolved

89
Written judgments delivered.

2
Requests for a preliminary ruling from the CJEU.

5 Weeks
Average length of time from filing of complete documents to appeal being heard.

COVID-19 response in numbers

40 Days
From announcement of first Government restrictions to first remote court hearing.

117
Remote sessions conducted in Supreme Court.

"The Court of Final Appeal shall be called the Supreme Court."

Article 34.5.1° of Bunreacht na hÉireann

PART 1

About the Supreme Court of Ireland

About the Supreme Court of Ireland

The Supreme Court of Ireland is established by and draws its authority from Bunreacht na hÉireann, the Constitution of Ireland. As the fundamental law of the State, the Constitution establishes both the institutions of State such as the President, the Houses of the Oireachtas and the Government and prescribes certain fundamental personal rights to citizens.

Whilst the Constitution provides for the existence of these institutions, the source of their powers derive from the People, with Article 6 prescribing that "[a] ll powers of government, legislative, executive and judicial, derive under God, from the people."

Article 34.1 of the Constitution provides that "[j] ustice shall be administered in courts established by law by judges appointed in the manner provided by [the] Constitution." Under this Article, judges of the Supreme Court are constituent members of one of the three branches of State as provided for in the Constitution, namely the Judiciary, with the other two branches being the Legislature (that is the Houses of the Oireachtas) and the Executive (the Government). Each branch has its own specific architecture as set out in the Constitution, the overall structure of which is designed to ensure that the principle of the separation of powers is maintained and respected.

The Supreme Court was established in 1961 as a result of legislation passed that year pursuant to Article 34.5.1° of the Constitution which provides that "[t]he final court of appeal called the Supreme Court." As it is the final court of appeal in all areas of law, it sits as the highest of the five tiers of court jurisdiction in Ireland, the other courts being the District Court, the Circuit Court, the High Court and the Court of Appeal.

Specific articles of the Constitution prescribe the jurisdiction of the Supreme Court. Articles 12 and 26 provide the Court with an original jurisdiction to consider certain prescribed matters. Article 12 provides that it is the Supreme Court which must determine, should the situation arise, whether the President of Ireland is permanently incapacitated. Article 26 confers on the Supreme Court jurisdiction to determine the constitutionality of Bills which the President of Ireland has referred to it.

In terms of its appellate jurisdiction, the Supreme Court considers appeals from either the Court of Appeal or the High Court. The Supreme Court has jurisdiction to consider appeals from the Court of Appeal where it is satisfied that the decision in question involves a matter of general public importance or that it is in the interests of justice that there be an appeal to the Supreme Court. A significant majority of appeals that the Supreme Court hears are from decisions of the Court of Appeal.

However, the Constitution also provides for a jurisdiction for the Supreme Court to consider appeals directly from the High Court. Such appeals, colloquially referred to as "leap-frog" appeals as they, in effect, by-pass the Court of Appeal. In order to bring an appeal via this route, there must be, in addition to the general constitutional threshold, exceptional circumstances which warrant the consideration of a direct appeal.

Irrespective of the route, the Supreme Court determines all appeals properly brought before it on all matters in respect of which leave to appeal has been granted. Such appeals typically involve questions of interpretation of the Constitution, of primary and secondary legislation, or the common law or the law of the European Union and may involve the question of the validity of any law having regard to the provisions of the Constitution.

Branches of Government in Ireland

The Constitution of Ireland establishes the three branches of government.: The Legislature, the Judiciary and the Executive Together these branches ensure that the democratic nature of the State is fulfilled and maintained within the scope of the powers of each branch provided for in the Constitution.

The 'separation of powers' doctrine involves the exercise by each branch of a degree of oversight on the other two branches. This system of checks and balances exists so that no one branch overreaches its jurisdiction.

The Executive
Article 28

The Executive, also referred to as the Government or the 'Cabinet', is the Government of Ireland. The Government must consist of no fewer than 7, and no more than 15 members and includes the Taoiseach (Prime Minister) who is the Head of the Executive. The Deputy Prime Minister, who is also a member of Government, is referred to as the Tánaiste.

The Government is responsible to Dáil Éireann and has day-to-day responsibility for implementing the laws as passed by the Oireachtas.

The Government decides major questions of policy and carries out a number of different and important functions.

The Government meets and acts as a collective authority, responsible for all Departments of State.

The Legislature
Articles 15-27

Comprising the Oireachtas, made up of the President and the Houses of the Oireachtas, being Dáil Éireann (House of Representatives) and Seanad Éireann (the Senate).

Members of Dáil Éireann are directly elected by the Electorate. Members of Seanad Éireann are either elected or nominated in a manner provided for by the Constitution and statute law.

Considers and enacts laws by way of primary legislation.

Enacts laws that are presumed to be in accordance with the Constitution.

Article 15.2.1° of the Constitution provides that the sole and exclusive power of making laws for the State is vested in the Oireachtas. No other legislative authority has power to make laws for the State. Article 15.2.2° prescribes that provision may be made by law for the creation or recognition of subordinate legislatures and for the powers and functions of these legislatures. Secondary legislation enacted by the Executive derives its authority to enact such legislation from this provision of the Constitution.

The Judiciary
Article 34

The Constitution requires that justice be administered in courts established by law by judges appointed in the manner provided by the Constitution.

Judges are appointed by the President of Ireland on the nomination of the Government.

Upon taking up judicial office, judges are required to make and subscribe a solemn declaration to uphold the exercise of their judicial functions subject only to the Constitution and the law.

Judges have the power to review the compatibility of statutes with the Constitution and to judicially review secondary legislation, decisions or actions of the Government or State bodies, with a view to determining their legality and compatibility with the Constitution, and principles deriving from the Constitution such as due process and natural justice.

Jurisdiction of the Supreme Court

Background

Prior to the establishment of the Court of Appeal in October 2014, there were four tiers of court jurisdiction in Ireland: the District Court, the Circuit Court, the High Court, and the Supreme Court. The Constitution of Ireland provided for an almost automatic right of appeal from the High Court, a constitutionally established Superior Court of Ireland with first instance full original jurisdiction, to the Supreme Court in relation to civil cases which originated in the High Court.

As a result of a constitutional referendum held in 2013, which was approved by a majority of the People, the Constitution now provides for a Court of Appeal which occupies an appellate jurisdiction tier between the High Court and the Supreme Court.

In essence, the Supreme Court exercises three separate and distinct jurisdictions, namely:

(i) an appellate jurisdiction;
(ii) an appellate constitutional jurisdiction; and
(iii) an original jurisdiction as expressly provided for in the Constitution.

Original jurisdiction

The Constitution of Ireland prescribes two instances where the Supreme Court has an original jurisdiction, which provides for it to make both the initial and final decision on the matter. The first instance is provided for in Article 12, where it states that the Supreme Court must determine, by no fewer than five judges of the Court, whether the President of Ireland has become permanently incapacitated. This constitutional provision has not, to date, been invoked.

The second instance of original jurisdiction conferred on the Supreme Court is in respect of the constitutionality or otherwise of Bills passed by both Houses of the Oireachtas. Article 26 of the Constitution provides a rigid and temporal mechanism under which the President of Ireland may, after consultation with his or her Council of State, refer a legislative Bill deemed to have been passed by both Houses of the Oireachtas for a decision as to whether such Bill or any specified provision or provisions of such Bill is or are repugnant to the Constitution or to any constitutional provision.

The decision to invoke Article 26 is within the absolute discretion of the President. Where it is invoked, a constitutionally prescribed time period of sixty days begins to run, where in that time the Supreme Court must assign counsel to argue the unconstitutionality of the Bill or provision(s) referred to it, hear oral arguments, adjudicate on the matter and pronounce its decision.

In such cases, the Supreme Court is required, by the Constitution, to deliver its decision by way of a single judgment. This means that only the majority decision of the Court is pronounced. Where the Supreme Court decides that a Bill, or any of its provisions, referred to it, is or are incompatible with the Constitution, that Bill or the offending provisions must not be signed into law by the President.

On the other hand, where the Supreme Court decides that a Bill, or any of its provisions that were referred to it, is or are not incompatible with

the Constitution, the legislation must be signed into law by the President forthwith. Moreover, those provisions are immune from any subsequent constitutional challenge before the Courts so long as they remain in force.

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

Whilst Article 26 of the Constitution is one of the few powers of the President that can be exercised at his or her sole discretion, its use is rare. The last Article 26 reference was made to the Supreme Court fifteen years ago, in 2005. In that reference, the Supreme Court found that provisions of the Health (Amendment) (No. 2) Bill 2004 were repugnant to the Constitution.

Appellate jurisdiction

Article 34.5.3° of the Constitution provides that:

> "The Supreme Court shall, subject to such regulations as may be prescribed by law, have appellate jurisdiction from a decision of the Court of Appeal if the Supreme Court is satisfied that –
>
> i. the decision involves a matter of general public importance, or
>
> ii. in the interests of justice it is necessary that there be an appeal to the Supreme Court."

In addition, Article 34.5.4° of the Constitution provides that:-

> "Notwithstanding section 4.1° hereof, the Supreme Court shall, subject to such regulations as may be prescribed by law, have appellate jurisdiction from a decision of the High Court if the Supreme Court is satisfied that there are exceptional circumstances warranting a direct appeal to it, and a precondition for the Supreme Court being so satisfied is the presence of either or both of the following factors:
>
> i. the decision involves a matter of general public importance;
>
> ii. the interests of justice."

The Supreme Court has a particular role in the application of European Union law as it is, as the court of final appeal, obliged to refer questions of EU law arising in cases before it concerning (a) the interpretation of the EU Treaties or (b) the validity of an interpretation of acts of institutions, bodies, offices or agencies of the Union to the Court of Justice of the European Union where necessary to enable the Supreme Court to decide the case before it.

Appellate constitutional jurisdiction

Article 34.4.5° of the Constitution provides:-

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

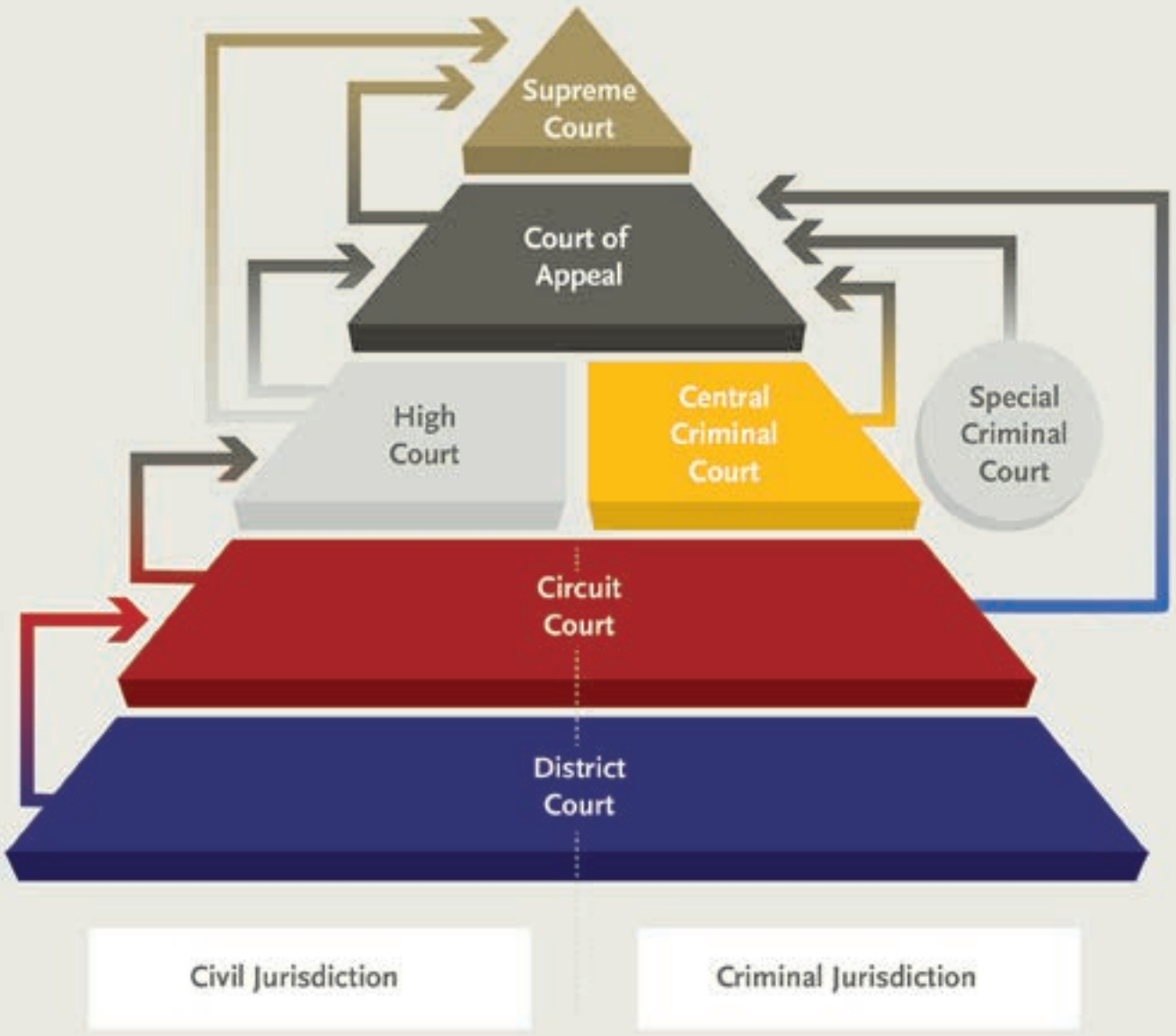
Based on this provision, the Supreme Court exercises a function as a constitutional court in that it is the final arbiter in interpreting the Constitution of Ireland. The exercise of this function is particular importance in Ireland as the Constitution itself expressly permits the courts to review any law, whether passed before or after the enactment of the Constitution. While such cases must be brought in the first instance in the High Court, there is an appeal from every such decision to the Court of Appeal, and the Supreme Court if the threshold has met. Subordinate legislation and administrative decisions may also be subjected to such constitutional scrutiny . The Superior Courts retain the power to declare invalid legislation that is inconsistent with the Constitution.

Structure of the Courts of Ireland

The Courts of Ireland comprise five tiers, with both the District and Circuit Courts serving as courts of 'local and limited jurisdiction' as prescribed in the Constitution. The High Court enjoys full and original jurisdiction in all matters of fact and law, whether criminal or civil. Together, these three courts can be described as courts of first instance, with both the Constitution and primary legislation prescribing their respective jurisdictions.

On its establishment in 2014, the Court of Appeal was provided with appellate jurisdiction from decisions of the Circuit Court and the High Court in both criminal and civil matters.

The Supreme Court, at the apex of the court structure, enjoys both an appellate and original jurisdiction which has been conferred on it by the Constitution.



Timeline of key events
in the Supreme Court's history

1922 — Ireland gains Independence; Four Courts complex destroyed

Courts of Justice temporarily move to King's Inns

1923 — Courts of Justice move to Dublin Castle

1924 — Supreme Court formally established upon enactment of Courts of Justice Act 1924

1931 — Courts of Justice, including the Supreme Court, return to the Four Courts

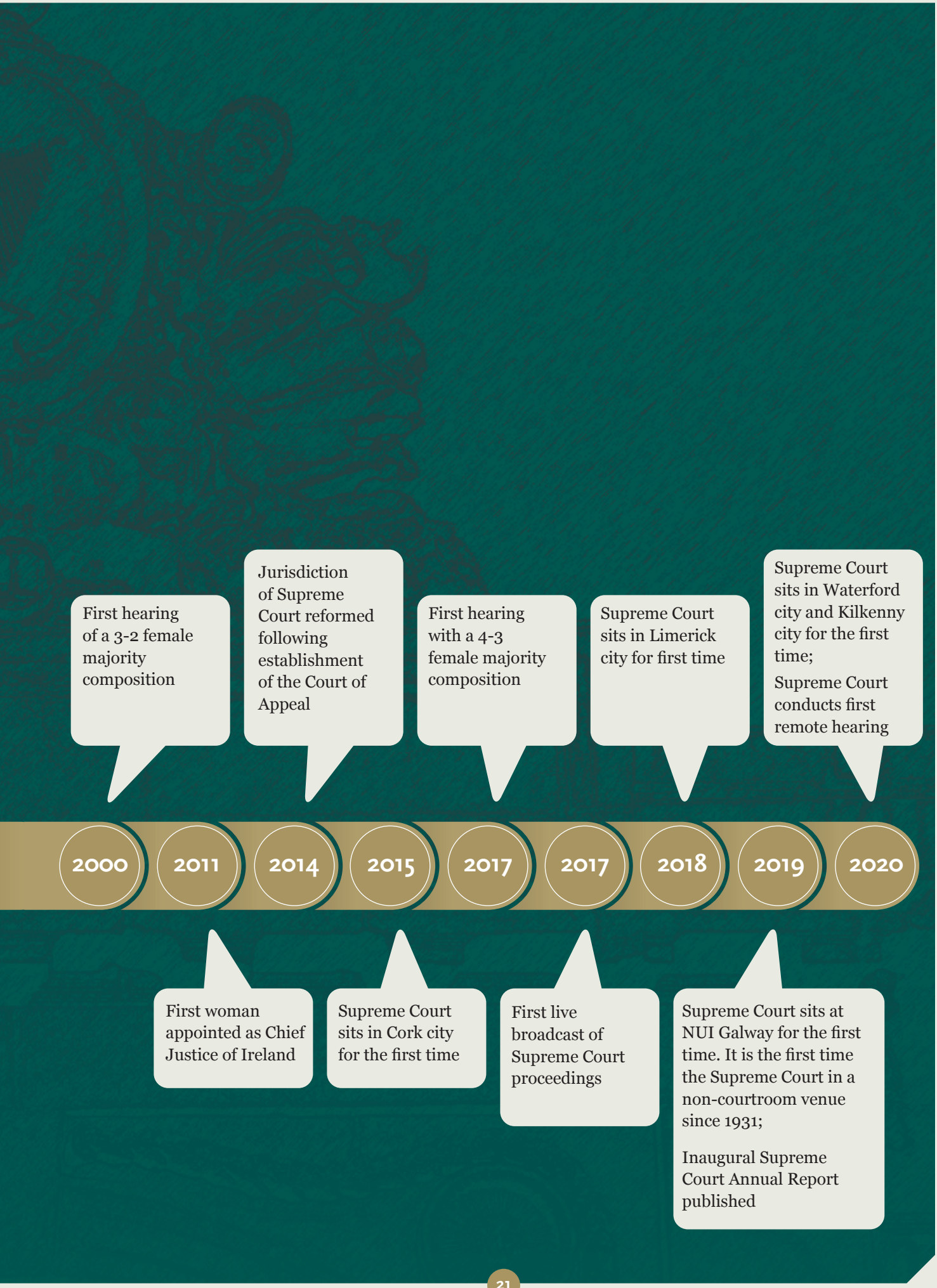
1937 — Bunreacht na hÉireann approved by the People and enacted

1961 — Enactment of the Courts (Establishment and Constitution) Act, 1961

1988 — Fiftieth anniversary of the enactment of the Constitution celebrated in the Four Courts

1992 — First woman appointed to the Supreme Court

1996 — Bicentenary of first courts sittings at the Four Courts celebrated


2000
First hearing of a 3-2 female majority composition
2011
First woman appointed as Chief Justice of Ireland
2014
Jurisdiction of Supreme Court reformed following establishment of the Court of Appeal
2015
Supreme Court sits in Cork city for the first time
2017
First hearing with a 4-3 female majority composition
2017
First live broadcast of Supreme Court proceedings
2018
Supreme Court sits in Limerick city for first time
2019
Supreme Court sits at NUI Galway for the first time. It is the first time the Supreme Court in a non-courtroom venue since 1931;
Inaugural Supreme Court Annual Report published
2020
Supreme Court sits in Waterford city and Kilkenny city for the first time;
Supreme Court conducts first remote hearing

Seat of the Supreme Court

The Four Courts is the seat of the Supreme Court. As the centre of the administration of justice in Ireland for over two hundred years, its name derives from the location of the four superior courts which it housed prior to Ireland gaining independence in 1922. These courts were the Court of King's Bench, the Court of Common Pleas, the Court of Exchequer and the Court of Chancery. Today, the functions of these historic courts are carried out by the High Court. The four courts, which are located off the great Round Hall, are used today by the High Court.

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

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

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

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

When the new courts of the Irish Free State finally took their place in the building in October 1931, then Chief Justice, Hugh Kennedy, in a simple ceremony to mark the occasion, warmly congratulated the Office of Public Works on the reconstruction, where he said:

> "I am proud to take my place here in the building which represents so much of Irish art, Irish craftsmanship and Irish labour."

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

Composition of the Supreme Court at hearing - 16th January 2020

The Supreme Court Courtroom

The Supreme Court courtroom is the main courtroom in which the Supreme Court ordinarily hears appeals and pronounces judgment. It accommodates compositions of the court sitting in panels of three, five, or in exceptional cases, seven judges. Arising from the coming into effect of the Thirty-third Amendment to the Constitution, the reformed jurisdiction of the Supreme Court means that the Court now considers cases having been satisfied that the decision involves a matter of general public importance, or in the interests of justice it is necessary that there be an appeal to the Supreme Court. Therefore, cases are now generally heard by a panel of five judges.

The Supreme Court courtroom is the main courtroom in which the Supreme Court ordinarily hears and pronounces judgment. It accommodates compositions of the court sitting in panels of three, five, or in exceptional cases, seven judges. Arising from the coming into effect of the Thirty-third Amendment to the Constitution, the reformed jurisdiction of the Supreme Court considers cases having been satisfied that the decision sought to be appealed involves a matter of general public importance, or that it is necessary, in the interests of justice that there be an appeal to the Supreme Court. Therefore, cases are now generally heard by a panel of at least five judges.

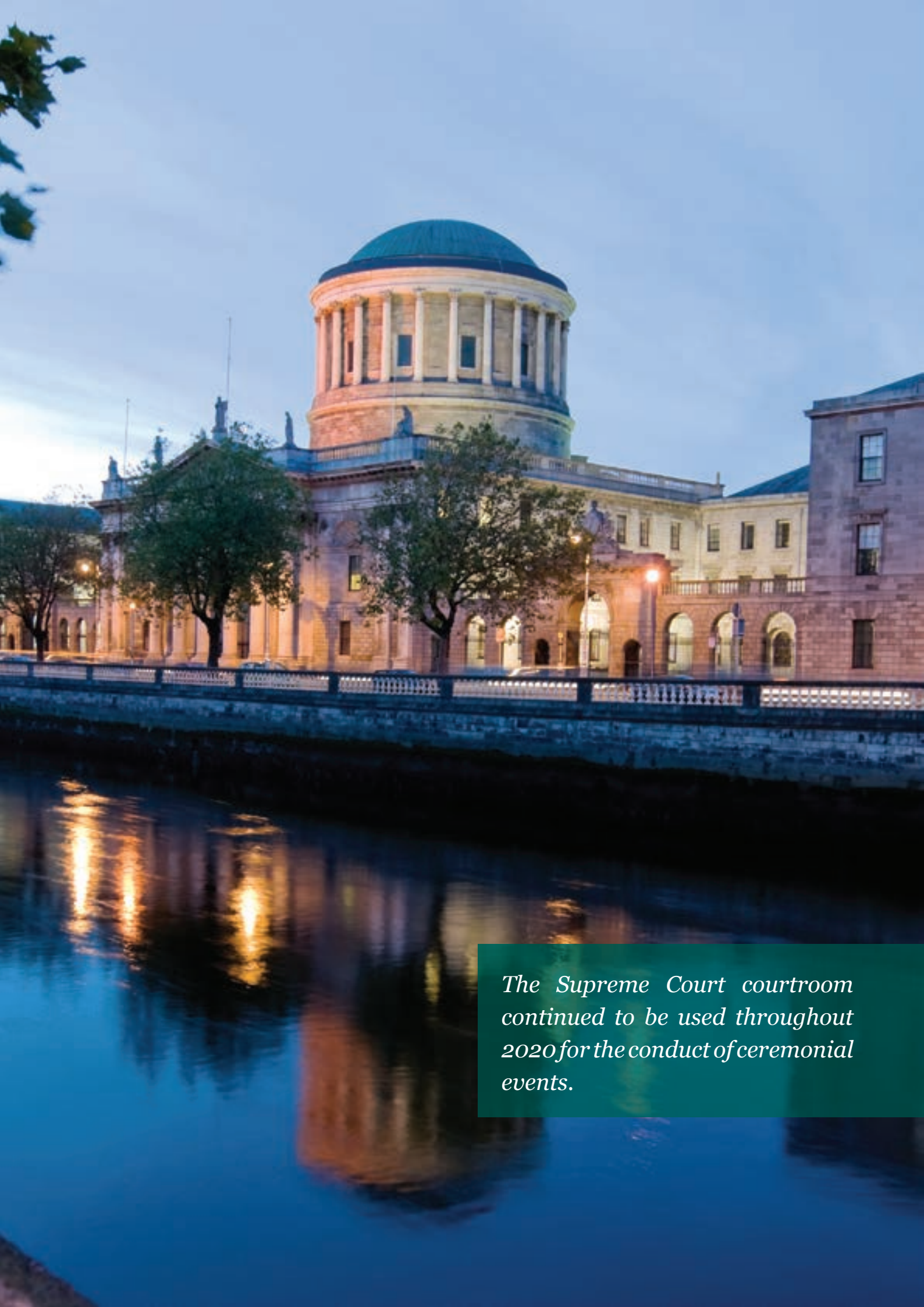
Most cases that come before the Supreme Court are heard in public in accordance with Article 34.1 of the Constitution. The courtroom contains a viewing gallery where members of the public may observe court proceedings. There is also a dedicated area for members of the press and staff supporting the Supreme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

One of the most significant and noticeable features installed in response to the pandemic is a large screen used to display Supreme Court proceedings conducted remotely. Notwithstanding the fact that the Supreme Court has conducted its business remotely since 12th March 2020, in order to ensure that the constitutional requirement that justice be administered in public, any hearings conducted that would ordinarily take place in public, but are currently conducted remotely, are streamed live into the Supreme Court courtroom, where the Registrar is present. Members of the public can, subject to complying with public health safety measures, observe proceedings and share the same view as all other participants in a remote hearing.

The Supreme Court courtroom continued to be used throughout 2020 for the conduct of ceremonial events including Calls to the Bar of Ireland, the Inner Bar, the presentation of Patents of Precedence to solicitor and barrister applicants, judicial declarations and appointment ceremonies for Commissioners for Oaths and Notaries Public.

The courtroom, as with all other courtrooms across the Courts Estate, saw health and safety measures introduced in response to the pandemic. These included the installation of glass screens to protect presiding judges and the Registrar. In addition, the ventilation system of the Court enables a constant circulation of fresh air through the courtroom and all spaces within the Four Courts are constantly cleaned on a daily basis. In addition, seating was removed to facilitate physical distancing, whilst seating that remained was designated accordingly. Following a risk assessment, the capacity of Supreme Court room was limited to 20 persons.

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



The Supreme Court courtroom continued to be used throughout 2020 for the conduct of ceremonial events.

Journey of a typical appeal

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

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

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

On receiving the application for leave to appeal and the respondent's notice, a panel of three judges of the Supreme Court convenes to consider whether the constitutional threshold for granting leave to appeal has been met. In addition to the application for leave and respondent's notice, the panel reviews the written judgment(s) of the High Court and/or the Court of Appeal. Having considered the application, the panel prepares and issues a written determination stating whether or not leave to be appeal has been granted. The determination is then circulated to the affected parties.

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

Where leave has been granted and the applicant, who at this stage is referred to as 'appellant', files a notice of intention to proceed, the Chief Justice assigns the appeal to a judge of the Supreme Court for the purposes of case management. This is to ensure that the procedural requirements as laid down in the Rules of the Superior Courts and applicable Practice Directions are complied with, enabling the appeal to be conducted in an effective and efficient manner.

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

Both the appellant and the respondent must prepare and lodge written submissions, limited to a directed word count, in which both sides set

out their respective reasons as to why the decision being appealed should be reversed or upheld. As the Irish legal system is part of the common law legal tradition, decisions of the Superior Courts of Ireland are binding on courts of lower jurisdiction by virtue of the doctrine of precedent and case law constitutes an important source of law. Therefore, legal submissions of the parties generally rely on previous court decisions in support of their respective arguments.

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

At the oral hearing which, since the onset of the pandemic, takes place in most instances remotely, both the appellant and the respondent are allocated a period of time in which to make their respective arguments. At the end of the respondent's oral arguments, the appellant is provided with an opportunity to reply to arguments made by the respondent. When this has concluded, the Supreme Court ordinarily reserves its judgment,

meaning that the Court indicates that it will not deliver its decision there and then, but will do so at a later date, following careful consideration and deliberation of the arguments made.

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

The members of the Supreme Court which have heard the appeal meet in what is referred to as a 'conference' and deliberate. Each judge arrives at his or her respective decision independently of the other members of the Court. As the Court sits in odd numbers of three, five or seven, a decision is arrived at either unanimously or by majority.

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

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

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

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

When the written judgment(s) is to be delivered, in normal times the Court would be convened and its decision would be pronounced in public. However, since the onset of the pandemic, the Court now delivers its judgment electronically. Judgment(s) are emailed to the parties at an appointed date and time as notified in the Supreme Court Legal Diary on the website of the Courts Service.

The decision reached by a majority of the Court is given formal effect by an order of the Court. Any costs or ancillary applications which are disputed are generally also considered on the delivery of a written ruling of the Court.

In addition to being circulated to the parties, the judgment(s) and ruling(s) delivered are uploaded to the Courts Service website. In some cases, owing to the complexity of the issues or where multiple judgments are delivered, both concurring and dissenting, an Information Note or Statement may also be published which summaries the issues the Court had to consider and the decision reached by the majority. This summary is for information purposes only and does not purport to be an interpretation of the Court's decision.

Journey of a typical appeal

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

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

Other parties to the case given the opportunity to file notice setting out why leave to appeal should not be granted.

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

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

Panel issues determination setting out whether leave has been granted or not. If leave is refused, that is the end of the matter.

If leave granted, case management process begins – both parties will be required to follow the directions of an assigned Supreme Court judge to ensure appeal is placed in a both 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 and other relevant materials in advance.

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

Court reserves judgment and begins its deliberations remotely.

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

Court delivers its judgment electrically 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

Current members of the Supreme Court

The Supreme Court is currently composed of the Chief Justice, who is the President of the Court, and eight ordinary judges. In addition, both the President of the Court of Appeal and the President of the High Court are *ex-officio* – by virtue of their respective offices – members of the Supreme Court. Legislation enacted in 2013 increased the maximum number of ordinary judges of the Supreme Court to nine. At the end of 2020, there was one vacancy on the Court. However, the full complement of the Court has normally been nine judges (including the Chief Justice) for the last five or so years and it is not considered that the appointment of a tenth judge to the Court is currently required.

Appeals are usually heard and determined by five judges of the Court unless the Chief Justice directs that any appeal or other matter (apart from matters relating to the Constitution) should be heard and determined by three judges. Since the establishment of the Court of Appeal, there has never been a Court comprised of three members for substantive appeals other than for Article 64 return cases. In exceptional cases, the Supreme Court may sit as a composition of seven. In instances where the Supreme Court is exercising its original jurisdiction it sits, at a minimum, as a panel of five judges.

Applications for leave to appeal are considered and determined by a panel of three judges of the Supreme Court. The Chief Justice or an ordinary judge of the Supreme Court may sit alone to hear certain interlocutory and procedural applications. However, this does not normally happen and any issues of controversary are normally decided by a panel of at least three judges. As a matter of practice, the Chief Justice appoints a judge of the Court to case manage appeals for which leave to appeal has been granted.

Judges of the Supreme Court

Mr. Justice
Frank Clarke

Chief Justice Clarke was appointed to the Supreme Court in February 2012.

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

Chief Justice Clarke was called to the Bar of Ireland in 1973 and to the Inner Bar in 1985.

In 2004, he was appointed to the High Court and was mainly assigned to the newly established Commercial List of that Court. While a judge of the High Court, he was Chairperson of the Referendum Commission on the Twenty-eight Amendment of the Constitution (Lisbon Treaty II) in 2009.

Mr. Justice
Donal O'Donnell

Mr. Justice O'Donnell was appointed to the Supreme Court in 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 appointed Senior Counsel

Mr. Justice O'Donnell is a member of the Incorporated Council for Law Reporting and the Council of the Irish Legal History Society. He is also a member of the Legal Research and Library Services Committee of the Courts Service.

Mr. Justice
William McKechnie

Mr. Justice McKechnie was appointed to the Supreme Court in June 2010.

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

Mr. Justice McKechnie was called to the Bar of Ireland in 1971 and was admitted to the Inner Bar in 1987.

He was appointed to the High Court in 2000, taking charge of the competition list from 2004 to 2010. He is a member of the Advisory Board of Fundamental Rights In Courts and Regulation (FRICoRe) and a co-chair of the Irish Hub of the European Law Institute (ELI).

Mr. Justice
John MacMenamin

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

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

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

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

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

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 subsequently appointed to the High Court in 2004.

Ms. Justice Dunne is a correspondent judge for the Supreme Court of Ireland on ACA-Europe.

Mr. Justice
Peter Charleton

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

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

Mr. Justice Charleton was called to the Bar of Ireland in 1979 and was called to the Inner Bar in 1995.

In 2006, Mr. Justice Charleton was appointed to the High Court and was assigned principally to the commercial list.

Mr. Justice Charleton has published numerous texts on criminal law. In addition, he is the lead Irish representative on the Colloque Franco-Brittanique-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 in 2007 was called to the Inner Bar.

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 was called to the Inner Bar in 2004.

In 2014, Ms. Justice Baker was appointed to the High Court. She was appointed to the Court of Appeal in 2018. Ms. Justice Baker is currently the assigned judge for the purposes of the Data Protection Act 2018.

Mr. Justice
Séamus Woulfe

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

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

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

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.

Ex-officio members of the Supreme Court

Mr. Justice
George Birmingham
President of the Court of Appeal

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

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

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

Ms. Justice
Mary Irvine
President of the High Court

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

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

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

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

President Irvine is chair of the Personal Injuries Guidelines Committee of the Judicial Council.

The Role of the Chief Justice

The Chief Justice of Ireland is, first and foremost under the Constitution, the President of the Supreme Court and is the titular head of the Judiciary, the judicial branch of Government. In addition to the prescribed role as President of the Supreme Court, the Constitution of Ireland also confers on the Chief Justice certain ex-officio functions.

President of the Supreme Court and judicial functions

Responsibility for the management of all aspects of the Supreme Court lies with the Chief Justice. In conjunction with the Registrar of the Supreme Court, the Chief Justice lists appeals to be heard. The assignment of cases to judges is the sole responsibility of the Chief Justice. The Chief Justice regularly sits on cases which come before the Supreme Court and invariably presides in cases concerning the constitutionality of statutes, references made pursuant to Article 26 of the Constitution and other cases of importance. The Chief Justice chairs one of the panels of the Court which convenes to consider applications for leave to appeal. In addition, the Chief Justice is an *ex-officio* a member of both the Court of Appeal and the High Court.

Presidential Commission

By virtue of Article 14 of the Constitution, the Chief Justice is the first member of the Presidential Commission, which exercises the powers and functions of the President of Ireland in his or her absence or, should circumstances arise in which the President is incapacitated, refuses to discharge his or her constitutional duties, or as has died. The other members of the Presidential Commission are the Ceann Comhairle (the Chairperson of Dáil Éireann) and the Cathaoirleach (Chairperson of Seanad Éireann). If any of the above office-holders are unable to act, the President of the Court of Appeal, the Leas (Deputy) Ceann Comhairle and the Leas (Deputy) Cathaoirleach, respectively, can act as members of the Presidential Commission in his or her place.

In 2020, the Chief Justice was not required to exercise his functions as a member of the Presidential Commission.

Council of State

Under Article 31 of the Constitution, the Chief Justice is an *ex officio* member of the Council of State, a body which aids and counsels the President of Ireland in the exercise of such of his or her powers as are exercisable under the Constitution after consultation with the Council of State. Former holders of the office of Chief Justice remain members of the Council of State after their terms of office have concluded.

Other responsibilities

In addition to the judicial duties and administrative responsibilities associated with the Supreme Court, the Chief Justice has a range of other responsibilities. The Chief Justice chairs the Board of the Courts Service, the Judicial Appointments Advisory Board, and the Superior Courts Rules Committee. The Chief Justice also chairs two standing committees of the Courts Service, namely the Finance Committee and the Modernisation Committee.

In addition, the Chief Justice is Chair of the Judicial Council, which was established in December 2019. He is chair of the Board of the Judicial Council and of the Judicial Conduct Committee. Further, the Chief Justice chairs the Supreme Court Support Committee.

The Chief Justice is also a member of a number of bodies and committees established under statute. He is a Governor and Guardian of Marsh's Library, Dublin pursuant to an 1707 Act of Parliament titled 'An Act for Settling and Preserving a Public Library

for Ever'. The Act vested the house and books of Marsh's Library in a number of trustees known as 'Governors and Guardians' of Marsh's Library.

The Irish Legal Terms Act, 1945 established the Irish Legal Terminology Committee. That Act authorises 'the provision, for the purposes of law, of standard equivalents in the Irish language for certain terms' and provides for 'the publication of legal forms and precedents in the Irish language'. The Chief Justice is a member of the Committee, nominated by the Government.

The Chief Justice receives no emoluments or fees as chair or member of the foregoing bodies.

Ceremonial role

In addition to his judicial and constitutional role, the Chief Justice also has a role in the appointment of various officers of the Court.

Admittance of Barristers

The Chief Justice calls to the Bar of Ireland persons admitted to the degree of Barrister-at-Law by the Benchers of the Honorable Society of King's Inns. It is the Call to the Bar by the Chief Justice which formalises a Barrister's ability to practice in the Courts of Ireland. The Call to the Bar is the short formal ceremony entitled the 'Call to the Outer Bar' which takes place in the Supreme Court, which is presided over by the Chief Justice. Once called to the Bar of Ireland, the Barristers are referred to as junior counsel.

The Honorable Society of King's Inns admits to the degree of Barrister-at-Law persons who qualify by following its professional course, barristers from jurisdictions with whom there are reciprocal arrangements (at present these arrangements are only extend to Northern Ireland) and qualified lawyers practising in other jurisdictions whose qualifications are recognised and who satisfy the other requirements of King's Inns.

In 2020, 153 Barristers were called to the Bar of Ireland by the Chief Justice. Individuals called at the Trinity sitting had the option of electing to be called remotely or in person. Owing to Level 5 public health restrictions that were in force at the time, Barristers called at the Michaelmas sitting were required to be called remotely. Notwithstanding the facility to be called in person, the formalities of these short but significant ceremonies were maintained, with family and friends of those Barristers being called provided with the opportunity to observe the remote ceremonies.

Patents of Precedence

The Government recognises the desirability of maintaining, in the public interest, a designation of 'Senior Counsel' which indicates that those holding the title can provide, with exceptional skill, a wide range of specialist advice and advocacy in all courts and tribunals in areas of national, European and international law. The Government, at its discretion, following advice rendered to it by a statutory Advisory Committee, grants Letters of Patents of Precedence to suitable persons who meet the eligibility criteria as prescribed in the Legal Services Regulatory Act 2015. Where the person receiving a Patent of Precedence is a barrister, that person also becomes entitled to be called to the Inner Bar.

In 2020, the Advisory Committee was established and in September 2020, the Government granted Letters of Patents of Precedence to 20 Barristers and 17 Solicitors. This was the first time that members of the solicitor profession could apply for a Patent of Precedence.

Whilst the Letters of Patents of Precedence are granted by the Government, it is the Chief Justice who presents the Patents to successful applicants. Over a series of remote presentation ceremonies held in September 2020, the Chief Justice presented Patents to 37 applicants. In addition, the Chief Justice called to the Inner Bar those 20 applicants who were members of the barrister profession.

All successful applicants who are granted Patents of Precedence are permitted to style themselves as Senior Counsel and to use the suffix 'S.C.' after their name. The process of being called to the Inner Bar is colloquially referred to as 'taking silk'. The

phrase derives from the black silk robes worn by Senior Counsel.

Notaries Public

A Notary Public is an officer who serves in public in non-contentious matters usually concerned with foreign or international business. Notaries certify the execution in their presence of a deed, a contract or other writing. The Chief Justice appoints qualified persons as notaries. The process of appointment involves a formal petition to the Chief Justice in open court. The Faculty of Notaries Public, which is the body responsible for the advancement and regulation of notaries and the Law Society of Ireland, which is the educational, representative and regulatory body of the solicitors' profession in Ireland, are notice parties to such applications.

In December 2020, 10 applicants were appointed by the Chief Justice as Notaries Public, in a short remote ceremony held in the Supreme Court.

Commissioner for Oaths

A Commissioner for Oaths is a person who is authorised to verify affidavits, statutory declarations and other legal documents. Affidavits are statements made in writing and on oath. Persons wishing to be appointed as a Commissioner for Oaths are made by petition to the Chief Justice sitting in open court.

In December 2020, 10 individuals were appointed by the Chief Justice as Commissioners for Oaths in a remote ceremony held in the Supreme Court

Declarations of newly appointed judges

The Chief Justice receives the declaration made and subscribed by persons who are appointed to judicial office under Article 34.6 of the Constitution. This includes judges who are appointed a judge of a higher court and who thereby vacate the judicial office previously held.

In 2020, the Chief Justice received judicial declarations from 11 judges appointed to judicial office. Of these, 8 were judges who were appointed for the first time.

All such declarations are received in the Supreme Court and in open court.

International responsibilities

In addition to his domestic responsibilities, the role of Chief Justice encompasses a role as representative of the Supreme Court, the Judiciary and the Irish legal system at an international level. Details of the international engagements of the Chief Justice and other members of the Supreme Court in 2020 are outlined in part 4 of this report.

Article 255 panel

During 2020, the Chief Justice attended a number of meetings of the panel established by Article 255 of the Treaty on the Functioning of European Union in order to give opinions on candidates' suitability to perform the duties of Judge or Advocate General of the Court of Justice and the General Court. He attended a majority of the meetings remotely due to the restrictions in place during the pandemic.

Throughout 2020, the Chief Justice also engaged with courts in other jurisdictions in the context of international meetings and organisations in which the Supreme Court is involved, including work associated with his membership of the Board of the Network of the Presidents of the Supreme Judicial Courts of the European Union and in the context of the activities of ACA-Europe as outlined in part 4 of this report.

Judicial Council

The Judicial Council has a statutory mandate to promote judicial excellence and independence to ensure public confidence in the administration of justice. Membership of the Judicial Council comprises all members of the Judiciary. In addition to being Chairperson of the Council's Board, the Chief Justice is also chair of the Judicial Conduct Committee.

The Judicial Council met for its inaugural meeting in February 2020.

In 2020, the Advisory Committee was established and in September 2020, the Government granted Letters of Patents of Precedence to 20 Barristers and 17 Solicitors.

Retirement and Appointments

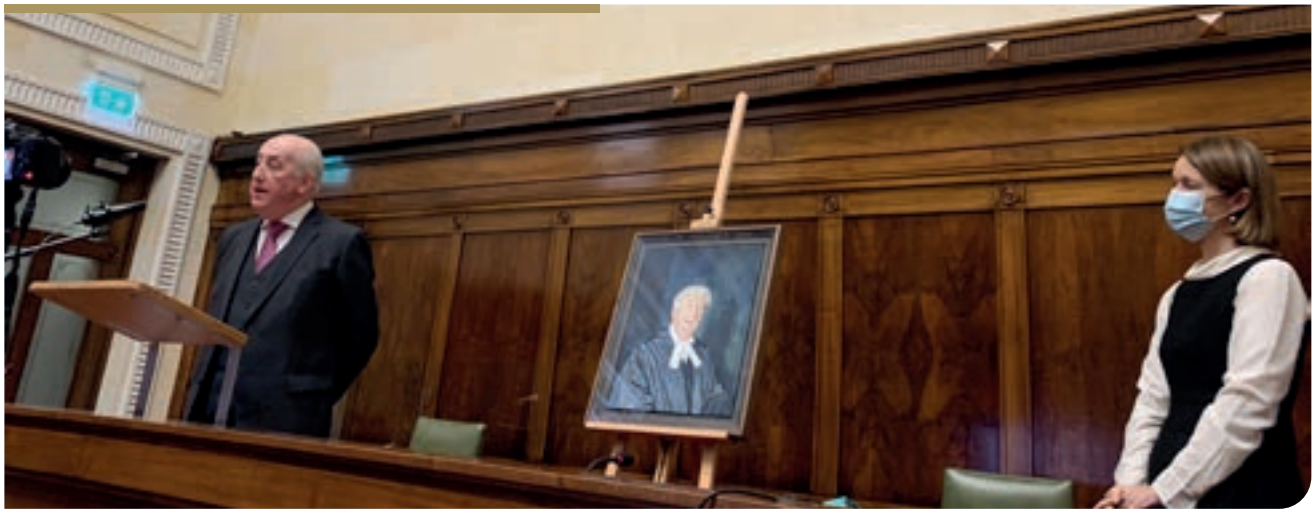
In June 2020, Mr. Justice Peter Kelly retired as President of the High Court. His five year term as President of the High Court, concluded a long and distinguished career. He was appointed as a judge of the High Court in 1996 and was the judge-in-charge of the Chancery List from 1997 to 1999, the Judicial Review List from 1999 to 2003 and was head of the Commercial Court when it was created as a distinct High Court list in 2004. In 2014, upon its establishment, Mr. Justice Kelly was appointed as a Judge of the Court of Appeal. His colleagues on the Supreme Court wish him a happy and rewarding retirement.

In June 2020, Ms. Justice Mary Irvine was appointed as President of the High Court, following the retirement of Mr. Justice Peter Kelly. Notwithstanding this appointment, President Irvine continues to remain a member of the Supreme Court as the President of the High Court is an ex officio member of the Supreme Court.

In July 2020, Mr. Séamus Woulfe S.C. was appointed by the President as an Ordinary Judge of the Supreme Court, filling the vacancy that arose upon the retirement in May 2019 of Ms. Justice Mary Finlay Geoghegan.

Pursuant to Article 34.6.1° of the Constitution, judges appointed by the President of Ireland are required to make and subscribe a declaration in the presence of the Chief Justice. Such declarations take place in the Supreme Court. Owing to the prevailing public health advice and restrictions in relation to COVID-19, throughout 2020, judicial declarations took place in the Supreme Court with the Chief Justice, the newly appointed judge and the Registrar of the Supreme Court in attendance. Depending on the degree of restrictions for the time being in force, a small number of other persons were sometimes permitted to be physically present. A practice has developed whereby declaration ceremonies are recorded so that those who might have wished to be present can view the ceremony after it has taken place.

The current membership of the Supreme Court stands at nine, with one vacancy on the Court arising from the appointment of Ms. Justice Irvine as the President of the High Court in June 2020.

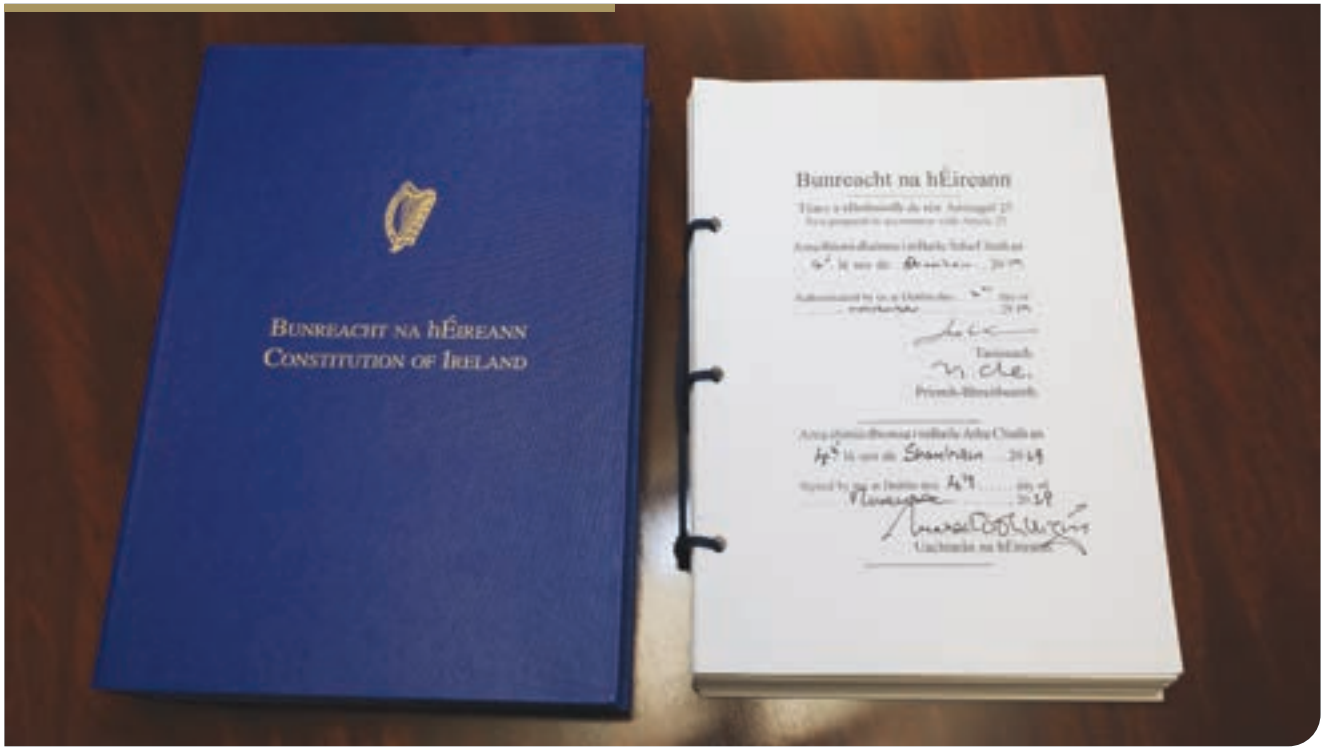


Mr. Justice Peter Kelly, former President of the High Court, being presented with a portrait commissioned by his successor Ms. Justice Mary Irvine, President of the High Court, on behalf of his former colleagues in the High Court, to mark his retirement from the judiciary in June 2020.

Newly appointed President of the High Court, Ms. Justice Mary Irvine making the declaration required of her in the presence of the Chief Justice, Mr. Justice Frank Clarke.

Mr. Justice Frank Clarke, Chief Justice with Mr. Justice Séamus Woulfe upon his appointment to the Supreme Court in July 2020.

The Constitution of Ireland



The Supreme Court's existence, authority and *raison d'etre* originates from Bunreacht na hÉireann – the Constitution of Ireland. As the basic law of the State, the Constitution prescribes the legislative, executive and judicial branches of government. In addition, it provides for certain fundamental human rights.

The constitutional architecture outlined in the Constitution is based on the separation of powers doctrine which is attributed to the French political philosopher Montesquieu.

Each branch is carefully calibrated to ensure a balance in the powers that can be exercised. This is colloquially referred to as 'checks and balances'. In essence, each branch has been empowered to exercise a degree of oversight over the other branches to ensure that no one branch can go beyond the powers conferred on it by the Constitution.

Articles 15-27 of the Constitution establish a national Parliament known as the Oireachtas. More specifically, Articles 16-17 provide for a House of Representatives known as Dáil Éireann, its membership being directly elected by the Electorate. Articles 18-19 provide for an upper house, or Senate, known as Seanad Éireann. The President forms the final constituent element of the Oireachtas and is expressly conferred with the power to promulgate Bills passed by both Houses of the Oireachtas. Article 15 of the Constitution expressly provides that the Oireachtas is the only branch under the Constitution that has the power to make laws.

Article 28 provides that the executive authority of the State, subject to the provisions of the Constitution, shall be exercised by or on the

authority of the Government. The Government is responsible to Dáil Éireann and comprises of between 7 and 15 members, known as Ministers. The Head of Government is titled as An Taoiseach, with the deputy Prime Minister referred to as Tánaiste. In addition to the responsibility for the day-to-day administration of the State, the Government is responsible for giving effect to laws passed by the Oireachtas.

The third branch of government – the Judiciary –receives its power from Articles 34-37 of the Constitution. Those articles establish courts of law and provide for an independent Judiciary. The independence of the Judiciary is enshrined in Article 35 which requires tall judges to be independent in the exercise of their judicial functions, subject only to the Constitution and the law.

The People ratified the Constitution by way of a direct vote known as a plebiscite on the 1st July, 1937. The proposal to ratify a draft Constitution was passed by a majority of the People, with 685,105 votes in favour of the proposal and 526,945 voting against. The draft Constitution came into force on 29th December 1937 and that date is now known as 'Constitution Day'.

The Constitution and Fundamental Rights

In addition to providing the basis for branches of government, the Constitution of Ireland prescribes certain fundamental rights which are afforded to citizens and non-citizens. Articles 40-44 set out such fundamental human rights such as the right to equality, the right to life, and the right to personal liberty, save in accordance with law. Certain rights are afforded their own articles, such as Article 42 which enshrines the right to education, and Article 42A which prescribes the rights of children.

Amending and Interpreting the Constitution

The Constitution of Ireland has been described as "a living document" and as far back as the 1970s it was stated by the Supreme Court (per Walsh J.) in the seminal case of *McGee v. Attorney General*[1] that:

> "...no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts."

The Supreme Court, as the ultimate arbiter of the Constitution of Ireland, has interpreted the fundamental law of the State over the past eight decades to identify rights ranging from the right to bodily integrity in *Ryan v. Attorney General*[2] and martial privacy in *McGee v. Attorney General*[3]. In 2017, the Supreme Court held in *NVH v. Minister for Justice*[4] that the absolute ban on asylum seekers working in the State was contrary to the constitutional right to seek employment.

As the basic law of the State, the Constitution may only be amended by the People through the referendum process which is expressly provided for in Article 47 of the Constitution. In a constitutional referendum, where a Bill to amend the Constitution is passed by the Oireachtas, it is put to the People for them to determine whether they approve or reject the proposal contained in the Bill.

In the eighty-three years for which Bunreacht na hÉireann has been in force, the Constitution has been amended by referendum by the People on 32 occasions. The nature of these amendments has varied from providing for Ireland's membership of the European Economic Community, the present-day European Union, to inserting a prohibition

[1] [1974] I.R. 284

[2] [1965] 1 I.R. 294

[3] [1974] I.R. 284

[4] [2018] 1 IR 246

on the death penalty, providing for divorce and also same-sex marriages and ratifying Ireland's membership of the International Criminal Court.

It should be noted that proposals to amend the Constitution have been defeated at referendum, where a majority of the People have voted to reject such proposals. Proposals which have been defeated include reducing the age of eligibility for nomination to the Office of the President and to abolish the Upper House of Parliament, Seanad Éireann (the Senate).

Derived Rights

In addition to the rights which are specifically mentioned in the Constitution, the case law of the Supreme Court identifies other rights which have been determined to arise under the Constitution even though not specifically referred to. In the past these rights were referred to as "unenumerated rights" reflecting the fact that they are not specifically mentioned.[5] However, in a recent judgment of the Supreme Court in *Friends of the Irish Environment v. The Government of Ireland*,[6] the Court described such rights as "derived" rights on the basis that their existence can stem from the text and structure of the Constitution and the values inherent in it, and thus be derived from the Constitution even if not specifically named. The Court found:-

> "[T]here is a danger that the use of the term "unenumerated" conveys an impression that judges simply identify rights of which they approve and deem them to be part of the Constitution.
>
> ...
>
> It is for that reason that I would consider the term "derived rights" as being more appropriate, for it conveys that there must be some root of title in the text or structure of the Constitution from which the right in question can be derived... It may derive from a combination of rights, values and structure. However, it cannot derive simply from judges looking into their hearts and identifying rights which they think should be in the Constitution. It must derive from judges considering the Constitution as a whole and identifying rights which can be derived from the Constitution as a whole."[7]

However, the Court emphasised that that it did not "thereby advocate a narrow textualist approach"[8] and referred to previous decisions of the Supreme Court which held that for the Courts to decide in a particular case whether or not the right relied on comes within the unspecified rights guaranteed by Article 40.3 of the Constitution:-

> "[I]t must be shown that it is a right that inheres in the citizen in question by virtue of his human personality. The lack of precision in this test is reduced when sub-s. 1 of s. 3 of Article 40 is read (as it must be) in the light of the Constitution as a whole and, in particular, in the light of what the Constitution, expressly or by necessary implication, deems to be fundamental to the personal standing of the individual in question in the context of the social order envisaged by the Constitution." [9]

A more detailed summary of the Court's judgment in this case can be found on page 134.

[5] The finding of the High Court (Kenny J.) in Kenny J in *Ryan v Attorney General* [1965] I.R. 294, as upheld by the Supreme Court, that Article 40.3 of the Constitution guaranteed personal rights not expressly referred to in the Constitution, has led to the identification of a number of such rights.

[6] [2020] IESC 49.

[7] [2020] IESC 49 at paras. 8.5-8.6.

[8] Ibid. at para. 8.7.

[9] Ibid. citing *McGee v. The Attorney General* [1974] IR 284 per Henchy J. at p. 325 and cited with approval by the Supreme Court in *N.V.H v. Minister for Justice and Equality* [2018] 1 IR 246 and *Fleming v. Ireland & Ors.* [2013] 2 IR 417.

Mr. Justice William McKechnie conducting a case management hearing remotely. Remote hearings are displayed live in the Supreme Court courtroom to comply with the constitutional requirement that justice be administered in public.

Depositary for Acts of the Oireachtas

Article 25.4.5° of the Constitution provides that as soon as a Bill has been signed and promulgated as a law, the text of such law which was signed by the President shall be enrolled for record the office of the Registrar of the Supreme Court. The Article also applies where texts of laws have been signed in each of the official languages.

The text, or both texts, so enrolled, shall be conclusive evidence of the provisions of such law. Article 25.5.6° provides that in case of conflict between the texts of a law enrolled in both the official languages, the text in the national language shall prevail.

As soon as a Bill has been promulgated into law by the President, the signed text is conveyed to the office of the Registrar of the Supreme Court, where it is enrolled and stored in a secure location.

In 2020, 32 Acts of the Oireachtas were promulgated into law and duly enrolled in the Office of the Registrar of the Supreme Court.

The Office of the Registrar of the Supreme Court has enrolled over 3,134 Acts of the Oireachtas. These Acts include 33 Acts to Amend the Constitution, 3,063 Public Acts and 38 Private Acts.

In addition to being the constitutionally prescribed repository, the Office of the Registrar of the Supreme Court is also responsible for the custody and superintendence of texts of the Constitution enrolled pursuant to Article 25.4. Since the enactment of Bunreacht na hÉireann in 1937, there have been six enrolments of the text of the Constitution to reflect amendments made by way of Referendum. Texts of the Constitution were enrolled in 1938, 1942, 1980, 1990 and 1999. The last enrolment took place in December 2019. The text of the Constitution enrolled is the definitive text.

The Office of the Registrar of the Supreme Court is also responsible for the safe custody of Acts enacted by Saorstat Éireann. In total, there are 729 Act enacted between 1922 and 1937.

The Emergency Measures in the Public Interest (COVID-19) Act 2020 which was signed into law by the President on 27th March 2020. Once signed into law, all Acts are enrolled in the Office of the Registrar of the Supreme Court pursuant to Article 25.4.5°

PART 2

The Supreme Court in 2020

COVID-19 and the response of the Court

As soon as it became apparent that COVID-19 was spreading throughout Europe, contingency arrangements were drawn up. A co-ordinated response by the Court Presidents and the Courts Service ensured that the courts have remained open for business whilst ensuring that the health and safety of all court users – parties, practitioners, judges and staff – remained the foremost priority.

Those contingency arrangements became operational on 12th March 2020 following the announcement of the Government restrictions. Those arrangements ensured that urgent family, criminal and civil law matters would continue to be heard.

A unified approach was taken in terms of the measures introduced in all court jurisdictions, adjusted to reflect the specific considerations of each court. In the Supreme Court, in addition to the introduction of remote hearings, other procedural and operational measures were introduced in response.

Remote hearings

Arising from the public health restrictions introduced in March 2020 as a result of COVID-19, the possibility of conducting remote court hearings was explored at an early stage by the Supreme Court, the wider Judiciary and the Courts Service.

Also referred to as VMR (Virtual Meeting Room), Pexip is a video-conferencing solution that existed within the Courts Service prior to COVID-19 and has been used to enable the conduct of remote or virtual hearings. Following extensive testing and the conduct of mock hearings, the Supreme Court

First remote case management hearing

agreed to conduct its business on a remote basis using the Pexip video-conferencing platform. Detailed guidance was provided to practitioners in advance to assist in familiarisation with the platform.

On the 20th April 2020, the Chief Justice conducted a case management hearing remotely via the Pexip platform and on the 11th May 2020, the first full hearing of a Supreme Court appeal was conducted remotely.

Practice Direction SC21

On 20th April 2020, Practice Direction SC21 – Conduct of Proceedings in the Supreme Court (COVID-19) came into effect. This Practice Direction outlines the position that applies in the Supreme Court in respect of applications for leave, case management, remote hearings and the delivery of judgments electronically. It will remain in force until such time as it is superseded by a subsequent Practice Direction or is revoked.

Application for Leave panels

Prior to March 2020, it was the practice of judges of the Supreme Court to convene in person in the Supreme Court conference room or in Chambers in panels of three on a rota basis and, ordinarily on each Friday during term, to consider the applications. However, such panel meetings now take place remotely via the Pexip VMR platform. The Registrar of the Supreme Court attends these meetings and records the decision of the panel, which is published electronically in the form of a written Determination, along with the Application for Leave and Respondent's Notice.

Statement of Case

A Practice Direction – Conduct of Proceedings in the Supreme Court (COVID-19) (SC21) was issued by the Chief Justice on the 19th April 2020. One of the principal innovations addressed in that practice direction was the introduction of a document known as a "statement of case". This is a document that the Supreme Court may issue to parties to an appeal in advance of the remote hearing, which sets out the understanding of the Court of the key facts and legal issues the Court must determine and the positions of the parties in relation to those issues.

The statement of case sets out the understanding of the Court of the relevant facts insofar as they have been determined by the court or courts below or appear to have been accepted at the trial of the action. In addition, it outlines the Court's understanding of the essential elements of the decisions of the courts below insofar as they are material to the issues which arise on the appeal.

The circulation of the statement of case to parties also provides an opportunity to clarify issues which appear to the Court to require determination on the appeal having regard to the determination granting leave to appeal.

Clarification request

In addition, or as an alternative procedure, the Court may issue a second document ("a clarification request") seeking clarification from the parties in respect of any matters in respect of which the Court considers that additional information would be useful in advance of the hearing so that the hearing itself can be conducted as efficiently as possible. In particular, clarification concerning matters of fact or the position of the parties on any issues properly arising on the appeal may be the subject of such a request.

It is important to stress that the statement of case is not intended to convey even a preliminary view on the part of the Court on the merits of the appeal, but is rather designed to establish such common ground as may appear from the papers. For example, a party may consider that, on its case, certain facts are not relevant. The relevance or otherwise of any facts may be the subject of submissions during the oral hearing but it will be unnecessary, and inappropriate, to file an additional document designed simply to reiterate the position of a party in that regard. Parties are strongly discouraged from filing such a document unless there are real issues of substance to be raised concerning the statement of case.

Electronic delivery of judgments

On the 24th March 2020, a new procedure was introduced in respect of the delivery of judgments. In order to minimise the exposure of persons using the courts to unnecessary risk, the default position until further notice is that all written judgments of courts will be delivered by means of a copy of the judgment being sent electronically to the parties and a copy, subject to such redactions as would ordinarily apply, being posted as soon as possible on the Courts Service website. The date and time of delivery to the parties is notified in the Legal Diary on the Courts Service website.

Subsequent to the electronic delivery of the judgment, parties are invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which is to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard, concise written submissions must be filed electronically in the Office of the Supreme Court within 14 days of delivery subject to any other direction given in the judgment.

Unless the interests of justice require an oral hearing to resolve such matters, any issues arising will be dealt with remotely and any ruling which the Court is to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate.

Sitting in King's Inns

Since the onset of the COVID-19 pandemic, the Supreme Court has only sat in person on one occasion. On 22nd June 2020, seven members of the Court sat in the Dining Hall of King's Inns to hear oral argument in the case of *Friends of the Irish Environment v. Government of Ireland* [2020] IESC 49. This was to facilitate compliance with the requirement of physical distancing. Members of the public who wished to view proceedings were facilitated in a designated area. A summary of the Court's decision in that case can be found on page 134.

Supreme Court sitting in King's Inns

Statistics

Applications for Leave to Appeal

Since the new jurisdiction of the Supreme Court came into force in 2014, the Court has resolved 927 applications for leave to appeal.[11] The below graph, 'Incoming and Resolved Applications for Leave to Appeal 2015-2020', illustrates the trajectory of applications for leave to appeal brought to the Supreme Court each year since the first year in which it began to consider such applications. Figures compiled by the Supreme Court Office indicate that, in 2020, the Court determined 158 applications for leave to appeal. The Court granted leave in respect of 40 applications (25%) and refused leave in relation to 111 applications (70%).[12]

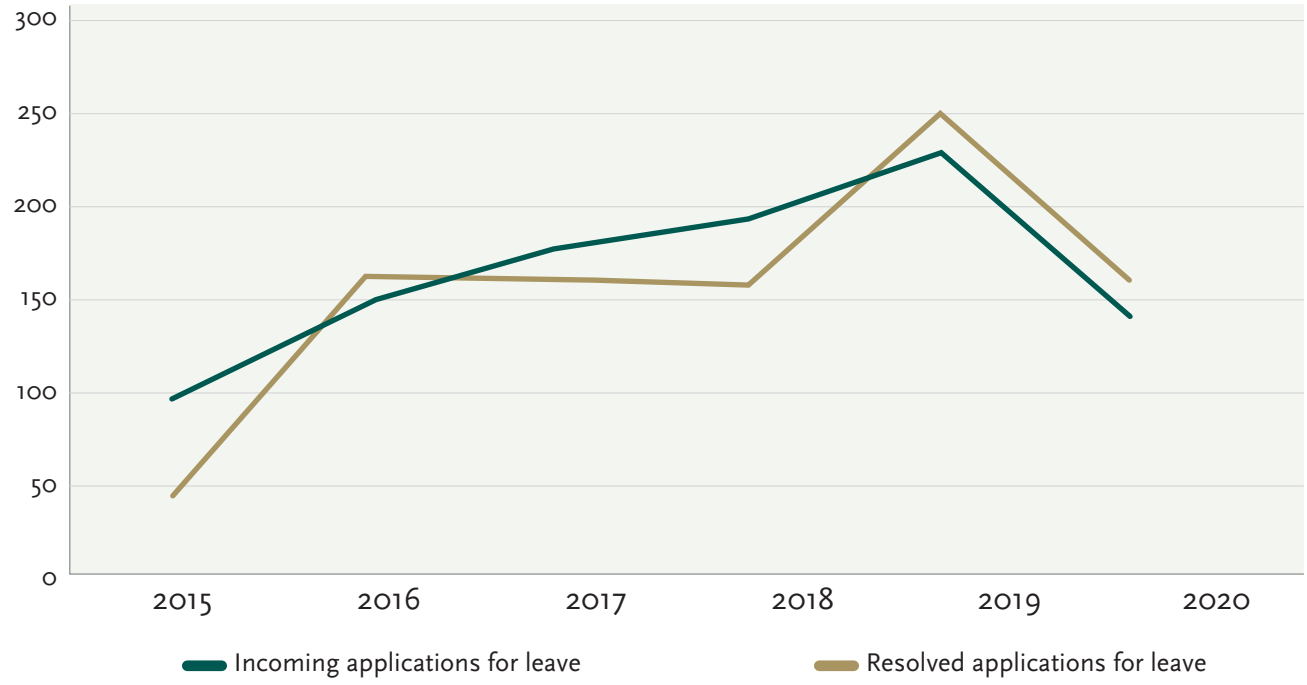
While this figure is a 14% overall increase in applications for leave to appeal since 2015, 2020 is the first year in which there has been a decrease in such applications, with 36% fewer determined in 2020 compared to 2019.

This may be explained by the effect of the restrictions associated with COVID-19 in all of the courts, and in particular 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. In particular, the second graph below, 'Incoming AFLs from the High Court and Court of Appeal', depicts a sharp decrease in the number of incoming applications for leave to appeal from the High Court. This may be explained by the greater impact of COVID-19 restrictions on the High Court as a trial court.

[10] Annual statistics for cases considered by the Supreme Court each year can be found in the Annual Reports of the Courts Service, available at www.courts.ie.

[11] 142 applications for leave to appeal were lodged in the Supreme Court Office and seven were withdrawn.

Incoming and Resolved Applications for Leave to Appeal 2015 - 2020



Incoming AFLs from High Court and Court of Appeal

Categorisation of Applications for Leave to Appeal

The graph and table in the preceding pages categorise all applications for leave to appeal brought from the High Court and the Court of Appeal to the Supreme Court in 2020 into areas of law. The categorisation is based on a consideration of the determinations of the Court published on the Courts Service website in 2020.

The categorisation comes with the caveat that many cases involve issues which fall under more than one area of law. It aims to identify the most relevant single category relating to the case. However, there may be aspects of a case which raise important issues in other areas of law. The categorisation is based on the issues of law arising in an appeal rather than the area of law at issue in the underlying proceedings.

A categorisation of applications for leave to appeal in 2020 by area of law reveals that procedural issues gave rise to the highest number of applications. For the third year in a row, judicial review proceedings in the area of immigration law and criminal law were the substantive areas which gave rise to the highest number of applications for leave to appeal.

Appeals involving judicial review proceedings in the area of immigration law accounted for 10% of applications for leave to appeal (similar to 11% in 2019). Leave to appeal was granted in 40% of cases in this area of law (an increase from 30.8% in 2019).

Appeals in the area of criminal law also made up 10% of applications for leave to appeal, with leave being granted in 13% of such applications (down from 27.8% in 2019).

Applications for Leave to Appeal directly from the High Court

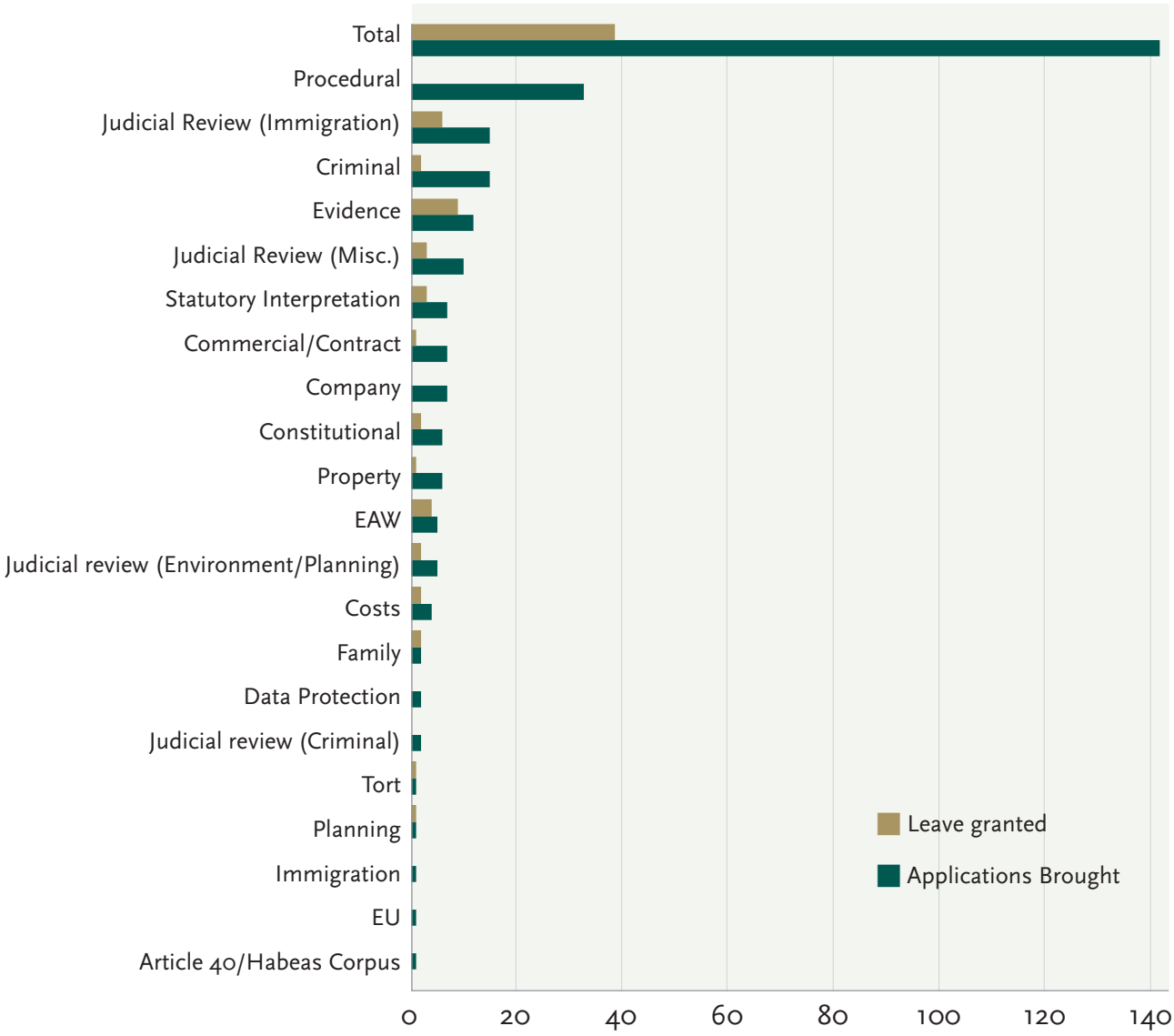
The Constitution provides for a direct appeal (often referred to as a 'leapfrog' appeal) from the High Court to the Supreme Court in exceptional circumstances. Forty seven of the 148 published determinations of the Supreme Court in 2020 involved applications for leave to appeal directly to the High Court (32%). This was a slight reduction on 36% in 2019. The Supreme Court granted leave to appeal directly from the High Court in 16 of the 47 applications (34%), which is similar to the figure of 35% in 2019.

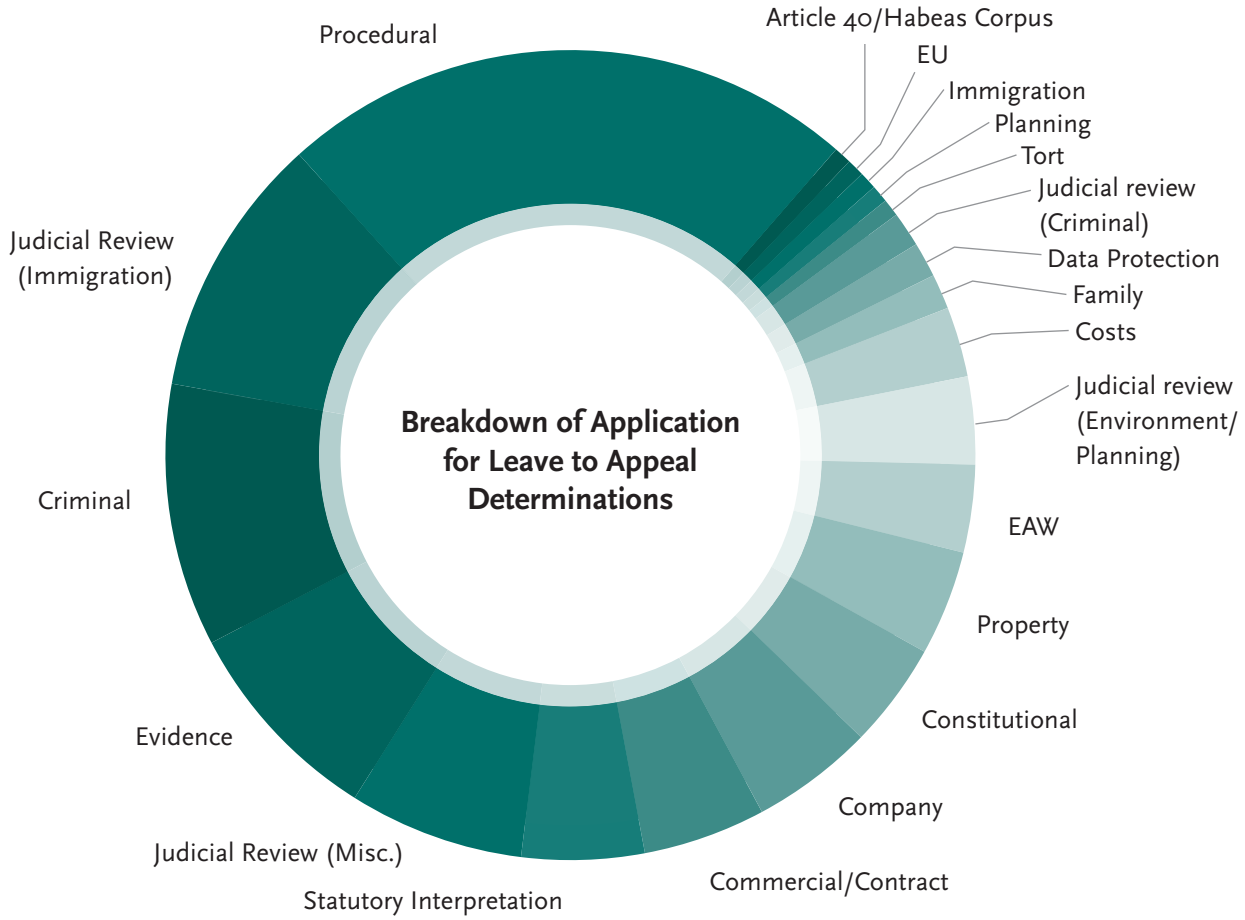
A breakdown of the categories of cases in which applications for a leapfrog appeal was granted follows. This shows that procedural issues and judicial review in the area of immigration law are the areas which attract the highest number of leapfrog appeals, with each making up 21% of the areas in which applications for leave to appeal directly was sought.. In four of the ten applications for leave to appeal in the area of judicial review in respect of immigration law proceedings (40%), the Court granted the applications for leave to appeal directly to the High Court. None of the ten applications for a leapfrog appeal in respect of procedural issues was granted. With regard to the categories in which applications for leave to appeal had the highest success rate, 100% of applications for leave to appeal directly from the High Court were granted in appeals involving European Arrest Warrant and family law issues, albeit the number of such applications was very low.

Of the 16 instances in which leave to 'leapfrog appeal' was granted from the High Court to the Supreme Court, two were in cases in which the High Court had refused to certify that an appeal to the Court of Appeal was justified. Such a certificate is required by statute in certain circumstances before an appeal from a High Court decision can be brought to the Court of Appeal. However, the Supreme Court has noted in its determinations that, as a consequence of the appellate structure in place following the Thirty-third Amendment of the Constitution, even if the High Court refuses to grant such a certificate, this does not preclude

a party from applying for a leapfrog leave directly to the Supreme Court. If the Supreme Court is satisfied that the leapfrog application presents an issue of public importance, and therefore satisfies the general constitutional threshold for the granting of leave to appeal, the refusal by the High Court to grant a certificate might of itself satisfy the exceptional circumstances requirement in leapfrog cases, thus justifying the granting of leave to appeal.

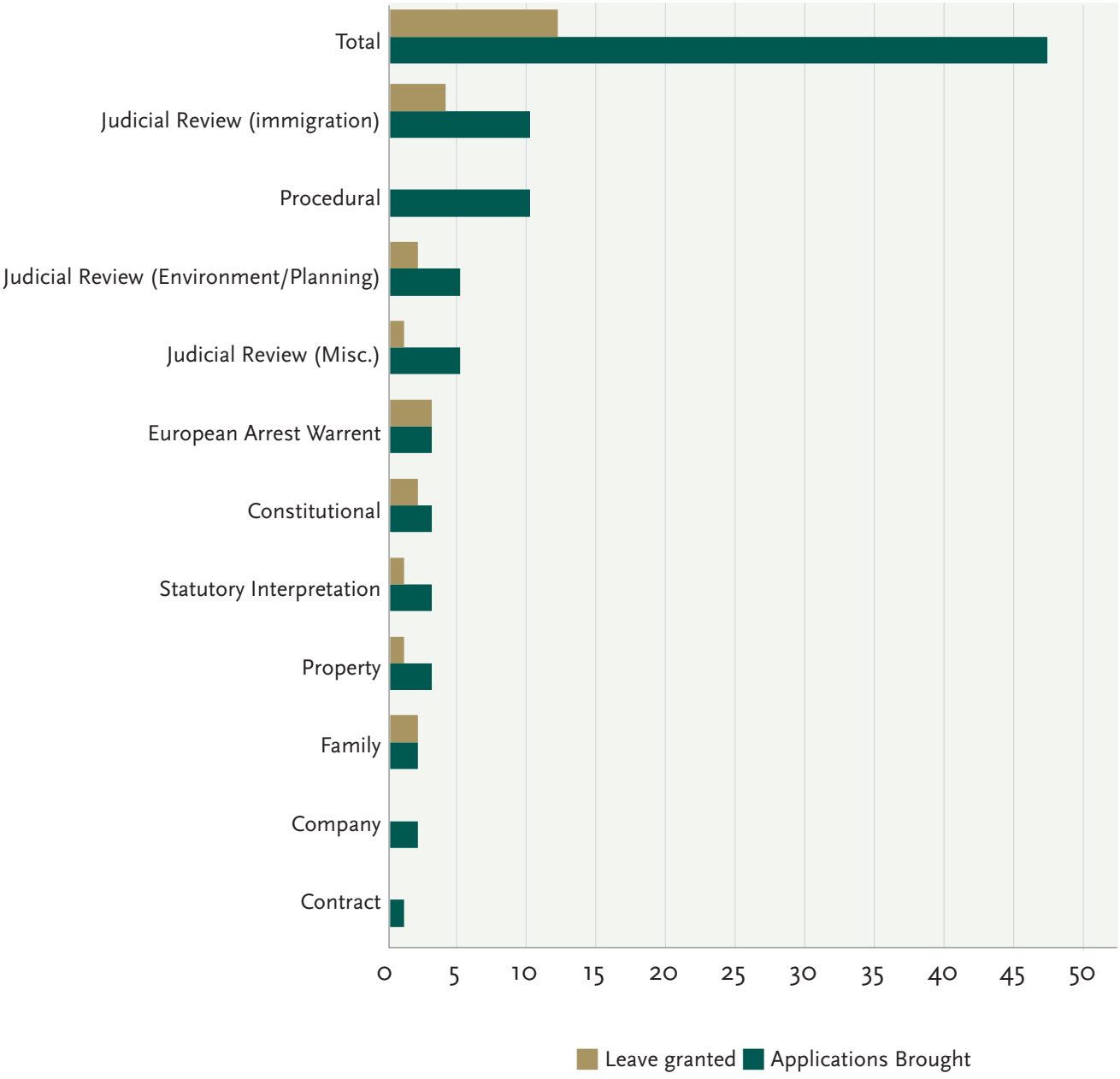
AFLs granted in each category





Categorisation of Application for Leave to Appeal Determinations by Number		
Categories	**Applications Brought**	**Leave Granted**
Article 40/Habeas Corpus	1	0
EU	1	0
Immigration	1	0
Planning	1	1
Tort	1	1
Judicial Review (Criminal)	2	0
Data Protection	2	0
Family	2	2
Costs	4	2
Judicial Review (Environment/Planning)	5	2
EAW	5	4
Property	6	1
Constitutional	6	2
Company	7	0
Commercial/Contract	7	1
Statutory Interpretation	7	3
Judicial Review (Misc.)	10	3
Evidence	12	9
Criminal	15	2
Judicial Review (Immigration)	15	6
Procedural	33	0
Total	**143**	**39**

Categorisation of Leapfrog Appeals from High Court



Full Appeals determined in 2020

New jurisdiction appeals

The Supreme Court disposed of 65 'full' appeals in 2020. Fifty five of those were 'new' appeals which were brought under the jurisdiction of the Court which came into force with the establishment of the Court of Appeal in 2014. Despite the decrease in the number of applications for leave to appeal this year, the Court dealt with only five fewer new jurisdiction appeals.

Eight of the full appeals were 'legacy appeals' under the previous jurisdiction of the court, which were still in the system due to procedural issues. Only two full appeals were so-called 'Article 64' appeals which were transferred to the Supreme Court from the Court of Appeal.

Article 64 'returns'

A small number of 'full' appeals (eight) were cases returned to the Supreme Court from the Court of Appeal. Most cases in this category were dealt with in 2019, when the Supreme Court disposed of 60 so-called 'Article 64 returns'.

This category of full appeals stems from the amendment of the Constitution to establish the Court of Appeal and a transitory provision in Article 64 of the Constitution which provided the basis for a direction by the Chief Justice in October 2014 that 1,355 appeals be transferred to the newly established Court of Appeal. The Supreme Court retained over 800 appeals under its previous jurisdiction, which are colloquially referred to as 'legacy appeals'. The establishment of the Court of Appeal enabled the Supreme Court to dispose of a backlog of such legacy appeals which had accumulated as a result of the previous almost universal right of appeal from the High Court to the Supreme Court.

While the Supreme Court had by 2019 effectively disposed of all of its legacy cases, the almost universal right of appeal was transferred to the Court of Appeal which was then comprised of only ten judges. Consequently, a backlog of appeals arose in the Court of Appeal. Following an agreement by the Chief Justice and President of the Court of Appeal that a number of appeals which had been transferred under Article 64 of the Constitution should be transferred back to the Supreme Court, the Supreme Court assisted to clear the backlog.

Legislation enacted in 2019 provided for an increase in the number of Court of Appeal judges from ten to 16 in order to alleviate the issue which had created the backlog.

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 five weeks in the last quarter of 2020; a reduction on six and a half weeks in the first quarter.

The average length of time from the grant of leave to appeal to the listing of an appeal was 21 weeks in the last quarter of 2020, a reduction on 26 weeks in the first quarter.

Reserved judgments

The Supreme Court delivered 89 reserved judgments in 2020. This was a decrease from 131 in 2019, but close to the figure of 91 in 2018. The 2019 figure was significantly influenced by the disposal of Article 64 returns, many of which were straightforward cases capable of being dealt with expeditiously by a panel of three judges.

Part 7 of this report contains summaries of many of the judgments delivered in 2020, which have been prepared by the judicial assistants.

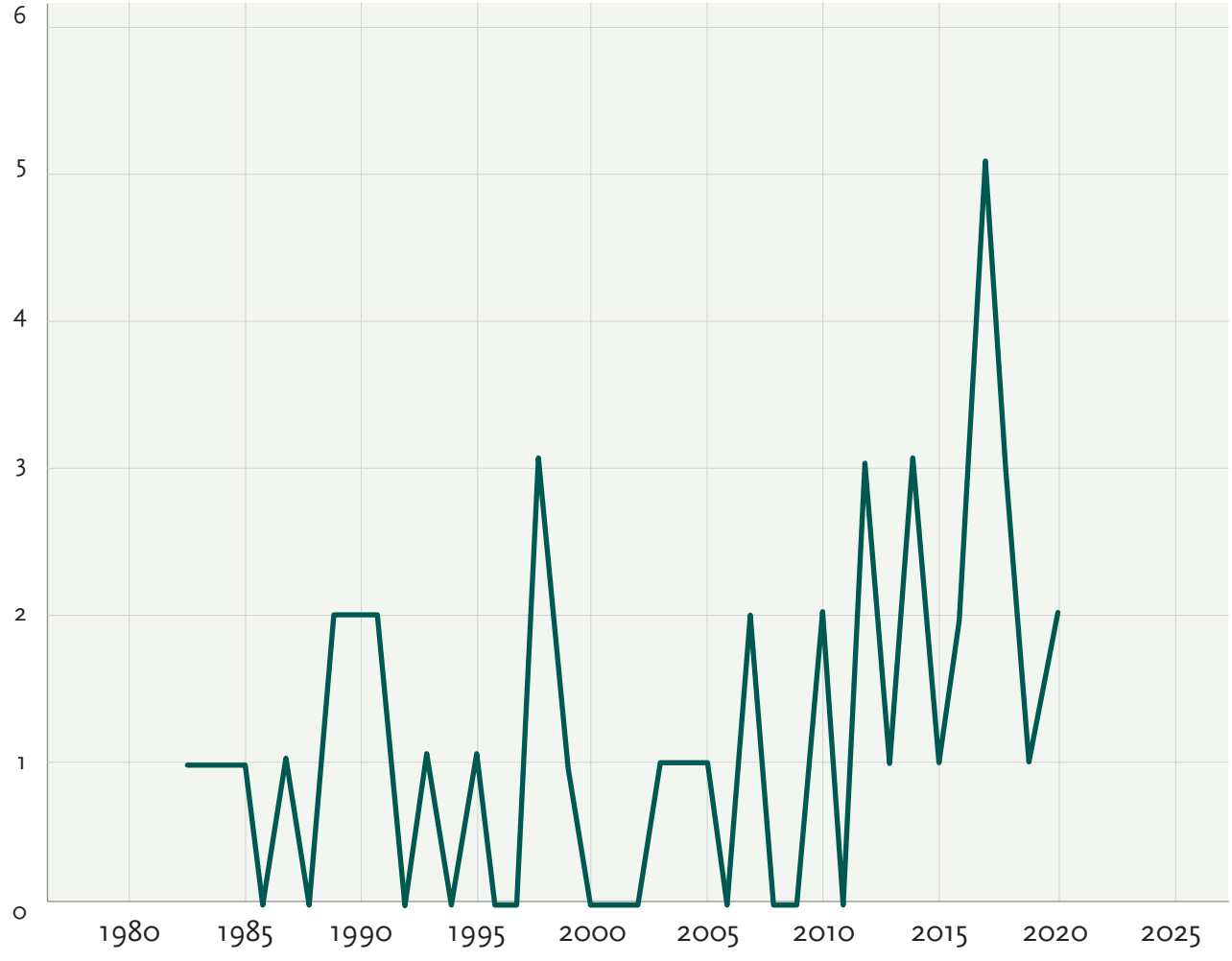
Judgments are publicly available on the Courts Service website, www.courts.ie.

Requests for Preliminary Rulings by the Supreme Court to the Court of Justice of the European Union

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

The Supreme Court of Ireland has made preliminary references under Article 267 TFEU (or formerly under Article 234 EC) in 44 cases since 1983. The below graph indicates the number of preliminary references made by the Supreme Court each year. The Supreme Court made two references to the CJEU in 2020.

Requests for Preliminary Rulings 1983-2020



Request for preliminary ruling in Dwyer v. The Commissioner of An Garda Síochána

The first preliminary ruling was request in the case of Dwyer v. The Commissioner of An Garda Síochána [2020] IESC 4, which is summarised at page 98 of this report. In Dwyer, the respondent, who was convicted of murder, brought proceedings challenging the validity of provisions of the Communications (Retention of Data) Act 2011 ('the 2011 Act') under which telephony data relied upon in evidence in his trial was retained by service providers and accessed by An Garda Síochána. The CJEU had declared invalid the EU legislation on the basis of which Ireland enacted the 2011 Act to transpose its relevant obligations on the grounds that it breached rights guaranteed by the Charter of Fundamental Rights of the EU.

The Supreme Court (Clarke C.J. writing for the majority), referred three questions for consideration by the CJEU. First, whether a system of universal retention of certain types of metadata for a fixed period of time is never permissible irrespective of how robust any regime for allowing access to such data may be. Secondly, the criteria whereby an assessment can be made as to whether any access regime to such data can be found to be sufficiently independent and robust. Thirdly, whether a national court, should it find that national data retention and access legislation is inconsistent with European Union law, can decide that the national law in question should not be regarded as having been invalid at all times but rather can determine invalidity to be prospective only.

Request for preliminary ruling in Fitzpatrick v. Minister for Agriculture, Food and the Marine

In *Fitzpatrick v. Minister for Agriculture, Food and the Marine* [2020] IESC 50, the Supreme Court considered the lawfulness of the 'time spent' methodology used by the Sea Fisheries Protection Authority ('the Authority') under which it calculated total fishing yield over an entire trip so as to attribute catch to an area based on time spent fishing, rather than on what a logbook indicated as having been caught in that area. Based on this methodology, the Authority concluded that 1991 tonnes of Nephrops norvegicus had by the end of July 2017 already been fished in Functional Area 16 (FU16), a sub-area within Area VII, an area of the Irish Exclusive Economic Zone off the west coast of Ireland.

Therefore, Ireland's Total Allowable Catch for that area for the entire year had been exceeded and this was communicated by the Authority to the Minister for Agriculture, Food and the Marine, who issued a number of "Fishery Management Notices" and refused to assign a quota for Nephrops in FU16 for October to December 2017 on the basis that the national quota had already been exceeded. The Authority had a specific obligation to so do under Article 35 of Council Regulation (EC) No 1224/2009 ('the Control Regulation'). Thus, the practical effect of this was the closure of the Porcupine Bank to Irish Nephrops fishermen.

Parallel to this, the Authority communicated to the European Commission the exhaustion of the national quota for Nephrops in FU16 for 2017. After this notification was made, the EU Commission issued a closure notice on the 2nd November, 2017, with the result that the area in question was off limits to fisherman from all Member States. The applicants were fishermen affected by these decisions.

The Supreme Court (McKechnie J.,) referred questions to the Court of Justice of the European Union. First, whether the Single Control Authority in a Member State (in this case the Sea Fisheries Protection Authority) in notifying and certifying to the European Commission under the Control Regulation is limited to notifying the data as to catch in a particular fishing ground logged by fishers under Articles 14 and 15 of the Regulation when the Single Control Authority for good reason believes the logged data to be grossly unreliable or whether it entitled to employ reasonable,

scientifically valid methods to treat and certify the logged data so as to achieve more accurate outtake figures for notification to the European Commission. Secondly, whether, the Authority, where it is so satisfied, can based on reasonable grounds, lawfully utilise other data flows such as fishing licenses, fishing authorisations, vessel monitoring system ("VMS") data, landing declarations, sails notes and transport documents.

PART 3

Education and Outreach

Education and Outreach

The Supreme Court is aware of the importance of external engagement with educational institutions, the legal professions and wider society in creating an awareness of the role and work of the Court. Such engagement improves the accessibility of Supreme Court proceedings and provides opportunities for members of the Court to discuss the law and various aspects of the legal system with citizens affected by it. Events involving engagement by members of the Court with educational institutions also provides students with an insight into possible career paths in the law.

Supreme Court Sitting in Waterford and Kilkenny

From the 24th to 26th February 2020, the Supreme Court visited the South East of Ireland, where it sat in Waterford and Kilkenny courthouses and participated in a number of events with the local legal, academic, history communities and local interest groups.

This was the first time that the Court sat in either city and the special sitting in the South East follows on from previous sittings outside Dublin which began with the Court sitting in Cork in 2015, Limerick in 2018 and Galway in 2019.

Sitting in Waterford

"It is often said that victory has many parents but defeat is an orphan. I think that we can count the Irish Constitution as having been a success by any measure and its adoption a victory. There may, therefore, be many who would claim to be its parent or its continuing guardian at least. But, on behalf of the Supreme Court, which is after all the guardian of the Constitution and the ultimate enforcer of the rights and obligations for which it provides, it is important that we acknowledge that we sit today for the first time in the home city of its most distinguished parent, John Hearne."

Chief Justice's Introductory remarks at the sitting of the Supreme Court in Waterford Courthouse.

Supreme Court at Waterford Courthouse in February 2020

The judges were welcomed to the recently remodelled and extended Waterford Courthouse by local Courts Service management and office staff, practitioners and local members of An Garda Síochána. While there, the Court heard *Waterford Credit Union v. J & E Davy* and *Fitzpatrick & anor v Minister for Agriculture*. It also delivered judgment in the case of *Dwyer v. Commissioner of An Garda Síochána*.

Waterford Court house

Historical locations

The members of the Supreme Court enjoyed a walking tour of historical locations in Waterford City, guided by historian and biographer of John J. Hearne, Eamonn McEneaney, Director, Waterford Museum of Treasures and Donnchadh O Ceallacháin, Keeper of the Medieval Museum. The tour took in the birthplace of John J. Hearne at Number 8 William Street, City Hall, the Medieval Museum and No. 33 The Mall, from where the Tricolour was first flown by Thomas Francis Meagher. The Great Charter Roll of Waterford and the Heavens' Embroidered Cloths, Waterford's cloth-of-gold 15th century vestments also featured. The tour concluded with the Chief Justice laying a wreath at the bronze bust of John J. Hearne on Constitutional Square.

Chief Justice Clarke laying wreath at John J. Hearne memorial bust on Constitutional Square, Waterford City.

Public Lecture in Waterford City Hall – 'The Irish Constitution: Yesterday's Memory or Tomorrow's Dream?'

Waterford City Hall was the setting of a public lecture delivered by Mr. Justice Donal O'Donnell on 'The Irish Constitution: Yesterday's Memory or Tomorrow's Dream?'. Mr. Justice O'Donnell opened with a quote from the musical, Hamilton, which focuses on the foundation story of the United States of America and one of its founding fathers. Alexander Hamilton was a participant in the Constitutional Convention which produced the United States Constitution, and authored a majority of the Federalist Papers, defending concept of the separation of powers and emphasising the importance of the independence of the Judiciary. Mr. Justice O'Donnell reflected on the United States Constitution as a central symbol and noted the familiarity of most Americans with the highlights of case law on the development of the United States Constitution.

Members of the Supreme Court were welcomed to Waterford Institute of Technology by Gráinne Callanan, Dr. Jennifer Kavanagh and other teaching staff of the institute, where they participated in events with third level students.

Mr. Justice Donal O'Donnell delivering a public lecture at Waterford City Hall

Noting that the development of Irish constitutional law does not really feature in the accounts of the history of the 20th century, Mr. Justice O'Donnell traced the Irish constitutional tradition through the 19th and 20th centuries, commencing as far back as the Acts of Union 1800, the 1921 Anglo-Irish Treaty, the drafting of the 1922 Constitution of the Irish Free State and the influence of its defining case, *State (Ryan) v. Lennon* [1934] I.R. 170. This account, together with a discussion of the creation of the 1937 Constitution with its powers of judicial review and the "flurry of activity" in the 1960s and 1970s in constitutional interpretation, provided a broader approach to the consideration of the case law and the position of judicial review in the Constitution.

Fast forwarding to more recent times, the lecture referred to constitutional amendments in modern Ireland in the areas of abortion and marriage equality, suggesting that there is a sense in which the Constitution "tries to form a bridge between past and future":-

> "At one level, a Constitution is meant to be the expression of truths which are self-evident and immutable, that is to put certain areas and rights beyond the capacity of future generations to change, or at least change easily. The Irish constitutional tradition seems to have achieved a position, through perhaps some happy accidents, that there is a reasonably rigid structure which nevertheless permits some play at the joints."

Mr. Justice Donal O'Donnell, 'The Irish Constitution: Yesterday's Memory or Tomorrow's Dream?', Waterford City Hall

Ms. Justice O'Malley interacting with representatives from local community groups during the Civic Engagement held at St. Brigid's Family and Resource Centre, Ballybricken, Waterford City.

The City Hall houses a Permanent Exhibition of John J. Hearne artefacts. On display at the public lecture were both the sixth and current enrolled text of the Constitution of Ireland brought by the Registrar to Waterford on the occasion of its sitting there, together with the first enrolled text from 1937.

Engagement with Waterford Institute of Technology

Members of the Supreme Court were welcomed to Waterford Institute of Technology by Gráinne Callanan, Dr. Jennifer Kavanagh and other teaching staff of the institute, where they participated in events with third level students. Mr. Justice MacMenamin addressed the students for a plenary session on 'Independence of judges in modern constitutional democracies and the rule of law'. This was followed by breakout sessions lead by: Mr. Justice MacMenamin and Ms. Justice Dunne on 'Reflections on a life in the Law': Ms. Justice O'Malley on 'Privacy in the context of the criminal law'; and Mr. Justice Charleton on 'Facts on the ground in criminal investigations'.

Along with WIT's own student population studying law were over 75 second level students from across the South East region, representing schools from counties such as Wexford and Carlow. In addition, an information session in respect of the role of judicial assistants was delivered by Juliet Dwyer, Legal Research Manager.

Civic Gathering

The judges were also grateful for the opportunity to participate in an insightful gathering organised by the Waterford Citizens Information Centre and Waterford Free Legal Advice Centre. In this event, Mr. Justice MacMenamin, Ms. Justice Elizabeth Dunne, Mr. Justice Peter Charleton and Ms. Justice Iseult O'Malley met representatives of local civic and community groups and discussed the work of these groups in their respective areas.

Sitting in Kilkenny

In Kilkenny Courthouse, the members of the Court were greeted by local Courts Service staff and

Ms. Justice Marie Baker delivering a CPD lecture at the Medievel Mile Museum, Kilkenny

practitioners. The Chief Justice commented on the importance of the Supreme Court sitting outside of Dublin and the Court's pleasure at having the opportunity to sit in Kilkenny before launching the second Annual Report of the Supreme Court, which chronicled the work and activities of the Court in 2019.

The Supreme Court heard the case of *Director of Public Prosecutions v. Power* and delivered judgment in the case of *Director of Public Prosecutions v. F.E.*

Engagement with local practitioners

The South East sitting also provided an occasion for engagement with the local practising legal professions, via the Waterford Law Society, Kilkenny Solicitors Bar Association and the South Eastern Bar. In remarks at an event hosted jointly by these associations, the Chief Justice emphasised that the Supreme Court sees itself as very much a court for all of Ireland but also as a court which hopes that the public will understand and appreciate its role under the Constitution and in the administration of justice.

The Medieval Mile Museum served as a picturesque backdrop for a lecture hosted by the Kilkenny Solicitors Association and delivered by Ms. Justice Baker on 'The role of the General Data Protection Regulation in the context of the administration of justice'.

'Comhrá Live' in Waterford and Kilkenny

During its programme of events in conjunction with the sitting of the Court in Waterford and Kilkenny, members of the Court were delighted to participate in a series of 'Comhrá Live' events with local secondary school students. 'Comhrá Live' was an adaptation of the virtual Comhrá programme, which provided second level students in the South East to meet in person with members of the Supreme Court, who spoke to them about their roles as judges and the work of the Court. Building on the pilot 'Comhrá' virtual initiative, the National Association of Principals and Deputy Principals nominated schools

While in Waterford, Mr. Justice O'Donnell and Ms. Justice Baker visited Waterpark College while Mr. Justice McKechnie and Ms. Justice Irvine spent time at De La Salle College.

In Kilkenny, Mr. Justice MacMenamin and Ms. Justice Dunne participated in Comhrá Live with Kilkenny College while Mr. Justice Charleton and Ms. Justice O'Malley visited Scoil Pobail Osraí. St. Kieran's College, Kilkenny was the final setting for a Comhrá Live with Mr. Justice MacMenamin, Ms. Justice Dunne and Ms. Justice Baker.

At the end of the Comhrá Live, the judges presented each School with a signed copy of the Constitution.

Mr. Justice O'Donnell, Ms. Justice Baker and Dr. Eugene Broderick engaging in a Comhrá at Waterpark College, Waterford City

Comhrá – a video call initiative with secondary schools

In 2019, the Supreme Court launched the pilot programme, 'Comhrá' (or 'conversation' in English). 'Comhrá' is a collaboration between the Supreme Court and the Courts Service with the National Association of Principals and Deputy Principals to allow secondary school students in schools around the country to participate in live Q & A video calls with judges of the Supreme Court.

In 2020, the Supreme Court completed its pilot programme. Students from St. Joseph's Secondary School, Rush, County Dublin took part in a video call with Mr. Justice William McKechnie and Mr. Justice Peter Charleton, asking the judges questions about the work of the Supreme Court, how they approach their roles as judges and how the Court has met the challenges presented as a result of COVID-19.

Students from Coláiste Lorcáin in Castledermot, Athy, Co. Kildare also participated in a Comhrá. Niamh O'Halloran, English teacher and assistant principal at Coláiste Lorcáin gave an account of the school's experience.

> When I was first approached by my Principal, Mr. Eric Gaughran back in October 2020 about the Comhrá project, I immediately agreed to accept the opportunity and decided to involve my Fifth Year English class. The thirty boys and girls were as excited as I was to explore this most unique opportunity.
>
> We spent several enjoyable classes researching The Supreme Court and how it works. The students, then, were asked to come up with questions they would like to ask the two Judges who would join us for the Comhrá. Over sixty questions had to be whittled down to thirty for the discussion morning. The questions from the students were varied and ranged from 'What personality traits do you think are necessary to

Mr. Justice Charleton addressing students at Waterford Institute of Technology

be a good judge?' to 'Has there ever been a case to really affect you personally?' There were also a couple of excellent gender based questions which both Judges enjoyed answering on the day itself!

The Comhrá took place on Wednesday, December 8th last. Justice Elizabeth Dunne and Justice John MacMenamin joined us for a live web call. The students each got to ask one question to a Judge. We were really struck by how down to earth both Judges were. They really took the time to answer the questions honestly and shared with us lots of personal reflections about their job and its challenges and rewards which really gave us a wonderful insight into the world of The Supreme Court. These insights would never have been afforded to us were it not for the unique experience of Comhrá. Coláiste Lorcain would like to thank all those involved in allowing us this very special opportunity."

The participating judges provided students guidance and advice on those aspiring to embark on careers in the law. The schools received a signed copy of Bunreacht ha hÉireann from the participating judges as a token of their appreciation.

Following the successful completion of the pilot programme, the Supreme Court and the Courts Service looks forward to launching and rolling out the Comhrá initiative on a formal basis in 2021.

The Chief Justice remarked:-

"I would like to thank the National Association of Principals and Deputy Principals, the principals, deputy principals, staff and students of the schools that took part in the pilot programme for working with the Courts Service to ensure that the pilot Comhrá programme was a success. I am delighted that we received very positive feedback has been received from the participating schools and look forward to formally launching the programme so that more second level students can engage with members of the Court and learn about the law and the work of the Court."

Third Level Institutions

Members of the Court engage with law in Ireland and overseas, in roles such as Adjunct Professors of Law

The Chief Justice is an Adjunct Professor of the Law School of University College Cork, a Judge in Residence at Griffith College Dublin and recipient of the Griffith College Distinguished Fellowship Award.

In November 2020, Mr. Justice George Birmingham, *ex officio* member of the Supreme Court and President of the Court of Appeal was appointed by the Government as Judicial Visitor at Trinity College Dublin, a role which involves hearing internal appeals against decisions of the Board and other bodies in the College, interpret the College Statutes and approve amendments to the College Statutes.

Mr. Justice John MacMenamin is an Adjunct Professor of the National University of Ireland Maynooth and Judge in Residence at Dublin City University. Mr. Justice Peter Charleton is an Adjunct Professor at the National University of Ireland Galway and Judge O' Malley served as Judge in Residence at Dublin City University.

Judges of the Supreme Court regularly deliver lectures and papers and participate in initiatives of third level educational institutions around the country and abroad. The members of the Court participated in a number of in-person events prior to the coming into effect of public health restrictions.

The Chief Justice was Guest of Honour and chaired the Grand Final of the 60th Irish Times debate at Trinity College Dublin in February. He delivered a keynote address on 'The Common Law Post Brexit' at Trinity College Dublin's programme events to mark 250 years of its Historical Society in March.

In February, Mr Justice Birmingham, President of the Court of Appeal, delivered a talk at the University of Limerick on the topic of 'Consent in Criminal Law'.

Dublin City University School of Law & Government, in association with the British-Irish Chapter of ICON-S, hosted Mr Justice John MacMenamin in January for a Roundtable on Legal Reasoning at the Irish Supreme Court.

Despite the impact of COVID-19 on the ability of third level institutions to hold in-person events in 2020, technology allowed for engagement to continue throughout the year in the form of virtual events. The Chief Justice gave an opening address at a virtual conference on 'Environmental Law Enforcement: Emerging Challenges, which was co-hosted by the EPA and the Irish Centre for European Law (ICEL). He also spoke, together with Oonagh Buckley, Deputy Secretary General, Department of Justice & Equality, at a webinar hosted by University College Cork 'Maintaining Access to Justice in the Pandemic'

Ms. Justice Irvine, President of the High Court, participated in an online panel discussion on 'Dealing with Difficult Medico-Legal Cases in the Courts: A Discussion with Law and Medicine' hosted by University College Dublin in December.

Ms. Justice Baker chaired a webinar on 'Enforcing European Union Environmental Law' at University College Cork's Centre for Law and the Environment in December.

Mooting, Debating and Negotiating

Moot competitions provide students with an opportunity to act as legal representatives in simulated court hearings, while debating and negotiating competitions help students to hone skills which are important for a career in the law.

In 2020, the Chief Justice, Ms. Justice Dunne and President Birmingham judged the Bar of Ireland Adrian Hardiman Memorial Moot Competition.

President Birmingham, along with Mr. Justice Mark Heslin, Ms. Justice Nuala Butler, judges of the High Court, acted as adjudicators for Kings

Winners of the Bar of Ireland Adrian Hardiman Moot Court Competition, Raphael O'Leary BL and Kevin Roche BL with Chief Justice Frank Clarke

Inns Maiden's Moot Competition. Mr. Justice MacMenamin chaired the final of the Brian Walsh Memorial Moot at King's Inns, alongside Mr. Justice Maurice Collins and Ms. Justice Mary Rose Gearty. He also chaired the final of the National Moot Court Competition hosted by Dublin City University alongside Ms. Justice Carmel Stewart, judge of the High Court and the Maynooth University Law Society Negotiation.

Mr. Justice Charleton chaired the final of the Trinity College Law Society Senior Mock Trial competition.

Publications and extra-judicial speeches

The members of the Supreme Court continued to publish materials in legal publications throughout 2020.

Mr. Justice Charleton is chair of the judicial editorial board of the Irish Judicial Studies Journal, which is a legal publication aimed at the Irish judiciary and produced under the auspices of the Judicial Studies Institute, a statutory body with the function of organising training, seminars and study visits. The journal aims to provide Irish judges with information and opinions that are relevant and useful to them in their work and is published by an editorial team of the University of Limerick. The Chief Justice is also *ex officio* a member of the judicial editorial board. Two editions of the IJSJ were published in 2020.

Mr. Justice O'Donnell contributed an essay entitled 'Law Reports as History' to a book published by the Incorporated Council for Law Reporting, *Law as History*, in Honour of the late Dr. Eamon G. Hall, solicitor, Notary Public and Commissioner for Oaths and former chair of the Incorporated Council for Law Reporting.

Mr. Justice Charleton published the textbook, *Charleton and McDermott's Criminal Law and Evidence*, with Paul A. McDermott SC, Ciara Herlihy and Stephen Byrne BL, a second edition, rewriting of the first edition of this textbook published in 1999, which covers all aspects of criminal law and evidence. Other publications of Mr. Justice Charleton in 2020 included: an article on 'Patentability of inventions through artificial intelligence' in the Dublin University Law Journal, with Quentin Laurent and Clara Charleton; and 'Carl Jung, Victor White and the Book of Job' in the Irish Judicial Studies Journal.

Having wrote the foreword to the third edition of *Civil Proceedings and the State* by Anthony M. Collins and James O'Reilly, Mr. Justice O'Donnell launched the book in February 2020. He also wrote the foreword to the third edition of *McGrath on Evidence* by Declan McGrath and Emily Egan McGrath.

Other extra-judicial outreach

Judges of the Supreme Court and deliver extra-judicial speeches at a variety of events, both in person and online in 2020.

The Chief Justice launched a report of the EU Bar Association Ireland and the Irish Society for European Law on litigation funding and class actions in January 2020 and delivered the keynote address at the International Fraud Prevention Conference at Croke Park. The Chief Justice also spoke at an event on 'Using Irish Law And Courts

For Corporate Restructuring, Intellectual Property, Data Protection, And Derivatives', organised under the auspices of 'Ireland for Law', which is a government-led initiative that promotes the use of the law of Ireland and Ireland's courts and arbitration facilities to the international business community.

Mr. Justice O'Donnell participated in a panel on the 'Application of ECtHR Judgments within the Irish Courts in relation to Bioethics' in the Royal College of Surgeons in Ireland's Symposium for Bioethics & Human Rights.

Ms. Justice Irvine, President of the High Court spoke at an online conference of the National Disability Authority in relation to the inclusion of persons with disabilities in the courts.

Ms. Justice O'Malley chaired the Irish Rule of Law International Criminal Law Update and Mr. Justice MacMenamin J delivered a legal history speech entitled, 'Fake News, Forgery and Dirty Tricks: The British Secret Service, Parnell and Ireland, 1885 to 1892' at Costume Barracks, Athlone in January.

The Chief Justice and Ms. Justice Baker participated in two separate events organised under 'Ireland's Edge', a multidisciplinary creative event series which is a distinct strand of 'Other Voices' festival of music and ideas. In the first, Ms. Justice Baker took part in 'Through the Looking' which was a special online edition of Ireland's Edge in partnership with Trinity Long Room Hub Arts and Humanities Research Institute and the Irish Traditional Music Archive involving performances and discussions on living in unprecedented times of COVID–19. In the second event, the Chief Justice participated in a live streamed conversation with Dr. David Kenny, Associate Professor of Law at Trinity College Dublin.

The Honorable Society of King's Inns

The Honorable Society of King's Inns is the institution of legal education with responsibility for the training of barristers in Ireland. 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 is comprised of 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 a committees of King's Inns which, in 2020, included Ms. Justice O'Malley's membership of the Education Appeals Board, Mr. Justice McMenamin's membership of the Disciplinary Committee and Ms. Justice Baker's membership of the . Education Committee. The affairs of King's Inns are managed by a Council which includes a Judicial Benchers Panel of which the Chief Justice, The President of the High Court and the President of the Court of Appeal are *ex officio* a member. 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. delivered training to students of King's Inns over the course of 2020. Ms. Justice Irvine, President of the High Court, delivered a lecture on 'Ensuring the Decision-Maker's Impartiality for the Advanced Diploma in Quasi–Judicial Decision–Making, which was launched by Ms. Justice Baker. Ms. Justice Baker also delivered a lecture on the 'view from the Bench' for the Society's Advanced Diploma in Public Procurement Law and assisted with the design and delivery of a drafting workshop for students of the Barrister-at-Law degree course.

The Bar of Ireland and the Law Society of Ireland

In Ireland, there are two branches of the Irish legal profession – barristers and solicitors. The Bar of Ireland is an independent referral bar that has a current membership of approximately 2,300 practising barristers. The Law Society is the educational, representative and regulatory body

The Chief Justice and Ms. Justice Baker participated in two separate events organised under 'Ireland's Edge', a multidisciplinary creative event series which is a distinct strand of 'Other Voices' festival of music and ideas.

Image Credit: Fiona Morgan

of the solicitors' profession in Ireland. Members of the Supreme Court of Ireland are all former practising lawyers and continue to engage with the practising professions through their involvement in education and outreach initiatives of The Bar of Ireland and the Law Society.

Engagement with The Bar in 2020

The Chief Justice presented certificates to transition year students who participated in the Bar of Ireland's 'Look into Law' programme, for which President Irvine also recorded a video message. The Chief Justice recorded a video and statement to mark the launch of the inaugural 'Justice Week, spearheaded by The Bar of Ireland, which has the objective of raising awareness amongst those aged under-25s about the importance of the justice system, and how the law protects fundamental rights and freedoms.

President Irvine chaired a webinar delivered hosted by the Young Bar Committee of the Bar of Ireland on 'COVID-19 and Implications for Junior Practitioners: Banking, Employment and Landlord and Tenant Law'.

Mr. Justice O'Donnell chaired a joint seminar of the Young Bar associations of Ireland and Northern Ireland on 'Dual Qualification: Comparative Discussion & Brexit Forecast' and Ms. Justice Baker delivered a CPD on 'Civil Proceedings and the State'.

The Chief Justice, Ms. Justice Irvine, Ms. Justice Dunne and Ms. Justice Baker are mentors for the Denham Fellowship. The programme, named after Ms. Justice Susan Denham, former Chief Justice, which is operated by The Bar of Ireland in association with The Honorable Society of King's Inns, assists annually two aspiring barristers who come from socio-economically disadvantaged backgrounds to gain access to professional legal education at the King's Inns and professional practice at the Law Library through the provision of stipend, paid fees and mentoring supports for a year at King's Inns and four years at the Library.

Ms. Justice Baker is a mentor for the Bar of Ireland Law and Women Mentoring programme.

The Law Society

Cian Monahan, Course Leader of the Diploma in Judicial Skills and Decision-Making, and Ms. Justice Marie Baker

In 2020, Ms. Justice Marie Baker acted as a speaker on a panel discussion delivered to the participants of the Law Society's Diploma in Judicial Skills and Decision-Making course. The President of the High Court, The Hon. Ms. Justice Mary Irvine joined Judge David Barniville and Angela Denning, the CEO of the Courts Service as key note speakers at the online Law Society Professional Training/Litigation Committee Annual Conference in October 2020. They spoke on topical issues including the impact of COVID-19 on the Courts, recent technological developments such as remote hearings, efiling and electronic bundles and how changes made in response to COVID-19 could permanently affect the way we litigate in Ireland.

With regard to celebrating new solicitors, more than 120 new solicitors were welcomed to the profession in the Law Society's first ever virtual parchment ceremonies. With COVID-19 precluding in-person events, the Society celebrated the hard work and commitment of those who became solicitors in

2020 through online events streamed live to the new solicitors and their families. The President of the High Court, Ms Justice Mary Irvine, who was the guest speaker at the parchment ceremony, said that never before had the two arms of the legal profession been closer or more inter-connected.

> "This year, for the first time, patents of precedence have been granted to a substantial number of solicitors, allowing them to practise at the bar as senior counsel."
>
> "We also have an increasing number of solicitors being appointed as members of the judiciary," she continued.

President Irvine said that she expected the number of solicitors being appointed to the superior courts to grow year-on-year, as a result of these changes.

Faculties of Notaries Public

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

Dr. Eamonn G. Hall

The Supreme Court was saddened to learn of the death of Dr. Eamonn G. Hall in 2020. Dr. Hall was the first Director of Education of the Faculty of Notaries. He established and was Head of The Institute of Notarial Studies. Dr. Hall authored many books on a variety of legal themes, including *The Superior Courts of Law – Official Law Reporting in Ireland 1866 to 2006* and was described by his colleague and friend E. Rory O'Connor, Dean Emeritus at the Faculty of Notaries Public as "unquestionably Ireland's most prolific contributor to the literature of the law." In a foreword to one of his works, Judges as Authors; Judgments as Literature, Mr Justice Frank Clarke, Chief Justice, referred to Dr. Hall's contribution to the cause of law reporting in Ireland, observing that "[h]e is not only its preeminent historian but he is also the person who has played the greatest role in its modern evolution and, indeed perhaps, its survival."

Dr. Eamonn G. Hall, RIP

Chief Justice's Summer Placement Programme

The Chief Justice welcomed twenty eight law students at a remote ceremony to mark the Chief Justice's Summer Placement Programme for Law Students. For the first time, the programme took place entirely on a remote setting over a two-week period.

Participation in the 2020 edition of the Programme was extended to all third level institutions in

Ireland that deliver a Level 8 law degree. A total of 28 students from national and international institutions participated in the two-week long programme. Students were nominated from higher education institutions from Ireland, Wales and the United States.

Whilst the 2020 programme transitioned to an online setting, the programme retained key elements including talks, engagement with judges and workshops. In a new addition, students were provided with the opportunity to observe remote court hearings.

Students were assigned to a judge of the Superior Courts, according to students' areas of interest. In addition, the programme included a variety of talks from eminent speakers including the Director of Public Prosecutions and the Director General of the Office of the Attorney General. Students were provided with an insight into the courts system in Ireland and how the courts have had to adapt during the COVID-19 pandemic, as well as highlighting to students the diversity of career paths which they can pursue in the legal sphere, both in the courts and in the public service. Several staples of the Summer Placement Programme remained in the schedule, such as the Hardiman Lecture Series and the talk with the team at the Drug Treatment Court.

Students undertook legal research exercises and were invited draft and submit response papers reflecting on their participating on the programme. These papers will take the form of a journal that will be launched in Summer 2021.

Reflecting on his time on the Placement Programme, Charles Elie-Martin said:

> "The programme is very well-organised, adapted to every student's preferences, interesting and rewarding. I really enjoyed being part of it, this is why I would encourage every student to apply for the placement, especially for those who are undecided about their future career. After the programme, it is likely that you will get an idea of what job is best suited for you."

In addition, Alex Porter found his experience on the programme to be:

> "One of the most valuable elements of the experience was the talks with some incredible role models of mine. This included the Director of Public Prosecutions, the Chief Justice and other practicing legal professionals such as Senior Barristers, Judicial Assistants, experienced Solicitors, Judicial Researchers and others.
>
> I took this opportunity to build my network and volunteered to set up the group chat whereupon we discussed lectures and shared learnings. I am still in contact with some of program participants since the Programme concluded."

The Hardiman Lecture Series

Named in honour of the late Mr. Justice Adrian Hardiman, this lecture series forms a key part of the Summer Placement Programme. In 2020, the lecture series transitioned to an online setting where speakers delivered their lectures remotely and were followed by an interactive question and answer session.

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

In 2020, the series saw lectures on a wide range of topics being delivered by:

- Mr. Justice Peter Charleton – *The Iranian Hostage Crisis: 444 days that ruined a Presidency*;
- Ms. Justice Mary Irvine – *Apologies, Open Disclosure and the Duty of Candour*;
- Mr. Justice Max Barrett – *Maria Edgeworth, Castle Rackrent and The Law*;
- Mr. John L. O'Donnell SC – *The 1979 Fastnet Disaster*; and
- Advocate General Gerard Hogan – *Holmes and Harlan, Atkin and Denning: Four 20th Century Legal Icons compared.*

PART 4

International Engagement

International Engagement

The preliminary reference system provided for in Article 267 of the Treaty on the Functioning of the European Union provides a formal avenue of dialogue between the Supreme Court and the Court of Justice of the European Union. Additionally, it is 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 are arise. Such judgments are not binding but are of persuasive authority for the Irish courts. Under the provisions of 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. However, beyond these formal legal relationships, there is an increasing level of co-operation between the Supreme Court and other senior courts which principally takes place through regular or occasional bilateral meetings or through the membership of the Supreme Court of international bodies.

As a consequence of the travel restrictions associated with COVID-19, which were in effect for most of 2020, it was not possible for judges to participate in face-to-face meetings or in person events with courts in other jurisdictions for most of the year. However, virtual engagement took place where possible.

Opening of the Judicial Year at the European Court of Human Rights

In January 2020, the Chief Justice provided the keynote address at the Solemn Hearing on the occasion of the Opening of the Judicial Year of the European Court of Human Rights. The Chief Justice spoke on the topic of 'Who Harmonises the Harmonisers?'. The delegation of members of the Irish Judiciary who attended the events to mark the opening of the legal year included Mr. Justice George Birmingham, President of the Court of Appeal, Mr. Justice Donal O'Donnell and Ms. Justice Ann Power , a former judge of the European Court of Human Rights. A seminar on the topic of 'The European Convention on Human Rights: living instrument at 70' also took place to mark the opening of the judicial year.

Introducing Chief Justice Clarke at the Solemn Hearing, Mr. Linos-Alexandre Sicilianos, President of the European Court of Human Rights commented on the "close and deep-rooted ties" between Ireland and the European Court of Human Rights, noting the first case to come before the Strasbourg Court sixty years, Lawless v. Ireland, and the several leading Irish judgments in the early case law of the Court. President Sicilianos also thanked Ireland for its support in ensuring that hearings of the European Court of Human Rights can be broadcast on the internet.

In his address, Chief Justice Clarke thanked President Sicilianos for his acknowledgment of the contribution of Ireland to the ECtHR both in practical terms and through the important jurisprudence deriving from Irish cases. He noted that following Brexit:-

"There will be additional challenges for Ireland, and not least for the Irish legal system, as we become the largest remaining common law country within the European Union."

However, the Chief Justice noted that Ireland has "a legal system governed by a strong Constitution" with a national jurisprudence "richly informed both by the jurisprudence of [the ECtHR] but also that of the Supreme Courts of other prominent common law jurisdictions."

He suggested that the "diversity of influences which that brings to bear enhances our understanding and protection of human rights."

Noting, the progress made in the last 70 years with regard to the development of the international legal order in respect of human rights, the Chief Justice acknowledged the long tradition of the Court of Human Rights and the Convention which it applies in guiding the shared approach to human right protection. He commented that the ECtHR and the Convention which it applies "have a long tradition which guides the shared approach to human rights protection." The Chief Justice observed that "[i]n reflecting on the progress achieved over the past seventy years it will be useful to discuss the challenges which await us over the next seventy years."

On this occasion, the Chief Justice addressed a particular challenge faced by national courts, who are tasked with applying a range of international human rights instruments which have a bearing on the result of individual cases.

> "[W]hatever the influence of international instruments within the national legal order and however those instruments interact with national human rights measures, the net result at the end of the day has to be a single answer. It is in those circumstances that the existence of an increasing range of international instruments which, to a greater or lesser extent, potentially influence the result of individual cases within the national legal order needs to be debated. We may not need to harmonise our human rights laws in the strict sense of that term but can I suggest that we do need a coherent and harmonious human rights order."

Mr. Justice Frank Clarke, Chief Justice, addressing the European Court of Human Rights on the occasion of the Solemn Opening of the Court on 31st January 2020.

The Chief Justice suggested that developing the vertical and horizontal dialogue which already exists at a number of levels between courts and other relevant institutions provides the best means of ensuring coherence and enhancing an harmonious approach to international human rights. However, he noted the challenges of developing such a harmonious approach across disparate States, concluding as follows:-

> "If we consider it desirable that we develop a coherent and harmonious international human rights order which nonetheless respects appropriate national differences, then a deeper understanding amongst the senior national judiciaries of each of our States of the way in which common issues are addressed in colleague courts must surely be to everyone's significant benefit."

Bilateral engagement

The Supreme Court benefits from bilateral meetings with courts in other EU states and beyond. Such engagement has always been important but has gained increasing significance in light of Ireland's new position as the largest and one of very few jurisdictions in the EU with a common law legal tradition.

Virtual Bilateral Meeting of the Judiciaries of Ireland and the United Kingdom

On the 3rd December 2020, the Supreme Court of Ireland participated in a virtual bilateral meeting with senior members of the Judiciary of the United Kingdom. 'In person' biennial meetings with judicial colleagues in the United Kingdom are a longstanding arrangement which is important to

the Irish Judiciary having regard to our shared history, close geographical proximity and similar legal systems which share a common law legal tradition.

Under the theme, '*Judicial considerations arising from COVID-19*', delegates from the judiciaries of England and Wales, Scotland, Northern Ireland and Ireland discussed the response of their respective courts to the pandemic.

The bilateral began with tributes being paid to the late Lord Kerr of Tonaghmore, retired Justice of the Supreme Court of the United Kingdom, who died suddenly in the days before the bilateral. Chief Justice Clarke, spoke warmly of the former justice, who was previously Lord Chief Justice of Northern Ireland. Tributes were also paid by Lord Reed of Allermuir, President of the Supreme Court of the United Kingdom, Lord Carloway, Lord President of the Court of Session of Scotland; Lord Burnett of Maldon, Lord Chief Justice of England and Wales; and Sir. Declan Morgan, Lord Chief Justice of Northern Ireland.

The opening session of the bilateral examined the legislative measures enacted in direct response to the pandemic. The Lord Chief Justice of England and Wales, Lord Burnett of Maldon, delivered opening remarks on the impact of COVID-related litigation in the Administrative Court. Ms. Justice Iseult O'Malley and Ms. Justice Marie Baker

United Kingdom and Ireland Judiciaries Bilateral held remotely in December 2020:
From top to bottom, left to right: Lord Burnett of Maldon, Lord Chief Justice of England and Wales; Mr. Justice Donal O'Donnell; Lord Reed of Allermuir, President of the Supreme Court of the United Kingdom; Mr. Justice John MacMenamin; Ms. Justice Iseult O'Malley; Lord Hodge, Deputy President of the Supreme Court of the United Kingdom; Mr. Justice Frank Clarke, Chief Justice; Ms. Justice Marie Baker; Sir Declan Morgan, Lord Chief Justice of Northern Ireland.

delivered a joint presentation on the position in Ireland.

In the second session, consideration was given to how the pandemic has given rise to constitutional issues in terms of human rights and fundamental freedoms, with the opening presentations delivered by the Lord President of the Court of Session of Scotland, The Rt. Hon. Lord Carloway and The Rt. Hon Sir Declan Morgan, Lord Chief Justice of Northern Ireland.

The final session, which was led with presentations by Lord Hamblen of Kersey, Justice of the Supreme Court of the United Kingdom and The Rt. Hon. Lord Flaux, Supervising Lord Justice of the Commercial Court, England and Wales, focused on how the pandemic has impacted on commercial life and ensuing litigation.

At the end of the meeting, the Chief Justice emphasised the importance of engagements such as these, through which information can be exchanged and matters of mutual interest discussed. Referring to the unprecedented situation that emerged in March 2020, he noted that the ability of the participating jurisdictions to exchange information on their respective responses to the pandemic and its impacted on court proceedings proved invaluable. The Chief Justice concluded by expressing the hope that such engagements would continue and that the ability to host such engagements in person would resume in the not too distant future when circumstances allow.

Cooperation with Judiciary of the Ukraine

Since 2017, the Chief Justice and other members of the Judiciary of Ireland have been cooperating with members of the Judiciary of the Ukraine via a series of study visits which have been facilitated by the Department of Foreign Affairs and Trade in conjunction with the European Union Advisory Mission (EUAM) Ukraine. In 2020, the Chief Justice and Mr. Justice George Birmingham, President of the Court of Appeal, participated in a webinar hosted by the National School of Judges of Ukraine (NSJU).

Other international engagements of the judges

Although restrictions associated with the global pandemic prevented judges from participating in overseas events to the same extent as in previous years and prohibited the hosting of visitors by the Supreme Court of Ireland, some overseas engagements took place prior to the onset of COVID-19.

In February, President Birmingham attended a High-Level Meeting of the Global Judicial Integrity Network in Qatar. The Network was launched in 2018 under the auspices of the United Nations and aims to assist judiciaries in strengthening judicial integrity and preventing corruption in the justice system.

In January, Ms. Justice Baker moderated a panel on 'Enforcing electronic communications law' at the 14th seminar for national judges on 'Balancing regulatory certainty and investment in the Digital Era' hosted by the Florence School of Regulation and organised on behalf of the European Commission at the Commission's premises in Brussels. Mr. Justice O'Donnell was also a panel member at judges' session of the Four Jurisdictions Family Law Conference in Malaga in February.

Mr. Justice John MacMenamin attended a silent march in Poland organised by the Association of Polish Judges IUSTITIA, "Themis" Association of Judges and Helsinki Foundation for Human Rights. as a representative of the Chief Justice of Ireland and on behalf of the Association of Judges of Ireland.

Ms. Justice Elizabeth Dunne attended a ceremony to mark the opening of the judicial year of the International Criminal Court in The Hague in January. At the third annual judicial seminar held on the occasion, Ms. Justice Dunne delivered a presentation at one of the working sessions on 'Separate and dissenting opinions – to do or not to do and how?'.

Mr. Justice Charleton spoke at a virtual conference of the European Union Intellectual Property Office on the topic of 'The role of reputation in passing off'.

International organisations

The Supreme Court cooperates on a multilateral basis via its membership of a number of international networks and organisations which facilitate cooperation with courts and institutions in other jurisdictions. The areas of law associated with each of these organisations varies but they have in common the aim of providing a forum in which courts of similar jurisdiction can meet when the public health situation allows to discuss their work, the nature of their functions and the organisation of their systems and to promote dialogue between such courts.

Throughout 2020,the Court and its staff continued to cooperate with courts in other jurisdiction through these organisations which provide platforms for the exchange of information on cases and legal systems of other states in Europe and beyond. Such platforms allowed for a valuable exchange of experience and information on how other supreme courts across the EU have adapted their work to the COVID-19 situation as circumstances evolved and provided a forum through which courts could highlight case law of other jurisdictions involving legal issues associated with the pandemic.

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

ACA-Europe - an organisation comprised of the Councils of State or the Supreme administrative jurisdictions of each of the members of the European Union and the Courts of Justice of the European Union. Through ACA-Europe, the Supreme Court exchanges views and information with other member institutions on jurisprudence, organisation and functioning, particularly with regard to EU law. In 2020, Ms. Justice Irvine, as one of the ACA-Europe correspondents for the Supreme Court, contributed to a cross-sectional analysis report prepared by an ACA-Europe working group on a 'Qualitative Review of the 2019 Seminar' of which she was a member. The report, which was contributed to the EU Justice Scoreboard, followed on from three ACA-Europe seminars organised in 2019 which dealt with topics relating to the functions and working methods of supreme administrative courts. Of these seminars was hosted by the Supreme Court of Ireland in Dublin on the theme of 'How our Courts Decide: the decision-making processes of supreme administrative courts'.

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. The Chief Justice is a vice president and a member of the Board of the Network, which met virtually in December 2020.

Judicial Network of the European Union – an association which was established on the initiative of the President of the Court of Justice of the European Union and the Presidents of the Constitutional and Supreme Courts of EU Member States at the Meeting of Judges hosted by the Court of Justice in 2017. The JNEU is based on an internet site designed to promote greater knowledge, in particular from a comparative law perspective, of law and legal systems of Member States and contribute to the dissemination of EU law as applied by the Court of Justice of the European Union and the national courts.

Conference of European Constitutional Courts - an organisation comprised of European constitutional or equivalent courts with a function of constitutional review. Meetings and exchange of information on issues relating to the methods and practice of constitutional review are the key feature of this organisation. The Conference is currently chaired by the Constitutional Court of the Czech Republic which, as a result of the pandemic, will host the XVIIIth Congress in 2021 virtually for the first time.

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. Liaison officers prepare summaries of important constitutional cases, which are published by the secretariat of the JCCJ in bulletins. Liaison officers also pose and answer questions via a number of fora on a restricted website.

International Association of Supreme Administrative Jurisdictions - In September 2020, the Supreme Court joined the International Association of Supreme Administrative Jurisdictions. The purpose of the IASAJ is to promote the exchange of ideas and experiences between those jurisdictions that are empowered to adjudicate, in the last instance, on disputes arising from the actions of public administrations. In addition, the IASAJ seeks to encourage cooperation on questions of law pending before these courts. The Supreme Court very much looks forward to developing closer ties with other members of the IASAJ and to exchanging ideas and experiences on matters of mutual interest.

In addition to the Supreme Court's involvement in the above organisations, Mr. Justice McKechnie is a member of the Executive of the Association of European Competition Law Judges, a member of the Advisory Board of Fundamental Rights In Courts and Regulation (FRICoRe) and a co-chair of the Irish Hub of the European Law Institute (ELI).

PART 5

Supporting the Supreme Court

Supporting the Supreme Court

The Courts Service

The Supreme Court is supported by the Courts Service, the statutory independent agency which is responsible for the administration and management of all courts in Ireland.

The Courts Service is an independent agency established pursuant to the Courts Service Act, 1998. It manages all aspects of court activities, with the exception of judicial functions, which is a matter exclusively for the Judiciary. The functions of the Courts Service are to:

- manage the Courts;
- provide support services for the Judiciary;
- provide information on the Courts System to the public;
- provide, manage and maintain court buildings throughout the courts estate;
- provide facilities for users of the Courts; and
- perform such other functions as are conferred on it by any other enactment.

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

The Courts Service Board

The Courts Service Board, chaired by the Chief Justice, has responsibility to consider and determine policy in relation to the Courts Service and to oversee the implementation of that policy by the Chief Executive Officer.

The Board consists of all five Court Presidents, a judicial representative from each court jurisdiction, a Courts Service staff representative, representatives from the legal professions, trade unions and the Department of Justice. In addition, the Minister for Justice nominates two representatives to the Board, one to represent consumers of the services provided by the Courts and another who has relevant knowledge and experience in commerce, finance or administration.

Chief Executive Officer

Angela Denning
Chief Executive Officer, Courts Service

The Chief Executive Officer, Angela Denning, is responsible for the implementation of policies approved by the Board, the day-to-day management of the staff, administration and business of the Service.

The Chief Executive Officer is supported by the Senior Management Team comprising:-

- Assistant Secretary, Superior Court Operations;
- Assistant Secretary, Circuit and District Court Operations;
- Assistant Secretary, Strategy and Reform Directorate;
- Assistant Secretary, Corporate Services; and
- The Chief Information Officer;

- Head of Human Resources;
- Principal Officer in the Office of the CEO; and
- A nominee from the Service's Principal Officer Network.

The Chief Executive Officer liaises closely with the Chief Justice, judges of the Supreme Court and staff of the relevant offices in supporting the Supreme Court.

A Judicial Support Unit within the Office of the Chief Executive provides support to judges of all jurisdictions, including the Supreme Court, in a variety of areas, such as foreign travel (when the public health situations permits), protocol matters, internal and external liaison and co-ordination of visits.

Offices and units of the Courts Service collaboratively support the Supreme Court and other courts. However, certain directorates, offices and officials provide support directly to the Court on a daily basis.

Registrar of the Supreme Court

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

Chief Justice Frank Clarke with Registrar of the Supreme Court, John Mahon.

Supreme Court Office

The Supreme Court Office provides administrative and registry support to the Supreme Court. Whilst it has a public office where leave to appeal and appeal documentation may be filed, with the emergence of the COVID-19 pandemic, applicants and appellants are strongly encouraged to avail of the online efiling portal for submitting applications for leave and appeal documentation to the Office.

The Registrar of the Supreme Court, John Mahon, is supported by an Assistant Registrar, Mary O'Donoghue and the office has six additional members of staff.

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

The Supreme Court and its staff is responsible for the following functions:

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

New Developments

Covid-19

The pandemic has had a dramatic effect on the work of the Office in support of the Court. The automation of virtually all business flows in the Office in support of partial remote working by staff, the Court's remote hearings and the sharing of electronic documentation, created significant challenges for Office operations throughout the year. This was in tandem with the necessity to observe the physical distancing requirements and other Government guidance in place from time to time during the year.

New Practice Direction and Guidance

A new Practice Direction (SC 21) was signed by the Chief Justice and came into effect on the 16th April, 2020. The main provisions included:

- The work of the Court was to be conducted remotely;
- The Registrar could require any document or documents to be lodged or filed electronically in a manner complying with guidance in that regard for the time being in force;
- New case management procedures were introduced including a requirement that parties file a joint document which sets out matters agreed and those not agreed in advance of the first case management hearing;
- A requirement to file books of appeal electronically in addition to hard copy;
- A new procedure where the Court may issue a Statement of Case setting out the Court's understanding of the relevant facts and the issues to be determined together with a Clarification Request addressed to the parties in advance of the hearing;
- The default position was to be that the Court's judgments were to be issued electronically and that parties were to communicate electronically

with the Court in respect of any issues arising from the judgment; and

- Rulings on post judgment issues were to be delivered electronically and to be published.

In addition, guidance was issued for participants in remote hearings setting out how the hearings would be conducted and the obligations for participants including that there be advance notification of participant lists and provision of lists of documentation and of the specific authorities that were to be referred to during the oral hearing of the appeal.

VMR Hearings

All of the Court's hearings have been conducted remotely by video conference (VMR) since April, 2020 with only one exception. There were in excess of 100 such hearings during the year. Practically all of the documentation and correspondence received by the Office, including the additional materials required by the new procedures, have been managed and shared electronically with the Court over this period. This has been a very significant undertaking for the Court and for the Office. Processes and administrative procedures were put in place very quickly to support these new innovations which have worked very well notwithstanding the constraints on working during the pandemic.

Electronic Delivery of Judgments

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

Waiting Times

There has been a significant reduction in applications for leave to appeal filed during 2020 (38% approx.) due to the effects of the pandemic including the impact on the level business transacted in the High Court and in the Court of Appeal. Application for leave may be filed from both jurisdictions. Growth in excess of 10% in applications filed year on year had been experienced prior to the pandemic. One of the additional challenges for the Office in 2021 will likely be responding as business returns to expected levels later in the year. At year end all scheduled hearings have taken place and no backlog has been allowed to develop. Applications where leave is granted in the current term can expect an appeal hearing date in the following term.

Office of Chief Justice

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

- Senior Executive Legal Officer to the Chief Justice, Sarahrose Murphy, who provides legal and administrative support to the Chief Justice and other judges nominated by the Chief Justice in the discharge of their international functions and their engagement with international organisations and assists the Chief Justice in discharging domestic, administrative and organisational functions;
- Executive Legal Officer to the Chief Justice, Patrick Conboy, who also provides legal and administrative support in respect of the Chief Justice's domestic and international functions. From March 2020 to January 2021, Patrick was the Acting Senior Executive Legal Officer to the Chief Justice and Rachael O'Byrne was the Acting Executive Legal Officer to the Chief Justice.
- Judicial Assistant, Aislinn McCann, was assigned to the Chief Justice in February 2020 and provides the Chief Justice with legal research assistance.

Tom Ward, Assistant Secretary with responsibility for the Superior Courts Operations Directorate

Audrey Leonard, Assistant Secretary with responsibility for the Strategy and Reform Directorate

- Private Secretary, Tina Crowther, provides secretarial support to the Chief Justice.
- As Usher to the Chief Justice, Tony Carroll, provides the Chief Justice with practical and court-going assistance.

Superior Courts Operations

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

Geraldine Hurley was Assistant Secretary with responsibility for the Superior Courts Directorate until July 2020, with Angela Denning, Chief Executive Office, assuming responsibility until the end of January 2021.

Tom Ward was appointed Assistant Secretary with responsibility for the Superior Courts Directorate and Chief Registrar of the High Court in February 2021.

Strategy and Reform Directorate

Under the leadership of Audrey Leonard, the Strategy and Reform Directorate is responsible for taking the lead on the delivery of improved services through reform of procedures and processes and setting the strategic direction for the Courts Service's modernisation programme. This programme of work, which is underway since 2020, is focused on providing a modern, digital, transparent and accessible courts system that ensures court users are at the centre of how services are designed and delivered.

The offices within the Strategy and Reform Directorate are the:

- Change Programme Office (including the Modernisation Programme);
- Communications & Media Unit;
- Learning and Development Unit;
- Legislation and Rules Unit (including support for all Rules Committees); and
- Legal Research and Library Services.

Within the Directorate, the Office of the Strategy and Reform Directorate is responsible for the co-ordination of the work of the offices outlined above, including policy and strategy work, stakeholder management, monitoring budget and ensuring best governance and performance measures are adhered to.

Legal Research and Library Services

The Legal Research and Library Services (LRLS) team is led by Laura Butler. Over 90 members of staff provide support to the Judiciary of all court jurisdictions. This includes Legal Research Managers and Executives, Library staff, Senior and Executive Legal Officers to Presidents, Judicial Assistants and Research Support Associates. The LRLS Committee is made up of members of the judiciary from each jurisdiction and the Head of the LRLS. This committee acts as a liaison providing commentary and feedback to the Head of the LRLS on behalf of the judiciary.

The LRLS covers a wide remit including running the Judges' Library, management of the Research Support Office (RSO) and judicial assistants (JAs), European Union and International committee work, drafting Benchbooks, implementation of a knowledge management (KM) system and training the JAs and Research Support Associates (RSAs).

Ushers

During 2020, five Ushers provided practical support to judges of the Supreme Court. In general, the role of an Usher involves attending court with the judges to whom he is assigned, maintaining order in court, assisting with papers and correspondence of the judge, directing litigants to court and assisting with managing the judges' Chambers.

Judicial Secretaries

Six Judicial Secretaries, under the remit of the Superior Courts Operations Directorate, provided administrative and secretarial assistance to the judges of the Supreme Court in 2020. Mary Gill, Judicial Secretary to Ms. Justice Dunne retired in December 2020. The responsibilities of the Judicial Secretary involve typing and formatting judgments and memoranda dictated by Judges, maintaining diaries and arranging appointments.

Judicial Assistants

In 2020, a total of 19 judicial assistants, as part of the Legal Research and Library Services Team, supported the judges of the Supreme Court, including those who concluded their positions as judicial assistants during the year. The work undertaken by judicial assistants varies depending on the requirements of the judge to whom they are assigned. However, the work will invariably involve providing the judge to whom they are assigned with legal research, practical assistance and assistance in the preparation of draft Statements of Case. In addition, judicial assistants often proof-read reserved judgments, prior to their electronic delivery.

Judicial assistants, as an essential entry requirement, must possess a law degree at minimum of Level 8 on the National Framework of Qualifications or an appropriate professional legal qualification. In addition, judicial assistants must demonstrate an extensive knowledge of Irish law and the Irish legal system.

As a result of the enactment of the Financial Measures in the Public Interest (Amendment) Act 2011, the assignment of Ushers to Judges has been replaced by the recruitment of Judicial Assistants.

Judicial Assistants are recruited by the Courts Service on a three-year non-renewable contract. The Courts Services conducts regular open competitions for the recruitment of Judicial Assistants, further information of which is available on its website, www.courts.ie.

(L-R:) Ushers of the Supreme Court Tony Carroll, Chris Maloney and Pat Fagan. Absent from photograph are Séamus Finn and John O'Donovan.

Supreme Court Judicial Secretaries
Back row (L-R): Gillian McDonnell, Tina Crowther
Front Row (L-R): Sharon Hannon, Bernadette Hobbs, Margaret Kearns and Mary Gill.

A Day in the Life of a Supreme Court Judicial Assistant

By Caoimhe Hunter Blair

Mr. Justice Peter Charleton with Judicial Assistant, Caoimhe Hunter-Blair.

Like almost everyone, in 2020 many of aspects of my job changed completely. I went from being in the office, sifting through papers and attending court hearings to carrying out most of my role remotely. My precarious cycle along the quays to the Four Courts has been swapped with the commute to the kitchen table to start work. As a judicial assistant to a judge of the Supreme Court Judge my role is in part a research role and includes an element of the practical aspect of a case being before the Court.

I work directly alongside another judicial assistant to manage the, at times, hectic work load. As we are all currently working remotely this means plenty of calls over Pexip (the platform used by the Court to conduct remote hearings and by the Courts Service for meetings) and constantly updating the to-do list. In terms of what we do on a day to day basis it is easiest to explain this in the context of the 'life-span' of a case coming before the Supreme Court. Judicial Assistants are involved from the beginning, from the application for leave to appeal to the final proof of a draft judgment. On any given day we can work on a number of different cases or a specific research task and attend a remote court hearing once or twice a week.

A case starts with an application for leave to appeal. The judges sit 'in chambers' for making determinations on applications for leave. My role is to read through the applications in advance and set out the information that needs to be included in the determination, including the legal history of

the case in which leave to appeal is sought and the facts of the case that have led to the application for leave. Once the panel of judges has met and decided if leave to appeal is to be granted or not, I proof read the determination and ensure that it is formatted correctly. It is important that I liaise with colleagues at this stage to know if there have been determinations recently made on a similar point of law, or if there are any comments made about potential future applications. We are working alongside the Chief Justice's team to consider how this information can be shared between the Court and its support staff to assist in the determination process.

If a case is granted leave to appeal the next stage of the process is case management. In advance of a case management hearing I check to see what papers have been received from any parties involved in the case and liaise with the judge to see what stage the case is at in terms of readiness to proceed to hearing, or if there is a list of things to be ascertained or dealt with at the case management hearing. I take a note during the case management hearing and send it to the judge afterwards. This note includes any discussion on what needs to be done before the hearing. For example, it might include a date for agreed books to be submitted to the Supreme Court Office, the time allocated for the hearing and whether the case is ready to proceed to hearing or there is need for a further case management.

Once the case is ready it is assigned a date in the legal diary. In advance of the hearing I check to make sure the books for the hearing comply with Practice Directions and nowadays this means making sure that as much of that material as possible is available in soft copy. All cases in the Supreme Court take place remotely at the moment. I log on to Pexip just before the hearing starts and take notes throughout. My own personal experience is that it is a lot harder to concentrate when listening to a remote hearing in comparison to listening and taking notes when you are physically in court. If the judge I work for is writing a judgment in the case, I work with the judge on a draft. This can involve researching a specific area that arises in the case, looking to see how it has been dealt with in another jurisdiction, reading through transcripts of the trial and then carrying out a fact check and proof read of the judgment before it is finalised.

In addition to the usual court going elements of my role I work on a number of research projects. The judge I work for also delivers a number of lectures throughout the year and I have been lucky to work alongside him to assist in research.

What comes across is the diversity of work in which I can be involved as a judicial assistant. This past year we have been faced with many new challenges from colleagues starting new roles remotely, to managing with bad Wi-Fi and people forgetting to mute themselves during a hearing. The Supreme Court Office and my fellow Supreme Court judicial assistants have been integral in assisting us all in being able to carry out our roles remotely and ensuring the efficient running of the remote hearing process.

PART 6

A look to 2021

A look to 2021

Sitting of the Supreme Court in the North West

Subject to the prevailing public health advice and government guidance, it is the fervent hope of the Supreme Court to undertake sittings of the court in Castlebar, County Mayo and Letterkenny, County Donegal in 2021. As has been the case with previous sittings outside of Dublin, the Supreme Court will engage with local and regional legal practitioners, local schools and civic groups.

Comhrá

Having successfully concluded the pilot Comhrá programme, the Supreme Court will formally launch the programme in 2021 and invite expressions of interest to participate, via the National Associations of Principals and Deputy Principals, to all second-level schools in the State. Selected schools will take part in the programme which involves members of the Supreme Court engaging remotely with students via video-conference. Over the course of an hour, students will have the opportunity to put questions to participating judges on a wide range of topics including their role as judges, their careers, how the Supreme Court operates and guidance on pursuing a career in law.

Conference on Access to Justice

Under the auspices of a Working Group on Access to Justice which has been established by the Chief Justice, a conference will be organised with the support of the Bar of Ireland and the Law Society on the subject of access to justice.

Summer Placement Programme for Law Students 2021

The Chief Justice's Summer Placement Programme for Law Students will take place remotely in June 2021. Under the Programme, participants nominated by law schools in Ireland, the United States of America and Wales will have the opportunity shadow judges of the Supreme Court, Court of Appeal and High Court. Participants will observe remote court proceedings, undertake legal research assignments and attend the Hardiman Lecture Series in addition to numerous other guest speaker events.

Bilateral Meeting with Judiciary of Northern Ireland

Subject to prevailing public health restrictions, in July 2021, senior members of the Judiciary hope to engage with their Northern Ireland counterparts to discuss matters of mutual interest. This longstanding exchange arrangement enables the sharing of views and observations on areas of law that arise in both jurisdictions and is an engagement that both Judiciaries look forward to each year. The 2021 exchange will take place in Belfast.

Castlebar Courthouse, Co. Mayo. It is anticipated that the Supreme Court's special sitting in the North West will begin at Castlebar Courthouse, when circumstances permit.

The Chief Justice's Summer Placement Programme for Law Students will take place remotely in June 2021.

PART 7
Case summaries

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CASES

Dwyer v. The Commissioner of An Garda Síochána [2020] IESC 4

A reference to the Court of Justice of the EU ("the CJEU") was made under Article 267 TFEU in relation to matters of Union law regarding the retention of telephony data by service providers and its disclosure to investigating and prosecuting authorities.

The respondent unsuccessfully contested the admissibility of certain prosecution evidence based on retained telephony data in the course of his trial for murder. He initiated these proceedings in order to challenge the validity of the provisions of the Communications (Retention of Data) Act 2011 under which the data relied upon in evidence was retained by service providers and accessed by An Garda Síochána (the police). It is his intention that a declaration of invalidity in respect of the relevant provisions will be relied upon in a criminal appeal in order to argue that his murder conviction is unsafe.

The 2011 Act transposes Ireland's obligations under Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communication services or of public communications networks and amending Directive 2002/58/EC ("the 2006 Directive"). The 2006 Directive was found by the CJEU to be in breach of rights guaranteed by the Charter of Fundamental Rights of the EU, and was declared invalid in *Digital Rights Ireland Limited v. Minister for Communications, Marine and Natural Resources & Ors* and *Kärntner Landesregierung and Others* (Joined Cases C-293/12 and C-594/12), ECLI:EU:C:2014:238 on the basis that its provisions governing the retention and processing of metadata constituted a serious and wide-ranging interference with the rights laid down in Articles 7 and 8 of the Charter, which exceeded the limits of the principle of proportionality.

In *Dwyer* , the High Court, having regard to jurisprudence of the Court of Justice of the European Union declared s. 6(1)(a) of the 2011 Act inconsistent with Article 15(1) of the 2002 Directive, which had continued in force and became the key Union law governing the retention of data following the invalidation of the 2006 Directive.

On appeal to the Supreme Court, three issues arose for consideration. First, whether, properly interpreted, the jurisprudence of the CJEU is such that the "universal" retention of data could ever be permissible. Second, Mr. Dwyer argued that the access regime under the 2011 Act provides insufficient safeguards against inappropriate access to retained data, and does not lay down clear and precise rules governing the grant of access to data to competent national authorities as set out in the judgment of the Court of Justice of the European Union in *Digital Rights*, *Tele2 Sverige AB v. Post- och telestyrelsen* and *Secretary of State for the Home Department v. Tom Watson and Others* (Joined Cases C-203/15 and C- 698/15), ECLI:EU:C:2016:970. Finally, whether it would be permissible for a national court, which finds that a measure of national law is inconsistent with EU law, to make such a determination with prospective, rather than retrospective, effect, particularly in light of the fact that Ireland had been required to transpose the 2006 Directive into national law following a decision of the CJEU in *Commission v. Ireland* (Case C-202/09) [2009] E.C.R. I-203, ECLI:EU:C:2009:736.

In the Supreme Court, Chief Justice Clarke (Mr. Justice O'Donnell, Mr. Justice McKechnie, Mr. Justice MacMenamin, Ms. Justice O'Malley and

Ms. Justice Irvine (as she then was) concurring, Mr. Justice Charleton dissenting in a separate judgement) considered the totality of the expert evidence tendered in the High Court and made a number of findings of fact. First, the Court held that alternative forms of data retention, by means of geographical targeting or otherwise, would be ineffective in achieving the objective of the prevention, investigation, detection and prosecution of certain types of serious crime, and could give rise to the potential violation of other rights of the individual. Second, the objective of the detention of data by any lesser means than of a universal or general system of retention, subject to the necessary safeguards, is unworkable. Finally, the objectives of the retention regime would be significantly compromised in the absence of a general data retention regime.

Chief Justice Clarke then set out his own position on the matters in dispute on the appeal. Recognising the obligation of the State to protect and vindicate the rights of victims in the criminal process as one which is required by the Irish Constitution and which is also set out in the jurisprudence of the European Court of Human Rights, he noted that significant regard should be attributed to the fact that, on the evidence, many serious crimes against vulnerable people are most unlikely to be capable of successful prosecution in the absence of a system of universal retention. On that basis, he held that if he was to resolve the issue of Union law concerning the universal retention of data, he would hold that such a regime is permissible. Further, Chief Justice Clarke held that, if he were deciding the matter himself, he would be likely to conclude that the Irish regime did not provide adequate safeguards to meet the requirements of Union law and is not sufficiently robust to meet the standards identified by the CJEU in its jurisprudence. Finally, concerning the temporal effect of any finding of invalidity, Chief Justice Clarke held that he would be inclined to take the view that the Court may well have the jurisdiction to determine that a finding of invalidity should not operate retrospectively, and that it would be appropriate that a prospective declaration be exercised in the circumstances of this case, given Ireland was required as a matter of Union law to introduce the 2011 Act.

However, as a court of final appeal, the Supreme Court is obliged to make a reference to the CJEU under Article 267 of the Treaty on the Functioning of the European Union unless any relevant issues of EU law necessary to the final determination of the appeal before it are already clear. Chief Justice Clarke held that the three issues arising on the appeal raised questions of Union law which were not already clear and that it was therefore necessary to make a reference under Article 267 in regard to the following areas of Union law:-

i) Whether a system of universal retention of certain types of metadata for a fixed period of time is never permissible irrespective of how robust any regime for allowing access to such data may be;

ii) The criteria whereby an assessment can be made as to whether any access regime to such data can be found to be sufficiently independent and robust; and

iii) Whether a national court, should it find that national data retention and access legislation is inconsistent with European Union law, can decide that the national law in question should not be regarded as having been invalid at all times but rather can determine invalidity to be prospective only.

CASES

Director of Public Prosecutions v. F.E. [2020] IESC 5

The jurisdiction of the Supreme Court on appeal extends not only to the questions certified by a panel of the Court whereby leave is given under Article 34.5 but also any necessary issue central to the resolution of the appeal, provided this is within the grounds of appeal.

This case involved an appeal brought by the Director of Public Prosecutions against undue leniency of a rape sentence. The accused was the victim's husband. After a row he produced a knife and threatened his wife. He ordered her upstairs and raped her and threatened her. The victim pretended reconciliation. The next day she went to the family law courts to protect her child. The accused called and threatened to kill her. Three charges were laid in relation to these events: one count of rape, one count of threat to cause serious harm and one count of threat to kill. The accused pleaded not guilty, but was convicted at trial. A few weeks later the accused threatened the victim in a shopping centre. A couple of months later the accused turned up at the victim's parents' house. He was refused entry and returned the following day with a bag he claimed contained a present for the child. On entering the house he produced a hammer and attacked the victim and also hit the victim's mother. The accused pleaded guilty to the charges related to these attacks. The accused was sentenced to a headline sentence of 14 years for the charge of rape reduced to 10 years through 2 years mitigation and 2 years suspended alongside a number of concurrent sentences in respect of the other offences. The original sentence was appealed by the accused. The Court of Appeal reduced the sentence, which was found by the Supreme Court to have been reduced on an incorrect legal basis.

It was noted that the Director of Public Prosecutions did not appeal the original sentence on grounds of undue leniency under s. 3 of the Criminal Justice Act 1993, nor did she appeal the approach taken by the trial judge in her approach to the sentencing in terms of imposing concurrent rather than consecutive sentences.

The accused made submissions in relation to his sentence and raised questions in relation to the constitutional jurisdiction of the Supreme Court to reconsider the sentence. It was further argued that there should only be one appeal in which the sentence of the accused may be changed. Mr. Justice Charleton (Chief Justice Clarke, Mr. Justice McKechnie, Ms. Justice Irvine (as she then was) concurring, Ms. Justice O'Malley concurring in a separate judgement) found that:-

'The jurisdiction of the Supreme Court on appeal extends not only to the questions certified by a panel of the Court whereby leave is given under Article 34.5 but also any necessary issue central to the resolution of the appeal, provided this is within the grounds of appeal thereby enabled.'

Further, he reiterated that Order 58 rule 29 of the Rules of the Superior Courts rightly gives to the Supreme Court 'all the powers and duties of the court below' which allows it to 'give any judgment and make any order which ought to have been made' and to 'make any further or other order as the case requires.' The Court of Appeal order was quashed and was replaced with the original sentence imposed by the trial judge.

CASES

Morrissey & anor v. Health Service Executive & ors [2020] IESC 6

The Court set out the appropriate test for professional negligence in Irish law in the context of cervical screening professionals.

The first named respondent, Ms. Morrissey, had undergone screening for cervical cancer in 2009 and again in 2012 in accordance with the CervicalCheck screening programme, which was promoted by the first named appellant, the Health Service Executive. These cervical smears were tested by the second named appellant, Quest Diagnostics Ireland Ltd., and the third named appellant, Medlab Pathology Ltd. In both instances, Ms. Morrissey's smear test was reported as negative for abnormalities and she was provided with a clear result. However, in 2014, following symptomatic bleeding, she was diagnosed with cervical cancer. In 2018, after making enquiries as to whether there had been an error in her case, Ms. Morrissey was told that a review carried out in 2014 showed that the results of her smear tests taken in 2009 and 2012 had been incorrectly reported. The results of this review had first been communicated to CervicalCheck in 2015, but Ms. Morrissey had not been informed. Her cancer returned in 2018 and she was given a terminal diagnosis. She and the second named respondent, her husband, Mr. Morrissey, commenced proceedings in the High Court thereafter, alleging that the appellants were guilty of clinical negligence.

In the High Court, the trial judge made a finding of medical negligence against the appellants and awarded the respondents the sum of €2,152,508 against the appellants on foot of the misreading of Ms. Morrissey's smear slides. The trial judge awarded the respondents the additional sum of €10,000 in nominal damages against the first named appellant for its failure to notify Ms. Morrissey of the results of the review of her earlier smear tests.

The appellants sought, and were granted, leave to appeal directly to the Supreme Court. A so-called leapfrog appeal directly from the High Court to the Supreme Court was found to be justified on the basis of a number of similar claims which were pending before the High Court and the perceived need for an authoritative decision of the Supreme Court on the appropriate test for negligence to be applied in these cases. The urgency arising from the personal circumstances of Ms. Morrissey was also an important consideration.

In the Supreme Court, the appeal was dismissed and Chief Justice Clarke (with whom Mr. Justice O'Donnell, Mr. Justice McKechnie, Ms. Justice Dunne and Ms. Justice O'Malley concurred) outlined the proper standard of approach to be adopted by a cervical screening professionals.

Chief Justice Clarke held that the starting point in clinical negligence claims remains the judgment in *Dunne (an infant) v. The National Maternity Hospital* [1989] I.R. 91. In line with the dicta of this judgment, the correct legal standard is therefore the approach that would have been applied by a professional of comparable standing or skill as the person against whom the allegation of negligence is made. A failure to act in that way will amount to negligence.

Chief Justice Clarke emphasised that the question of the standard of approach which should be applied by an ordinarily competent professional is a matter of fact, and that a court will usually require the expert evidence from professionals within the relevant field to demonstrate the standard required. In this case, expert evidence provided to the Court by cervical screening professionals identified the standard of a

competent screener as being one which precludes a giving a clear result in a case where there is some element of doubt. In particular, Chief Justice Clarke was persuaded by expert evidence provided to the High Court to the effect that the standard applied to cervical screeners in the United Kingdom is one of "absolute confidence".

Based on this evidence, Chief Justice Clarke concluded that the High Court was correct in applying a standard for screening where screeners should have absolute confidence that a sample is adequate, and that it doesn't contain any suspicious material, before stating that it is clear. He also remarked that it was difficult to reconcile the appellants' "doomsday" arguments that such a standard would have far reaching consequences, with the fact that this is the standard actually applied in the United Kingdom. On this basis, Chief Justice Clarke held that the High Court was correct to find the appellants liable in negligence.

Chief Justice Clarke also concluded that the High Court had been incorrect to find the first named appellant vicariously liable for the negligent acts of the second and third named appellants. However, Chief Justice Clarke was willing to find the first named appellant liable on the more limited basis of a non-delegable duty it owed to the patients who availed of CervicalCheck. He remarked that a so-called non-delegable duty is a developing area of primary liability arising in exceptional circumstances, in which a party may be fixed with primary liability where it has accepted a duty to its customers, clients or patients to ensure that any relevant arrangements will be carried out in a non-negligent way. In the present case, Chief Justice Clarke characterised the first named appellant as having undertaken responsibility for the cervical screening scheme in spite of the fact that the actual screening was performed by a third party. On this basis he concluded that the first named defendant was primarily liable.

All of the appeals were therefore dismissed, save for a more minor issue relating to the damages to be paid to the second named appellant, which Chief Justice Clarke ordered was to be heard by the Court at a later date.

CASES

Ryan v. Governor of Mountjoy Prison [2020] IESC 8

Habeas corpus inquiry pursuant to Article 40.4.2° of the Irish Constitution is limited solely to the question of whether the detention of the applicant is in accordance with law and cannot be dismissed on the grounds that the application constitutes an abuse of process.

The proceedings concerned an application for an inquiry pursuant to the provisions of Article 40.4.2° of the Irish Constitution. Article 40.4.1° states that '[n]o citizen shall be deprived of his personal liberty save in accordance with law'. Article 40.4.2° provides for an expedited process by which the High Court can inquire into the lawfulness of an applicant's detention. If it is found that the individual concerned is unlawfully detained then the person concerned will be released immediately. The remedy provided under Article 40.4.2° is the successor to the old writ of *habeas corpus*. An Article 40.4.2° application is initiated on an *ex parte* basis.

The appellant had been the subject of a summons in the District Court as a result of his failure to comply with an instalment order made against him. The summons came before the District Court on four separate occasions, during the course of which hearings, the appellant's behaviour was said to be uncooperative and obstructive and he was warned that it could lead to his committal on the grounds of contempt of court. On the fourth occasion the matter came before the Court, a warrant of committal was issued by the District Judge against the appellant for contempt of court, and he was imprisoned.

An application for an inquiry pursuant to Article 40.4.2° was made on behalf of the appellant to the High Court and, as a result of the evidence contained in an affidavit sworn by his solicitor, an inquiry was commenced by the High Court. The inquiry was requested and granted on the basis of an assertion by his solicitor that Mr. Ryan had been imprisoned solely because he refused to accept the jurisdiction of the court to hear a claim in a civil matter involving an amount of €38,000. This, in his belief, exceeded the jurisdictional limit of the District Court and it was said that he did not consent to the process on this basis. Following his release on bail, Mr. Ryan swore an affidavit in which he verified the contents of his solicitor's grounding affidavit.

Following a full hearing, the High Court dismissed Mr. Ryan's claim for relief. Having regard to the transcripts of the hearings before the District Court, it held that the averments relied on by Mr. Ryan and his solicitor in order to initiate the inquiry significantly misrepresented what had occurred before his committal. It was held that the affidavits omitted key information and were materially misleading. The High Court held that any party making an *ex parte* application is bound by a duty of candour and utmost good faith (*uberrima fides*) towards the Court.

As the supposed facts underlying the application were untrue, the applicant knew them to be untrue and did nothing to correct them when given the opportunity, the High Court considered that the application constituted an abuse of process, and stated that it should be dismissed on this ground. The High Court judge then went on to consider, if incorrect in that conclusion, whether the detention of Mr. Ryan was lawful. He concluded that the detention of Mr. Ryan was in accordance with law.

On appeal, the Court of Appeal held that the High Court was justified in arriving at this conclusion as the application was brought in circumstances which were abusive of the process. The Court of Appeal held that, in order to ensure the effective functioning

of an inquiry under Article 40.4.2°, the High Court should be entitled to protect its own process by maintaining the need for a duty of candour and of utmost good faith, and therefore it could dismiss the application on the basis that it constituted an abuse of process. This finding was appealed to the Supreme Court.

Before the Supreme Court, Mr. Ryan argued that on an application under Article 40.4.2°, the Court on an inquiry is limited to considering whether the detention of the person concerned is lawful or not. If the Court finds the detention to be unlawful, Mr. Ryan argued that the Court must release the individual. The nature of the remedy under Article 40.4.2°, he submitted, is such that when an inquiry is initiated, the High Court is under a duty to proceed with that inquiry and is precluded from dismissing the application as an abuse of process.

Considering the remedy provided under Article 40.4.2°, the Supreme Court, in a judgement of Ms. Justice Dunne (Chief Justice Clarke, Mr. Justice McKechnie, Mr. Justice Charleton and Ms. Justice Irvine (as she then was) concurring), noted that such applications are often made as a matter of urgency, and the nature and importance of the remedy is such that it is not subject to strict procedural rules or regulations. Further, it was held that the duty of candour and of utmost good faith applicable in other forms of litigation also apply to applications under Article 40.4.2°.

However, the Supreme Court considered that previous decisions of the Supreme Court indicated that on an application pursuant to Article 40.4.2°, the role of the Court is limited to considering the question of whether the detention of the individual concerned is lawful or not.

The Supreme Court concluded that on an Article 40.4.2° inquiry, the duty which the Court has under the Constitution is to order the release of a person, unless satisfied that he is lawfully detained. Thus, abuse of process cannot preclude someone from obtaining their release from what would otherwise be unlawful detention.

The Supreme Court stated that this does not preclude the possibility of a High Court judge refusing an application for an inquiry where the application itself amounts to an abuse of process. However, if an inquiry is initiated pursuant to Article 40.4.2° of the Constitution then the High Court is under an obligation to proceed with the inquiry, and may not dismiss the application on the basis that it constituted an abuse of process. If issues arise as to the conduct of the applicant in respect of the manner in which the inquiry was initiated, it was suggested that it may be dealt with by way of costs of proceedings.

CASES

Minister for Justice & Equality v. Vestartas [2020] IESC 12

The European Arrest Warrant system is predicated on mutual trust. While human sympathy is natural in a case such as this, it must take second place to a court's duties under the Framework Decision on the European Arrest Warrant ("EAW") (2002/584/JHA).

The respondent was convicted of offences in Lithuania and later travelled to Ireland in breach of his parole conditions. The appellant sought the surrender of the respondent to Lithuania. In Ireland, the respondent had formed a *de facto* family with a partner, her child, and a child of their own. This, among other factors, led the High Court (Mr. Justice Hunt) to refuse the surrender of the respondent as it would infringe on the private and family rights of the family under Article 8 of the European Convention on Human Rights ("ECHR"). In the Supreme Court, Mr. Justice MacMenamin (Ms. Justice Dunne, Mr. Justice Charleton, Ms. Justice O'Malley and Ms. Justice Irvine (as she then was) concurring) allowed the appeal and ordered that the respondent be surrendered to Lithuania. For the Court, Mr. Justice MacMenamin commented on four primary matters.

First, in relation to a surrender under the European Arrest Warrant Act, 2003 ("the 2003 Act"), s. 4A states that it shall be *presumed* that an issuing state *will* comply with the requirements of the Framework Decision on the European Arrest Warrant (2002/584/JHA) ("the Framework Decision") unless the contrary is shown. Mr. Justice MacMenamin held that a court may consider whether surrender would lead to an egregious or flagrant denial of fundamental or human rights. However, to refuse surrender, there must be cogent, clear evidence of a real risk of such a denial. Otherwise, Framework Decision compliance must be presumed.

Second, the Court considered its own judgment in *Minister for Justice and Equality v. Ostrowski* [2013] IESC 24; [2013] 4 I.R. 206. There too, Chief Justice Denham highlighted the requirement of surrender so long as the provisions of the 2003 Act are complied with. Mr. Justice MacMenamin stressed that Mr. Justice McKechnie's concurring judgment did not advocate a proportionality test in the decision on whether or not to order surrender, but in the antecedent stage in relation to whether a rights-based defence could be raised.

Third, the Court considered that *Minister for Justice and Equality v. J.A.T. (No. 2)* [2016] IESC 17; [2016] 2 I.L.R.M. 262. *J.A.T.* involved truly exceptional Article 8 circumstances, including clear, cogent medical evidence of the adverse effects surrender would have. The Court laid particular emphasis on, among other things, the fact that considerable weight is to be given to the public interest in ensuring that persons charged with offences actually do face trial, and the "constant and weighty" interest in surrender under an EAW. In this appeal, Mr. Justice MacMenamin stated that there is no general principle that delay in processing the warrant.

Fourth, on the question of whether this case amounted to an exception to surrender on the basis of Article 8 of the ECHR, Mr. Justice MacMenamin pointed out that s. 37 of the 2003 Act provides that a person shall not be surrendered under the Act if his or her surrender would be incompatible with the obligations of the State under the ECHR, subject to certain provisos. However, this requires "exceptional" factors, which were simply not present in the instant case.

In conclusion, Mr. Justice MacMenamin emphasised that the EAW system is predicated on mutual trust. While human sympathy is natural in a case such as this, it must take second place to a court's duties under the Framework Decision and the terms of the 2003 Act.

CASES

The People (at the suit of the Director of Public Prosecutions) v. Buck [2020] IESC 16

In an application brought under s. 2(5) of the Criminal Procedure Act 1993 for an order quashing a conviction on the grounds of new or newly discovered facts, the holding of such facts in reserve in order, when the first such application under s. 2(1) has failed, to bring a second such application is contrary to the principle that cases should be disposed of through each party putting forward their best case and deploying facts known or known and appreciated later is an affront to the proper disposal of justice.

In 1998, Anthony Buck was convicted of the murder of David Nugent, who was found dead in a field at St Michael's Hospital on 9 July 1996. He died of head injuries and a stabbing to the chest and abdomen. The only DNA evidence recovered from the scene was the victim's blood that was on a stone found near the victim's body. The prosecution case was based on: an alleged sighting of Anthony Buck by two witnesses jumping over the wall of the field immediately after they both heard screams coming from the direction of the field; friends of the victim alleging that Anthony Buck had told them that he was due to meet the victim on the 9 July; and the admissions Anthony Buck made on 14 and 15 July during his detention in the Garda station.

Mr. Buck was sentenced to 12 years for a conviction of robbery to run concurrently alongside the life sentence for murder. In 1999, the Court of Criminal Appeal dismissed the application for leave to appeal against the conviction. This was then appealed to the Supreme Court, which dismissed an appeal in relation to the circumstances in which an accused can be questioned by Gardaí after he had claimed to have requested the presence of a solicitor but before a solicitor had arrived and also on the right of reasonable access to a solicitor. In September 2014 an application was made by Mr. Buck claiming a miscarriage of justice. This was dismissed by the Court of Appeal on the back of a motion by the DPP as the proceedings having no chance of success.

Thus, the case fell to be considered under s 2 (5) of the Act of 1993, which provides:

> '(5) Where—
>
> (a) after an application by a convicted person under subsection (1) and any subsequent re-trial the person stands convicted of an offence, and
>
> (b) the person alleges that a fact discovered by him or coming to his notice after the hearing of the application and any subsequent re-trial or a fact the significance of which was not appreciated by him or his advisers during the hearing of the application and any subsequent re-trial shows that there has been a miscarriage of justice in relation to the conviction, or that the sentence was excessive, he may apply to the Court for an order quashing the conviction or reviewing the sentence and his application shall be treated as if it were an application under that subsection.'

In relation to new facts or newly discovered facts establishing a miscarriage of justice, Mr. Buck put forward 13 grounds of appeal. These included a claim that the same solicitor represented him and two others who were involved in the robbery of the victim. This was indeed a fact, but it was discovered by Mr. Buck in 2015 and was not raised in the appeal in 2015. A number of the other points raised by

Mr. Buck were in relation to alleged inaccuracies in the trial judge's charge and summing up of evidence. The argument put forward was that the significance of these issues were not appreciated by his legal team at the time of the trial. Mr. Buck also takes issue with gaps in the investigation of the garda in terms of failing to speak to certain people mentioned in witness statements. These statements were only made available to Mr. Buck's legal team in 2015, but, again, these were not raised as issues in the 2015 Appeal.

In the Supreme Court, Mr. Justice Charleton (Mr. Justice O'Donnell, Mr. Justice McKechnie, Mr. Justice MacMenamin and Ms. Justice O'Malley concurring) noted that s. 2 of the 1993 Act is about fact, but it accepts that facts may be known without the significance of those facts being appreciated during the trial and appeal. S. 2(5) of the Act of 1993 does not allow for a fact that is held back. He found that there was a time limit to applications brought under s. 2(5), stating that to hold such facts in reserve order, when the first such application has failed, to bring a second such application is contrary to the principle that cases should be disposed of through each party putting forward their best case and that, exceptional circumstances apart, deploying facts known or known and appreciated later is an affront to the proper disposal of justice.

Mr. Buck's application was found not to have any reasonable prospect of succeeding.

CASES

Mungovan v. Clare County Council [2020] IESC 17

In considering whether an applicant is statute-barred from bringing judicial review proceedings, administrative actions that lead to an actual result must be challenged straight away, whereas the continuing nature of a policy or delegated legislation where decisions are made by reference to such policy or delegated legislation must be part of the analysis in deciding whether a time limit is applicable due to any failure to challenge a particular decision.

This case concerned the validity of several refusals by the respondent, Clare County Council, to accept the application of the appellant, Mr. Mungovan, to become a qualified water treatment engineer for planning purposes by putting his name on a list of such experts. The issue before the Supreme Court was whether the appellant was statute barred from bringing judicial review proceedings in respect of this decision in the High Court.

The issue before the Supreme Court was whether the claim was statute barred in terms of the time limits in Order 84 rule 21 RSC that any application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when the grounds for the application first arose, or six months where the relief sought is *certiorari*. In the Supreme Court, Mr. Justice Charleton (Chief Justice Clarke, Mr. Justice MacMenamin, Ms. Justice Dunne and Ms. Justice O'Malley concurring) considered whether a person affected by a fixed policy implemented by an administrative body is required to bring a challenge within the usual time limits fixed for judicial review or whether they are permitted to seek judicial review of the policy at any time whilst it is in force.

In his judgment, Mr. Justice Charleton differentiated between two types of administrative action: decisions leading to an actual result which must be challenged straight away, and decisions which are not particular to an individual but are made by reference to a policy or delegated legislation. Observing that the policy or delegated legislation in question is an instrument that continues in being followed regardless of what decision is made, the Court considered that this continuing nature must be part of the analysis in deciding whether a time limit is applicable due to any failure to challenge a particular decision.

The Court found that the appellant's situation fell within the second type of administrative action, to be characterised as continuing measures, but noted that this does not give an individual an unlimited period of time to bring an action. It must be considered that the individual reacted in an appropriate time taking into consideration the circumstances of the situation.

Mr. Mungovan's appeal was successful on the issue of whether he was statute-barred from bringing proceedings and the case was remitted to the High Court.

CASES

B. v. Director of Oberstown [2020] IESC 18

Children serving sentences of detention are not entitled to be treated in the same manner as adult prisoners in respect of the rules regarding remission of sentences, on the basis of the equality guarantee contained in Article 40.1 of the Irish Constitution.

The appellant was a minor who was sentenced to a term of detention in Oberstown Detention Centre under the Children Act 2001 ('the 2001 Act'). The 2001 Act provides for a variety of procedures which have the objective of diverting children away from crime and the formal criminal justice system and it treats all persons under the age of 18 as children. At the time of this judgment, Oberstown was the only child detention centre in Ireland. The purpose of child detention centres, as set out in the 2001 Act, is to provide appropriate educational and training programmes and facilities for children and to promote their reintegration into society.

The Minister for Justice is empowered to regulate remission for prisoners under the Prisons Act 2007. Regulations made by the Minister do not apply to children detention schools. Under the Prison Rules 2007, an adult prisoner sentenced to a term of imprisonment shall be eligible by good conduct to earn remission of their sentence for a period up to a quarter of that term. Any prisoner who does not misbehave is entitled to standard remission.

While provision was made in the 2001 Act for rules to be made in respect of remission for children in detention, no such rules had been made at the time of this judgment. In *Byrne (A Minor) v Director of Oberstown* [2013] IEHC 562, the High Court found that that a situation in which certain children in Oberstown detention centre who had been previously detained in St. Patrick's were entitled to remission of part of their sentence under the Prison Rules governing adult prisoners, whereas those who had commenced their term of detention in Oberstown had no such entitlement, was unconstitutional.

Under the Prison Rules, an adult prisoner who has engaged in authorised structured activity may apply to the Minister for Justice for enhanced remission, which may be up to one third of their sentence. This can be granted if the Minister is satisfied that the prisoner, having regard to certain specified matters, is less likely to reoffend and better able to reintegrate into the community. The appellant, B., was sentenced to three years' detention with twenty months suspended and was entitled to the ordinary remission of one quarter of this term which is granted to children detained in Oberstown through the exercise of a general power conferred on the government under the Criminal Justice Act 1951. He applied to be considered for enhanced remission, and complained that a refusal to permit him to apply placed him in a worse position than adult prisoners. When enhanced remission was not granted by Oberstown, he sought leave to judicially review the terms of his detention.

The High Court rejected the claim that a failure to consider the appellant's application for enhanced remission constituted a breach of the equality guarantee under Article 40.1 of the Constitution, as it does not require identical treatment of all persons without recognition of different circumstances.

In a 'leapfrog' appeal from the High Court to the Supreme Court, the appellant argued that the failure to provide a system for the consideration of applications for enhanced remission in Oberstown breached his constitutional right to equality and placed him at a disadvantage as compared with an adult prisoner. The appellant argued that this differentiation was not justified for reasons of social

policy, as detention in Oberstown is not viewed by the legislature (the Oireachtas) as essentially different to detention elsewhere in the general criminal justice system. Further, since the intended purpose of enhanced remission is to incentivise behaviour that will assist in rehabilitation, it serves the same interests as child detention.

The Supreme Court, in a judgment by Ms. Justice O'Malley (Chief Justice Clarke, Mr. Justice O'Donnell, Ms. Justice Dunne and Ms. Justice Irvine (as she then was) concurring), dismissed the appeal, holding that the rationale and policy objectives behind the 2001 Act made it clear that the legislature considered there to be a difference in the capacity and social function of adults and children, and legislated for a distinction in their treatment on this basis. This differential treatment can only be challenged on the basis that it is, in principle, unconstitutionally invidious, an argument which was not made on the appeal. The Court distinguished this appeal from the set of facts in *Byrne,* in which the High Court was dealing with an unjustified distinction between two categories of young offender within the juvenile criminal justice system, rather than as between adult prisoners and young offenders.

Comparing the penal regimes governing children and adults, the Court held that the incentives to engage in positive behaviour while in custody differ significantly. Adults are subject to long-term objectives, while under the 2001 Act, certain goals can be achieved much more quickly. Noting the considerable discretion available to the Director of Oberstown under the 2001 Act to allow for temporary leave from the facility for any purpose conducive to the reintegration of a child into the community, the Court found that the scheme of incentives in Oberstown is incremental and geared towards relatively short-term steps according to the planned management of the individual child's sentence. The presumption of the legislature that differences between children and adults call for different regimes was not shown to be factually incorrect or unfair in principle.

CASES

M. v. The Parole Board & ors [2020] IESC 24

The legislation applicable to parole or temporary release was not intended to apply to prisoners who had been transferred to the Central Mental Hospital.

The applicant, M., had been convicted of murder and was sentenced to life imprisonment. During his term of imprisonment, he was continually transferred back and forth to the Central Mental Hospital to receive treatment for schizophrenia. He had written to the Parole Board in 2017 enquiring whether and when he would be considered for parole and the Board responded that it could not participate in a review as he was a patient in the Central Mental Hospital.

The applicant initiated judicial review proceedings in the High Court seeking amongst other reliefs, certiorari (quashing) of the Parole Board's refusal. The High Court rejected his claim stating that the power of the Minister to grant parole under s. 2 of the Criminal Justice Act 1960 required a release "from prison". The appellant was required to return to prison under the provisions of the Criminal Law (Insanity) Act 2006, in order to be considered eligible for parole.

In his appeal to the Supreme Court, the applicant claimed that he was a prisoner serving his sentence while detained in the Central Mental Hospital and that the Minister had the power to grant him release under s. 2 of the 1960 Act. The Court stated that it was accepted that the Minister does have a discretion in deciding any cases which come before him, but the core question was whether he could consider the case of the applicant.

The applicant argued that s. 2 of the 1960 Act should be read broadly to encompass anywhere a convicted person could be lawfully detained to serve a sentence including the Central Mental Hospital. He asserted that if the mental health facilities in the Prison Service had been adequate, he would not have had to spend his detention in the Central Mental Hospital. He further contended that he was denied the benefit of the entitlement to seek release due to his illness, which he claimed was a punitive consequence in contrast with the paternalistic intent of the 1960 Act. Finally, he claimed that a restrictive reading of the section would lead to a breach of the equality guarantee.

Ms. Justice O'Malley (Chief Justice Clarke, Mr. Justice MacMenamin, Ms. Justice Dunne and Ms. Justice Irvine (as she then was) concurring) held that the fundamental point was that s. 2 of the 1960 Act was never intended to apply to prisoners transferred to the Central Mental Hospital. Therefore, there existed no legislative framework where the appellant could be considered for release. However, the Court did anticipate that an argument could arise in an appropriate case, that the current legal framework is unlawful as it does not provide for the prospect of relief for a transferred prisoner who required in-patient treatment and was not well enough to return to prison, but who was not considered so dangerous that they could not be accommodated at an appropriate hospital in the community.

The appeal was dismissed.

CASES

X. v. Minister for Justice and Equality & Ors. [2020] IESC 30

For the purposes of the International Protection Act 2015, a reference to a "child", when given it's plain and natural meaning, could only mean a biological child (including an adopted child), having regard to the historical context of the legislation in question.

This appeal concerned the statutory interpretation to be given to the word "child" as it appears in s. 56(8) of the International Protection Act, 2015. The provision regulates the granting of permission for family reunification for a 'qualified person' under the 2015 Act.

Mr. X was a Cameroonian national who was granted subsidiary protection in Ireland in July 2014. Having been granted subsidiary protection, Mr. X applied for family reunification of two children pursuant to the European Union (Subsidiary Protection) Regulations, 2013. Mr. X claimed that these children were his, but when INIS requested that he undertake a DNA test to prove these children were his own, he refused. The Minister therefore refused the application for family reunification, but Mr. X was told that if he was granted sole guardianship of the two children, which was capable of recognition in Ireland, he could re-apply for family reunification. Mr. X was granted sole guardianship of the two children by the Western Appeal Court of Cameroon, and reapplied for family reunification pursuant to s. 56(8) of the 2015 Act. The application was again refused as Mr. X did not provide any DNA evidence that the children were his. Mr. X sought to judicially review this decision on the basis that the word "child" as it appears in the 2015 Act includes non-biological children.

The High Court (Mr. Justice Barton) granted the relief sought, quashing the decision of the Minister to deny the application for family reunification on that basis that the Minister erred in proceedings as s. 56(9)(d) of the 2015 Act required that a sponsor be the natural parent of a child.

On appeal to the Supreme Court, the Minister argued that the High Court erred in its approach in interpreting the word "child" in section 56 of the 2015 Act, and that the High Court failed to have due regard to the legislative context or history in which the provision was passed by the legislature. Mr. X sought clarification on whether it was appropriate for the Minister to seek DNA evidence to satisfy himself that the children in question were members of the family and whether Mr. X had a continuing, vested right to apply for family reunification under the now repealed scheme, under the European Union (Subsidiary Protection) Regulations 2013.

Ms. Justice Dunne (with whom Chief Justice Clarke, Mr. Justice O'Donnell, Ms. Justice O'Malley, Ms. Justice Irvine (as she then was) and Ms. Justice Baker concurred) overturned the decision of the High Court, and held that for the purposes of the 2015 Act, a reference to a "child", when given its plain and natural meaning, could only mean a biological child,[1] having regard to the historical context of the legislation in question. Ms. Justice Dunne surveyed the previous legislative schemes regulating family reunification, and held that it was clear that the legislative intention in redefining "member of the family", when compared to the previous schemes under the Refugees Act 1996 and the European Union (Subsidiary Protection) Regulations 2013,

[13] It should be noted that "biological child" includes in its definition an adopted child pursuant to section 18(d) of the Interpretation Act 2005.

was to limit the types of relationship that could benefit from family reunification.

In relation to the proffering of DNA evidence, Ms. Justice Dunne held that the Minister was entitled to request DNA evidence from Mr. X, in circumstances where the Respondent had created considerable doubt surrounding the paternity of the children. It is well-established case law that the Minister is entitled to request a DNA test to resolve issues of family relationships (see *Nz.N. v. Minister for Justice* [2014] IEHC 31 and *Z.M.H. v. Minister for Justice* [2012] IEHC 221), and where there is a refusal to undergo a DNA test, the Minister is entitled to draw an inference from that refusal. However, Ms. Justice Dunne did add a caveat that a DNA test should not be sought as a matter of routine, and that it should only be sought where a "serious doubt" exists in relation to the relationships in question.

Finally, Ms. Justice Dunne held that Mr. X did not have any vested rights under the 2013 Regulations, now repealed by the 2015 Act.

CASES

Reeves & anor v. Disabled Drivers Medical Board of Appeal & Ors.; Lennon & anor v. Disabled Drivers Medical Board of Appeal & Ors. [2020] IESC 31

In the context of a statutory scheme of assistance for the adaption of vehicles to the needs of seriously and permanently disabled persons, a regulation which in effect creates a sub-set of severely and permanently disabled persons who are eligible for such a scheme to the exclusion of other severely and permanently disabled persons is under inclusive and fails to vindicate the rights of the appellants.

These appeals concerned the Disabled Drivers and Disabled Passengers (Tax Concessions) Regulations, 1994 (the "Regulations") made under s. 92 of the Finance Act 1989, as amended, (the "1989 Act"). S. 92(1) of the 1989 Act entitles the Minister for Finance (the "Minister") to make regulations providing for the repayment of certain taxes in respect of vehicles used or driven by persons who are severely and permanently disabled. S. 92(2) empowers the Minister to make regulations establishing the eligibility criteria for repayments including such further medical criteria in relation to disabilities as may be considered necessary.

The applicants, two severely and permanently disabled minors, were unsuccessful in their applications for a medical certificate, which would have entitled them to certain repayments. They were equally unsuccessful in their appeals to the Disabled Drivers Medical Board of Appeal (the "Board"). Whilst acknowledging that the appellants were severely and permanently disabled, the Board found that they did not meet the medical eligibility criteria set out in Regulation 3 of the Regulations as established under s. 92(2) of the 1989 Act.

The applicants argued that the criteria under Regulation 3 had the effect of excluding a significant cohort of severely and permanently disabled persons from receiving repayments. They submitted that this did not reflect the intention of the Oireachtas as expressed in s. 92. In addition, they contended that Regulation 3 effectively permitted the Minister to make a personal choice as to whom among severely and permanently disabled persons could benefit and that this amounted to an infringement of the power of the Oireachtas under Article 15.2.1° of the Constitution. It was also asserted that the Board failed to provide adequate reasons for its decision to refuse to grant medical certificates to the appellants. An order of *certiorari* was sought to quash the decisions of the Board and a declaration that Regulation 3 was *ultra vires* the provisions of s. 92.

Both the High Court and the Court of Appeal dismissed the case of the applicant. On appeal to the Supreme Court, Ms. Justice O'Malley (Chief Justice Clarke, Mr. Justice O'Donnell, Mr. Justice McKechnie and Mr. Justice Charleton agreed) noted that under s. 92(2) any "further medical criteria" could only be provided if considered "necessary". She held that nothing within the terms of s. 92 suggested that a narrowing-down of the class of beneficiaries could in itself be considered necessary. Equally, the terms did not provide any guidance, by way of principle or policy, by reference to which the Minster could carry out such an exercise. As a result, to construe the provision as permitting the Minster to make what could, in effect, amount to a personal choice as to the qualifying conditions would fall foul of Article 15.2 of the Constitution.

The Court further considered what the purpose of the legislation might be if it permitted the Minister to create a subdivision of eligible severely and permanently disabled persons. Reference was made to the ruling of the Court of Appeal, which referred

to the need to protect the "public purse" as a possible motivation of the legislature in granting such power to the Minster. However, Ms. Justice O'Malley held that nothing within s. 92 suggested that the cost of the scheme was relevant to the formulation of "further medical criteria". In order to determine the scope of the Minster's power to introduce, if necessary, "further medical criteria" Ms. Justice O'Malley stated that it was essential to have regard to the purpose of s. 92. It was reiterated that the legislative intent of s. 92 was to assist with the transportation of severely and permanently disabled persons whose disablement created a need for a specially adapted vehicle. On that basis, it was held that any "further medical criteria" set out in regulations must be such as can reasonably be described as necessary in relation to a scheme dealing with the construction and adaption of vehicles.

Ms. Justice O'Malley found that the medical criteria set out in Regulation 3 appeared to focus on disabled drivers with the consequence that 'sight may have been lost' of the needs of disabled passengers.

Ms. Justice O'Malley noted that the undisputed evidence was that the appellants could not as a matter of practical reality, get around outside their homes without a wheelchair. However, they failed to meet the criteria within Regulation 3 as they were not 'wholly' or 'almost wholly' without the use of their legs. The Court questioned, in the context of a statutory scheme of assistance for the adaption of vehicles to the needs of seriously and permanently disabled persons, the relevance of being able to walk 25 steps with a walker or 100 metres without rest, as was the case with the appellants. Ms. Justice O'Malley restated that the key issue in terms of the statue was whether there was a need to adapt a vehicle to account for a person's severe and permanent disability.

It was concluded that Regulation 3 had the effect of excluding persons with severe and permanent disabilities, which greatly limit their mobility and create a need for adapted transport, from receiving repayments under the section. In light of the Courts interpretation of s. 92, it was held that this result could not have been within the contemplation of the legislature or that it came within the scope of the Minister's power to formulate further necessary medical criteria for the implementation of the section. It was also found that the Board failed to provide adequate reasons for its decision to refuse the granting of medical certificates to the applicants.

The Court allowed each of the appeals. However, it declined to hold that Regulation 3 was invalid in circumstances where the problem was not with what it set out, but rather with its under-inclusive nature. The Court quashed the refusals of the Board to grant a medical certificate, and granted a declaration that, in applying the criteria set out in Regulation 3 to the appellants, the respondents failed to vindicate their rights under the Act.

CASES

M.A.M. (Somalia) v. Minister for Justice and Equality, K.N. (Uzbekistan) and Ors. v. Minister for Justice [2020] IESC 32

A declaration that a person is a refugee under section 17 of the Refugee Act 1996 does not cease when the person acquires Irish citizenship.

Although s. 2 of the Refugee Act, 1996 ('the 1996 Act'), provides a definition of "refugee", s. 8(1) states that an asylum seeker may apply to the Minister for Justice ("the Minister") for a declaration under s.17 that he or she be recognised as a refugee. It is only persons recognised as refugees by virtue of a s.17 declaration that are entitled to the range of benefits extended to refugees under the Act; coming within the s. 2 definition alone is insufficient. The benefit under s. 18(1) permitting refugees "in relation to whom a declaration is in force" to apply for family reunification was central to this appeal.

These proceedings involved two appeals in which M.A.M. and K.N. were granted asylum and received s. 17 declarations, becoming eligible to family reunification. Both appellants became Irish citizens and thereafter sought to bring family members to Ireland. This raised the question of whether the 1996 Act permitted reunification for refugees who had become Irish citizens. S. 2 of the1996 Act defines a refugee as being outside their country of nationality and, owing to a well-founded fear, being unwilling to return to it. The High Court held that as the appellants were now Irish citizens, they could not be refugees because they were not outside their country of "nationality" which was, by that time, Ireland.

The Court of Appeal upheld the High Court on the main issues, determining that the s.17 declarations had been revoked by 'operation of law' once each acquired Irish citizenship. This was said to arise from the fact that an asylum seeker becomes a refugee when the test contained in the Geneva Convention relating to the Status of Refugees, 1951 is met, with the s. 17 determination being purely declaratory of that pre-existing status. It followed that the loss of such status was also declaratory, in that the person ceased to be a refugee by operation of law.

Mr. Justice MacMenamin (Mr. Justice O'Donnell, Mr. Justice McKechnie, Ms. Justice Dunne and Mr. Justice Charleton concurring) held that nothing in s. 2 suggests that, by becoming Irish citizens, the country of nationality of the appellants had altered. Their countries of nationality remained Somalia and Uzbekistan, respectively, and to hold otherwise would be to do violence to the statutory language in issue.

Concerning the contention that refugee status could cease by operation of law, Mr. Justice MacMenamin noted the fact that s. 21 of the 1996 Act exhaustively lists the circumstances where the Minister can revoke a s.17 declaration. This would be superfluous if revocation was automatic. Rather, a declaration was determinative of a new status, distinct from that under s. 2.

The Court held that, should the interpretation of the Minister of the Act be accepted, it would have the effect of creating substantial legislative uncertainty when the purpose of the Act was to achieve clarity. The appeal was allowed.

CASES

The People (Director of Public Prosecutions) v. McNamara [2020] IESC 34

Provocation is a defence which has always been limited by objective elements. The provocative act, by action or gross insult, is required to be outside the bounds of any ordinary interaction acceptable in our society and the test for a person to lose self-control requires a person to exercise ordinary restraint, the same kind as an ordinary person of the same age and state of health as the accused.

On the 20th of June, 2015 the accused was found guilty of murder. The Court of Appeal upheld the decision of the trial judge to rule out provocation. The accused then brought an appeal to the Supreme Court which granted leave to appeal on the following issues:

1. Does the defence of provocation require that the provoking action or words come from the ultimate victim?
2. To what extend can background circumstances found or inform the defence of provocation?
3. Should or does the proper construction of the defence of provocation contain any objective element either as to reaction or as to mode of response or as to time of response?
4. What role, if any, does the trial judge have in excluding the defence of provocation from the jury?

The accused was a member of a motorcycle club. On the 19th of June, 2015 he went with his wife to have a drink in a pub. On leaving the pub, they were accosted by three members of a rival motorcycle club who ripped off and stole the accused's jacket which bore the insignia of his club. His wife tried to intercede but she was held back. The accused alleges that, after he and his wife returned home, a car pulled up outside their house containing other members of the rival motorcycle club, who were bearing firearms. It was before the court at trial that these members of the rival club were shouting threats including, 'We're going to kill ye and burn your house down'. The following day, the 20th of June, 2015, three members of the motorcycle club of which the accused was a member, including his stepson, were driving through a village where they came across a member of the rival motorcycle club who had assaulted the accused in the pub, and they pursued him. The members of the motorcycle club of which the accused was a member were on the phone to the accused whilst this car chase was taking place. The man being pursued collected the now deceased man, who had not been at the pub nor involved in the drive-by, and went to the clubhouse of the other motorcycle club. The accused, who was at home at this point, armed himself with a sawn-off shotgun an dove towards the clubhouse. On arriving at the clubhouse, the accused shot the now deceased man.

The trial judge, Mr. Justice McDermott, did not consider this to be evidence of provocation. The accused unsuccessfully appeal to the Court of Appeal.

On appeal to the Supreme Court, Mr. Justice Charleton (Chief Justice Clarke, Mr. Justice MacMenamin, Ms. Justice Dunne and Ms. Justice O'Malley concurring) set out the history of provocation and the test for provocation in Irish law. Provocation is required to be "serious provocation". He ruled out "trivial insults" and set out that the provocative act cannot merely be gang warfare or unacceptable notions of how women ought to behave, thus ruling out honour killings from the defence.

Mr. Justice Charleton found that objective elements have never been abandoned from the application of the defence of provocation. He considered that it is common sense that the most staid person may be provoked into using bad language and that a hot-tempered person who has used violence throughout a lifetime may respond violently to a trivial insult or take matters to the level of lethal violence. All are required to exercise control over themselves and all are to be judged on the basis of their sober, and not intoxicated or drugged, selves. There has to be a common and sensible standard which takes into account the variability of people as to age or sex or pregnancy and state of health or capability. Equally, social norms must now exclude violent responses to ordinary stresses or to phobic reaction to the right of people to choose their own lifestyle or path.

Mr. Justice Charleton held that provocation is a defence which has always been limited by objective elements and by the need for the account of loss of self-control to be genuine and not contrived or bogus. There must be a sudden and unlooked-for, and not a considered or planned, loss of self-control. That loss must be total to the degree that it is not merely a loss of temper but such a complete overwhelming of constraint, in the face of what was done or said, that the accused cannot help intending to inflict death or serious injury, and cannot stop himself or herself inflicting such deadly violence. Loss of self-control must be in response to a serious provocation, not a mere insult, by the victim. The provocative act, by action or gross insult, is required to be outside the bounds of any ordinary interaction acceptable in our society. The defence does not apply to warped notions of honour for cultural or religious reasons or on the proper romantic or sexual conduct of males or females, or mere hurt to male pride, or to gang vengeance, or to situations where non-intoxicated people, sharing the same fixed characteristics as the accused as to age or sex or pregnancy or ethnic origin, would be able to exercise self-restraint in the same background circumstances as apply to that accused. If any of those features is absent, the defence is not applicable.

With regard to the decision of the trial judge to allow provocation to be put to the jury, Mr. Justice Charleton found that the trial judge is required to filter claims of provocation so that only those with an “air of reality” are accepted as establishing the defence. Ultimately, the appeal was refused and the decision of the Court of Appeal was affirmed.

CASES

Defender Limited v. HSBC France (formerly known as HSCBITS) [2020] IESC 37

The Court addressed the functioning of the provisions of the Civil Liability Act 1961 in relation to concurrent wrongdoers, and the standard to be reached to dismiss a matter as a preliminary issue.

In May 2007, the appellant, Defender Ltd., entered into a Custodian Agreement with the respondent, HSBC France, under which the latter would act as custodian for investment purposes. The following day, the respondent entered into a Sub-Custodian Agreement with Bernard L Madoff Investment Securities ("BLMIS"). Eighteen months later, it was revealed that BLMIS was in fact a Ponzi scheme run by its sole shareholder, Bernard Madoff. BLMIS was placed into liquidation in December 2008, and in March 2009, the respondent entered a claim on the appellant's behalf in the liquidation, seeking the recovery of the appellant's investment. The Trustee of the liquidation entered a counter-claim against the respondent a year later, seeking the recovery of monies already paid to the appellant. On March 23rd, 2015, the parties concluded a Settlement Agreement, under which it is expected that the appellant will recoup approximately 75% of its investment ($349 million of the $500 million having been returned to date).

In November 2013, the appellant commenced proceedings against the respondent, alleging negligence on their behalf in failing to guard against BLMIS's fraud, and asserting that the respondent was vicariously liable for BLMIS's acts. The appellant sought $141 million, being the balance of the funds then owing to it.

The case was heard in the High Court by Mr. Justice Twomey, who determined that the matter in relation to the Civil Liability Act 1961 ("the 1961 Act") could be dealt with as a preliminary issue. As it was dealt with in this way, the case of the appellant was to be taken at its height, assuming the respondent guilty of negligence, and BLMIS of fraud. Under s. 11 of the 1961 Act, the respondent and BLMIS were deemed concurrent wrongdoers and, by virtue of ss. 17(2) and 35(1)(h) of the 1961 Act, the appellant was identified with BLMIS (with whom they had made a settlement agreement pursuant to s. 17) and thus contributorily negligent in any action against the respondent. As part of this identification process, the Court had to engage in a hypothetical exercise where it determined the amount which it would have been just and equitable for BLMIS to contribute to the respondent, had the latter settled with Defender. In considering this contribution under s. 21(2), Mr. Justice Twomey found that, in light of the qualitative difference in the wrongs committed by the two parties, BLMIS would have had to contribute 100% of the settlement to the respondent. As such, the trial judge found that the respondent would not be obliged to repay the balance to the appellant.

In a leapfrog appeal by the appellant to the Supreme Court, Mr. Justice O'Donnell gave judgment on July 3rd, 2020, remitting the matter to the High Court (Ms. Justice Dunne, Ms. Justice O'Malley and Ms. Justice Baker concurring, and Mr. Justice Charleton concurring in a separate judgment). In his judgment, Mr. Justice O'Donnell found that, while the High Court was correct in his orthodox interpretation of the relevant provisions of the 1961 Act, it was incorrect in its finding that there was no possibility of BLMIS having to contribute less than 100% to the respondent in the hypothetical contribution analysis. Further, Mr. Justice O'Donnell found that it was incorrect to hold that a

criminal wrong always trumped a civil wrong such that a concurrent wrongdoer whose wrong was civil in nature would never have to contribute where the other concurrent wrongdoer was guilty of criminal wrongdoing.

In his separate concurring judgment, Mr. Justice Charleton emphasised the importance of using the provisions contained in the Rules of the Superior Courts to effectively case-manage complex litigation in the Commercial Court so as to ensure the best possible functioning of the Courts for all litigants.

CASES

University College Cork v. Electricity Supply Board [2020] IESC 38

The Court set out the appropriate test for negligence in the context of a dam operator who had failed to take steps to prevent downstream flooding. A duty of care to prevent foreseeable harm exists in circumstances where the alleged tortfeasor has a special level of control over the source of a danger, provided that the duty can be expressed in a manner which is not impermissible vague.

The appellant, UCC, suffered significant damage to their property during severe flooding in Cork City in November 2009. The appellant claimed that the respondent, the ESB, was negligent and guilty of nuisance for the way it had handled its dams upstream of Cork City, thereby causing or contributing to a significant part of the flooding. The respondent denied the claims of negligence and nuisance, but pleaded that, if it were found liable, the appellant should be found guilty of contributory negligence and have its damages reduced accordingly.

In the High Court, the appellant succeeded in part, as the trial judge concluded that the respondent was liable in nuisance and negligence. The trial judge found the respondent had a "measured duty of care" as an occupier to remove or reduce a hazard which existed to neighbouring properties. The respondent was held to have failed to do what it reasonably could and should have done to mitigate the nuisance. However, the High Court also found the appellant to be liable of contributory negligence, measured at 40%, of its failure to take reasonable steps to avoid and alleviate the effects of flooding on its campus.

Both parties appealed to the Court of Appeal. Speaking for the Court, President Ryan allowed the appeal of the respondent and overturned the High Court judgment on the basis that, in his view, it represented a significant alteration to the existing law of negligence and nuisance.

Both parties sought, and were granted, leave to appeal to the Supreme Court. Leave was granted in respect of both the question of primary liability on the part of the respondent, and any contributory liability of the appellant. However, in the course of case management it was determined that the matter of the appellant's contributory negligence was to be left over, pending a determination of primary liability.

In a joint judgment of Chief Justice Clarke and Mr. Justice MacMenamin (Ms. Justice Dunne concurring, Mr. Justice Charleton concurring in a separate judgement, and Mr. Justice O'Donnell dissenting), the respondent was found liable in negligence on the basis that it had breached a duty of care owed to downstream occupiers. This duty of care was held to arise on the basis of the special level of control the respondent held over water levels in the River Lee.

In its submissions before the Supreme Court, the respondent argued that the law of negligence generally imposes a duty not to cause harm, or, in the circumstances of this case, not to worsen nature, rather than a duty to confer a benefit, in an approach referred to as a "do no harm" principle. Chief Justice Clarke and Mr. Justice McMenamin were satisfied that Irish law recognises an exception to the "do no harm" principle in circumstances where a duty of care can arise to prevent harm from a foreseeable danger caused independently of the alleged wrongdoer, where it can be said that that wrongdoer has a special level of control over the source of the danger. This control must be substantial and not tangential. Chief Justice Clarke and Mr. Justice MacMenamin held that, on one hand, this exception does not require the wrongdoer to have a contractual or professional obligation to prevent harm but, on

the other hand, the special level of control required does take the scope of the duty beyond that of the mere bystander who foresees harm and chooses not to act. Moreover, the obligation to prevent harm does not arise if it would lead to the risk that the person exercising special control would suffer significant loss or damage themselves.

In assessing whether the above duty of care arose in the circumstances of any individual case, Chief Justice Clarke and Mr. Justice MacMenamin held that a court must assess first, whether there is a reasonable relationship between any burden which would arise from imposing such a duty of care and the potential benefits to those who may be saved from the danger in question, and second, whether it is possible to define the duty of care in question with a sufficient, but not absolute, level of precision so as to avoid imposing a burden which is impermissibly vague and imprecise.

Having regard to the forgoing factors, Chief Justice Clarke and Mr. Justice MacMenamin reached the conclusion that, in the circumstances of the case, the respondent had a significant level of special control over water levels in the River Lee downstream of the Lee Dams, and that this control was sufficient to give rise to a duty of care. They considered that it was possible to characterise the duty of care in question in a manner which is not impermissibly vague, expressing it as a duty of care owed to downstream land occupiers to assess, having regard to existing conditions and relevant weather forecasts, the likely range of possible outcomes, and to form a reasonable judgement as to how to manage the Lee Dams to minimise the risk to downstream land occupiers provided that any actions which might be required for that purpose would not place an excessive burden on the Respondent.

Chief Justice Clarke and Mr. Justice MacMenamin concluded that, on the facts of the case, the respondent had breached its duty of care to the appellant and was liable in negligence for the damage caused by the flood in November 2009. They reached this finding on the basis that the respondent had its possession sufficient scientific knowledge to assess the potential effects on downstream land occupiers of any failure to increase the capacity of the Lee Dams so as to prevent flooding which had been predicted by weather forecasts.

In his dissenting judgment, Mr. Justice O'Donnell found that, while there was sufficient proximity between the parties, and that the damage caused by the flooding was foreseeable, in light of the respondent's statutory function of electricity generation, it was not fair, just and reasonable to impose a duty of care which would alter their function to one of flood alleviation. Concurring with the majority that, in general, nobody is liable for the acts of another party, unless in specific exceptional circumstances, Mr. Justice O'Donnell disagreed with their conclusion that the respondent enjoyed a sufficient level of control over the river to justify their owing a duty of care to persons downstream. He concluded that it would be incorrect to attribute liability to the respondent for the damage caused by the November 2009 flood.

CASES

An Taisce v. An Bord Pleanála, An Taisce v. An Bord Pleanála & Ors., Sweetman v. An Bord Pleanála [2020] IESC 39

Provisions of the Planning and Development Act 2000 (as amended) which provided for a 'substitute consent' procedure Act 2000 (as amended) concerning "substitute consent" were inconsistent with Ireland's EU law obligations in relation to exceptionality and public participation under EIA Directive 85/337.

The appeals concerned two different quarries and three different cases. One appeal concerned a quarry in Co. Monaghan owned by J. McQuaid Quarries Limited ("the McQuaid case") and the other two appeals concerned a quarry in Co. Kildare ("the Ballysax cases"). The quarries had applied for "substitute consent" planning permission in order to regularise their activities.

The cases centred on whether the "substitute consent" procedure under the Planning and Development Act 2000 (as amended) ("the 2000 Act") was in breach of Ireland's EU Law obligations under the Environmental Impact Assessment Directive 85/337 (EIA Directive) in relation to exceptionality and public participation, two issues which the European Court of Justice (ECJ) had previously ruled on.

In the High Court, McQuaid Quarries applied to An Bord Pleanála ("the Board") for leave to seek substitute consent, pursuant to s. 177C(2)(a) with the Board granting leave, under to s.177D(1)(a). Thereafter, a substantive application was made by McQuaid Quarries. An Taisce brought proceedings to challenge that decision. The High Court held that the proceedings had been commenced out of time and were a collateral attack on the leave decision. The High Court also took the view that procedural issues aside, the substantive issues raised had no merit.

In the High Court, the Ballysax cases were decided as composite cases. The cases concerned an unauthorised development with no planning permission. An application was made for substitute consent under s. 177C(2)(b) of the 2000 Act to the Board. An Taisce and Mr. Sweetman sought to make submissions to the Board. However, these submissions were returned to them as the Board contended there was no legislative provision for members of the public to make submissions at that stage of the process. Judicial review proceedings were separately instituted by An Taisce and Mr. Sweetman challenging that decision of the Board. The High Court noted the possibility in s. 177K(2) of the 2000 Act for the public to make submissions at the substantive stage and the substitute consent proceedings were a "closed process" and therefore, by way of statutory interpretation it concluded that there was no right to participate at the leave stage.

The parties in the McQuaid case and the Ballysax cases appealed to the Supreme Court directly in a so-called "leapfrog appeal". The cases were co-joined in the Supreme Court. Mr. Justice McKechnie gave the judgment of the Court (with whom Chief Justice Clarke, Mr. Justice O'Donnell, Ms. Justice Dunne and Ms. Justice Baker agreed).

The Court first dealt with the issue arising from the McQuaid case of whether the gateway application for substitute consent under s. 177(2)(a) of the 2000 Act was compliant with the exceptionality test as laid down repeatedly by the ECJ. The Court highlighted the settled jurisprudence of the ECJ and noted that the principles of exceptionality were reaffirmed in C-215/06, *Commission v. Ireland*. The Court concluded that "there can be no doubt that exceptionality remains an essential requirement

of EU law and must therefore be respected in any national measure providing for retrospective regularisation in circumstances such as those arising in the McQuaid Quarries case."

The Court examined the type of procedure that s. 177C(2)(a) required and whether that was compliant with the exceptionality requirement. The High Court held that it had, as the McQuaid quarry was able to squeeze itself through the gateway offered by s. 177C(2)(a) and D(1)(a) and not all quarries will be in that position to do so. The Supreme Court held that this was not sufficient to meet the EU law exceptionality requirement as the types of considerations under Statute required were 'relatively general and ordinary' and are 'broad and widely drawn'. As such, the Court held that Irish legislation had not properly transposed the Directive on the point of "exceptionality" in relation to the gateway of s. 177C(2)(a) and s. 177D(1)(a).

Next, the Court turned to the central issue in the Ballysax cases of whether the public right to participate under the EIA Directive was satisfied under either s. 177C(2)(a) or C(2)(b). The High Court had been satisfied that as there was no right to make submissions under Irish legislation and under EU law, there was no breach of participatory rights as submissions could be made once application for leave is granted.

The Supreme Court held that there is no method of construction which leads to the conclusion that the public has a general right to make submissions at the leave stage. However, the Court noted that the EIA Directive regards public participation as an important step in the decision-making process. On this basis, the Court held that the 2000 Act fails to provide for effective participation at a stage when all solutions remain open – the option of refusing to grant leave is no longer possible once the public have any opportunity to make submissions. Therefore, the Court held that the 2000 Act had failed to transpose the EIA Directive in respect of public participation.

There were other issues raised by the cases, however, the Court declined to provide definitive answers as they were not necessary to resolve the cases. The Court raised the prospect that, in the future, the Court might have to address whether the doctrine of collateral attack might need to be addressed in light of EU law. Similarly, there was a question as to whether EU law requires non-Court bodies to strike down conflicting provisions of national law.

CASES

Minister for Justice and Equality v Palonka [2020] IESC 40

The Supreme Court retained the appeal but found that the High Court may not have had sufficient information on which to order the enforcement of a European Arrest Warrant.

This case concerned a European Arrest Warrant issued by Poland. Two offences committed by the appellant were relevant in this case – the first was committed in July 1999 and concerned the possession of drugs, and the second was committed in March 2003. In 2002, a Polish sentencing court imposed a ten month sentence in respect of the first offence, but it was stayed. Sentencing for the second offence took place in June 2003 and a fine was imposed; in 2004 this was changed into a prison sentence, possibly because the prior record on the 1999 offence was only discovered then, although this is unclear. It is also unclear as to whether the 2002 sentence was revoked in 2006 as a result of the second offence, although this seems likely. Surrender was sought from Ireland to Poland in May 2015 in respect of the second offence but this was rejected by the Court of Appeal. Surrender on the 1999 offence was sought in June 2019 and formed the subject of this case.

In the High Court, the EAW issued by Poland was ordered to be enforced. In the Supreme Court, Mr. Justice Charleton (Chief Justice Clarke and Ms. Justice Baker concurring) identified two questions of general public importance: first, if the issue of a second EAW, seven years after the issue of a warrant in this jurisdiction in relation to a separate offence, and four years after refusal of surrender in that case, may be seen as an abuse of process; and second, whether surrender can be ordered in respect of an *in absentia* activation of a suspended sentence if such activation was triggered by an *in absentia* conviction for which surrender has been refused.

Mr. Justice Binchy in the High Court had found against the appellant in respect of both questions. With regards to the first, he found that the appellant's family circumstances were not out of the ordinary and the effects of surrender on himself and his family would be typical of the impact surrender has on any family; he found the surrender to be proportionate considering the public interest; and he noted that delay can result in a refusal of surrender but only when combined with other factors which were not present in this case. Regarding the second question, Mr. Justice Binchy found that because the 2004 decision to revoke the suspension of sentence for the 1999 offence did not change the nature or level of the sentence initially imposed upon the appellant, the appellant's surrender would not be contrary to s.45 of the European Arrest Warrant Act 2003.

Mr. Justice Charleton notes that what concerned the Supreme Court in this case was that the High Court may not have had sufficient information on which to rule. The Court retained the appeal but also saw it as necessary for the High Court to seek further information from the Polish authorities. Suggested questions to be posed to these authorities were included within the Supreme Court's judgment but that Court found that it is for the High Court to make the information request. Mr. Justice Charleton noted that the information should relate to such facts as might reasonably be necessary to enable an assessment to be made of the legal issues, including the possible necessity for a reference to the Court of Justice of the European Union on the questions of the activation of a sentence *in absentia* and what constitutes an abuse of process.

CASES

I.X. v. Chief International Protection Officer & Anor. [2020] IESC 44

The use of independent contractors in the process of determining whether or not asylum-seekers be granted international protection or subsidiary protection is permissible. On the evidence presented of how the contractors work, in practical terms, there is no unlawful delegation of statutory functions.

These cases concerned the practice of utilising the services of a panel of independent contractors made up of self-employed barristers to assist in the processing of applications for refugee status under the Refugee Act 1996 ("the 1996 Act") and applications for refugee status and subsidiary protection under the International Protection Act 2015 ("the 2015 Act").

Section 11 of the 1996 Act provided that the-then Refugee Appeals Commissioner ("the Commissioner") would investigate applications received to ascertain whether the applicant was a person in respect of whom a declaration of asylum status should be given and that the Commissioner 'shall … direct an authorised officer or officers' to interview the applicant and furnish a written report to the Commissioner. Section 13 of the 1996 Act provided that where the Commissioner carried out a s. 11 investigation, they would then prepare a report in writing along with the recommendation as to whether or not the applicant be declared a refugee.

The 2015 Act was introduced to provide a single statutory procedure for the assessment of claims of asylum, subsidiary protection, and leave to remain. It also contained transitional provisions providing that where an appeal was outstanding under s. 16 of the 1996 Act against a refusal of refugee status, the applicant was deemed to have made an application for international protection under the 2015 Act.

The issue at hand was whether it was permissible to use the independent contractors to carry out interviews and draft reports for use in the assessment of whether an applicant should be declared a refugee or granted international protection or subsidiary protection. Section 1 of the 1996 Act provided for an "authorised officer", authorised in writing, to exercise the powers conferred on them by the Act. Section 76 of the 2015 Act provided that contractors could be engaged to carry out functions under the Act, and it seemed that they could indeed interview the applicants. The core issue in these cases was whether the level of contractor input into the reports recommending that applicants be granted or refused declarations was permissible.

In the Supreme Court, after a careful review of the statutory framework, the affidavits of the relevant civil servants, and the guidance documents given to the contractors, Mr. Justice O'Donnell (with whom President Irvine, Mr. Justice MacMenamin, Ms. Justice Dunne and Mr. Justice Charleton agreed) dismissed the appeals and held that there was no issue regarding the impermissible delegation of powers. In each of the cases, the contractors carried out their duties lawfully. Furthermore, the designated civil servants under both the 1996 Act and the 2015 Act carried out their duties and could be said to have improperly delegated their functions. It was clear that the reports and the decisions in relation to applications remained those of the Commissioner or the international protection officers, depending on the statute.

CASES

Director of Public Prosecutions v. Doherty [2020] IESC 45

'Communication' means that information is made common as between the person communicating and the person communicated. Indirect communications could constitute harassment for the purposes of s. 10 of the Non-Fatal Offences Against the Person Act 1997, provided that they were manifestly for the victim's eyes.

This case arose from a series of communications from the appellant to the victim, which involved the sending of letters (both to the victim personally and to her employer), the sending of emails to persons connected to the victim and the placing of leaflets close to the home of the victim, all of which alleged that the victim was engaged in corruption.

The appellant was convicted of harassment contrary to s. 10 of the Non-Fatal Offences Against the Person Act 1997 ("the 1997 Act"). Under s. 10 of the 1997 Act, a person is guilty of harassment if they, without lawful authority or reasonable excuse, harass another "by persistently following, watching, pestering, besetting, or communicating" with him or her by any means, including a phone. The trial judge had directed the jury that harassment under s. 10 of the 1997 Act encapsulated both direct and indirect harassment, and that "beset" was to be given its plain, ordinary meaning, which did not require it to be understood as surrounding property, but instead meant 'to trouble persistently'. On appeal, the Court of Appeal upheld the direction of the trial judge.

On appeal to the Supreme Court, the appellant made three submissions. First, that emails to people other than the victim did not constitute communication within the meaning of the legislation. Secondly, leafleting a neighbourhood could not be considered communication with a specific person. Thirdly, as the prosecution had described the alleged harassment in terms of "besetting", the case must fail as this required physical watching or a physical presence, something which the appellant had not engaged in

In the Supreme Court, all five members of the panel (Mr. Justice O'Donnell, Mr. Justice MacMenamin, Mr. Justice Charleton, Ms. Justice O'Malley and Ms. Justice Baker) agreed that indirect communication could constitute harassment. Mr. Justice Charleton found that that, relying on plain meaning and ordinary usage, communicating with someone 'means that some information is made common as between the person communicating and the person communicated with' and that this 'does not necessarily require the victim to be directly addressed.'

A majority of the Court (Mr. Justice O'Donnell, Mr. Justice MacMenamin, Ms. Justice O'Malley and Ms. Justice Baker) held that what had occurred in this case was not, as the prosecution had submitted, harassment through "besetting". Ms. Justice O'Malley held that besetting required the accused's persistent physical presence in or close to the location of the complainant, as to create an offence based on the figurative use of the term would be too loose a basis on which to create a criminal offence.

The judgments of Mr. Justice O'Donnell, Mr. Justice Charleton and Ms. Justice O'Malley agreed that the recommendations of the Law Reform Commission to the effect that the 1997 Act should be updated to remove the "arcane" language of "beset", should be implemented.

CASES

NVU & ors v. Refugee Appeals Tribunal & Ors. [2020] IESC 46

The discretion in Article 17 of the Dublin III Regulation which vests in Member States the discretion to deal with an application for refugee status on humanitarian or compassionate grounds where Dublin III would otherwise have resulted in that application being transferred to another Member State is vested in the Minister for Justice and has not been delegated to refugee assessment bodies.

Where a person seeks protection in Ireland but has previously made an application for refugee status within the EU, or has travelled on a visa to another EU country, European law requires that they be transferred to that other country for their claim to be considered. However, the EU Member State in which the application is made has a general discretion to consider it on humanitarian or compassionate grounds, as set out in Article 17 of the Dublin III Regulation.

This case involved judicial review proceedings brought by a family from Pakistan who went to the United Kingdom before moving to Ireland on the expiration of their visiting visa. The proceedings related to a decision of the Refugee Appeals Tribunal in Ireland that their asylum application should be examined in the United Kingdom on the basis that, until such time as an organ of the State sets out clearly that the Tribunal has jurisdiction to exercise the discretionary power under Article 17 of the Dublin III Regulation, it could not do so.

The High Court upheld the decision of the Refugee Appeals Tribunal that discretion under Article 17 was a sovereign power of the State vested only in the Minister for Justice to decline to transfer the family to Britain unless that power had been expressly delegated to the national asylum authorities, and that no such delegation had been provided for in Irish law. The Court of Appeal reversed this decision.

On appeal to the Supreme Court, the finding of the Court of Appeal was rejected. Mr. Justice Charleton (with whom Chief Justice Clarke, Mr. Justice O'Donnell, Mr. Justice MacMenamin and Ms. Justice O'Malley concurred) referred to SI 525/2014 European Union (Dublin System) Regulations and noted that upon reading them 'it becomes apparent that no discretionary power has been devolved from the Minister to the decision-making bodies' and that '[w]hat have been transferred are administrative tasks as to the enquiry into the origin of an applicant for international protection, whether he or she reveals the issue of a visa for another country or that an application had already been commenced in another country.'

The family claimed that, within Dublin III and SI 525/2014, there are to be found some bases upon which the unfettered discretion reserved to the State is to be exercised by the examining bodies responsible for refugee applications. Mr. Justice Charleton noted that examples of discretionary powers of such a wide and unfettered nature vested in an administrative or quasi-judicial body are difficult to come by, if they exist at all. He concluded that there is no sign of any such delegation or of any basis on which that discretion could ever be exercised by anyone other than the Minister.

CASES

Friends of the Irish Environment v. Government of Ireland & Ors. [2020] IESC 49

A statutory plan enacted for the purpose of tackling climate change did not comply with its statutory mandate as it did not sufficiently specify the policy measures which are required to be taken over the whole period until 2050 so as to transition to a low carbon, environmentally sustainable economy, and therefore was quashed.

A corporate entity, Friends of the Irish Environment ("FIE"), brought proceedings against the Government of Ireland, seeking judicial review of the manner in which it adopted a statutory plan for tackling climate change, the National Mitigation Plan ("the Plan"). The Plan was adopted under the provisions of the Climate Action and Low Carbon Development Act 2015 ("the 2015 Act"). The Plan is required, under s. 3(1) of the 2015 Act, for the purpose of enabling the State to pursue and achieve the objective of transitioning to a low carbon, climate resilient and environmentally sustainable economy by the end of 2050. That objective is described as the National Transitional Objective ("NTO"). Such a plan must be published at least once every five years.

FIE claimed that, in adopting the plan, the Government failed to adequately vindicate rights guaranteed by the Irish Constitution, and, further that the Plan was *ultra vires* the 2015 Act. Their claim was dismissed at first instance in the High Court (*Friends of the Irish Environment v. Government of Ireland* [2019] IEHC 747), and FIE sought leave to appeal to the Supreme Court. In light of the urgency of the matter and the fact that there was no dispute between the parties as to the science underpinning the Plan, the Supreme Court considered that it was unlikely that factual issues or questions of law would be further refined as a result of a hearing before the Court of Appeal, and so a "leapfrog" appeal from the High Court to the Supreme Court was allowed.

On appeal, FIE argued that Government had failed to comply with a number of mandatory requirements and obligations under the 2015 Act with regard to the adoption of the Plan. In particular, s. 4(2)(a) of the 2015 Act requires that the Plan must 'specify the manner in which it is proposed to achieve the national transition objective'.

At first instance, the trial judge concluded that the Plan did not breach any of the relevant sections of the 2015 Act and found nothing in the Plan which, in his view, could be said to be inconsistent with the statutory aim to transition to a low carbon, climate resilient and environmentally sustainable economy by 2050 as required by the NTO. He also held that the Plan made clear proposals in respect of the state's pursuit of the NTO by 2050 and, therefore, it could not be said to be inconsistent with s. 4 (2) of the 2015 Act.

FIE also argued that as the Plan envisages an increase, rather than a decrease, in emissions over the initial period of the Plan while, at the same time, committing to achieving the objective of zero net carbon emissions by 2050, this will inevitably lead to a greater total volume of emissions in the period to 2050. Thus, it was submitted that the Plan did not contribute sufficiently to the aim of reducing warming, and FIE alleged that as a result, the Government had failed to vindicate rights guaranteed under the Constitution such that its adoption was unlawful.

The rights invoked by FIE under the Constitution were the right to life and the right to bodily integrity, said to be under threat from the future consequences of climate change, and the unenumerated right to a healthy environment, as previously identified in

an earlier judgment of the High Court (*Friends of the Irish Environment v. Fingal County Council* [2017] IEHC 695).

In response to this, the Government argued, amongst other things, that having regard to the separation of powers, the issues raised were matters of policy which were not justiciable, and that FIE, as an incorporated association, did not have standing to assert constitutional or Convention rights which it does not enjoy itself, such as the right to life.

While the trial judge held that as FIE sought to raise important issues of a constitutional nature which affected both its own members and the public at large, as well as significant issues in relation to environmental concerns, in the interests of justice it did have standing to assert the rights invoked, he was not satisfied that the making or approval of the Plan could be said to put these rights at risk.

Delivering the Supreme Court's judgment, Chief Justice Clarke (President Irvine, Mr. Justice O'Donnell, Mr. Justice MacMenamin, Ms. Justice Dunne, Ms. Justice O'Malley and Ms. Justice Baker concurring) held that it would be appropriate to consider the question of *vires* (justiciability) first. Chief Justice Clarke dismissed the Government's submission that the matter was not justiciable, holding that the question of whether a plan complies with statutory obligations is clearly a question of law rather than one of policy, and in particular that the question of whether the Plan meets the specificity requirements in s. 4 of the 2015 Act is justiciable.

Considering the proper approach to the interpretation of statute, Chief Justice Clarke held that the statutory regime was designed with a view to ensuring public participation and transparency regarding the achievement of the NTO by 2050. Having regard to these values, it was determined that the level of specificity required of a compliant plan under s. 4 of the 2015 Act was such that a reasonable and interested member of the public should know how the government of the day intends to meet the NTO by 2050. Considering the text of the Plan, Chief Justice Clarke held that significant parts of the policies can be reasonably characterised as being 'excessively vague or aspirational'.

It was also held that while plans are to be published every five years, it would be wrong to suggest that the legislation contemplates a series of five-year plans. Rather, Chief Justice Clarke held, the legislation contemplates a series of rolling plans adjusted every five years to reflect prevailing circumstances. While the level of specificity for the latter years may legitimately be less, he held there must be nonetheless a policy identified which does specify in some reasonable detail the kind of measures that will be required up to 2050 in order to achieve the NTO.

It was concluded that the Plan did not demonstrate the specificity required, and that therefore the Plan did not comply with the requirements of s. 4 of the 2015 Act. On that basis, it was held that the Plan should be quashed.

Obiter, Chief Justice Clarke then addressed certain remaining issues in relation to the rights-based claims advanced, given they may arise in potential future challenges to a new plan. It was concluded that FIE, as a corporate entity which does not enjoy in itself the right to life or the right to bodily integrity, does not have standing to maintain the rights-based arguments which were put forward. Further, he considered that an exception to the

general rule of standing was not appropriate in the circumstances, as there had been no suggestion that the potential class of individual plaintiffs affected by the measures would be in a disadvantaged position such that they cannot adequately assert their constitutional rights.

Finally, Chief Justice Clarke offered some comments on the existence of a right under the Constitution to a healthy environment. First, he noted that rights which are not explicitly mentioned in the text of the Constitution should be more properly referred to as 'derived' rights, rather than unenumerated ones, for it conveys that there must be some root of title in the text or structure of the Constitution from which the right in question can be derived. Chief Justice Clarke then expressed the view that the right to a healthy environment as asserted in these proceedings was either superfluous, if it does not extend beyond the boundaries of the pre-existing rights to life and to bodily integrity, or excessively vague and ill-defined, if it does go beyond those rights, and thus cannot be derived from the Constitution. Chief Justice Clarke reserved his position, however, on whether constitutional rights and obligations may be engaged in future environmental litigation.

CASES

Gorry & Anor. v. Minister for Justice and Equality; A.B.M. & Anor. v. Minister for Justice and Equality [2020] IESC 55

Irish citizens do not enjoy a constitutional right to have their non-national spouse reside in Ireland.

In the first matter before the court ("the Gorry case"), the first named appellant (Ms. Gorry), a Nigerian national, was the subject of a deportation order in 2005, which she evaded. In 2006, she began a relationship with an Irish national, the second named appellant (Mr. Gorry), and, in 2009, they went to Nigeria, where they were married. The couple then applied both for a revocation of the deportation order, and for a visa for Ms. Gorry to enter Ireland. Both applications were rejected by the Minister. Though the couple separated between the issuing of the High Court and Court of Appeal judgments, but the latter Court deemed the issue not to be moot.

In the second matter ("the A.B.M. case"), the applications of a the first named appellant, a Nigerian national (A.B.M.), for asylum and/or subsidiary protection had been refused in 2006. A deportation order was issued against him in 2008, which he evaded for seven years and sought revocation thereof in 2014. In 2015, he married the second named appellant (B.A.), also a Nigerian national, who became pregnant later that year. The Minister refused to revoke A.B.M.'s deportation order, which the applicant then sought to judicially review, leading to the proceedings.

In the Gorry case, the High Court quashed the Minister's decision, considering that Irish nationals have a *prima facie* right to have their non-national spouse reside in Ireland. In the ABM case, the High Court dismissed the challenge to the Minister's refusal to revoke the deportation.

The Court of Appeal upheld the decision in the Gorry case, although on a different basis from the High Court. The Court of Appeal held that the High Court was not correct to find that Irish nationals enjoy a *prima facie* right to have their non-national spouse reside in Ireland. Additionally, the Court of Appeal considered that the Minister had erred in treating the constitutional rights enjoyed by families as indistinguishable from those enjoyed by families under the European Convention on Human Rights ("the ECHR"), when in fact the Constitution's protections are stronger than those under the ECHR. In the A.B.M. case, the Court of Appeal allowed the appeal as the Minister had again incorrectly weighted the Constitutional and ECHR rights. Both of these judgments were appealed to the Supreme Court.

In the Supreme Court, Mr. Justice O'Donnell (Mr. Justice MacMenamin, Ms. Justice Dunne and Mr. Justice Charleton concurring, Mr. Justice McKechnie concurring for different reasons in a separate judgment) upheld the conclusions of the Court of Appeal, finding that the Minister had incorrectly treated the constitutional analysis as identical to the ECHR analysis. Additionally, he found that the Minister is required to have regard to the rights of an Irish citizen to reside in Ireland and to marry and found a family.

However, non-citizens do not have a right of residence in Ireland, nor do they acquire such by marriage to an Irish citizen. The right to marry exists, but is not unqualified, as evidenced by the prohibition on polygamy and the long-standing, now removed, restriction of marriage to heterosexual couples only, which was unconstitutional. Further, Mr. Justice O'Donnell held that the words of Article 41, in particular, "inalienable" and "imprescriptible", should be given their ordinary, natural meaning. There was no right to cohabit in Ireland, which was

protected by the constitutional obligation to protect the institution of the family, and the removal of persons from the State was within the realm of the State and not that of the family.

While the non-citizen spouse of an Irish citizen did not therefore enjoy a right to reside in the State, in making or refusing to revoke a deportation order concerning that spouse, a majority of the Court held that the Minister was obliged to consider: the right of the Irish citizen to reside in Ireland; the right of the Irish citizen to marry and found a family; the obligation on the State to protect the institution of marriage; and the fact that deportation prevents cohabitation in Ireland and may make such difficult elsewhere.

Though reaching the same overall conclusion as the majority in dismissing the Minister's appeal, Mr. Justice McKechnie differed in holding that Irish citizens do have a right to decide to cohabit with their spouse in Ireland, locating this right in Article 41.1.1°. In his judgment, the words "inalienable" and "imprescriptible" in Article 41 were not to be read literally, but as an indication that the rights in Article 41.1.1° enjoy the highest level of protection possible in the State. Among these rights are the rights of a married couple to reside in, and to decide to reside in, Ireland. However, there is no *prima facie* right of an Irish citizen to reside in Ireland with their non-citizen spouse. Further, the rights in Article 41 can be constrained by "compelling justification", including the need to maintain an orderly immigration system and the interest in controlling entry to the State.

Notwithstanding the different approaches preferred in the majority judgment of Mr. Justice O'Donnell and that of Mr. Justice McKechnie, the Court unanimously dismissed the Minister's appeals.

CASES

Word Perfect Translation Services Limited v. Minister for Public Expenditure and Reform [2020] IESC 56

The Court set out the principles to be applied to discovery requests in public procurement cases involving confidential commercial information pertaining to third parties.

The appellant, Word Perfect Translation Ltd., is a company providing translation and interpretation services. The appellant challenged the decision by the respondent, the Minister for Public Expenditure and Reform, to award a contract for the provision of translation services to an Garda Síochána to a rival tenderer. In the context of that challenge, the applicant sought discovery of nine categories of documents relating to the criteria used by the Minister for evaluating tenders. The appellant argued that these documents were necessary to allow it to pursue its application for judicial review, and alleged that there had been a series of errors in the tendering process. The respondent argued that granting the full discovery sought would result in the complete disclosure of the tender of the successful tenderer which, it submitted, would be disproportionate as it would fail to respect the confidentiality of documents containing financial information pertaining to a third party.

In the High Court, the applicant was granted discovery of all nine categories of documents sought. The Court of Appeal overturned the decision of the High Court in its entirety on the basis of what it found were legitimate confidentiality concerns on the part of rival tenderers that their sensitive commercial information could become available to their business rivals in discovery.

On appeal to the Supreme Court, partial discovery was granted and Chief Justice Clarke (with whom Mr. Justice O'Donnell, Mr. Justice MacMenamin, Ms. Justice Dunne and Ms. Justice O'Malley concurred) set out the correct approach to granting discovery in public procurement cases.

In respect of the potential EU law dimension to the issues arising in the case, Chief Justice Clarke observed that EU member states enjoy procedural autonomy with regard to regimes for the disclosure of materials, subject to the EU law principles of equivalence and effectiveness.

Turning to the issue of the principles that should be applied to discovery in procurement law proceedings, Chief Justice Clarke found that the starting point in any discovery litigation is to determine the relevance of the requested documents to the proceedings. Chief Justice Clarke stated that, in public procurement litigation, the standard of review and the scope of remedies available to a court are potentially wider than those in judicial review proceedings and that, consequently, the scope of issues properly arising, and the potentially relevant categories of documents, also have the potential to be wider.

Chief Justice Clarke identified four principles to be applied in the particular context of public procurement litigation. First, the fact that information may be confidential is not necessarily a barrier to its disclosure. Second, achieving proportionate discovery requires striking a balance between the extent to which ordering discovery of a particular category of document may give rise to the disclosure of confidential information, and the extent to which it can be reasonably anticipated that the information concerned may be important to a just and fair resolution of the proceedings. Third, it may be disproportionate to direct discovery of confidential information where no credible basis has been put forward for suggesting that there is a sustainable basis for the aspect of the claim in respect of which the confidential information concerned is

said to be relevant. In procurement proceedings, the extent to which adequate reasons have been given for the result in the tender competition may be relevant. Fourth, it is recognised generally that a judge conducting a substantive hearing of proceedings may well be in a better position to identify whether the disclosure of confidential information is really necessary to enable a fair result of the proceedings to be achieved.

Chief Justice Clarke held that the above principles have particular application in the context of procurement cases, not because those cases inherently require a special or different approach to discovery, but due to the tendency of procurement cases to involve confidential information. He emphasised that the principles set out above should be adopted in any type of proceedings involving a similar level of confidential information.

The approach that Chief Justice Clarke suggested should be adopted in appropriate procurement proceedings involves directing immediate discovery of documents which are relevant and which either do not involve confidentiality or where it is clear, even at the interlocutory stage, that the disclosure of confidential information will be required but where it is left to the trial judge to determine whether further disclosure may be necessary. Chief Justice Clarke found that this approach was one which improved the likelihood of a speedy resolution to the proceedings.

In the present case, Chief Justice Clarke concluded that, of the nine categories of discovery sought, immediate discovery should be ordered of the final evaluation report, subject to redactions, where no reasons were given for the marking in the areas concerned and where issues arose regarding the application of undisclosed award criteria. In respect of any further discovery, Chief Justice Clarke determined immediate discovery should not be ordered of the remaining documents sought, but that the position should be preserved so that the trial judge could require further disclosure should it become clear at the hearing that such disclosure was necessary for a just and fair resolution of the proceedings.

CASES

Minister for Communications, Energy and Natural Resources v. Information Commission & Anor. [2020] IESC 57

Refusals by public bodies to disclose confidential or commercially sensitive documents under the Freedom of Information Act 2014 must be justified.

The appellant, the Minister for Communications, Energy and Natural Resources ("the Minister") refused a request by the journalist Gavin Sheridan seeking a copy of a contract between the Department and e-Nasc Éireann Teoranta to manage the State's fibre-optic broadband network. The refusal was based on two exemptions provided under Part 4 of the Freedom of Information Act 2014 ("the 2014 Act"): commercial sensitivity and confidentiality. The Minister claimed it had a duty of confidence to the private interests of e-Nasc and that releasing the underlying contract would undermine the ability of the company to act on behalf of the State in a competitive environment.

The respondent, the Information Commissioner ("the Commissioner"), directed that the contract be disclosed. The Minister appealed this decision to the High Court, which upheld the decision of the Commissioner on the grounds that a refusal to disclose records requires justification. The Minister then appealed to the Court of Appeal, which reversed the decision of the High Court. The Commissioner appealed to the Supreme Court, arguing that there is nothing unclear about s. 22(12)(b) of the 2014 Act, which provides that a 'decision to refuse to grant' access to a record is presumed not to be justified.

In a judgment by Ms. Justice Baker (with whom Chief Justice Clarke, Mr. Justice O'Donnell, Mr. Justice MacMenamin, and Ms. Justice O'Malley agreed), the Supreme Court held that that the Commissioner was correct in stating that public bodies are required under ss. 35(3) and 36(3) of the 2014 Act to justify a refusal to disclose their records by providing reasons.

The decision of the Court centred on the balancing test in s. 22 of the 2014 Act, which considers whether disclosure is in the public interest. The finding of a public body that its records are exempt from disclosure does not automatically mean that they cannot be disclosed. Such a decision must be justified by reasons and the head of the Freedom of Information body must explain why the public interest does not justify the release of the document.

However, the Court held that the Commissioner was incorrect in requiring that lawful refusals to disclose can be justified only by 'exceptional circumstances', as this imposed an 'unduly high' bar on the public bodies.

On the facts, the Court dismissed the Minister's claim that the records benefited from the confidentiality exemption. However, it held that information could be excluded if its disclosure would amount to a breach of a duty of confidence, as created by contract or statute, provided that the public interest override in s. 35(3) did not apply.

The Court also held that s. 35(2), which carves out certain types of confidential information from the statutory exemption, applies to internal information of public bodies generated from any of its functions, and is not limited to internal information generated by its FOI function. The Court was clear that an FOI body cannot generate confidentiality by its own actions where there is no contractual or statutory basis to do so.

CASES

University College Cork v. Information Commission & ors [2020] IESC 58

A body claiming an exemption on disclosure of records under the Freedom of Information Act 2014 must be justified.

An investigative journalist with Raidió Teilifís Éireann ("RTÉ") sought disclosure of records relating to a €100 million loan advanced to the appellant, University College Cork ("UCC"), by the European Investment Bank ("EIB"), under the Freedom of Information Act 2014 ("the 2014 Act"). The case concerned four records to which UCC refused access, citing a commercial sensitivity exemption under s. 36(1)(b) of the 2014 Act. The decision to refuse access was appealed to the Office of the Information Commissioner, where the case was assigned to a Senior Investigator ("the Commissioner"). The Commissioner determined that the justification to refuse access to four records was insufficiently specific and ordered disclosure of four records.

The High Court overturned the decision of the Commissioner, following a ruling of the Court of Appeal in *Minister for Communications, Energy and Natural Resources v. Information Commissioner* [2014] IECA 68 ("ENET") that the Information Commissioner had made an incorrect presumption of disclosure of records pursuant to s. 22(12)(b) of the 2014 Act. The decision of the High Court was appealed directly to the Supreme Court. At the same time, an appeal to the Supreme Court was ongoing in the ENET decision. Ms. Justice Baker (with whom Chief Justice Clarke, Mr. Justice O'Donnell, Mr. Justice MacMenamin and Ms. Justice O'Malley agreed) gave judgments for the Supreme Court in the UCC and ENET cases on the same day.

In the UCC case, the Supreme Court granted leave to appeal *inter alia* on the issue of the correct presumption of disclosure, whether the Commissioner applied the correct commercial sensitivity test and whether the High Court erred in allowing UCC to present evidence not available to the Commissioner. In ENET, the Supreme Court held that an FOI body must come to a reasoned decision under the function of s. 22(12) with sufficient justifying reasons. A record is not exempt because it might fall within the remit of s. 36(1)(b) of the 2014 Act, which exempts documents on the basis of commercial sensitivity. It establishes that *prima facie* a document should be disclosed. In relation to the commercial sensitivity, it is not sufficient to assert that documents have commercial sensitivity. An FOI body must have a reasonable basis for that position.

Applying this analysis to the UCC case, the Court determined that the Commissioner was correct to require that the reasons for refusal be justified by the FOI body and UCC could not simply assert that the records fell within the exceptions of s. 36(1)(b). As *per* the ENET case, the application of s. 22(12) to the records by the Commissioner was correct. Further, the Court held that UCC's change in position at the High Court in relation to three records fell outside of the review of the decision of the Commissioner permitted by s. 24 of the 2014 Act. However, the Court held that the Commissioner's role is inquisitorial and, as such, one record which was provided by the EIB to the Commissioner with redactions should have been assessed as to whether it would suffice to meet the public interest under s. 36(3).


Encyclopedia of Forms and Precedents
Irish Current Law
1984 - 1986
Irish Current Law
1987 - 1998
Commercial Law

CASES

Bookfinders Ltd. v. Revenue Commissioners [2020] IESC 60

When interpreting the provisions of taxation Acts, the principle against doubtful penalisation arises only where, after the general principles of statutory interpretation have been applied, there is still ambiguity as to whether or not the provision is applicable in the circumstances of the case.

The case arose from a claim submitted by the appellant, Bookfinders Ltd., to the respondent, the Revenue Commissioners, in December 2006, seeking a refund on VAT paid at a composite rate of 9.2% for the years 2004-05, claiming instead that it should have been taxed at the 0% VAT rate. This claim was based on a number of propositions: that "food and drink" was only to be read conjunctively in the Act and that "bread" ceased to be considered bread only if each of the included ingredients exceeded the allowed percentages. It asserted that the tea and coffee in liquid form in cafés and restaurants benefitted from the 0% as they were made from dried products which also benefitted from the 0% rate. All of these propositions were premised on the basis that taxation Acts were to be interpreted more strictly than other Acts. This claim was refused by the Revenue, and subsequently by the Appeal Commissioner.

The High Court dismissed the claim. The Court of Appeal, also dismissing the claim, held that a purposive interpretation of a tax statute was permissible where the Act gave rise to an ambiguity, which was not the case here. It found that the principles of legal certainty and fiscal neutrality were not breached in this case and that the principle against doubtful penalisation was similarly inapplicable as no ambiguity arose in the Act. Applying these principles to the facts of the case, it found that food and drink could be read disjunctively, that tea and coffee served in cafés did not benefit from the 0% rate, and that the High Court was correct in its interpretation of "bread".

On appeal to the Supreme Court, Mr. Justice O'Donnell (with whom Chief Justice Clarke, Mr. Justice MacMenamin, Mr. Justice Charleton and Ms. Justice O'Malley agreed) held that s. 5 of the Interpretation Act 2005 (which would permit a purposive interpretation of the Act in cases of ambiguity) was inapplicable. However, the provisions of taxing Acts (as with other Acts) were not to be construed independently of any context, which may include the purpose of the legislation. As regards the strict interpretation advanced by the appellants, Mr. Justice O'Donnell found that '[t]he rule of strict construction is best described as a rule against doubtful penalisation'. This rule means that where, after the general principles of statutory interpretation have been applied, it is still unclear whether the provision applies to the particular situation, effect must be given to the narrower interpretation. The strict construction does not require a different method of interpretation. Further, Mr. Justice O'Donnell held that the principle against doubtful penalisation did not arise in the present case.

Having determined such, Mr. Justice O'Donnell then applied the principles of statutory interpretation to the facts of the case, and upheld the findings of the lower courts in relation to the tea and coffee, "food and drink", and bread issues. Consequently, he dismissed the appeal.

CASES

Damache v. Minister for Justice [2020] IESC 63

The statutory procedure under s. 19 of the Irish Nationality and Citizenship Act 1956, which provides for a power to revoke Irish citizenship from people who acquired Irish nationality on certain grounds, was unconstitutional as it did not provide the appropriate safeguards required to ensure the requisite high standards of natural justice.

The appellant was an Algerian citizen who had been granted a certificate of naturalisation in Ireland following his marriage to an Irish national. Subsequently, he pleaded guilty and was convicted in the United States of materially assisting an Islamist terrorist conspiracy while resident in Ireland. Following this conviction, the respondent, the Minister for Justice and Equality ("the Minister") issued a proposal to revoke the applicant's naturalisation on the basis that s. 19(1)(b) of the Irish Nationality and Citizenship Act 1956 ("the 1956 Act") provided that the Minister could revoke a certificate of naturalisation if he was satisfied that the person to whom it had been granted had failed in their duty of fidelity to the nation and loyalty to the State.

The appellant instituted judicial review proceedings challenging the procedure by which the revocation of citizenship was determined under the 1956 Act. He sought an order prohibiting the Minister from revoking his citizenship and a declaration that s. 19 of the Act of 1956 was unconstitutional and incompatible with the State's obligations under European Union Law and under Articles 6 and 13 of the European Convention on Human Rights. The High Court refused the relief sought but ordered a stay on the revocation.

The appeal to the Supreme Court centred on the contention that s. 19 of the 1956 Act was unconstitutional. Ss. 19(2) and(3) of the 1956 Act set out the process to be followed after an intention to revoke citizenship is formed by the Minister. If the intention to revoke is opposed by the subject of the intended revocation, a committee of inquiry (consisting of members appointed by the Minister) considers the case. The committee then issues a recommendation upon which the Minister makes his final decision, but the Minister is not bound by such recommendation.

The appellant argued that this process breached the constitutional requirement of fair procedures as the Minister initiated the revocation process, appointed the committee of inquiry, and then reached the final decision. This, he argued, resulted in the absence of an independent decision-maker, a breach of the principle of *nemo iudex in causa sua*, and the appearance of pre-judgment.

The appellant also contended that s. 19 of the 1956 Act was a category of power that could only be lawfully exercised by the courts and did not come within the meaning of "limited" functions and powers as provided for in Article 37 of the Constitution. On this ground, the Court considered submissions on the five-limb test of Mr. Justice Kenny for whether a body is administering justice in *McDonald v. Bord na gCon* [1965] 1 I.R. 217.

The respondents submitted that such bestowal of citizenship was not a power that was traditionally exercised by courts. Therefore, the revocation of citizenship, although bearing significant consequences, could not be said to fall within the administration of justice. Instead, it was an exercise of the executive power to be exercised fairly and independently. The Irish Human Rights and Equality Commission (acting as an *amicus curiae* to the Court) also noted that even though the exercise of

the executive power could significantly impact the rights of an individual, this was not determinative of it being the administration of justice. On this point, reference was made to the judgment of Mr. Justice O'Donnell in the case of *O'Connell v. The Turf Club* [2017] 2 I.R. 43.

Ms. Justice Dunne (with whom Chief Justice Clarke, Mr. Justice MacMenamin, Mr. Justice Charleton and Ms. Justice O'Malley agreed) was satisfied that the revocation of a certificate of naturalisation does not amount to the administration of justice but is rather the exercise of an executive function. It was held that the fourth and fifth criteria of the *McDonald* test were not met.

However, the Court concluded that the process provided for in s. 19 of the 1956 Act did not provide the procedural safeguards needed to meet the high standards of natural justice required in circumstances where a person faces such severe consequences by reason of the absence of an impartial and independent decision-maker. Therefore, the Court held that s.19 of the 1956 Act was invalid and repugnant to the Constitution.

The appeal was allowed.

CASES

Mangan v. Dockeray & Ors., Mangan v. Dockeray & Ors. [2020] IESC 67

On the facts of the case, an order to dismiss a personal injuries claim was neither appropriate pursuant to the relevant rules of court providing for dismissal of a claim for failure to disclose a reasonable cause of action and being bound to fail, nor a just application of the High Court's inherent jurisdiction.

The appellant, suing through his mother and next friend, was granted leave to appeal from a decision of the Court of Appeal which affirmed the decision of the High Court, striking out his personal injuries action against the second and third respondents. The first named respondent was a consultant obstetrician and gynaecologist who performed a caesarean section on the appellant's mother as well as attending on her at the time of birth. The second named respondent is a consultant paediatrician who provided the appellant with neonatal care at a Dublin hospital. The third named respondent is a religious order which, at the time was responsible for the operation and management of that hospital.

The appellant was born in January, 1995 in the hospital. His mother underwent an emergency caesarean section. The first named respondent was her treating doctor until soon after he was born, at which point the second named respondent became involved. Due to injuries suffered by the appellant at the time of his birth, he suffers from cerebral palsy, cortical blindness and quadriplegia and is entirely dependent on others in every aspect for his day-to-day living. In general terms, his action against the three named respondents sought compensation for these catastrophic injuries.

The first named respondent was the only defendant originally named in the personal injuries summons, which issued on the 17th June, 2008. After obtaining expert evidence as to his position to the effect that the injuries of the appellant were a result of the negligence of the second and third named respondents, he applied to join them as third parties. The High Court acceded to this application. An amended personal injuries summons issued which, in making allegations against the second and third named respondents, sought to rely on a portion of the affidavit of the solicitor of the first named respondent, which referred to the expert opinion obtained by him which implicated the second and third Respondents. It was common case that this report had never been seen by the Appellant, was not in his possession and that his own expert did not support that view. However, the concern was that his claim would 'fall between stools', *i.e.* that the defence of the first named respondent would succeed and the appellant would be left without a claim against those who had ultimately been found responsible.

The second named respondent and the hospital then issued similar motions seeking to have the claim of the appellant against them dismissed. Each motion was drafted in reliance first on Order 19, rule 28 of the Rules of the Superior Courts ("RSC"), that the claim failed to disclose a reasonable cause of action and was bound to fail and, in the alternative, pursuant to the inherent jurisdiction of the court. The High Court acceded to both motions under Order 19, rule 28 RSC and that decision was affirmed by the Court of Appeal.

On appeal to the Supreme Court, Mr. Justice McKechnie (Chief Justice Clarke, Mr. Justice MacMenamin, Ms. Justice Dunne and Ms. Justice Baker concurring) first set out the applicable

principles for the use of Order 19, rule 28 RSC, which are well-settled by established case law. A sensible reading of the appellant's pleadings led to the conclusion that he had made allegations of negligence against the second and third named respondents. The fact that the report was not in his possession was not a relevant consideration for use of the rule. While the manner in which the pleadings were drafted, quoting *verbatim* from the affidavit of the solicitor of the first named respondent, was unsatisfactory to some extent, it was clear that this had been a strategic choice on the part of the appellant's counsel. Given the parameters of the application, the Court found that it must be assumed that the facts were true and could be proven at trial. Accordingly, in view of the uncontroverted jurisprudence, it could not be said that the action was bound to fail or that no reasonable cause of action had been disclosed.

The next issue was whether it would be just to strike out the proceedings under the inherent jurisdiction of the Court. In essence, the core question was whether it was proper to institute the proceedings. Due to the nature of the claim being rooted in medical negligence, it was necessary to consider a distinct strand of case law with a discrete rule of practice. By instituting practice related proceedings against a professional person or body, this is to put their reputational integrity in issue, at least to some extent, and thus should only be undertaken if there is justifiable reason for so doing. In the vast majority of cases, an expert report would be necessary to fulfil this reasonable basis requirement. However, Mr. Justice McKechnie found that a degree of flexibility was required to accommodate a variety of diverse circumstances.

The report of the first named respondent would become available to the appellant through normal pre-trial procedural avenues, such as discovery and disclosure. It was also the case that the contents of the report would be divulged by the expert at trial, given that the foremost obligation of all expert witnesses is to the Court. Such evidence could be relied upon by the appellant in support of his pleaded allegations against both the second and third named respondents, even where the retention of the expert(s) was originally that of the first named respondent. The Court considered that the situation was reminiscent of what it had in mind in *Hetherington v. Ultra Tyre Service Ltd* [1993] 2 I.R. 535, and in *O'Toole v. Heavey* [1993] 2 I.R. 544, and was precisely the kind of injustice which Chief Justice Finlay sought to avoid when he felt compelled to express the view in those cases that, when dealing with an application for non-suit in an action with multiple defendants, where notices of contribution and indemnity have been served, a judge should always enquire whether any of the other defendants intend to defend themselves by bringing evidence which implicates the party seeking the direction. While the situation was by no means identical, Mr. Justice McKechnie found that the similarities could not be ignored and that to dismiss the Appellant's claim at this point would be to expose the very type of risk envisioned in *Hetherington* and *O'Toole*. In the circumstances, it was not a just application of the Court's inherent jurisdiction to strike out the claim of the Appellant.

As to the final issue of whether the appellant had been guilty of inordinate and inexcusable delay in progressing his action such that justice now required it to be struck out, Mr. Justice McKechnie found that no period of time since the birth of the appellant fulfilled both of these criteria. Considering where the interests of justice lay, Mr. Justice McKechnie did not feel it was justified to terminate the proceedings without a hearing on the merits at that point in time.

The appeal was allowed.

CASES

Opinion of panel to the Chief Justice on the power to remove a Commissioner for Oaths [2020] IESC 69

In addition to the Chief Justice's statutory power to appoint Commissioners for Oaths, he or she also has an inherent power to remove a Commissioner for Oaths in light of the fact that Commissioners for Oaths are appointed to serve under the authority of the Chief Justice "at his pleasure".

A panel of judges of the Supreme Court (Mr. Justice McKechnie, Ms. Justice Dunne, and Ms. Justice Baker) ("the Panel") was asked to consider the question of whether the Chief Justice had the power to remove a Commissioner for Oaths. The Panel was asked to consider three issues and expressed sincere thanks to both the Attorney General and the Law Society of Ireland for their detailed submissions. On the first issue of whether the Supreme Court had jurisdiction to deal with the question in the absence of a specific case brought before the Chief Justice, the Panel found that it was not operating in a judicial capacity, that the Opinion was advisory.

Regarding the second question of whether the Chief Justice had jurisdiction to remove a Commissioner for Oaths. The Panel considered the history of the legislation concerning the office of Commissioner for Oaths and the eventual vesting of the power of appointment in the Chief Justice. It traced the origin of the Commissioners for Oaths to the ecclesiastical faculties originally granted by the Pope and the clergy. The Irish Act of Supremacy ((1537) 28 Hen. VIII c. 5) and the Irish Act of Faculties ((1537) 28 Hen. VIII c. 19) "repatriated" this power from the Pope. Eventually, the power was vested in the Lord Chancellor by s. 73 of the Supreme Court of Judicature (Ireland) Act 1887 ("the 1887 Act") and was transferred to the Chief Justice by s. 19(3) of the Courts of Justice Act 1924 ("the 1924 Act") when the Courts of Saorstát Éireann were established. This section was repealed by s. 3 of the Courts (Supplemental Provisions) Act 1961 ("the 1961 Act"), with s. 10(1)(b) of that same Act vesting in the Chief Justice 'the power of appointing notaries public and commissioners to administer oaths'. The Panel concluded that the power under the 1961 Act was created by the 1961 Act and that the 1924 Act merely transferred a pre-existing power. It found that the power is not judicial, but an administrative function of the Chief Justice.

The Panel then considered how s. 73 of the 1887 Act had vested in the Lord Chancellor the power to remove a Commissioner for Oaths, but concluded that although the 1887 Act has not been repealed, it does not apply to the new power created under the 1961 Act. However, an examination of the warrant of appointment for a Commissioner for Oaths led the Panel to conclude that the power of the Chief Justice to revoke such an appointment was inherent. Whilst the position of solicitors provided a descriptive analogy, the Panel did not consider it to provide an indirect route to the removal of a Commissioner for Oaths in Ireland.

The third question the Panel considered was how the Chief Justice was to exercise such a power in the absence of a representative body for Commissioners for Oaths in Ireland. The Panel concluded that the process should be one regulated by statute with the necessary accompanying rules of court to provide a clear procedural route to removal.

CASES

A v. Minister for Justice and Equality & ors; S. v. Minister for Justice and Equality & Ors.; I v. Minister for Justice and Equality & Ors. [2020] IESC 70

The distinction made in section 56 of the International Protection Act 2015 in relation to the treatment of pre-flight and post-flight marriages was legitimate and justified having regard to the need to provide family reunification on the one hand, and the need to have regard to immigration control on the other hand.

A judge may depart from a decision of the same court, but must give substantial reasons for doing so, and explain why they believe that judgment was incorrect.

This was a joint hearing of three cases, each of which raised both overlapping and stand-alone issues. All three appellants sought to challenge the constitutionality of the provisions of s. 56 of the International Protection Act, 2015 ("the 2015 Act") on the basis that it infringed their rights pursuant to Article 40.3 and Article 41 of the Constitution, and their rights under the European Convention on Human Rights ("ECHR"). The decision of the Court also remarks on the circumstances in which a High Court judge can depart from a decision of another High Court colleague.

A v. Minister for Justice & Equality; S and S v. Minister for Justice & Equality

The cases of A and S followed a similar fact sequence. Both cases arose from marriages contracted outside the State after the appellants had made their respective applications for international protection (post-flight marriages). In the *A* case, Mr. A was granted refugee status on December 15th, 2016, and then travelled to Turkey, where he married his wife on 25th July, 2018. A family reunification request was then submitted on September 4th, 2018, and was rejected by the Minister for Justice and Equality ("the Minister") on 14th September, 2018.

In the S case, Mr. S was granted refugee status on 19th June, 2016. He then married his wife on 3rd April, 2017, submitted a family reunification request to the Minister on 19th April, 2017. That request was rejected on 12th October, 2017.

Neither respondent alleged that the Minister had misapplied the relevant section. Rather, they both contended that the section was both unconstitutional and contrary to the ECHR as it excludes post-flight marriages. The case was heard by Mr. Justice Barrett in the High Court, who gave judgment on 17th July, 2019, declaring s. 56(9)(a) both unconstitutional and contrary to the ECHR, and granting the reliefs sought to both respondents.

In relation to the constitutionality of the impugned section, the respondents alleged that: their wives were treated as being outside the family as protected by Article 41 of the Constitution; that the section distinguished between their families and those of refugees whose marriages had been contracted prior to any international protection application; that the Minister's justification for such distinction was too general, and based on a flawed assumption that all refugees apply for international protection on arrival; and that the difference in the treatment of the marriages of the respondents was such as to treat them differently compared to other refugees. Rejecting the arguments of the Minister, Mr. Justice Barrett found that the arguments of the respondents demonstrated the unconstitutionality of the section. However, he did not specify which article(s) the section contravened.

Additionally, in determining that s. 56(9)(a) was incompatible with the ECHR, the Court relied on *Hode & Abdi* v. *UK* [2013] 56 E.H.R.R. 27 ("*Hode*

& Abdi"). As there was no issue of incompatibility between the approach in Hode & Abdi and the Constitution, Mr. Justice Barrett held that he was bound to apply it (*DPP v O'Brien* [2010] IECCA 103). Having considered the principles he deemed to arise from Hode & Abdi, and having applied them to the case at hand, Mr. Justice Barrett found that s. 56(9)(a) was incompatible with Article 14 of the EHCR. This was despite previous decisions of Mr. Justice Humphreys and Mr. Justice Keane in *RC (Afghanistan) v. Minister for Justice* [2019] IEHC 65 ("*RC*") and *VB v. Minister for Justice & Equality* [2019] IEHC 55 ("*VB*"), which both declined to apply *Hode & Abdi*. Mr. Justice Barrett held that he was not bound by *RC*, relying on *Re Worldport Ltd (In Liquidation)* [2005] IEHC 189 and *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27. In a subsequent judgment, Mr. Justice Barrett made an order declaring s. 56(9)(a) unconstitutional.

The Minister sought leave to appeal to the Supreme Court, which granted leave on the issues of the constitutionality of s. 56(9)(a) and its compatibility with Article 14 of the ECHR, and the ability of the High Court to depart from other High Court decisions.

Ms. Justice Dunne (Chief Justice Clarke, Mr. Justice O'Donnell and Ms. Justice Baker concurring, Mr. Justice Charleton concurring in a separate judgment) overturned the findings made in the High Court that s. 56(9)(a) was unconstitutional and incompatible with the ECHR. The Court accepted that refugees should have the benefit of a family reunification procedure which is more favourable than those foreseen for others (see, *Tanda-Muzinga v. France,* 2260/2010 (10th July, 2014)). The Court then went on to consider the intention behind this principle. Having regard to Directive 2004/83/EC, a refugee should be able to resume their normal family life as it existed in their country of origin, and relationships that have been ruptured through persecution ought to be protected. The 2015 Act was enacted in part to give effect to this principle. The Directive makes it clear that the benefit of family reunification is intended to apply 'insofar as the family already existed in the country of origin'. The position of Mr. A and Mr. S can be distinguished from this, as their relationship did not subsist at the time they fled their country of origin. In finding that the relevant provision was constitutional, Ms. Justice Dunne held that the distinction made by the Minister in relation to the treatment of pre-flight and post- flight marriages was legitimate and justified 'having regard to the need to provide family reunification on the one hand, and the need to have regard to immigration control on the other hand.'

Ms. Justice Dunne also disagreed that s. 56(9)(a) was incompatible with the ECHR. Having examined the jurisprudence of the ECtHR around *Hode & Abdi*, it was held that this decision was not applicable to the facts before the Court, and that incompatibility arose in that case because there was no procedure through which a beneficiary of refugee status could apply for family reunification where that beneficiary married following the granting of refugee status. That is distinguishable from the situation in this jurisdiction, where a post-flight spouse can make an application under the non-EEA Family Reunification Policy Document. Thus, the Supreme Court held that the question of incompatibility with the ECHR did not arise having regard to the decision in *Hode & Abdi.*

Ms. Justice Dunne also outlined the circumstances in which a judge can depart from a judgment of a court of equal jurisdiction, and in particular emphasised

the decisions in *Re Worldport Ireland Limited (in Liquidation)* [2005] IEHC 189, and *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27. Ms. Justice Dunne held that different decisions on the same issue from different members of the same court give rise to uncertainty in the law. This, along with the issue of judicial comity, led Ms. Justice Dunne to endorse the decision of Mr. Justice Clarke in *Worldport,* that a judge may depart from a decision of the same court, but must give substantial reasons for doing so, and explain why they believe that judgment was incorrect. While it was clear from the trail judge's decision that he believed the previous decisions of Humphreys and Keane JJ in *RC* and *VB* respectively were incorrect, Mr. Justice Barrett did not explain why he believed that was so, and that the decision in *Hode & Abdi* was to be followed instead.

In a concurring judgment, Mr. Justice Charleton outlined that the doctrines of *res judicata*, whereby litigation as between the same parties is brought to an end by a final ruling, and of *stare decisis*, which requires courts at trial level to follow the decisions of an appellate court as a co-equal source of legal authority to that of statutory law, are linked by an underlying principle of mutual and appropriate deference to the structure of the courts, 'These principles ensure that the administration of justice is a monolith that is both self-correcting and the only lawful source of justice.' Precedent does not bind in the same way as provisions in a legal code in a civil law system; precedent operates through respect.

Legal certainty requires that, while departure from horizontal precedent is possible, it is not desirable unless there is some clear reason for doing so. The rule is as follows: 'follow unless there is good reason to depart by reason of a clear deficit, a simple expression of why there is to be departure from co-ordinate precedent suffices.' Outlining the reasons for departure are legally required so that 'an appellate court can see where the divergence is and why a co-ordinate decision should not be followed.'

I.I v. Minister for Justice and Equality

The appellant, I. who was a minor and who had since 2010 been under the care of his maternal aunt, was granted refugee status on 25th September 2014. The 2015 Act came into effect on 31st December, 2016, and replaced the ability under the previously-extant Refugee Act 1996 ("the 1996 Act") to make an application for family reunification at any point within a 12-month window from the date of the grant of refugee status. For those refugees who had been granted refugee status under the 1996 Act, they were permitted to make such an application until 31st December, 2017. The appellant applied for family reunification in July 2018. Following communication in August 2018 concerning the family members to be covered by the reunification order, the Minister refused the request on 3rd September, as it had been made outside of the 12 month window. The appellant sought to judicially review the decision.

In the High Court, the case was heard by Mr. Justice Humphreys, who gave judgment on 29th October, 2019, dismissing the application. He considered that the only claim of the appellant was that they had a vested right under the 1996 Act, which had been reduced by the 2015 Act. Noting that similar arguments had been dismissed in previous decisions of the High Court, Mr. Justice Humphreys held that the rights of the appellant in this regard had lapsed with the repeal of the

legislation, and had then been subject to the 12 month limitation after the commencement of the 2015 Act. In circumstances where there was an alternative remedy (in this case, a scheme run under the Minister's discretion), the Court found that it could not strike down the legislation.

Turning to the constitutional breaches alleged by the appellant, Mr. Justice Humphreys found that neither the 12 month limit on applications for family reunification nor its application to minors as to adults breached any provision of the Constitution. There was, he held, no constitutional right to family reunification, and any interference with such rights as did exist was proportional. He similarly found Article 23 of Council Directive 2004/83 and Article 8 of the ECHR to be inapplicable to the case and dismissed the application.

The Supreme Court granted leave to appeal in respect of two issues. The first was whether the 12-month time limit for application for family reunification as specified under s. 56(8) of the 2015 Act was unconstitutional or incompatible with Article 8 of the ECHR. Secondly, whether the appellant had a vested right pursuant to the 1996 Act.

While the appellant argued that her rights under Article 40.3 were contravened by the imposition of a 12-month time limit to apply for family reunification, Ms. Justice Dunne held that she had chosen an inappropriate comparator of minors who had complied with the 12-month time limit under the 2015 Act. Ms. Justice Dunne held that, if this was appropriate, all time limits would be constitutionality redundant, and as such, the constitutionality of s. 56(8) was upheld.

The relevant section was also held to be compatible with the ECHR. The appellant relied on the same comparator as above and again, the appellant failed to select an appropriate comparator which demonstrated a difference in treatment under any of the grounds protected by Article 14 of the EHCR. It was held that s. 56(8) applied without distinction and that time-limits are not incompatible with the Convention, nor could they be, given that there are mandatory time limits applicable to applications lodged with the European Court of Human Rights itself.

Finally, Ms. Justice Dunne rejected the appeal in relation to the issue of vested rights. It was held that, while the appellant had a right to apply for family reunification unlimited by time, the legislature, as it was entitled to do, altered this right by the introduction of a time-limit in s. 56(8) of the 2015 Act. The 2015 contained transitional provisions for those in a similar position to the appellant. Ms. Justice Dunne held that it was clear these transitional arrangements were put in place to deal with such persons whose rights in relation to family reunification had accrued under the 1996 Act. Therefore, she had no vested right pursuant to the 1996 Act.

CASES

Cantrell & Ors. v. Allied Irish Banks plc & Ors. [2020] IESC 71

In cases of financial loss resulting from investments, damage is suffered when the market value of the product is reduced due to the Defendant's wrongful act. Damage was not suffered on entry into the investment, nor at the end of the investment.

This case constituted eight "pathfinder" cases from a selection of approximately 300 investors who lost large investments in the Belfry 2, 3, 4, 5 and 6 investments schemes run under the auspices of AIB. The schemes invested in commercial properties in the UK, with the investors' equity making up 20% of the purchase price of the properties and the balance being provided via loans. These loans were, unbeknownst to the Appellants, subject to Loan-to-Value covenants ("LTV covenants") which stipulated that should the value of the properties fall below the value of the loan or 80% of their purchase price, the lender could take possession of the properties. The investors were notified of the progress of their investments annually with the issuing of annual accounts and a Net Asset Valuation ("NAV") for each individual investment, which included both the value of the properties and the sums accumulated in rent or properties sold.

In the High Court, the case was heard by Mr. Justice Haughton, who elected to deal with the issue of whether the claims of negligence brought by the Appellants against AIB were statute-barred, being made in August 2014 by all but one of the Appellants (who filed a statement of claim in May 2015), by preliminary hearing. The trial judge divided the claims into negligent misselling, LTV covenant and negligent mismanagement (the third of which was not pursued on this appeal) claims. Much of the argument centred on the interpretation of the Supreme Court judgments in *ACC Bank v. Gallagher* ("*Gallagher*") and *Brandley v. Deane* ("*Brandley*"). In respect of the negligent misselling claim, Mr. Justice Haughton considered that damage was only caused when the value of the investments fell below their original value, for which the relevant date was the date of finalisation and approval of accounts. Similarly, in respect of the LTV covenant claims, the Court found that damage occurred when the LTV covenants were engaged by the value of the properties falling below 80% of their original purchase price. Therefore, all the claims were in time in respect of the LTV covenant claims; only Belfry 2 & 3 were in time in respect of the negligent misselling claims. Finally, the trial judge found all the negligent mismanagement claims to be out of time, and this finding was not appealed, nor was his finding in respect of the Belfry 2 & 3 negligent misselling claims.

These findings in respect of the negligent misselling and LTV covenant claims were overturned by the Court of Appeal. Ms. Justice Baker, giving the unanimous judgment of the Court, found the damage to have occurred on entry into the investment scheme for the negligent misselling claim, and on the date at which the loans containing the LTV covenants were agreed. Consequently, the Court of Appeal found all of the claims to be statute-barred.

In the Supreme Court, Mr. Justice O'Donnell (Chief Justice Clarke, Ms. Justice Dunne, Mr. Justice Charleton, and Ms. Justice O'Malley concurring) found that damage, for the purposes of financial loss cases, was the point in time at which the investment or product fell in value due to the negligence of the defendant. He declined to adopt the UK distinction between flawed transaction and no transaction cases, as neither provided a clear rule for the accrual

of a cause of action, instead preferring the "benefits and burdens approach" adopted in Australia in *Wardley*. The Courts must, he considered, be pragmatic in determining when damage occurs, and this consideration must inform any understanding of the decision in *Gallagher*, where the plaintiff's investment was worth less on the day he bought it than the amount he had paid for it. Thus, the Plaintiff in *Gallagher* had suffered damage on that day, and the cause of action accrued.

The plaintiff's knowledge of the damage was not a relevant factor, Mr. Justice O'Donnell held. A cause of action accrues when damage is manifest: that is, when it is capable of being discovered and proven by the plaintiff. While there is a discoverability test in respect of personal injuries claims, there is no such test in other areas of tort and – short of the legislative intervention urged by the LRC and the Supreme Court in both *Gallagher* and *Brandley* – the only issue to be determined is when manifest damage has occurred. In certain cases, damage may occur at the same point as the wrongful act; in other cases, it may occur many years later.

Moving to the facts of the instant cases, Mr. Justice O'Donnell found that the appellants were not entitled to argue the claims in relation to negligent misselling of Belfry 4, 5 and 6, as they had not appealed the High Court's finding that they were statute-barred to the Court of Appeal, and were limited in their appeal to challenging the decision of the latter Court, which consequently did not deal with this matter.

In relation to those claims which were properly the subject matter of the appeal, Mr. Justice O'Donnell upheld the decision of the High Court that a cause of action accrued in respect of the negligent misselling claims at the point in time at which the NAV fell below the original value of the investments, and thus that the Belfry 2 and 3 claims were not statute-barred. The issue of notification of the accounts to the Appellants was further not relevant, as this related not to the manifestation of the damage but to the discoverability of such damage.

The LTV covenant claims were, the Court held, that damage accrued when the LTV covenants had the effect of reducing the value of the investments to zero. As it had not been established by the respondents that this had occurred prior to August 6th, 2008, the High Court was correct to find that the claims were not statute-barred.

Finally, Mr. Justice O'Donnell reiterated his comments in *Gallagher*, reflected by Mr. Justice McKechnie in *Brandley*, that the law in relation to the accrual of a cause of action in tort is in urgent need of reform to avoid the injustices which the current position of the law creates. In his view, though the common law had, in some jurisdictions, adopted a test of reasonable discoverability, it would be preferable if legislation set a primary limitation period, together with a reasonable discoverability test (as clarified in the legislation) and a long-stop period beyond which no claim, even if not reasonably discoverable, could be brought.

As a result, the Court allowed the appeal, and remitted the matter to the High Court for a substantive hearing on the claims of negligent misselling in relation to Belfry 2 and 3, and negligence in respect of the LTV covenants for all five schemes.

Notes

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