

A REPORT ON THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003 AND THE EUROPEAN CHARTER OF FUNDAMENTAL RIGHTS: EVALUATION AND REVIEW

July 2015

COMMISSIONING BODIES:
Law Society of Ireland
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AUTHORS:
Dr Suzanne Kingston, University College Dublin
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Preface

The Dublin Solicitors Bar Association (DSBA) and the Law Society of Ireland joined together to commission a Report on the impact of the *European Convention on Human Rights Act 2003* (the ECHR Act 2003) and the European Union Charter of Fundamental Rights on Irish jurisprudence. The Charter came into force in December 2009, and the ECHR Act 2003 has been in force since December 2003. While there are emerging bodies of Irish case law relying on either the ECHR Act 2003 or the Charter, there is also cross-fertilisation between the rights and principles set out in the ECHR Act 2003 and the Charter – a fact which is increasingly reflected in Irish case law.

One of the aims of this Report is to raise awareness amongst practitioners of the human rights protected by the ECHR Act 2003 and the Charter, and their application and development by the Irish courts. In this manner, it is hoped that the Report will assist the practitioner in utilising these cases in a range of areas of legal practice.

The Report outlines emerging trends that should be of considerable assistance to practitioners interested in using the ECHR Act 2003 and the Charter in litigation. A further aspect of the project is the creation of the Annex – an extensive list of decided cases in which the Convention or the ECHR Act 2003 or the Charter have been pleaded. This will allow for a detailed exploration of the potential of both the ECHR Act 2003 and the Charter to be utilised in litigation.

The authors of the Report are Dr. Suzanne Kingston and Dr. Liam Thornton of the Sutherland School of Law in UCD. The Report reflects their exceptional expertise and knowledge of human rights law and we are particularly grateful to them for producing such an excellent legal source of reference and analysis for practitioners.

The joint advisory sub-group of the Law Society of Ireland (Human Rights Committee) and the DSBA, which oversaw this project, consisted of Grainne Brophy, Greg Ryan, Noeline Blackwell, Michael Finucane, Aine Flynn, Hilka Becker, Aaron McKenna, Helen Kehoe and Michelle Lynch. We would like to thank each of them for their dedication and tireless work in contributing to this Report. We are particularly indebted to the significant contribution of Helen Kehoe, who played a pivotal role in maintaining the momentum of the project, and who helped in the finalisation and overall production of this Report.

Grainne Brophy, Chairperson, Human Rights Committee, Law Society of Ireland
Aaron McKenna, President, DSBA

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Dr. Liam Thornton is a lecturer in law in the School of Law, University College Dublin and a member of the UCD Human Rights Network. Liam's core research interests relate to the intersections between social justice and law. He researches and publishes in areas relating to immigration law, asylum law, social security law, socio-economic rights, European human rights law and international human rights law.

Acknowledgements

This Report was commissioned by the Law Society of Ireland's Human Rights Committee and the Dublin Solicitor's Bar Association.

The co-authors wish to thank Leanne Caulfield, an LL.M. Candidate in UCD Sutherland School of Law, who provided excellent research assistance to the project, and the sub-committee of the Law Society's Human Rights Committee. They also wish to thank Judge Rosemary Horgan, President of the District Court, and Judge Colin Daly of the District Court for meeting with them in connection with the Report.

Glossary

Court of Justice of the European Union	CJEU
European Convention on Human Rights	The Convention
European Court of Human Rights	ECtHR
European Convention on Human Rights Act 2003	ECHR Act 2003
European Union Charter of Fundamental Rights	The Charter
Constitution of Ireland (Bunreacht na hÉireann)	The Constitution
Treaty on the Functioning of the European Union	TFEU
Treaty on European Union	TEU
Treaty Establishing the European Economic Community	EEC Treaty

Chapter One: Introduction - European Rights in Irish Courts

Research Project Scope

This project explores the extent that the European Convention on Human Rights (the “Convention”), the European Convention on Human Rights Act 2003 (the “ECHR Act”), and the European Charter of Fundamental Rights (the “Charter”) have been utilised before Irish courts and specified tribunals. This remit of this research report explores rights under these instruments that have been:

- Utilised in argument before Irish Superior Courts and specified tribunals, with a clear identification of the areas of law at issue, and the precise right under the ECHR Act, the Convention and the Charter, that has been argued and/or considered;
- Relied upon by domestic courts and tribunals in coming to their decisions;
- Interpreted in light of Ireland’s constitutional framework.

Research Project Methodology

The research for this project was desk-based, focusing on the extent that the Convention, ECHR Act 2003 and the Charter were utilised, successfully or otherwise before the Superior Courts: the Irish High Court, Court of Criminal Appeal and Supreme Courts from January 2004 until December 2014. Specifically, each of the following databases (www.courts.ie, www.bailli.org, www.westlaw.ie, www.justis.com) were searched for a variety of different search terms covering the Convention, ECHR Act 2003 and the Charter as variously referred to by the courts.¹

The project team also considered reported cases from the District Court, as an increasing number of District Court decisions are being made available through the Courts Service website (www.courts.ie). No Circuit Court judgments were included; as there are no Circuit Court judgments publicly available online on any of the databases searched (the decisions of

¹ The search terms used were: (1) for the Convention and ECHR Act 2003. “European Convention on Human Rights”, “European Convention on Human Rights and Fundamental Freedoms”, “ECHR”, “ECHR Act 2003”, “Convention on Human Rights and Fundamental Freedoms”; (2) for the Charter. “Charter of Fundamental Rights of the European Union 2000”; “EU Charter of Fundamental Rights”, “European Charter of Fundamental Rights”; “EU Charter”, “ Charter of Fundamental Rights”.

the Circuit Court have not been published on www.courts.ie or through any other public source).

As well as looking at judgments of the courts insofar as reported, the project team included the decisions of a number of tribunals and quasi-judicial bodies in their search, to the extent that such decisions were published. These included:

- The Broadcasting Commission of Ireland;
- The Labour Court;
- The Equality Tribunal;
- The Irish Information Commissioners' Decisions; and
- The Irish Data Protection Commission Case Studies.

While decisions of the Taxation Appeal Commissioners or the Competition Authority of Ireland (now the Competition and Consumer Protection Commission) were also searched, this revealed that no reference had been made in these decisions to the Convention, the ECHR Act 2003 or the Charter during the relevant time period.

Initially, it had been hoped to also analyse the engagement of the Refugee Appeals Tribunal with European rights issues. However, after some initial scoping of the volume of relevant decisions, it was agreed that this would not be possible within the time-frame of this report. A study on the engagement of the Refugee Appeals Tribunal with European rights remains a potential area of further research.

Report Structure

This report is broken down into eight chapters.

The remainder of this chapter provides an overview of the level of engagement with European (Convention/ECHR Act 2003 and Charter) rights by the Irish Superior Courts, District Court and relevant tribunals between 2004 and 2014, and considers the role of the Irish Human Rights and Equality Commission in this regard.

Chapter 2 provides an overview of core provisions of the Convention and the ECHR Act 2003, the role of the European Court of Human Rights (ECtHR) in developing standards of interpretation, and Ireland's record before the ECtHR.

Chapter 3 explores horizontal issues relating to some common themes that cut across a number of significant areas of Convention-related jurisprudence, including the relationship of the Convention, the ECHR Act 2003 and the Constitution, interpretative obligations under the ECHR Act 2003, retrospectivity, declarations of incompatibility and damages and other remedies under the ECHR Act 2003.

Chapter 4 engages in a sectoral review of some key legal areas where the Irish Superior Courts, the District Court and quasi-judicial bodies/tribunals have engaged with rights protected under the Convention and the ECHR Act 2003. There is a particular focus on mental health law, asylum and immigration law, criminal law including the European Arrest Warrant, family and child law, and social and employment rights.

Chapter 5 provides a background to the Charter, its scheme and content, and compares the status of the Charter and the Convention in the Irish courts. It also considers the scope of application of the Charter and the relationship between the Charter, the Convention, and national human rights law.

Chapter 6 turns to consideration of the Charter before the Irish courts, considering the case law on a number of horizontal cross-cutting issues, namely, the scope of the Charter, the relationship between the Charter, the Constitution and the Convention, the right to good administration and the right to an effective remedy.

Chapter 7 reviews sectoral developments of Charter jurisprudence in the Irish courts, in the fields of asylum and immigration law, the European Arrest Warrant, data protection law, family law, companies' rights and social and employment rights.

Chapter 8 seeks to draw together some key conclusions on European rights as applied in Irish courts and tribunals.

European Rights before the Irish Superior Courts 2004-2014: The Empirical Data

A full list of cases in which the Convention, the ECHR Act 2003 and the Charter has been referenced in the case law of the courts and decisions of tribunals searched is contained in Annexes 2 to 4 to this Report. Annex 1 contains summary statistics of cases in which European rights were raised before these courts and bodies.

Unsurprisingly, the figures show a marked increase in the extent to which the Convention, the ECHR Act 2003 and the Charter have been relied upon before the Irish Superior Courts between 2004 and 2014. From 36 cases referring to or relying on European (Convention) rights in 2004, in 2014, 66 cases of the Superior Courts engaged with European rights claims.

Table 1.1: European Rights Referred to in Irish Superior Courts

Year	Published Judgments Utilising the Convention and/or the ECHR Act 2003 and/or the Charter
2004	36
2005	55
2006	42
2007	47
2008	44
2009	53
2010	56
2011	54
2012	69
2013	59
2014	66
Total Cases 2004-2014: 581	

Of these cases, the vast majority have involved the Convention and/or the ECHR Act 2003, rather than the Charter; again, this is unsurprising, as the Charter only became legally binding on 1 December 2009 (see chapter 5).

In some cases, counsel (and or the judge in summing up counsel's arguments) do not seem to concurrently utilise the ECHR Act 2003, when seeking judges' engagement with rights protections under the Convention, but rather only rely directly on the Convention rights.

Table 1.2 - The Convention and ECHR Act Pleaded Before the Irish Superior Courts

Year	Convention & the ECHR Act 2003 mentioned	Convention, not the ECHR Act 2003, mentioned*
2004	36	22
2005	54	27
2006	41	25
2007	47	23
2008	41	19
2009	51	22
2010	46	27
2011	43	34
2012	42	44
2013	41	28
2014	49	38

* Some cases also raise issues under the Charter: see Annex 1 to this Report.

There has been engagement across a range of rights protections under the Convention. Article 6 ECHR and Article 8 ECHR are the most referenced rights protections before the Irish Courts. Article 13 ECHR is the next most engaged or mentioned provision (see Annex 1 to this Report for further statistics on this issue).

In terms of legal fields in which European rights are raised, the statistics show that Immigration and Asylum Law and Criminal Law are two of the fields where counsel and/or judges of their own motion have most frequently made reference to European rights

provisions. As is explored in more detail in subsequent chapters, there is a high degree of engagement with precepts of Irish Constitutional and Administrative Law, that cross-cut many of the rights-based arguments.

In terms of engagement with European rights before the District Court, the figures show that 27 published District Court cases between 2004 and 2014 referred to the Convention and/or the ECHR Act 2003 and/or the Charter. However, a major caveat to these figures is that, to date, all of the published judgments of the District Court relate to child care law. Clearly, therefore, this is an extremely limited sampling of the extent to which the District Court engages in European rights arguments. Nevertheless, within the judgments published, the District Court has referred to a much more limited set of rights under the European rights instruments (see Annex 1 to this Report for further statistics). As with the Superior Courts, the right to family and private life has been engaged with substantially.

The Role of the Irish Human Rights and Equality Commission (IHREC)

On 1 November 2014, the Irish Human Rights Commission and the Equality Authority were fused to form the IHREC, pursuant to the Irish Human Rights and Equality Commission Act 2014.

Section 9 of the 2014 Act provides that the IHREC is to be independent in the performance of its functions, although it is to have regard to, and be guided by, best international practice applicable to national human rights institutions and to equality bodies. In furtherance of such independence, the IHREC is primarily accountable to the Oireachtas, with direct accountability of the IHREC's Director due to the Public Accounts Committee of the Dáil (section 22, 2014 Act).

While section 10(1) of the 2014 Act sets out what might be termed the IHREC's "high-level" functions, including the protection and promotion of human rights and equality, and working towards the elimination of human rights abuses and discrimination, the IHREC's detailed functions are provided in section 10(2). Certain of these powers go further than those of the Irish Human Rights Commission did.

For the purposes of this Report the following functions set out in section 10(2) are of particular relevance.

“(e) to apply to the High Court or the Supreme Court for liberty to appear before the High Court or the Supreme Court, as the case may be, as amicus curiae in

proceedings before that court that involve or are concerned with the human rights or equality rights of any person and to appear as such an amicus curiae on foot of such liberty being granted (which liberty each of the said courts is hereby empowered to grant in its absolute discretion);”

The IHREC’s power to apply for leave to appear as *amicus* was also enjoyed by its predecessor institutions. For its part, the Irish Human Rights Commission made use of this power in a wide variety of cases before the High Court and Supreme Court, making submissions in a large portion of the significant judgments relating to the Convention as discussed in this Report, as well as in numerous judgments raising Charter issues.¹

“(f) to provide such practical assistance, including legal assistance, to persons in vindicating their rights as it sees fit in accordance with section 40,”

Section 40 of the 2014 Act specifies that, in the case of *inter alia* “legal proceedings involving law or practice relating to the protection of human rights which a person has instituted or wishes to institute”, or legal proceedings “in the course of which a person relies on or wishes to rely on such law or practice”, the IHREC may decide, if an application is made to it, to assist a party in such proceedings, including by providing or arranging for legal advice or representation. Section 40(3) sets out a variety of factors to which the IHREC must have regard in deciding whether to assist an applicant, including whether the applicant would be eligible for legal aid. Section 40(5) provides that the arrangement reached between the applicant and the IHREC may include provision for the recovery of the IHREC’s expenses (raising the possibility of “no foal no fee” conditional fee-type arrangements).

“(g) where it sees fit, to institute proceedings under section 41 [...] as may be appropriate.”

Section 41 provides that the IHREC may institute proceedings “in any court of competent jurisdiction for the purpose of obtaining relief of a declaratory or other nature in respect of any matter concerning the human rights of any person or class of persons.” Pursuant to section 41(2), such relief includes relief by way of a declaration that an enactment or a provision thereof is unconstitutional.

Also of relevance here is section 35(1) of the 2014 Act, which empowers the IHREC to conduct an inquiry into “any body (whether public or otherwise) institution, sector of society, or geographical area” where there is

¹ For instance, *Digital Rights Ireland v Minister for Communications* [2010] IEHC 221, discussed in chapter 6. For a list of the cases in which the IHREC or its predecessor has intervened as *amicus*, see www.ihrec.ie (which includes, in many instances, the IHREC’s full written submissions in cases in which it intervened).

“(a) evidence of—

(i) a serious violation of human rights or equality of treatment obligations in respect of a person or a class of persons, or

(ii) a systemic failure to comply with human rights or equality of treatment obligations,

and

(b) the matter is of grave public concern, and

(c) it is in the circumstances necessary and appropriate so to do.”

The terms of reference of any such inquiry must be laid before the Houses of the Oireachtas.²

Section 36(1) empowers the IHREC to serve an ‘Equality and Human Rights Compliance Notice’ where, following such an inquiry, the IHREC is satisfied that, *inter alia*, a person has violated or is violating human rights. Such notices may be appealed to the District Court (section 37(1)) and, thereafter, to the Circuit Court (section 37(5)); subsequent appeal to the High Court is on a point of law only (section 37(8)). Pursuant to section 39 of the 2014 Act, the IHREC may apply to the Circuit Court to restrain a violation of human rights where, within 5 years of making of a section 36 compliance notice, that Court is satisfied that there is a “likelihood” of further violation.

² See also, Schedule 2 to the Irish Human Rights and Equality Commission Act 2014.

Chapter Two: The European Convention on Human Rights: Overview and Relationship with Domestic Law

Overview of the European Convention on Human Rights

The Convention was opened for signature and ratification in Rome on the 4th of November 1950 and entered into force in 1953.¹ The rights and freedoms protected include:

- The right to life;²
- The right to be free from torture, inhuman or degrading treatment or punishment;³
- Freedom from slavery and forced labour;⁴
- The right to liberty and security;⁵
- The right to a fair trial;⁶
- The right to respect for family and private life;⁷
- Freedom of expression;⁸
- Freedom of religious practice;⁹
- The right to an effective remedy for a breach of Convention rights;¹⁰
- The prohibition of discrimination in the enjoyment of Convention rights “*on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*”¹¹

In addition to the rights agreed within the core human rights document, a number of other rights were added by means of Protocols which Contracting States are at liberty to sign and ratify. Some significant rights are protected within these protocols including:

¹ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, *E.T.S* 5.

² Article 2 of the Convention.

³ Article 3 of the Convention.

⁴ Article 4 of the Convention.

⁵ Article 5 of the Convention.

⁶ Article 6 of the Convention.

⁷ Article 8 of the Convention.

⁸ Article 10 of the Convention.

⁹ Article 11 of the Convention.

¹⁰ Article 13 of the Convention.

¹¹ Article 14 of the Convention.

- The right to property and the right not to be denied an education;¹²
- Freedom of movement for those lawfully in a country;¹³
- Prohibition of collective expulsions of aliens;¹⁴
- Procedural protection for aliens in the event of expulsion;¹⁵
- The abolition of the death penalty;¹⁶
- Protocol No. 12 is a free-standing prohibition of discrimination on “...*any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*”¹⁷ Ireland has not yet ratified Protocol 12.

Some of the rights outlined above are absolute. Such absolute rights include:

- Article 3 (prohibition of torture, or inhuman or degrading treatment or punishment);
- Article 4(1) (prohibition of slavery and servitude);
- Article 7 (prohibition of retroactive offences);
- Article 13 (right to an effective remedy) and Article 14 (prohibition of discrimination).
- Article 1 of Protocol 13 (prohibition of the death penalty).

Other rights in the Convention are qualified. Some of the qualified rights within the Convention include:

- Article 2(2) (sets down the limitations on the right to life);
- Article 6 (allows for a trial otherwise than in public where it is the interests of morals, public order or national security, protection of young people, or where publicity would prejudice the interests of the parties);

¹² Protocol No. 1 of 20 March 1953.

¹³ Article 2 of Protocol 4, 16 September 1963.

¹⁴ Article 4 of Protocol 4.

¹⁵ Article 1 of Protocol 7, 22 November 1984.

¹⁶ Article 1 of Protocol 13, 3 May 2002. Protocol No. 6 allowed for the abolition of the death penalty, save in time of war or where there was an imminent threat of war.

¹⁷ Article 1 of Protocol 12, 4 November 2000. Where discrimination is found then there will be consideration as to whether any objective or reasonable justification in that the discrimination may pursue a legitimate aim or where there is a “*reasonable relationship of proportionality between the means employed and the aims sought to be realised.*” See Council of Europe *Explanatory Report on Protocol 12* (para. 18). This report can be accessed here: <http://conventions.coe.int/Treaty/EN/Reports/Html/177.htm>. [last accessed, 14 July 2015].

- Articles 8 to 11 (which are subject to restrictions which are prescribed by law and necessary in a democratic society);
 - “in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”
- Protocol 1, Article 1 (the right to property, may be restricted in accordance with the general interest or to secure payment of taxation).

Once an interference with Convention rights is shown, it is for the State to bring itself within the limitations proscribed. Central to the ECtHR determination of rights claims will be the *proportionality* of the measures introduced by the Contracting State. Limitations to Convention rights are construed narrowly.¹⁸

The Convention provides an important basis for protecting the rights of all persons in a State. While the rights protected in the Charter¹⁹ are only addressed to the institutions, bodies and offices of the European Union, and to EU Member States when implementing EU law²⁰, there is no such limitation in the Convention. Everybody within the jurisdiction of a Contracting State enjoys the rights set forth in the Convention.²¹ In *Austria v Italy* it was stated that the Convention:

“...not only applies to a States own nationals and those of other High Contracting Parties, but also to nationals of States not parties to the Convention and to stateless persons.”²²

The Role of the European Court of Human Rights: Developing Normative Standards of Interpretation

After exhausting domestic remedies, adjudication on rights compliance within the domestic sphere may be examined by the ECtHR.²³ Contracting parties to the Convention agreed to limit their sovereignty and abide by the judgment of the ECtHR where a decision is taken in

¹⁸ See for example, *Hatton v United Kingdom* (2002) 34 E.H.R.R. 1 at para. 97.

¹⁹ See below, from p. 102.

²⁰ See further discussion on scope and limitations on the application of the Charter below, from p. 109.

²¹ Article 1 of the Convention.

²² *Austria v Italy*, Yearbook IV (1961) as quoted in Zwaak, L. “General Survey of the European Convention” in van Dijk, P. *Theory and Practice of the European Convention on Human Rights* (4th edition, Oxford; Intersentia, 2006), pp. 13-14.

²³ See Article 35 and Article 46 of the Convention. This is known as the principle of subsidiarity whereby an applicant must have exhausted effective domestic remedies, see *A, B & C v Ireland*, (2011) 53 E.H.R.R. 13, para. 152.

favour of a plaintiff. While national human rights protections are considered to offer the best guarantee to individuals that the State will protect their human rights (as they are easier to access, for instance), internationalised enforcement mechanisms provide incentives for States to comply with their international obligations.²⁴

Since its foundation in 1959, the ECtHR²⁵ has been the guardian of the Convention. The ECtHR has played a pivotal role in developing the key principles of Convention law. Cases may be brought by individuals and groups²⁶ or by a Contracting State against another Contracting State.²⁷ States are obliged to abide by the judgments of the court in any case to which it is a party.²⁸ The ECtHR has stated that the Convention is a “*living instrument*” which “...*must be interpreted in light of present day conditions*”.²⁹ The ECtHR has noted that, while not formally bound to follow its own decisions, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from decisions in previous cases.³⁰

The ECtHR has developed a number of core principles that relate to the interpretation of all the rights protected in the Convention. It does not necessarily separate these principles (in general), and on occasion may combine its legal analysis of State practices/laws across a number of these headings.

Practical and Effective Rights: The ECtHR has emphasised that the rights protected under the Convention are to be “*practical and effective*” and not merely “*illusory*”.³¹

The Convention as a Living Instrument: The Convention is a living instrument in that, as society changes, so too might the interpretation of the Convention. The implementation of this principle is best seen in the case of *Goodwin v United Kingdom*.³² In *Goodwin*, the ECtHR departed from its previous jurisprudence on transgender rights:

“The Court observes that in the case of Rees in 1986 it had noted that little common ground existed between States, some of which did permit change of gender and some of which did not and that generally speaking the law seemed to be in a state of transition (see § 37). In the later case of Sheffield and Horsham, the Court’s

²⁴ Merrills, J.G. *The Development of International Law by the European Court of Human Rights* (2nd edition, Sheffield; Manchester University Press, 1993) at p. 1.

²⁵ Article 19 of the Convention.

²⁶ Article 34 of the Convention.

²⁷ Article 33 of the Convention.

²⁸ Article 46 of the Convention.

²⁹ *Tyrer v United Kingdom* (1979–80) 2 E.H.R.R. 1 at para. 31.

³⁰ See, *Chapman v. UK* (2001) 33 EHRR 18 at para. 70 and *Goodwin v UK* (2002) 35 E.H.R.R. 18 at para. 74.

³¹ See *Airey v Ireland* (1979) 2 E.H.R.R. 305, para. 24 and *McFarlane v Ireland* [2010] ECHR 1272 at para. 112.

³² *Goodwin v United Kingdom* (2002) 35 E.H.R.R. 18.

judgment laid emphasis on the lack of a common European approach as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas of law such as marriage, filiation, privacy or data protection. While this would appear to remain the case, the lack of such a common approach among forty-three Contracting States with widely diverse legal systems and traditions is hardly surprising. In accordance with the principle of subsidiarity, it is indeed primarily for the Contracting States to decide on the measures necessary to secure Convention rights within their jurisdiction and, in resolving within their domestic legal systems the practical problems created by the legal recognition of post-operative gender status, the Contracting States must enjoy a wide margin of appreciation. The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.”³³

Positive Obligations: A State must not take action to bring about a Convention violation through their agents. This argument frames the Convention in “negative”, non-interference terms. However, the ECtHR has emphasised that certain positive obligations inhere within Convention rights.³⁴ Positive obligations require Contracting States to take action or to regulate certain types of State actors and non-state actors conduct to ensure compliance with the Convention³⁵

When examining positive obligations a fair balance has to be struck between an individual’s Convention rights, the general community interest and the choices which elected governments must make in terms of priorities and resources.³⁶ Positive obligations may differ depending on the diversity of situations within the Contracting States.³⁷ States must have frameworks for the effective protection of Convention rights,³⁸ including means to prevent breaches of Convention rights by State³⁹ and non-state actors.⁴⁰ States are under a

³³ (2002) 35 E.H.R.R. 18 at para. 85.

³⁴ On positive obligations generally, see: Starmer, K. “Positive Obligations under the Convention” in Jowell, J. & Cooper, J. *Understanding Human Rights Principles* (Oxford: Hart Publishing, 2001), pp. 139-160 and Mowbray, A. *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart Publishing, 2004).

³⁵ *Ibid* at p. 51.

³⁶ *Ilascu et. al. v Moldova and Russia* (2004) 40 E.H.R.R. 1030, at para. 332.

³⁷ *Özgür Gündem v. Turkey* (2001) 31 E.H.R.R. 1082 at para. 43

³⁸ See, *X and Y v The Netherlands* (1985) 8 E.H.R.R. 235, at para. 23.

³⁹ See, *Keenan v United Kingdom* (2001) 33 E.H.R.R. 913, at para. 105.

⁴⁰ See, *Marckx v Belgium* (1979) 2 E.H.R.R. 330.

duty to respond to Convention violations by the provision of effective remedies.⁴¹ In some instances, most notably as regards civil legal aid, the State has a positive obligation to provide assistance to an individual in order to ensure protection of that individual's Convention rights.⁴²

Margin of Appreciation: The margin of appreciation is a principle used by the ECtHR whereby:

*“national authorities [are], in principle, better placed than an international court to evaluate local needs and conditions.”*⁴³

The margin of appreciation in essence seeks to defer rights analysis onto national authorities (be it government, courts, or administrative agencies). In many recent cases, the ECtHR has deferred to the national authorities' margin of appreciation in finding no violation of the Convention where a State fails to permit abortion, or fails to allow for same-sex couples.

In applying the margin of appreciation in *A, B & C* and deciding whether a violation of Article 8 of the Convention had occurred, the ECtHR stated:

*“... that a number of factors must be taken into account when determining the breadth of the margin of appreciation to be enjoyed by the State when determining any case under Article 8 of the Convention. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted (see *Evans v. the United Kingdom [GC]*, cited above, § 77). Where, however, there is no consensus within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider (*Evans v. the United Kingdom [GC]*, cited above, § 77; *X., Y. and Z. v. the United Kingdom*, judgment of 22 April 1997, Reports of Judgments and Decisions 1997-II, § 44; *Frette v. France*, no. 36515/97, § 41, ECHR 2002-I; *Christine Goodwin*, cited above, § 85). As noted above, by reason of their direct and continuous contact with the vital forces of their countries, the State authorities are, in principle, in a better position than the international judge to give an opinion, not only on the 'exact content of the requirements of morals' in their country,*

⁴¹ In a number of cases taken by individuals against Turkey, the ECtHR has emphasised the duty on States parties to investigate and respond to alleged violations of Convention rights in a prompt and timely manner. For example in *Aksoy v Turkey* (1997) 23 E.H.R.R. 553, at para. 56, the Court noted a Turkish Prosecutor's lack of action in investigating whether claims of torture constituted a violation of Article 13 of the Convention.

⁴² See *Airey v Ireland* (1979) 2 E.H.R.R. 305 and for more recent invocation of this obligation (in the civil sphere), *Steel and Morris v United Kingdom* (2005) 41 E.H.R.R. 403.

⁴³ *A, B & C v Ireland*, (2011) 53 E.H.R.R. 13, at para. 229.

but also on the necessity of a restriction intended to meet them (Handyside v. the United Kingdom judgment and the other references cited at paragraph 223 above).

There can be no doubt as to the acute sensitivity of the moral and ethical issues raised by the question of abortion or as to the importance of the public interest at stake. A broad margin of appreciation is, therefore, in principle to be accorded to the Irish State in determining the question whether a fair balance was struck between the protection of that public interest, notably the protection accorded under Irish law to the right to life of the unborn, and the conflicting rights of the first and second applicants to respect for their private lives under Article 8 of the Convention.”⁴⁴

However, in relation to the third applicant (C), in finding a violation of C’s Article 8 Convention rights, the ECtHR held that:

“While a broad margin of appreciation is accorded to the State as to the decision about the circumstances in which an abortion will be permitted in a State (paragraphs 231-238 above), once that decision is taken the legal framework devised for this purpose should be ‘shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention’ (S.H. and Others v. Austria, no. 57813/00, § 74, 1 April 2010).”

Proportionality: Unlike the Charter, which specifically provides for proportionality in its text,⁴⁵ the doctrine of proportionality under the Convention has been developed by the ECtHR over many decades, as regards non-absolute Convention rights. This is closely linked with the necessity of interference with rights (in particular under Articles 8-11) and the margin of appreciation States enjoy under the Convention. In essence, the doctrine of proportionality seeks to ensure that Convention rights are not interfered with in an unnecessarily restrictive manner. The ECtHR has described proportionality in a number of different ways: as striking a “*fair balance*” in determining whether a particular restriction on a right is permissible.⁴⁶ However, on other occasions the ECtHR has categorised proportionality somewhat differently, asking whether the State can justify an interference with Convention rights that address a pressing social need, with the restriction of the Convention

⁴⁴ *A, B & C v Ireland*, (2011) 53 E.H.R.R. 13, at para. 232-233.

⁴⁵ Article 52(1) of the Charter, discussed below, see from p. 102.

⁴⁶ *Bosphorus v Ireland* (App. No. 45036/98) (30 June 2005) at paras. 149-150.

rights corresponding to that need.⁴⁷ The ECtHR may inquire as to whether the legitimate aims sought by the State could have been achieved in a less intrusive manner.⁴⁸

Ireland before the European Court of Human Rights

Ireland was one of the first countries to sign the Convention in 1950⁴⁹ and the first country to accept the compulsory jurisdiction of the ECtHR in February 1953.⁵⁰ There have been 32 judgments of the ECtHR involving Ireland between 1959 and 2014.⁵¹ In 21 of these judgments, a violation of at least one of the Convention rights has been found. In six of these judgments, no violation was found. There was one friendly settlement, and four other judgments relating to procedural issues at hand. Table 2.1 below provides an overview of the twenty-four substantive determinations by the ECtHR on human rights compliance. The ECtHR has assessed Irish law, policy and administration in the areas of criminal law and process (in particular as regards the right to silence); civil legal aid; criminalisation of sexual conduct between gay men; delay in court process and proceedings, and state responsibility for child sex abuse.

*Table 2.1 Core Judgments on Ireland before the European Court of Human Rights*⁵²

Case Name	ECHR Articles Engaged	Violation?	Compliance	Core Legal Area
App. No. 332/57, <i>Lawless v Ireland</i> (No. 1 ; No. 2 & No. 3), 1960-1961	Article 7	No Violation		Criminal Law
App. No. 6289/73, <i>Airey v Ireland</i> , 09 October 1979	Article 6, Article 8, Article 13, Article 14	Article 6.1 and Article 8	Introduction of non-statutory civil legal aid scheme (now see Civil Legal Aid Act 1995)	Access to Justice (Civil Legal Aid)

⁴⁷ *A, B & C v Ireland*, (2011) 53 E.H.R.R. 13, at para. 229.

⁴⁸ For the most recent analysis of proportionality in this manner by the ECtHR, see *Hanzelkovi v Czech Republic* (App. No. 43643/10) (11 December 2014) at paras. 74, 76 and 78.

⁴⁹ De Londras, F. and Kenny, C. *European Convention on Human Rights Act: Operation, Impact and Analysis* (Dublin: Roundhall, 2010), at para. 1-04.

⁵⁰ Egan, S. "Introduction" in Egan, Thornton and Walsh, *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Dublin: Bloomsbury, 2014), para. 1.02-1.03. Ireland was the second country to accept the right of petition to the European Commission on Human Rights.

⁵¹ Council of Europe, *ECHR Overview 1959-2014*, p. 7. Available at http://www.echr.coe.int/Documents/Overview_19592014_ENG.pdf [last accessed 14 July 2015.]

⁵² For further information, including a review of some these cases, see O'Connell et al. *The ECHR Act 2003: A Preliminary Assessment* (Dublin: Law Society, 2006), at pp. 1-10. See also, Egan, S. and Forde, A. "From Judgment to Compliance: Domestic Implementation of the Judgments of the Strasbourg Court" in Egan, S., Thornton, L. and Walsh, J. *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Dublin: Bloomsbury, 2014).

			as amended)	
App. No. 9697/82, Johnston v Ireland , 18 December 1986	Article 8, Article 9, Article 12, Article 14	Article 8	Status of Children Act 1987	Family Law
App. No. 10581/83, Norris v Ireland , 26 October 1988.	Article 8	Article 8	Criminal Law (Sexual Offences) Act, 1993	Private Life, Gender, Sexuality
App. No. 12742/87, Pine Valley Developments v Ireland , 29 November 1991	Article 13, Article 14, Protocol 1, Article 1	Article 14 and Protocol 1, Article 1	Payment of just satisfaction	Property Law
App. Nos. 14234/88 & 14235/88, Open Door and Dublin Well Women v Ireland , 29 October 1992.	Article 10	Article 10	Thirteenth Amendment of the Constitution Act 1992 and Regulation of Information (Services outside the State for Termination of Pregnancies) Act 1995	Access to Information, Reproductive Rights
App. No. 16969/90, Keegan v Ireland , 26 May 1994.	Article 6.1, Article 8, Article 14	Article 6.1 and Article 8	Adoption Act 1988	Family Law
App. No. 36887/97, Quinn v Ireland , 21 December 2000.	Article 6.1, Article 6.2, Article 10	Article 6.1. and Article 6.2.	Section 52 of the Offences Against the State Act, 1939, remains on the statute books. See also, <i>Quinn v. O'Leary and Others</i> [2004] IEHC 103	Criminal Law
App. No. 34720/97, Heaney and McGuinness v Ireland , 21 December 2000.	Article 6.1, Article 6.2, Article 8, Article 10	Article 6.1. and Article 6.2	Section 52 of the Offences Against the State Act, 1939, remains on the statute books.	Criminal Law
App. No. 31253/96, McElhinney v Ireland , 21	Article 6.1	No Violation		Tort, Public International Law

November 2011.				
App. No. 39474/98, DG v Ireland , 16 May 2002.	Article 3, Article 5.1, Article 5.2, Article 8, Article 14	Article 5.1. and Article 5.2	Children Act 2001 (although significant concerns as to whether this fully complies with ECHR obligations)	Mental Health Law, Child Law
App. No. 44179/98, Murphy v Ireland , 10 July 2003.	Article 10	No Violation		Media Law
App. No. 50389/99, Doran v Ireland , 31 July 2003.	Article 6.1 and Article 13	Article 6.1 and Article 13	No clear compliance evidenced (see further: <i>Barry v Ireland</i> ; <i>Mc Mullen v Ireland</i> and <i>O'Reilly v Ireland</i> below).	Property Law, Court Procedure, Delay.
App. No. 54725/00, O'Reilly and Others v Ireland , 29 July 2004.	Article 6.1 and Article 13	Article 6.1 and Article 13	No clear compliance evidenced.	Court Procedure, Delay.
App. No. 42297/98, McMullen v Ireland , 29 July 2004.	Article 6.1	Article 6.1	No clear compliance evidenced.	Court Procedure, Delay.
App. No. 55120/00, Independent News and Media v Ireland , 16 June 2005.	Article 10	No Violation		Tort, Defamation, Damages
App. No. 45036/98, Bosphorus v Ireland , 30 June 2005.	Protocol 1, Article 1	No Violation		Property Law, Sanctions
App No. 8273/04, Barry v Ireland , 15 December 2005.	Article 6.1. and Article 13	Article 6.1. and Article 13	No clear compliance evidenced.	Court Procedure, Delay.
App. No. 31333/06, McFarlane v Ireland , 10 September 2009.	Article 6 and Article 13	Article 6 and Article 13	No clear compliance evidenced. A further Action Plan for Compliance was recently submitted to the Department for Execution	Criminal Law, Court Procedure, Delay

			of judgments of the ECtHR in May 2015. ⁵³	
App. No. 41130/06, Kelly v Ireland , 14 December 2010	Article 6 Article 13	No Violation		Criminal Law
App. No. 25579/05, A, B & C v Ireland , 16 December 2010.	Article 8	Article 8 (C)	Protection of Life During Pregnancy Act 2013	Reproductive Rights, Abortion Law
App. No. 7812/04, Superwood Holdings PLC and others v Ireland , 08 September 2011.	Article 6.1	Article 6.1.	No clear compliance evidenced.	Court Procedure, Delay
App. No. 19165/08, Donohue v Ireland , 12 December 2013.	Article 6	No Violation		Criminal Law, Evidence
App. No. 35810/09 O'Keefe v Ireland , 28 January 2014.	Article 3 and Article 13	Article 3 and Article 13	No clear compliance evidenced. Action Plan for Compliance under review by <i>Department for Execution of judgments of the ECtHR</i> since January 2015.	Tort, Child Law

The Convention and Irish Law

In *Re Ó Laighléis*,⁵⁴ the plaintiff was subject to internment by Ireland under the Offences Against the State (Amendment) Act 1940, due to his involvement with a proscribed/prohibited organisation, namely the Irish Republican Army. The plaintiff argued that this violated Convention rights under Article 5 and Article 6 ECHR (personal liberty and right to a judicial hearing on a criminal charge). Maguire C.J. noted:

⁵³ As Member states undertake to comply with final judgments of the ECtHR (where it finds there have been violations of the Convention) (see Articles 46 of the Convention), the adoption by the Member State of the necessary execution measures to remedy violations is supervised by the Committee of Ministers of the Council of Europe, made up of representatives of the governments of the 47 member states, assisted by the Department for the Execution of Judgments of the Court (Directorate General of Human Rights and Rule of Law). For further info: http://www.coe.int/t/dghl/monitoring/execution/Presentation/Pres_Exec_en.asp (last accessed 14 July 2015)

⁵⁴ In *Re Ó Laighléis* [1960] I.R. 93. For an overview of other cases invoking the Convention pre the ECHR Act 2003, see Hogan, G. and Whyte, G. *J.M. Kelly: The Irish Constitution* (Dublin: Lexis Nexis Butterworths, 2004), at pp. 794-797, at paras 6.2.91-6.2.93.

“The insurmountable obstacle to the importing of the [ECHR] into domestic law of Ireland-if they be at variance with that law, is that [the Constitution in Article 15.2.1] provides that “the sole and exclusive power of making laws for the State is hereby vested in the Oireachtas; no other legislative authority has power to make laws.”⁵⁵

Maguire C.J. continued:

“The Oireachtas has not determined that the [Convention] is to be part of the domestic law of the State.”

This interpretation of the Convention and its relationship with Irish law continued until the ECHR Act 2003.

In *Gilligan v Criminal Assets Bureau*,⁵⁶ McGuinness J. stated that since the Oireachtas has not adopted the Convention in a manner consistent with the Constitution (Article 15.2.1 and Article 29.6), there could be no question:

“...that this Court is entitled to have regard to the decisions of the European Court of Human Rights in construing provisions of the Constitution [but] there can be no question of any decision of the European Court of Human Rights furnishing in and of itself a basis for declaring legislation unconstitutional...”⁵⁷

At most, Convention jurisprudence was simply used as an interpretive tool to boost the judicial rationale for expanding Constitutional rights protection. It was never used as the sole basis for such expansion. However, judges of the Superior Courts (in at least one area as regards freedom of expression), noted that the approach of the Irish courts to constitutional rights were “*closely comparable*” to the approach of the ECtHR.⁵⁸

On 31 December 2003, the legal landscape changed when the Convention was indirectly incorporated into Irish law by the European Convention on Human Rights Act 2003.

⁵⁵ In *Re Ó Laighléis* [1960] I.R. 93 at 124.

⁵⁶ *Gilligan v Criminal Assets Bureau* [1998] 3 I.R. 69.

⁵⁷ *Ibid* at 102.

⁵⁸ See *Mahon v Post Publications* [2007] 2 I.L.R.M. 1.

The European Convention of Human Rights Act 2003: An Overview

The European Convention of Human Right Act 2003 ('the ECHR Act 2003') indirectly incorporated the Convention into Irish law.⁵⁹ The effect of the ECHR Act 2003 was to simply implement the rights that were protected under the Convention, without direct incorporation of the rights therein. In *Foy v An tArd-Chlaraitheoir*⁶⁰, McKechnie J. described the position of the Convention within Irish law as follows:

*"It is a misleading metaphor to say that the Convention was incorporated into domestic law. It was not. The rights contained in the Convention are now part of Irish law. They are so by reason of the Act of 2003. That is their source. Not the Convention. So it is only correct to say, as understood in this way, that the Convention forms part of our law."*⁶¹

The ECHR Act 2003 was prospective in nature⁶², and came about, in part, as a result of the *Belfast Agreement*⁶³ and the pledge for comparable human rights protections on both sides of the border within the island of Ireland.⁶⁴

Section 1 of the ECHR Act 2003 defines "*organs of State*" as tribunals or other bodies which are established by law and which exercise legislative, executive or judicial power. This definition does not include the President, the Courts, either House of the Oireachtas, or any committees therein.

Under section 3(1) of the ECHR Act 2003, organs of State must undertake their functions in a Convention compliant manner. Where organs of State fail to act in a Convention compliant manner, a person may commence proceedings in the Circuit Court or the High Court for damages.⁶⁵ Under section 4 of the ECHR Act 2003, Irish courts (but not tribunals)⁶⁶ must take judicial notice of judgments, decisions, declarations and advisory opinions of bodies

⁵⁹ See further, Hogan, G. "Incorporation of the ECHR: Some Issues of Methodology and Process" in Kilkelly, U. (editor) *ECHR and Irish Law* (Cork; Jordans, 2004), at pp. 13-14.

⁶⁰ *Foy v An tArd-Chlaraitheoir* [2007] IEHC 470

⁶¹ *Ibid* at para 93.

⁶² In *Dublin City Council v Fennell* [2005] 1 I.R. 604, the Supreme Court held that despite the provisions of section 2(2) of the ECHR Act 2003, which obliges the Court to interpret legislation in a Convention compliant manner, the ECHR Act 2003 was not retrospective in nature.

⁶³ See generally the "Human Rights" section of the Belfast Agreement, which obliged the United Kingdom to incorporate the European Convention of Human Rights into domestic law (para. 2 of the section "Rights, Safeguards and Equality of Opportunity").

⁶⁴ However, it should be noted that there was no specified obligation upon the Irish government to incorporate the Convention into Irish law. See Hogan, G. "The Belfast Agreement and the Future Incorporation of the ECHR in the Republic of Ireland" (1999) *Bar Review* 205.

⁶⁵ Section 3(2) of the ECHR Act 2003. Damages are limited to that available within each Court as if it exercising its tort jurisdiction.

⁶⁶ See below from p. 43.

that include the European Court of Human Rights.⁶⁷ Section 2 of the ECHR Act 2003 imposes an obligation on the Irish courts to interpret statutory provisions and rules of law in a Convention compliant manner. Section 2(2) of the ECHR Act 2003 states that this applies to statutory provisions and rules of law in force both before and after the coming into operation of the ECHR Act 2003.⁶⁸

Where it is not possible to interpret a rule of law in a Convention compliant manner, the High Court or Supreme Court may grant a declaration of incompatibility under section 5(1) of the ECHR Act 2003.⁶⁹ Declarations of incompatibility may be made where no other remedy is available. Where a declaration of incompatibility is granted, under section 5(2)(a) of the ECHR Act 2003, the rule of law or statutory provision which is incompatible with the ECHR will continue in operation.⁷⁰ Under section 5(3) of the ECHR Act 2003, the Taoiseach must bring the offending rule or statute to the attention of the Oireachtas within 21 days. Once an individual is granted a declaration of incompatibility, the individual is entitled to apply for an *ex gratia* payment to the Attorney General under section 5(2) of the ECHR Act 2003.⁷¹ The Government in its sole discretion will then consider whether any payment will be made.⁷²

Where a litigant seeks a declaration of incompatibility under the ECHR Act 2003, the Attorney General and the Irish Human Rights and Equality Commission are to be provided with notice of the proceedings. The Attorney General is entitled to appear in such proceedings.⁷³

Unlike the Charter when areas of European Union law are under judicial scrutiny in Irish Courts,⁷⁴ the Convention does not have the potential to be directly effective in Irish law.⁷⁵ However, as will be discussed in chapter 4, the Convention is more broadly applicable to all fields of law. The scope of application of the Charter is limited, in the domestic setting, to matters falling within the scope of EU law (see chapter 5).

⁶⁷ In addition, the courts are expected to take notice of any decision of the European Commission on Human Rights and any decision of the Committee of Ministers, see section 4 of the ECHR Act 2003.

⁶⁸ See further, Hogan, G. "Incorporation of the ECHR: Some Issues of Methodology and Process" in Kilkelly, U. (editor) *ECHR and Irish Law* (Cork; Jordans, 2004), at p. 28.

⁶⁹ Section 5(1) of the ECHR Act 2003.

⁷⁰ Section 5(2)(b) of the ECHR Act 2003 states that a declaration of incompatibility does not prevent an individual from bringing a case against Ireland before the European Court of Human Rights (ECtHR).

⁷¹ To date, one such *ex gratia* payment of "about €50,000" has been made. MacCormaic, R., "Compensation paid to Lydia Foy over gender recognition failures", *Irish Times*, 03 November 2014.

⁷² Section 5(2)(c) of the ECHR Act 2003. The Government may appoint an adviser who will examine the level of payment which may be made. In doing so, the adviser is to have regard to the level of damages which the ECtHR awards.

⁷³ Section 6 of the ECHR Act 2003. For role of the Irish Human Rights and Equality Commission, see above from p. 15.

⁷⁴ The relationship between the Charter and the Convention in Irish law is explored in more depth below, see from p. 105 and chapter 6.

⁷⁵ The distinction between the Charter and Convention as regards direct effect of EU law is discussed below, see from p. 105.

In the next chapter, the authors explore some horizontal, cross-cutting issues that have arisen in the Irish jurisprudence to date applying the Convention and the ECHR Act 2003, in the years 2004-2014.

Chapter Three: The Convention/ECHR Act 2003 before Irish Courts/Tribunals – Horizontal Issues

This chapter considers the following cross-cutting, horizontal issues relating to consideration of the Convention before the Irish courts:

1. Sequencing and pleadings of legal claims as regards the Convention and the Constitution;
2. Cross-fertilisation between the rights protected in the ECHR Act 2003 and the Irish Constitution;¹
3. Convention rights, retrospectivity and the ECHR Act 2003;
4. Interpretative obligations under the ECHR Act 2003;
5. Damages & effective remedies for rights violations under the ECHR Act 2003;
6. Declarations of incompatibility and the ECHR Act 2003.

Sequencing and Pleading of Legal Claims as regards the Constitution and the Convention

The Constitution contains a number of rights, explicitly or implicitly, which *prima facie* overlap with rights contained in the Convention. For instance, the Constitution recognises “Fundamental Rights” under Articles 40 to 44,² including the right to equality, personal liberty, education, family rights, property rights, freedom of expression, and peaceful assembly. Walsh J. in the Supreme Court in *McGee* held that,

*“...natural rights or human rights, are not created by law, but [...] the Constitution affirms their existence and gives them protection.”*³

Fundamental rights provisions in the Constitution are regarded as being,

*“...of universal application and apply to all human beings.”*⁴

¹ The relationship between the Convention and the Constitution is also considered in chapter 2. For the relationship between the Constitution, the Convention and the Charter, see below, chapters 6 & 7.

² See Hogan, G & Whyte, G. *The Irish Constitution* (Dublin: Tottel, 2006 reprint), chapters 7-10.

³ *McGee v Attorney General* [1974] I.R. 284 at 318.

Due process in criminal trials and access to the courts are also guaranteed by Articles 38 and 34 respectively of the Constitution.

This potential overlap in the rights protected raises the question of the interrelationship between Constitutional and Convention protection in the case of these rights, and the order in which such claims should be considered by the courts.

In *Carmody v Minister for Justice, Equality and Law Reform*,⁵ the Supreme Court held that in any action that challenges the constitutionality of a legislative provision (and this would equally apply to any rule of law), as well as the compatibility of that provision with the ECHR Act 2003, the constitutional claim must be considered first.

In the Superior Courts, since *McD v L*,⁶ judges have generally brought Convention rights into play via the ECHR Act 2003. As Murray C.J. held in that case:

“Even though the contracting parties undertake to protect convention rights by national measures, the Convention does not purport to be directly applicable in the national legal systems of the high contracting parties. Nor does the Convention require those parties to incorporate the provisions of the Convention as part of its domestic law. So far as the Convention is concerned it is a matter for each contracting party to fulfil its obligations within the framework of its own constitution and laws. The Convention does not seek to harmonise the laws of the contracting states but seeks to achieve a minimum level of protection of the rights specified in the Convention leaving the states concerned to adopt a higher level of protection should they choose to do so.”⁷

In so holding, Murray J. overruled Hedigan J. in the High Court decision in *McD v L* which sought to identify independent autonomous claims arising under Article 8 of the Convention, *i.e.*, a kind of direct effect. In the Supreme Court, however, this approach was criticised, with Murray C.J. holding that the High Court:

“had no jurisdiction to apply directly the provisions of the Convention in that manner. In considering and determining those issues the High Court was not exercising, or indeed purporting to exercise, a function pursuant to s. 2 of the Act of 2003 and no issue had arisen under ss. 3 or 5 of the Act of 2003. Accordingly there was no basis in law for applying article 8 of the Convention to the status of the respondents or any

⁴ *Northampton Co. Council v A.B.F & M.B.F* [1982] I.L.R.M. 164 at 166, per Hamilton J.

⁵ *Carmody v Minister for Justice, Equality and Law Reform* [2010] 1 I.R. 653. (See also, 2009 [IESC] 71.)

⁶ *McD v L* [2010] 2 IR 199.

⁷ *Ibid* at 248.

*of the parties. On those grounds alone the ruling of the High Court that the respondents and the child were a family for the purpose of article 8, may be set aside.*⁸

Further, it is now settled by the Supreme Court that, when pleading the Convention before the Courts, this should be done solely by reference to the limited incorporation through the ECHR Act 2003. Reference should not be made to Irish law “violating the Convention”, but the precise statutory provision or rule of law that is being challenged must be identified, and arguments as to its compliance or otherwise with the Convention, must be based strictly on the interpretative obligation upon the Courts, the duty on any organ of State to act in a Convention compliant manner, and/or the duty on the Courts to grant a declaration of incompatibility regarding a precise statutory provision or rule of law. In *M.D. (a minor) v Ireland*,⁹ the Supreme Court made clear that claims asserting that particular statutory or administrative practices of the State are “*in breach*” of the Convention, without further reference to the ECHR Act 2003, should not be entertained by the court. Denham C.J. stated:

*“The claim, as pleaded, is simply that s. 3 is “in breach of” the Convention. That formulation is not acceptable. It treats the Convention as if it had direct effect and presumes that the Court has the power to grant a declaration that a section is in breach of the Convention. It is clear from the judgments of this Court in *McD v L* [2010] 2 IR 199 that the European Convention on Human Rights Act 2003 did not give direct effect in Irish law to the European Convention on Human Rights. As Murray C.J. stated at page 248, ‘The Convention does not of itself provide a remedy at national level for victims whose rights have been breached by reference to the provisions of the Convention.’”¹⁰*

⁸ *McD v L* [2010] 2 I.R.199 at 255.

⁹ *M.D. (a minor) v Ireland* [2012] IESC 10, in particular see paras. 57-64.

¹⁰ *Ibid* at para. 59.

Cross-fertilisation between rights protected in the Constitution, the Convention and the ECHR Act 2003

Writing extra-judicially in 2014, Hogan states:

*“The enactment of the 2003 Act was hugely important (both at a symbolic and practical level) and it has made a difference, in particular by raising the awareness of the Convention and by ensuring that (subject to certain conditions) it had the force of law in the State. Further, there is no doubt but that the incorporation of the Convention has altered the perspective of the Irish courts in relation to some existing rights.”*¹¹

The extent of cross-fertilisation of rights standards between the Convention and the Constitution can be hard to decipher. The clearest example of this cross-fertilisation of Convention rights with Constitutional rights has occurred in *The People (D.P.P.) v Gormley*.¹² In this case, which concerned the issue of whether the questioning of an accused person could take place in the absence of a solicitor, the Supreme Court noted significant Convention jurisprudence on the rights of accused persons in police custody. The Supreme Court held that, once an accused person had requested a solicitor, barring any exceptional circumstances, questioning of the accused should not commence until they have had the opportunity to consult a solicitor. Focusing on the fusion of Convention jurisprudence and constitutional rights, Clarke J. stated:

*“The likelihood that the State would be required, as the UK Supreme Court put it in Cadder, to organise its systems to take account of such rights has been on the agenda for a sufficient period of time that a finding that the constitutional right to a fair trial encompasses the right to access to legal advice before questioning can hardly come as a surprise. If it be the case that the State has not, to date, organised itself in a manner sufficient to allow such questioning to take place in conformity not just with the Constitution but also with the well-established jurisprudence of the ECtHR, then it is those who are in charge of putting such provisions in place who must accept responsibility.”*¹³

¹¹ Hogan, G. “The Constitution and the Convention: Happily Married or a Loveless Co-Existence” in Egan, Thornton and Walsh, *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Dublin: Bloomsbury, 2014) at p. 73.

¹² *The People (D.P.P.) v Gormley* [2014] 1 I.L.R.M. 377. Discussed in more detail below from p. 76.

¹³ *Ibid* at 404.

In *C.A. & T.A.*,¹⁴ Mac Eochaidh J., considering a number of human rights claims challenging the system of direct provision for asylum seekers, held that rights enjoyed under Article 3 and Article 8 of the Convention were similar in scope to, if not the same as, rights under Articles 40.1, 40.3, 40.5, 41 and 42.1 of the Constitution.¹⁵

In *O'Donnell (a minor) v. South Dublin County Council* (2007),¹⁶ which concerned a human rights challenge to certain aspects of the Housing Acts 1996-2004, the High Court seemed less inclined to equate constitutional rights with Convention rights. While finding a breach of Article 8 of the Convention in this case,¹⁷ on the constitutional point, Laffoy J. stated:

*“The plaintiffs’ allegation of such breach, as pleaded, is that the defendant failed to properly respect, vindicate and act in accordance with their constitutional rights, including their right to bodily integrity, their right not to have their health endangered, and their right to respect for their private and family life... Counsel reminded the court of the caveats issued by the Supreme Court in T.D. v. Minister for Education [2001] 4 I.R. 259: first that, save where an unenumerated right has been unequivocally established by precedent, for example, the right to travel and the right to privacy, some degree of judicial restraint is called for in identifying new rights (per Keane C.J. at p. 281); and, secondly, the inadvisability of the courts at any stage assuming the function of declaring what are frequently described as “socio-economic rights” to be unenumerated rights guaranteed by Article 40 (per Keane C.J. at p. 282)... I am not satisfied that a case has been made out that the defendant has infringed the plaintiffs’ constitutional rights.”*¹⁸

A similar result emerged in *O'Donnell & Others v South Dublin County Council & Others* (2008),¹⁹ similarly in the field of housing law under the Housing Acts 1966-2004, where Edwards J. in the High Court held that, while the applicant’s Article 8 rights under the Convention were violated, there had not been a breach of any constitutional rights. However, the *O'Donnell* (2008) decision must now be read in light of the Supreme Court decision, on appeal.²⁰ MacMenamin J. in the Supreme Court emphasised that the non-compliance of the local authority with the Housing Acts breached Convention rights; however, he also stated

¹⁴ *C.A. & anor v Minister for Justice and Equality & ors* [2014] IEHC 532.

¹⁵ *Ibid* at para 7.2 *et seq.* (Article 3 ECHR and Article 40.3 of the Constitution); paras 8.1-8.6 (Article 8 ECHR and the Constitution); para 8.9 (Article 8 ECHR and Article 40.5). This case is discussed in more detail below, see from p. 94.

¹⁶ *O'Donnell (a minor) v. South Dublin County Council* [2011] 3 I.R. 417. This case, while raising similar issues as *O'Donnell & Others v South Dublin County Council & Others* [2008] IEHC 454, involves different plaintiffs.

¹⁷ For discussion on Convention points for this and other similar cases, see from p. 95.

¹⁸ *O'Donnell (a minor) v. South Dublin County Council* [2011] 3 I.R. 417 at 453-454.

¹⁹ *O'Donnell & Others v South Dublin County Council & Others* [2008] IEHC 454.

²⁰ *O'Donnell & ors v South Dublin County Council & ors* [2015] IESC 28.

that the rights of the minor applicant should have been considered firstly “*in light of the Constitution*”. MacMenamin J. noted:

“The preamble to the Constitution outlines the values of promoting the common good with due observance of prudence, justice and charity, so that “the dignity and freedom of the individual may be assured”. It is clear that constitutional values established by our jurisprudence, specifically those of autonomy, bodily integrity and privacy, are engaged here (In the matter of A Ward of Court (withholding medical treatment) (No. 2) [1996] 2 I.R. 75, and Ryan v AG [1965] I.R. 294). The position of Ellen O’Donnell is distinct by virtue of the evidence. Of course, in every family situation, and in all forms of accommodation, the constitutional values just identified are compromised by the inevitable activities of other family members, or economics, or lack of space. But because of the exceptional overcrowding, and the destruction of the sanitation facilities, and in light of Ellen O’Donnell’s disability, her capacity to live to an acceptable human standard of dignity was gravely compromised. Her integrity as a person was undermined. Her rights to autonomy, bodily integrity and privacy were substantially diminished. The Council was aware of the issue.”²¹

MacMenamin J. then went somewhat further than the High Court in finding:

“...insofar as Ellen O’Donnell is concerned, this is not only a case about parental choices, rights and duties (though these arise), but also about the duty of the Council, when faced with clear evidence of inhuman and degrading conditions, to ensure that it carried out its statutory duty. This was to vindicate, insofar as was practicable, in the words of Article 40.3 of the Constitution, the rights of one young woman with incapacities to whom, by virtue of the evidence, the Council owed a discrete and special duty under Article 40 of the Constitution. That statutory duty [under the Housing Acts] is to be informed with due regard to Ellen O’Donnell’s capacity as a human person (Article 40.1 Constitution of Ireland).”²²

The legal duty on the Council by virtue of the Housing Acts, due to the high level of detailed knowledge that they had on the minor applicant’s living conditions,

“is sufficient to lead to the consequence of fixing the County Council with a duty under s.10 [Housing (Traveller Accommodation) Act, 1998] to take practicable steps on foot of the request for accommodation which was made to it (see s.10(2)). At its highest, that duty was, then, to ‘provide a homeless person with such assistance

²¹ *Ibid* at para. 68

²² *O’Donnell & ors v South Dublin County Council & ors* [2015] IESC 28 at para 70.

(including financial assistance) as the authority considered appropriate' (see s.10(1)(a)), or to 'rent accommodation, arrange lodgings or contribute to the cost of such accommodation or lodging for this young person who was homeless' (see s.10(c))... The evidence, therefore, does not show that the County Council performed its statutory duty, towards Ellen, 'insofar as it was practicable' as the Constitution provides.²³

However, the Supreme Court ruled that as there was no basis “under the statutes or the Constitution, for a finding in favour of Mr, and Mrs. O'Donnell in their claim for a second caravan” - the only remedies open to the minor applicant were damages under the ECHR Act 2003, to be assessed with regard to the Civil Liability Act 1961.²⁴

In the two cases wherein declarations of incompatibility have been issued, the status of the successful Convention right invoked was discussed in context of the Constitution.

In *Foy (No. 1)*²⁵, the plaintiff, a post-operative male-to-female transgender person, claimed that the refusal of the Registrar General to correct mistakes to the plaintiff's birth certificate, and to recognise that the plaintiff was of the female gender, violated constitutional rights to privacy, dignity, and the protection of her person under Articles 40.1, 40.3 and 40.3.2 of the Constitution. Rejecting this claim, (which came prior to the ECHR Act 2003 and dealt with legislation pre the Civil Registration Act 2004), McKechnie J. determined:

“The State's obligations under Articles 40.3.1 and 40.3.2 of the Constitution are circumscribed in that under the former section the law must respect “as far as possible” the rights in question and under the latter section must “by its laws protect as best it may” from unjust attack the right to life, person, good name and property rights of every citizen. When one therefore considers whether the existing situation represents a fair, reasonable and just balance, between the rights of those persons affected via their legal relationship with a transsexual and the rights of the latter, as asserted and sought to be vindicated in the manner requested in this case, I am of the view that it does. Of course I acknowledge that some inconvenience is still caused to the transsexual but I feel that this has been ameliorated very considerably in the past decade. A continuation of the applicant's unease has to be viewed as against competing constitutional rights and the State's entitlement to act for the benefit of the common good. I am therefore of the opinion that the degree of intrusion on the human dignity and privacy of the applicant is not so excessive or

²³ *Ibid* at paras. 73-74.

²⁴ *O'Donnell & ors v South Dublin County Council & ors* [2015] IESC 28 at paras. 75 and 85-87.

²⁵ *Foy v An tArd Chlaraitheoir (No. 1)* [2002] IEHC 116

*disproportionate in the circumstances outlined as would breach either of these constitutional rights.... I am of the opinion that any difference of treatment between the applicant and a biological female is not in my view either unjust; invidious or arbitrary. Despite advances in surgery a male to female transsexual can never shed entirely, that persons male biological characteristics and likewise can never acquire, in many material respects, vital characteristics of the female sex.”*²⁶

In *Foy (No. 2)*,²⁷ the plaintiff sought a declaration of incompatibility under section 5 of the ECHR Act 2003, in relation to the said refusal of the Registrar General. While succeeding on the Convention and ECHR Act 2003 arguments,²⁸ McKechnie J. again rejected the constitutional arguments,²⁹ holding:

*“The facts which she relies upon and the submissions which she makes in this regard are, subject to one variation, virtually identical to those previously advanced and dealt with in the July, 2002 judgment. Whilst this court at that time, both acknowledged and affirmed the applicant's right to equality, to privacy, to dignity and to freedom, it nevertheless concluded for the reasons set out, that the statutory provisions then applicable did not breach any of these rights. In addition at para. 175 of the judgment, the court considered whether the prohibition on persons of the same biological sex from marrying each other could be said to be inconsistent with the constitutional right to marry. For the reasons again set forth in that judgment it concluded that such a prohibition did not violate any right of the applicant in this regard. Such findings, insofar as the same are applicable to the Act of 2004, remain binding on the applicant.”*³⁰

McKechnie J. noted the impact of the enactment of the ECHR Act 2003³¹ and the significant shift in Convention interpretation and jurisprudence on transgender issues since *Foy (No. 1)*.³² The State argued that McKechnie J. should not grant a declaration of incompatibility as,

“the applicant could not identify any particular provision(s) which prohibited the exercise of these rights. In other words, since the applicant's case was firmly based

²⁶ *Foy v An tArd-Chlaraitheoir (No. 1)* [2002] IEHC 116, at paras 173-174.

²⁷ *Foy (No. 2) v An tArd-Chlaraitheoir* [2012] 2 I.R. 1.

²⁸ *Ibid* at 23-31 and 39-63.

²⁹ *Foy (No. 2) v An tArd-Chlaraitheoir* [2012] 2 I.R. 1 at 11.

³⁰ *Ibid* at 38.

³¹ *Foy (No. 2) v An tArd-Chlaraitheoir* [2012] 2 I.R. 1 at 23-31.

³² *Ibid* at 39-58. McKechnie J. noted in particular the decision of the European Court of Human Rights in *Goodwin v United Kingdom* (2002) 35 E.H.R.R. 18.

on the State's failure to enact appropriate legislation, rather than in condemning an existing piece of legislation, she could not successfully seek these said remedies."³³

In granting a declaration of incompatibility, McKechnie J. held:

*"...the failure by the State, through the absence of having any measures to honour the Convention rights of its citizens, is every bit as much a breach of its responsibility as if it had enacted a piece of prohibited legislation. On a daily basis the High Court sees constitutional actions being successfully taken by reason of the State's failure to have in place, for example, proper educational facilities for its minors. Moreover in many of the cases dealt with by the European Court of Human Rights, and which are referred to above, that court has considered (and found) violations of articles 8 and 12 expressly on the grounds of the respondent's State's failure to have in place a system of law affording to a transsexual person proper respect for his or her Convention rights."*³⁴

In granting this declaration of incompatibility, McKechnie J. noted that this was "by far the most suitable remedy", but

*"the respondent State still retains a margin of appreciation as to the most appropriate method by which the applicant's rights can be vindicated. In so doing I see no reason why the State, consistent with upholding such rights, cannot also make provision for the accrued rights of others, meaning those who have been or are affected, impacted, or touched by this decision. Whilst in particular I have in mind the position of Mrs. Foy and the two children of their marriage, there is a wider community also involved. I said very much the same in the last para. of the July, 2002 judgment (see para. 128 supra). Therefore the precise model which might be used is still very much a matter for the Oireachtas and not this court."*³⁵

The other declaration of incompatibility issued to date was issued by the Supreme Court in *Donegan v Dublin City Council*,³⁶ which concerned section 62 of the Housing Acts. The constitutionality of this section had been upheld previously,³⁷ with the Supreme Court holding in *Dublin City Council v Fennell*:³⁸

³³ *Foy (No. 2) v An tArd-Chlaraitheoir* [2012] 2 I.R. 1 at 59.

³⁴ *Ibid* at 60.

³⁵ *Foy (No. 2) v An tArd-Chlaraitheoir* [2012] 2 I.R. 1 at 63.

³⁶ *Donegan v Dublin City Council* [2012] 3 I.R. 600.

³⁷ *The State (O'Rourke) v Kelly* [1983] I.R. 58

³⁸ *Dublin City Council v Fennell* [2005] 1 I.R. 604

“...it is clear that the statutory process involved in an application for possession by a housing authority under s. 62 of the Act of 1966 has survived constitutional and judicial scrutiny, not least because of the obvious need of a housing authority to be able effectively to manage and control its housing stock without being unduly restricted or fettered whilst so doing. Obviously a housing authority must not abuse its powers of discretion when exercising those powers and where it does so the proper remedy is that of a judicial review application to the High Court.”³⁹

In *Donegan*, the Supreme Court recognised that, while section 62 of the Housing Act 1966 was constitutional as regards fair procedures under Article 40.3.1, it was not compliant with Article 8 of the Convention, in light of ECtHR jurisprudence.⁴⁰ The substantive elements of this case are discussed in chapter four.⁴¹

Convention Rights, Retrospectivity and the ECHR Act 2003

In *Fennell*,⁴² the Supreme Court held that the ECHR Act 2003 did not have retrospective effect. The Supreme Court held that Dublin City Council, utilising its statutory powers under section 62 of the Housing Act 1966, did not have to perform its functions or exercise its powers in a Convention-compliant manner at the time.⁴³ Kearns J. noted the relationship between the Convention and Irish law prior to the ECHR Act 2003:

“Prior to the Act of 2003...the Convention was said to be ‘binding on Ireland, but not in it’. The Government was obliged to accept the ruling of the European Court in judgments against it, but the Convention otherwise placed no direct obligations on public authorities. Furthermore, legislative, executive or judicial measures, which appeared to conflict with the Convention, could not be the subject of a Convention specific challenge in the domestic courts. Nor were the courts required to consider relevant Convention caselaw, although, of course, decisions of the European Court have frequently been cited over the years as persuasive authority for the guidance of Irish courts where a particular issue was not governed by any specific domestic

³⁹ *Dublin City Council v Fennell* [2005] 1 I.R. 604 at 614, per Kearns J.

⁴⁰ *Donegan v Dublin City Council* [2012] 3 I.R. 600, in particular at pp. 624-636, where McKechnie J. outlines the key ECtHR jurisprudence on these issues.

⁴¹ See below from p.95.

⁴² *Dublin City Council v Fennell* [2005] 1 I.R. 604.

⁴³ See also, *Rooney v Minister for Agriculture, Food and Forestry & Ors* [2004] IEHC 305. As de Londras and Kelly note (De Londras, F. and Kenny, C. *European Convention on Human Rights Act: Operation, Impact and Analysis* (Dublin: Roundhall, 2010), p. 47), as per section 2 of the ECHR Act 2003, pre-existing legislation/common law etc. even if enacted prior to the enforcement of the ECHR Act 2003, must now be interpreted, in so far as is possible, in a Convention compliant manner.

statutory provision or rule of law. However, the bottom line was that those who sought to have Convention rights vindicated could only do so before the European Court of Human Rights in Strasbourg, with the added requirements that they first exhaust all domestic remedies and then make application within a strict six month deadline."⁴⁴

In finding that provisions of the ECHR Act 2003 were not retrospective, Kearns J. stated:

*"[T]he proceedings were not merely pending but had proceeded to final determination in one court and a notice of appeal had been lodged to another court prior to the coming into operation of the new statute. The parties' legal rights and obligations were, in my view, fixed and determined once the wheel was set in motion by the service of a notice to quit, an act which triggered the provisions, requirements and consequences of Section 62 of the Housing Act..."*⁴⁵

Therefore, administrative actions occurring prior to the entry into force of the ECHR Act 2003 could not be impugned on the basis that the relevant authority had (allegedly) acted in a manner that was not compliant with the Convention. The only option therefore for an applicant in Fennell's position claiming a breach of Convention rights was to bring a case to the ECtHR. As Laffoy J. noted in *Byrne v An Taoiseach*:

*"The Act of 2003 introduced a starting point at which the liability of an organ of the State for failure to perform its functions in a manner compatible with the provisions of the Convention arises under national law which is fixed in time, irrespective of the evolution of the jurisprudence of the European Court of Human Rights which may give rise to additional obligations on the part of the State at the level of international law."*⁴⁶

So while the ECHR Act 2003 may act as a useful means of ensuring Convention compliance, there are limitations to its usefulness, in particular as regards State action prior to the ECHR Act 2003. While claimants may have to satisfy limitation periods under domestic law, recourse to Strasbourg may still, in certain instances, be the only effective remedy available to litigants.

⁴⁴ *Dublin City Council v Fennell* [2005] 1 I.R. 604 at 615.

⁴⁵ *Ibid* at 638-639.

⁴⁶ *Byrne v An Taoiseach* [2011] 1 I.R. 190 at 218.

Interpretative Obligations (section 2, ECHR Act 2003)

Legal practitioners have sought to utilise the interpretative obligation under the ECHR Act 2003 as a means of enhancing discretionary, statutory and constitutional rights of individuals. The Irish Superior Courts have made clear:⁴⁷

- The Irish courts are bound to continue applying the rules of statutory construction which applied prior to the ECHR Act 2003;
- Courts must first consider the correct construction of the statutory provision (or rule of law) interpreted in the light of the Convention;
- Courts must consider whether it is possible, without doing violence to the purpose of the statutory provision, to give the relevant provision a Convention meaning;
- Irish courts should “*not adopt interpretations of the Convention at variance with the current Strasbourg jurisprudence*”;⁴⁸
- Where this is not possible, and if there is a breach of Convention rights, then the only solution open to the Court is a declaration of incompatibility.

In *McD v L*, Murray C.J. stated that section 2 of the ECHR Act 2003,

*“is not a basis for founding an autonomous claim based on a breach of a particular section of the Act. It is an interpretative provision and is limited to requiring that a court, so far as possible, when interpreting or applying any ‘statutory provision’ or ‘rule of law’ do so in a manner compatible with the State’s obligations under the Convention. In exercising its jurisdiction pursuant to s. 2 a court must identify the statutory provisions or rule of law which it is interpreting or applying. Even then it is subject to any rule of law relating to interpretation and application.”*⁴⁹

Murray C.J. analysed the section 2 of the ECHR Act 2003 obligation on the courts in interpreting statutory provisions and rules of law in a Convention-compliant manner, and recognised the fluidity of this obligation:

“...the Oireachtas in providing, in the most general terms, that the laws which it passes are to be interpreted to the extent possible in accordance with the case law of the European Court of Human Rights (or decisions of the Committee of Ministers)

⁴⁷ See generally: *Donegan v Dublin City Council* [2012] 3 I.R. 600.

⁴⁸ *McD v L* [2010] 2 I.R. 199 at 316, per Fennelly J.

⁴⁹ *Ibid* at 250-251.

that the Oireachtas itself will not always be in a position to perceive or even contemplate, by recourse to any objective considerations, the meaning, by reference to the Convention, which may subsequently be given to the provision of an Act which it is passing (and which it might have passed in altogether different terms if it could have). This raises questions as to how the intent of the Oireachtas by reference to the text of a statute which it has adopted in accordance with the Constitution is to be determined and the relevance of that intent to its interpretation. These questions are relevant to the role of the Oireachtas in whom 'the sole and exclusive power of making laws for the State' is vested by Article 15.2 of the Constitution. Perhaps the answers to such questions lie in whole or in part in the proviso in s. 2, by which the requirement to interpret a statute in a manner compatible with the Convention is 'subject to the rules of law relating to such interpretation and application.'"⁵⁰

Fennelly J., in his judgment in the same case, struck a note of warning that, in interpreting statutory provisions:

*"The national courts do not become Convention courts."*⁵¹

The Supreme Court has emphasised that, where courts are called upon to interpret a statutory provision in a Convention-compliant manner, the courts should not engage in a "redrafting exercise",⁵² in order to read legislation in such a manner.

An excellent example of this cautious approach by the courts can be seen in *Ryan v Clare County Council*⁵³. Section 34(8)(f) of the Planning and Development Act 2000 ('the PDA 2000') provides that if a planning authority is silent as regards a planning application within eight weeks from the date of receipt of the application, then planning permission is deemed to be granted:

*"Where a planning authority fails to make a decision within the period specified in paragraph (a), (b), (c), (d) or (e), a decision by the planning authority to grant the permission shall be regarded as having been given on the last day of that period."*⁵⁴

There was no requirement to notify the appellant planning applicant or any notice parties of this deemed grant of planning permission.

⁵⁰ *McD v L* [2010] 2 I.R. 199 at 315 at 252.

⁵¹ *Ibid* at 315.

⁵² *Ryan v Clare County Council* [2014] IESC 67 at para. 54.

⁵³ *Ryan v Clare County Council* [2014] IESC 67

⁵⁴ *Ibid*.

Clare County Council argued on appeal that section 34(8)(f) of the PDA 2000 had to be read in a Convention-compliant manner, namely, in conformity with Articles 6 and 8, and with Article 1 of Protocol 1, of the Convention, such that the objections of notice parties should be taken into account in all planning decisions. The Supreme Court noted that the respondents and notice parties to the proceedings did not seek a declaration of incompatibility under section 5 of the ECHR Act 2003.⁵⁵ While the Supreme Court accepted that such deemed planning permission may impact (even significantly) on the rights of the respondents and notice parties under the above-named Articles of the Convention, section 2 of the ECHR Act 2003 did not make it possible,

“to construe the section so as to provide the form of protection of potential [Convention] right[s]...”⁵⁶

The Supreme Court noted that in reality the arguments of the respondent and notice parties would effectively mean that the Court would be making additions to section 34(8)(f) of the PDA 2000 to read:

*“Where a planning authority fails to make a decision within the period specified in paragraph (a), (b), (c), (d) or (e), a decision by the planning authority to grant the permission shall be regarded as having been given on the last day of the period” and then to add the words ‘save where **third parties have made submissions or observations pursuant to s.4(3)(b)**’”⁵⁷*

To interpret the PDA 2000 in such a manner would have obliged the Court to adopt a construction of section 34(8)(f) of the PDA 2000 that,

“could not be said to be implied in this section, nor could it be capable of implication, even if there was supporting ECtHR case law to support such an interpretation.”⁵⁸

In *M.O.I v Refugee Appeals Tribunal*⁵⁹ the applicant challenged the decision of the Refugee Appeals Tribunal (the Tribunal) on the basis that the decision maker did not consider Convention rights grounds, in particular based on Articles 2, 3, 5 8 and 10 of the Convention. Counsel for the applicant argued that section 2 of the ECHR Act 2003 obliged the Tribunal

⁵⁵ *Ryan v Clare County Council* [2014] IESC 67 at para. 47.

⁵⁶ *Ibid* at para. 54.

⁵⁷ *Ryan v Clare County Council* [2014] IESC 67 at para. 54. Emphasis in original judgment, outlining how the Court would have to read the relevant statutory provision if the respondent's and notice parties arguments were accepted.

⁵⁸ MacMenamin J. also stated that he did not believe that Convention rights were necessarily engaged in this particular case. *Ryan v Clare County Council* [2014] IESC 67 at para. 55.

⁵⁹ *M.O.I v Refugee Appeals Tribunal* [2014] IEHC 291.

Member to have regard to the substance of Convention rights in interpreting the Refugee Act 1996. Mac Eochaidh J. rejected this argument, holding that:

“section 1 of the ECHR Act 2003 provides the definitions to be used throughout the Act and expressly refers to an “organ of the State” as including “a tribunal or any other body (other than...a court) which is established by law or through which any of the legislative, executive or judicial powers of the State are exercised.” As such, the definition clearly indicates that the Refugee Appeals Tribunal comes within the provisions of s. 3 of the ECHR Act 2003 which is referable to an “organ of the State” rather than s. 2. It is clear that s. 2 applies specifically to “a court” which does not include the Refugee Appeals Tribunal for the purposes of the section and the applicant’s claims in this regard must fail.

I reject the argument that s. 2 of the European Convention on Human Rights Act 2003 requires the Tribunal Member to apply or consider the provisions of the European Convention on Human Rights in deciding on an asylum claim. Self-evidently, the section is directed to the duties of a Court to interpret and apply the law of the State in a manner compatible with the State’s obligations under the Convention.”⁶⁰

Mac Eochaidh J. held that the “sole function” of the Tribunal was to determine whether an individual was a refugee within the meaning of section 2 of the Refugee Act 1996 and,

“while the rights available under the constitution and the convention are applicable to the manner in which the Tribunal carries out its functions, they simply do not arise in terms of making an assessment on refugee status.”⁶¹

As well as the Tribunal not being obliged to consider Convention rights, Mac Eochaidh J. further held that section 4 of the ECHR Act 2003 did not oblige Tribunal Members to take “judicial notice” of Convention jurisprudence from the ECtHR.⁶²

This interpretation of the ECHR Act 2003 was based on the limited role for the Tribunal in deciding an applicant’s refugee (and now subsidiary protection) claim. However, it will also impact on all other quasi-judicial bodies/tribunals in the State. While such bodies will have to act in a Convention-compliant manner, there is no obligation on these bodies to take “judicial notice” of Convention jurisprudence.

⁶⁰ *Ibid* at paras. 10-11.

⁶¹ *M.O.I v Refugee Appeals Tribunal* [2014] IEHC 291 at para. 18.

⁶² *Ibid* at para. 22.

Remedies for Rights Violations under the ECHR Act 2003

Damages

To date, damages have been awarded on a number of occasions under section 3(2) of the ECHR Act 2003.⁶³ There has been one *ex gratia* payment made to Dr Lydia Foy.⁶⁴

Where the relevant breach is attributable not just to an organ of the State, but also to another party, the Civil Liability Act 1961 will apply. This can be illustrated in the recent Supreme Court decision of *O'Donnell v South Dublin County Council*⁶⁵ where MacMenamin J. stated that Ms. O'Donnell's parents may have "potential legal liability or part liability"⁶⁶ in the context of a claim for failure to provide suitable accommodation under the Housing Acts. The levels of damages in *O'Donnell* are to be assessed at a further plenary hearing in the High Court.⁶⁷ MacMenamin J. also noted that neither the Charter, nor the EU's accession to the "UN Convention for the Protection of Persons with Disabilities", could have been considered by the High Court in assessing damages, as these instruments were not pleaded.⁶⁸ Therefore, it remains to be seen how the High Court will calculate damages under the ECHR Act 2003 in light of these clarified principles from the Supreme Court.

Injunctions

In *Donegan v Dublin City Council*⁶⁹, the High Court refused to grant an interlocutory injunction prior to the ultimate substantive ruling discussed above that section 62 of the Housing Act 1966 (as amended) is incompatible with the obligations of the State under Articles 6, 8, 13 and 14 ECHR. In *Gifford v Dublin City Council*⁷⁰, also a Housing Act case, Smyth J. held that the correct procedure in such cases was for the applicant to seek a judicial review of the Council's removal of the tenant. Smyth J. stated:

"[I]f the Council had acted unreasonably, unfairly or from an improper motive or in breach of its obligations under Section 3 of the Act of 2003, [the applicant] should have applied to the High Court for judicial review. The availability of that remedy,

⁶³ See: *Pullen v. Dublin City Council (No. 3)* [2009] IEHC 452 and *O'Donnell (minor) v South Dublin County Council* [2011] 3 I.R. 417.

⁶⁴ Mac Cormaic, R., "Compensation paid to Lydia Foy over gender recognition failures", *Irish Times*, 03 November 2014.

⁶⁵ *O'Donnell & ors v South Dublin County Council & ors* [2015] IESC 28.

⁶⁶ *Ibid* at para. 87.

⁶⁷ *O'Donnell & ors v South Dublin County Council & ors* [2015] IESC 28 at para. 86.

⁶⁸ *Ibid*.

⁶⁹ *Donegan v Dublin City Council* [2008] IEHC 288

⁷⁰ *Gifford v Dublin City Council* [2007] IEHC 387. There are no page or paragraph numbers in the judgment to which pointed reference can be made.

coupled with the fact that the Council cannot recover possession of the dwelling without a court order is sufficient to supply the necessary and appropriate degree of respect for the Plaintiff's rights under Article 6, 8, 13 and 14 of the Convention."⁷¹

However, in *Byrne v Dublin City Council*⁷² (post the High Court decision in *Donegan*), Murphy J. granted an interlocutory injunction, restraining Dublin City Council from removing the applicant from her local authority house. Providing a detailed analysis of Article 13 Convention jurisprudence⁷³ as regards right to an effective remedy, Murphy J. noted:

*"Article 13 may therefore require the provision of relief which is such as to prevent a potentially irreversible violation of Convention rights, provided that such a violation flows from the execution of a particular measure rather than from the law itself."*⁷⁴

Murphy J. stated that damages would not provide an adequate remedy for the applicant. The judge outlined the consequences that could follow if the injunction was not granted:

*"The consequences of the proposed eviction for the applicant would appear to be severe. It is submitted on her behalf that no alternative accommodation is open to her and the children who continue to reside with her. As a result of an eviction for anti-social behaviour she would be deemed to have deliberately rendered herself homeless and would not be entitled to be re-housed. In addition, it is said that she is currently unemployed and might be precluded and/or prevented from obtaining social welfare supplementary allowance under s. 16 of the Housing (Miscellaneous Provisions) Act, 1997 if evicted. This would adversely affect her ability to secure private rented accommodation, rendering her situation still more difficult. Although the issue was not argued before this Court, it may be appropriate to note that in such circumstances, the loss of such welfare support might, by reason of its impact on the right of the applicant and her children to respect for family life, entail an infringement of the Convention (*Anufrijeva v Southwark London B.C. [2004] 1 All ER 833 at para. 43*)."*⁷⁵

Murphy J. noted that unlike the UK's Human Rights Act 1998, Article 13 ECHR had been explicitly included within the remit of the ECHR Act 2003. Relying on the law on injunctive

⁷¹ *Gifford v Dublin City Council* [2007] IEHC 387.

⁷² *Byrne v Dublin City Council* [2009] IEHC 122.

⁷³ With precise reference to *Klass and others v Federal Republic of Germany* (1980) 2 E.H.R.R. 214, *James and others v United Kingdom* (1986) 8 E.H.R.R. 123, *Leander v Sweden* (1987) 9 E.H.R.R. 433, *Plattform Ärzte für das Leben v Austria* (1991) 13 E.H.R.R. 204, *Conka v Belgium* (2002) 34 E.H.R.R. 1298 and *Krasuski v Poland* (App. No. 61444/00) (14 June 2005).

⁷⁴ *Byrne v Dublin City Council* [2009] IEHC 122 at para. 5.2.4.

⁷⁵ *Ibid* at section 8.

relief, and seeking to ensure this was exercised in a Convention-compliant manner, Murphy J. held:

*“As there exists a reasonable prospect of the perpetual injunction sought being obtained, and because there is a serious question to be tried as to whether the implementation of the warrant for possession would amount to such a breach [in light of Donegan], the Court proposes to grant the interlocutory injunction sought, the balance of convenience favouring such a course.”*⁷⁶

However, just a number of weeks later, in *Pullen v Dublin City Council (No. 2)*,⁷⁷ Irvine J. refused to grant an injunction restraining Dublin City Council from effecting an eviction against the applicants. This was despite a High Court declaration in a previous case⁷⁸ that Dublin City Council failed to act in a Convention-compliant manner. Irvine J. examined the overall scheme of the ECHR Act 2003 and held:

*“Section 3(2) provides that a person who has suffered injury, loss or damage as a result of a contravention of s.3(1) may institute proceedings to recover damages in respect of such contravention....The court concludes that it has no jurisdiction to grant any relief other than an award of damages in the event of proceedings being instituted wherein it is established the plaintiffs have suffered injury, loss or damage arising from the defendant's contravention of the obligations under s.3(2). The court believes that its decision in this regard is consistent with the overall scheme of the Act and is one which upholds the doctrine of the separation of powers. Further, the court believes that the general rule in respect of statutory interpretation namely *expressio unius exclusio alterius* precludes the court from concluding that the plaintiffs are entitled to any relief by way of injunction. To grant an injunction would be to grant a relief not provided for in s.3(2) of the ECHR Act 2003 and would be an order that would conflict with the clear provisions of s.3(2), would offend the doctrine of the separation of powers and would be against the canons of construction already referred to.”*⁷⁹

While the applicants were subsequently awarded damages,⁸⁰ this line of case law does not require the State (or organs of the State) to prospectively act in a manner that is Convention-compliant. De Londras and Kelly argue that *Pullen (No. 2)* should be restricted to the particular peculiar facts at play, where the actions of the local authority were protected under

⁷⁶ *Byrne v Dublin City Council* [2009] IEHC 122 at sections 7 and 8.

⁷⁷ *Pullen v Dublin City Council (No. 2)* [2009] I.L.R.M. 484.

⁷⁸ *Pullen v Dublin City Council (No. 1)* [2009] IEHC 452.

⁷⁹ *Pullen v Dublin City Council (No. 2)* [2009] I.L.R.M. 484 at 503.

⁸⁰ *Pullen v. Dublin City Council (No. 3)* [2009] IEHC 452.

legislation. Where an organ of State fails to act in a Convention-compliant manner in performing a statutory function or exercising a statutory discretion,⁸¹ then the option of gaining an injunction *may* remain. This hypothesis has yet to be tested in the Irish courts.

Other Remedies: An Obligation to have a Satisfactory Rights Protection System in Place

In *O’Keeffe v Ireland*⁸² the applicant, who had been the victim of sexual abuse perpetrated by a national school teacher, argued that Ireland failed to meet its positive obligations under Article 3 and Article 8, and with Article 2 of Protocol 1, of the Convention, by not having a satisfactory system in place to effectively monitor safety of children in national schools.⁸³ While this argument was not pursued in domestic proceedings, the ECtHR noted:

*“...having regard to the fundamental nature of the rights guaranteed by Article 3 and the particularly vulnerable nature of children, it is an inherent obligation of government to ensure their protection from ill-treatment, especially in a primary education context, through the adoption, as necessary, of special measures and safeguards... this is an obligation which applied at the time of the events relevant to this case, namely in 1973...”*⁸⁴

In addition, the ECtHR found that the applicant did not have any effective remedies for breaches of Convention rights, which is a requirement under Article 13 of the Convention.⁸⁵ The Strasbourg Court was not convinced that the remedies under Irish law were effective.⁸⁶

Declarations of Incompatibility to Date

As noted above, two declarations of incompatibility have been issued to date, under section 5 of the ECHR Act 2003, in the fields of housing law⁸⁷ and concerning the failure of the State to permit transgender persons to recognition of actual gender⁸⁸. The time taken to remedy

⁸¹ De Londras F. and Kelly, C. *The European Convention on Human Rights Act 2003* (Round Hall, 2010), at para. 7-48.

⁸² *O’Keeffe v Ireland* [App. No. 35810/09] [28 January 2014]. For the 2008 Supreme Court decision in this case, see *O’Keeffe v Hickey* [2008] IESC 72.

⁸³ *O’Keeffe v Ireland* [App. No. 35810/09] [28 January 2014] at paras 123-129.

⁸⁴ *Ibid* at paras 146-147.

⁸⁵ For further analysis of the entirety of the judgment, see Kilkelly, U. “The State’s Duty to Protect Children from Abuse: Justice in Strasbourg in *O’Keeffe v. Ireland*”, available [here](#) and Utiz, R. “Grand Chamber Judgment in *O’Keeffe v Ireland*”, available [here](#).

⁸⁶ *O’Keeffe v Ireland* [App. No. 35810/09] [28 January 2014] at paras. 183-186.

⁸⁷ See *Donegan v Dublin City Council & anor and Dublin City Council v Gallagher* [2012] 3 I.R. 600. The Oireachtas passed the Housing (Miscellaneous Provisions) Act 2014 in response to this ruling. This case is discussed above from p. 41 and p. 48, and below from p. 95.

⁸⁸ *Foy v Registrar of Births, Deaths and Marriages* [2012] 2 I.R. 1. See above from p. 39.

the declarations of incompatibility is of some concern. The Gender Recognition Bill 2014 was recently passed by the Oireachtas, some eight years after the declaration in *Foy*. Whether the significant length of time it has taken to remedy Ireland's breach of the Convention satisfies the right to an effective remedy under the Convention remains to be seen.

Chapter Four: The Convention/ECHR Act 2003 before the Irish Courts – Sectoral developments

This chapter considers the impact of the ECHR Act 2003 in areas where it has been most argued before tribunals, the District Court and the Superior Courts. This will be analysed under the following headings:

- (1) Mental Health Law;
- (2) Asylum and Immigration Law;
- (3) Criminal Law;
- (4) European Arrest Warrant;
- (5) Family and Child Law;
- (6) Social Rights and Employment Rights.

As noted in chapter 1, the Convention and the ECHR Act 2003 have been pleaded to date across a wide variety of legal fields before Irish courts and tribunals. This chapter highlights some of the key legal areas where the Convention and/or the ECHR Act 2003 were argued before the courts in which there was substantive engagement from judges on the arguments raised. While arguments have been raised in other legal areas, these have often been pleaded or utilised in argument but not necessarily fully analysed by the Irish courts. Readers are directed to the full case list in Annexes 2-4 to this Report for a full list of these cases.

Mental Health Law

There have been a number of cases relating to the compliance of Ireland's mental health legislation with Convention rights.

In the area of committal to a designated centre¹ for commission of offences that would otherwise have been criminal, the challenges have revolved around whether the Criminal

¹ See section 3 of the Criminal Law (Insanity) Act 2006; section 3(2) states: "*The Minister for Health and Children by order may after consultation with the Mental Health Commission established under section 32 of the Act of 2001, designate a psychiatric centre as a centre (in this Act referred to as a "designated centre") for the*

Law (Insanity) Act 2006 (as amended) is Convention compliant. In *B. v Mental Health (Criminal Law) Review Board & Ors*,² Mr. B had killed his daughter while suffering from mental illness and had been detained pursuant to the Trial of Lunatics Act 1883. Due to significant legal changes, and by virtue of section 20(2) of the Criminal Law (Insanity) Act 2006, Mr. B. was entitled to a review of his detention by the Mental Health (Criminal Law) Review Board. The applicant made strides in recovering from his mental illness and was spending 4 days in his family home and 3 days in the Central Mental Hospital in Dundrum. The applicant argued that, as he no longer suffered from a mental illness, he should be conditionally discharged under section 13 of the Criminal Law (Insanity) Act 2006. However, due to the wording of section 13 of the 2006 Act at the time,³ the Review Board feared that a conditional discharge, as provided for in the Act of 2006, was in effect unconditional, and therefore refused conditional discharge. The conditional discharge scheme was challenged on the grounds that it breached Article 5 ECHR. Hanna J. reviewed some of the key Convention jurisprudence on detention and mental health.⁴ He concluded:

“The regime under which the applicant is living his life and working is very different from that experienced [in Johnson v United Kingdom [1999] 27 EHRR 296].⁵ We are not dealing here with the sort or level of “compulsory confinement”.... The Board, as mandated by statute, is overseeing a regime which is in the applicant’s interest... [W]hether the applicant’s current situation be unsatisfactory or otherwise, I do not perceive it to amount to a violation of Article 5 of the Convention... The applicant has been afforded a significant measure of liberty founded upon unanimous medical advice and the Board has properly and lawfully acted upon same.”

In *L v Kennedy*,⁶ the applicant had been found guilty by reason of insanity of the murder of his mother.⁷ The applicant challenged his continued detention as incompatible with Article 5 ECHR. He no longer suffered from a mental disorder at the date of the hearing,⁸ but had

reception, detention and, where appropriate, care or treatment of persons or classes of persons committed or transferred thereto under the provisions of this Act.”

² *B. v Mental Health (Criminal Law) Review Board & Ors* [2008] IEHC 303. Please note that precise references to paragraph numbers are not provided in this judgment. The applicant appealed to the Supreme Court, but this appeal was struck out after the enactment of the Criminal Law (Insanity) Act 2010 allowing for the enforcement of conditional discharge orders.

³ See section 13A of the Criminal Law (Insanity) Act 2006 (as inserted by the Criminal Law (Insanity) Act 2010).

⁴ In particular, *Winterwerp v The Netherlands* [1979] 2 E.H.R.R. 387 and *Johnson v United Kingdom* [1999] 27 E.H.R.R. 296.

⁵ *Johnson v United Kingdom* [1999] 27 E.H.R.R. 296 at para. 63; the ECtHR noted that conditions can be imposed on release of an individual, who had been confined to a mental health institution for his own protection and protection of others. The ECtHR found that the delay in releasing the applicant in the UK did constitute a violation of Article 5 of the Convention.

⁶ *L. v Kennedy* [2011] 2 I.R. 124.

⁷ *Ibid* at 127.

⁸ *L. v Kennedy* [2011] 2 I.R. 124 at 128.

been on temporary release in 2009 and had breached a condition of his release.⁹ Peart J. held that the Convention provides sufficient margin of appreciation for bodies such as the Review Board, so that:

“It does not follow that because he no longer suffers from the mental disorder which justified his or her detention at the Central Mental Hospital in the first place that he must be discharged.”¹⁰

Referring to the case of *Kolanis v United Kingdom*, Peart J. noted that where supports cannot be put in place outside the mental health detention setting,¹¹ the failure to release an individual from detention does not necessarily violate Article 5(1) of the Convention.¹² The applicant’s continued detention was in accordance with the law and in accordance with Article 5(1) of the Convention.¹³ Peart J. did however state that, while not challenged in this case, the general policy of the Review Board to refuse a conditional discharge under the 2006 Act, based on the presumption that a person will not abide by imposed conditions,

“will lead to arbitrariness in the decision to detain, and may constitute a breach of obligations under article 5 of the European Convention on Human Rights.”¹⁴

The issue of medical treatment for those detained under the Mental Health Acts has also been considered by the Superior Courts in the Convention context. In *Health Service Executive v M.X.*¹⁵ MacMenamin J. had to consider whether the provision of “treatment”¹⁶ under the Mental Health Act 2001 could be provided to a patient who was suffering from paranoid schizophrenia and borderline personality disorder. The Court recognised that even if a person is suffering from mental illness, they continue to enjoy free will, self-determination, freedom of choice, dignity and autonomy.¹⁷ Where decisions are made to commence treatment, then the right to fair procedures is necessarily engaged given the significant abridgment of personal rights that may occur in such circumstances.¹⁸

MacMenamin J. noted that, in the arena of consent to medical treatment, while the Constitution and Convention provide “*separate*” safeguards, the same rights (as well as the procedures to vindicate these rights) were at stake:

⁹ *L. v Kennedy* [2011] 2 I.R. 124 at 145 and 152.

¹⁰ *Ibid* at 150.

¹¹ *Kolanis v United Kingdom* (2005) 42 E.H.R.R. 12.

¹² *L. v Kennedy* [2011] 2 I.R. 124 at 152-153.

¹³ *Ibid* at 154.

¹⁴ *L. v Kennedy* [2011] 2 I.R. 124 at 147-148.

¹⁵ *Health Services Executive v. M.X.* [2012] 1 I.R. 81.

¹⁶ See sections 2, 4 and 57 of the Mental Health Act 2001 (as amended).

¹⁷ *Health Services Executive v M.X.* [2012] 1 I.R. 81 at 85.

¹⁸ *Ibid* at 86-87 (referring to *Shtukaturov v Russia* (2012) 54 E.H.R.R. 27 and *Winterwerp v The Netherlands* [1979] E.H.R.C. 387).

*“the prohibition of inhuman and degrading treatment, the right to autonomy and liberty, the right to fair procedures and rights to an effective remedy and to prohibition on discrimination.”*¹⁹

MacMenamin J. did not see any disjuncture between constitutional rights and Convention rights in this arena.

In concluding, MacMenamin J. stated:

*“I think a broad construction of the word ‘treatment’ will have the following consequences: it will respect the principles that allow for a broad interpretation; it will have regard to the other provisions of the Act; it will respect and reflect the constitutional values involved and the precedents which bind this court. But it must be emphasised it should be compatible with the Constitution itself and the terms of ss.2, 3 and 4 of the European Convention on Human Rights Act 2003. I conclude that, after these hearings, the Court in its interpretation of the Act, and in the assessment of the defendant's best interest, should allow for a medical procedure which, albeit invasive, is ancillary to, and part of the procedures necessary to remedy and ameliorate her mental illness or its consequences. Clearly ‘treatment’ could not include measures or procedures which are entirely unrelated to a patient's mental illness.”*²⁰

Admission of children to psychiatric care and administering treatment without consent was considered in the case of *XY (No. 2)*.²¹ The different means of admitting children to psychiatric care were challenged. The Court refused to make an order that section 25(6) of the Mental Health Act 2001 was repugnant to the Constitution and/or the Convention. In doing so, Birmingham J. had due regard to the Constitution, the Convention, the jurisprudence of the ECtHR, and the broad principles of the UN Convention on the Rights of Persons with Disabilities.²² Distinguishing the case of *X v Finland*,²³ Birmingham J. held that

¹⁹ *Health Services Executive v M.X.* [2012] 1 I.R. 81 at 108.

²⁰ *Health Services Executive v M.X.* [2012] 1 I.R. 81 at 105. See also, *In the matter of Article 40.3 of the Constitution and Article 41 of the Constitution and in the matter of section 25 of the Mental Health Act 2001, in the matter of XY, a minor: Health Service Executive v JM and RP* [2013] 1 I.L.R.M. 30.

²¹ *XY (a minor suing by her guardian ad litem, Raymond McEvoy) v Health Service Executive and the Attorney General and Irish Human Rights Commission (notice parties) (No.2)* [2014] 1 I.L.R.M. 170

²² *XY (a minor suing by her guardian ad litem, Raymond McEvoy) v Health Service Executive and the Attorney General and Irish Human Rights Commission (notice parties) (No.2)* [2014] 1 I.L.R.M. 170 at 179, citing with approval, comments of MacMenamin J. in *M.X. (a person of unsound mind) v Health Service Executive* [2012] 3 I.R. 254 at 271-280. For a comment on the applicability of the UN Convention in Ireland through European Union law, see *M.X. (a person of unsound mind) v Health Service Executive* [2012] 3 IR 254 at 272-277.

²³ *X v Finland* [2012] ECHR 1371, discussed in *XY (a minor suing by her guardian ad litem, Raymond McEvoy) v Health Service Executive and the Attorney General and Irish Human Rights Commission (notice parties) (No.2)* [2014] 1 I.L.R.M. 170 at 181-183.

an independent court made a decision (subject to appeal) to commit the applicant,²⁴ and there were clear restrictions on the circumstances under which the order to commit can be made. There must be no other alternatives open to the authorities.²⁵ The District Court has the power to amend, vary or discharge the order, of its own motion, or upon the application of an interested party. This contrasted to the regime in *X v Finland*, where the detained person could not challenge his or her confinement.²⁶ Therefore, the State's approach to issues of detaining children under the Mental Health Act 2001, and provision of medical treatment, was in compliance with the Convention.

Where an order is made by the Mental Health Tribunal as regards transfer to a different designated centre (e.g. the Central Mental Hospital in Dundrum), and where this order has not been effected for a significant period of time, the High Court stated that the failure to give effect to the order to transfer will not necessarily breach Convention rights or render continued confinement unlawful.²⁷ While better treatment may have been available in the Central Mental Hospital, this did not automatically mean that the applicant's rights under Article 3 and/or Article 8 of the Convention were violated.²⁸ The Court accepted that,

*“there can be situations which fall so far short of acceptable as to the conditions of detention and treatment that confinement becomes unlawful. It is also the case that a situation of confinement that would ordinarily be lawful, may be rendered unlawful by reason of a medical condition...”*²⁹

After reviewing core ECtHR jurisprudence,³⁰ Charleton J. concluded:

“(iii)...the conditions of treatment and the confinement applied to her are not unreasonable. It is impossible to say that they are not mandated by her condition even though better treatment may be available elsewhere. They do not amount to torture or to inhuman or degrading treatment;

(iv) the applicant may receive some benefit through being transferred for a time to the Central Mental Hospital. The court cannot be expected to order her transfer, in the context of scarce resources, in preference to other patients on that waiting list who would have their necessary treatment put back in consequence;

²⁴ *XY (a minor suing by her guardian ad litem, Raymond McEvoy) v Health Service Executive and the Attorney General and Irish Human Rights Commission (notice parties) (No.2)* [2014] 1 I.L.R.M. 170 at 182.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *E.T. v. Clinical Director, Central Mental Hospital* [2010] 4 I.R. 403.

²⁸ *Ibid* at 412-413.

²⁹ *E.T. v. Clinical Director, Central Mental Hospital* [2010] 4 I.R. 403 at 413.

³⁰ *Ibid* at 413-415, in particular: *Aleksanyan v Russia* [2011] ECHR 841 and *Groni v Albania* [2009] ECHR 1076, as well as the more general “detention conditions” jurisprudence.

(v) the applicant's right to privacy has been briefly mentioned. That right is certainly infringed by her conditions of confinement, but this is necessary for her proper care and treatment so that harm may be avoided to herself and to those who come in contact with her. This is not a breach of her Convention rights or her right to privacy under the Constitution because it is necessary and is justified by the statutory scheme; and

(vi) the applicant's detention is not therefore unlawful. There is no breach of article 3 of the European Convention on Human Rights 1950. Whereas her constitutional rights have been severely circumscribed, this has been done in accordance with the paternal jurisdiction of the State to care for the severely ill.”³¹

Asylum and Immigration Law

As Annex 1 to this Report illustrates, the area of asylum and immigration law has been the most litigated as regards Convention rights within Irish law.³² The ECtHR has adopted a cautious interpretation of the Convention in the field of asylum and immigration law. There is no express obligation in the Convention for a State to admit an individual who claims asylum to a State.³³ However, as can be seen below, the Convention can result in an additional measure of protection for asylum seekers and other migrants³⁴

Being physically present in a State entitles a person to protection under the Convention.³⁵ Differences in the extent of Convention rights protection may arise due to a person's status as an asylum seeker or other migrant status,³⁶ vis-à-vis citizens or other settled residents. A significant number of Irish Superior Courts' case law relates to either general fair procedures or due process within asylum/immigration status determination mechanisms, or claims that Convention rights will be violated in the event of removal.

³¹ *E.T. v. Clinical Director, Central Mental Hospital* [2010] 4 I.R. 403 at 415-416.

³² While asylum and immigration law are evidently distinct fields of law, they are considered here together due to significant overlaps in the issues arising before the Irish courts, and judicial treatment of said issues, from a Convention perspective.

³³ *Vilvarajah and others v United Kingdom* [1991] 14 E.H.R.R. 248 at para. 102 and repeated in *Ahmed v Austria* [1997] 24 E.H.R.R. 278 at para 38, where the ECtHR stated that “*the right to political asylum is not contained in either the Convention or its Protocols...*” Ireland has clear obligations to assess applications for refugee protection under the Refugee Convention, 1951 (see Refugee Act 1996 (as amended) and to assess subsidiary protection applications, under European and domestic law.

³⁴ The impact of the Charter on Irish asylum and immigration law is considered below, see p. 130.

³⁵ *D v UK* (1997) 24 E.H.R.R. 423 at para. 49.

³⁶ *Saadi v United Kingdom* (2007) 44 E.H.R.R. 50.

Judicial Review, the Convention and Proportionality in Immigration Decisions

Convention (and Charter)³⁷ jurisprudence in the field of immigration and asylum law has been extensive as regards procedural propriety and administrative fairness in decision making, and as regards decisions on refugee status, subsidiary protection³⁸, leave to remain and the issuing of deportation orders. The concept of “anxious scrutiny” was suggested by some as the standard of review of refugee decisions. In *I. v. Minister for Justice, Equality and Law Reform*, McGovern J. stated:

*“Since the purpose of the [Refugee Act 1996], is, inter alia, to give effect to the Geneva Convention and other related conventions on the treatment of refugees I think the test of “anxious scrutiny” is one which the courts should use as well as the O’Keeffe principles when considering matters of this kind. Of course if a decision is made on irrational grounds it will be susceptible to the O’Keeffe definitions of irrationality but might legitimately fall to be reviewed by the courts. It seems to me that this could arise in circumstances of manifest error disclosing a reasonable possibility on the facts that the original decision was wrong.”*³⁹

At a minimum from the line of case law explored below, the Courts must be on heightened alert to ensure that decisions impacting on Convention rights take proper account of Ireland’s obligations under the Convention. Under a more traditional judicial review doctrine, the Superior Courts would only interfere with decisions (in particular as regards exercise of discretionary powers), where a decision maker:

*“must have gone completely and explicitly mad.”*⁴⁰

A clear impact of the Convention on the process of decision making is that courts will be more cognisant of whether fundamental rights have been impacted, and should at least provide some heightened review of administrative/quasi-judicial decisions. This heightened review will not solely be limited to immigration and/or asylum law.

A similar “anxious scrutiny” may also be applied where an individual is not considered a refugee (or in need of subsidiary protection), but who is seeking humanitarian leave to remain under the Immigration Act 1999.⁴¹ In *Meadows v Minister for Justice, Equality and*

³⁷ For an analysis of key issues from a Charter perspective, see below: right to an effective remedy from p. 121; right to good administration from p. 127, and Charter jurisprudence on asylum and immigration law from p. 130.

³⁸ On subsidiary protection and the Charter, see below from p. 124.

³⁹ *I. v. Minister for Justice, Equality and Law Reform* [2008] 1 I.R. 208 at 213-214.

⁴⁰ *Denny v Minister for Social Welfare* [1998] 1 I.R. 34 at 37-38, per Hamilton C.J.

⁴¹ As is highlighted below, only the Convention should be relied upon when a proposed deportation of a non-European Union citizen is at issue, see from p. 62 and p. 116 (unless it concerns a *Zambrano* parent, see further from p. 129).

Law Reform,⁴² the applicant had been refused refugee status; the decision makers (the Office of the Refugee Applications Commissioner and the Refugee Appeals Tribunal) decided that the applicant did not have a well-founded fear of persecution on the basis of female genital mutilation and/or forced marriage in Nigeria.⁴³ The applicant was refused leave to apply for judicial review under Section 3 of the Immigration Act, 1999, and sought to quash the decision of the Minister for Justice to issue a deportation order. The High Court, while refusing the applicant leave to bring a judicial review, certified a point of law of exceptional public importance,

*“in determining the reasonableness of an administrative decision which affects or concerns constitutional rights or fundamental rights, is it correct to apply the standard set out in O’Keeffe v An Bord Pleanála [1993] 1 I.R. 39?”*⁴⁴

The applicant claimed that the Minister had not properly considered claims that removal to Nigeria might breach Article 3 and Article 8 of the Convention. The Supreme Court had to consider whether the judicial review of the Minister’s decision complied with the requirements of Article 13 of the Convention (right to an effective remedy).

Denham J. stated:

*“When the decision being reviewed involves fundamental rights and freedoms, the reviewing court should bear in mind the principles of the Constitution of Ireland 1937, the European Convention on Human Rights Act 2003, and the rule of law, while applying the principles of judicial review. This includes analysing the reasonableness of a decision in light of fundamental constitutional principles. Where fundamental rights and freedoms are factors in a review, they are relevant in analysing the reasonableness of a decision.”*⁴⁵

Fennelly J. in his decision focused on the obligations of the State in decisions that impact on Convention (and Constitutional) rights. The ECtHR, in his view:

*“...accepted the adequacy of the traditional judicial review standard, subject to its modern development in the direction of ‘anxious scrutiny.’”*⁴⁶

⁴² *Meadows v Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701. See also, below for discussion within the Charter (Article 47) context, from p. 120.

⁴³ *Meadows v Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701 at 806-809, which provides an overview of the timeline of decisions and the applicant’s claim.

⁴⁴ *Meadows v Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701 at 709.

⁴⁵ *Ibid* at 741.

⁴⁶ *Meadows v Minister for Justice, Equality and Law Reform* [2010] 2 IR 701 at 823.

Fennelly J., summarising the requirements of effective remedies as developed by the ECtHR held:

“it is relevant that s. 3 of the European Convention of Human Rights Act 2003 places an obligation on every organ of the State to perform its functions in a manner compatible with the State's obligations under the provisions of the Convention. In the Convention context, we must be conscious that the European Court of Human Rights is influenced by the effectiveness of legal remedies against administrative decisions, when it considers the effectiveness of a national remedy pursuant to article 13.”⁴⁷

While “matters of policy are for the Minister”,⁴⁸ the majority in *Meadows* seem to accept that in issues of rights, the proportionality of the interference and the reasonableness of the decision, may form a core element of any judicial review. Nevertheless, Murray C.J. (with the majority, but on different grounds) focused on the constitutional duty of decision makers to provide satisfactory reasons for their decisions. The Supreme Court granted leave for the applicant to seek a judicial review of the Minister’s initial determination.

Subsequently, Cooke J. in *F. & Ors v Minister for Justice, Equality, and Law Reform* summarised the Supreme Court decision in *Meadows* as holding that,

*“...while the judicial review remedies remain unchanged...the criteria by which they are applied are capable of evolving in order to accommodate rights to protection such as those created by the Constitution or the Act of 2003. By examining the substance of the effect of an interference brought about by an administrative decision on fundamental rights of an applicant for judicial review in order to assess whether it goes beyond a lawful encroachment, the Court is not substituting its own view of what the decision ought to be but is testing it by reference to what is objectively reasonable and common-sense”.*⁴⁹

In *Efe v Minister for Justice, Equality and Law Reform*,⁵⁰ the applicant argued that judicial review did not constitute an effective remedy against breach of Constitutional and Convention rights (in particular Article 8 and Article 13 of the Convention), Hogan J. interpreting *Meadows* stated:

⁴⁷ *Ibid* at 826.

⁴⁸ *Meadows v Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701 at 831.

⁴⁹ *F. & Ors v Minister for Justice, Equality and Law Reform* [2010] IEHC 457.

⁵⁰ *Efe v Minister for Justice, Equality and Law Reform* [2011] I.L.R.M. 411.

“...a majority of the Court was prepared to apply a general proportionality test in respect of all decisions affecting fundamental rights.”⁵¹

Hogan J. stated that there was “no basis” for contending that common law rules for judicial review, as interpreted post *Meadows*, were not Convention-compliant. While a degree of deference will be provided to specialised agencies tasked with assessing refugee and other immigration applications, proportionality in interference with Convention rights cannot be ignored.

The Convention, along with the Constitution, has therefore enabled courts, where rights claims are at issue and contested, to at least consider whether the rights claims relied upon in asylum and immigration law have been properly considered by the relevant decision makers.

While *Meadows* arose in the context of asylum and immigration law, its principles are clearly of key import in determining the applicable standard of review in the judicial review of decisions in all fields of law where potential Convention/constitutional rights arguments apply.

Refugee Definition, Determination and the Convention

A large proportion of the case law set down in Annexes 2-4 of this report provides an overview of the engagement of the Irish Superior Courts with decisions of the refugee status determination bodies, and Convention arguments on due process and fair procedure rights.

In *M.C.A. v Refugee Appeals Tribunal*⁵² incorrect regard was had to Article 3 of the Convention. Rather than focusing on the test for refugee status (a well-founded fear of persecution on one of the nexus grounds set down in the Refugee Convention), the Tribunal Member had asked whether the treatment the applicant suffered would give rise to a breach of Article 3. Barr J. in the High Court stated:

“This is an error of law. The applicant was required to show a well-founded fear of persecution, not that he was likely to suffer torture, inhuman or degrading treatment. The Tribunal here proceeded on an incorrect basis in reaching its decision.”⁵³

As regards the definition of refugee for the purposes of the 1951 Refugee Convention, the Irish Courts, relying on Article 2 of Protocol 1 of the Convention, held that the potential denial

⁵¹ *Efe v Minister for Justice, Equality and Law Reform* [2011] I.L.R.M. 411 at para. 28.

⁵² *M.C.A. v Refugee Appeals Tribunal & Ors* [2014] IEHC 504

⁵³ *Ibid* at para. 27.

of a basic education to the applicant, if returned to their country of origin, could constitute persecution for the purposes of section 2 of the Refugee Act 1996 (as amended). Hogan J. noted in *E.D (a minor) v Refugee Appeals Tribunal*:⁵⁴

*“The right to education (and especially the right to basic education) is widely regarded as fundamental. This is reflected in Article 42 of the Constitution, Article 2 of the First Protocol of the ECHR and Article 14 of the EU Charter of Fundamental Rights. It is also reflected in international agreements, such as Article 28 of the UN Convention on the Rights of the Child.”*⁵⁵

Administrative Immigration Schemes and Convention Rights

In *Bode v The Minister for Justice, Equality and Law Reform*,⁵⁶ the High Court attempted to infuse a Constitutional/Convention obligation on the Minister to consider the rights of the child when deporting their non-EU national parents. However, the Supreme Court rejected this interpretation. The focus of the decisions in the High Court on the Irish Born Child 2005 Scheme (IBC/05) was centred on the citizen child. Finlay Geoghegan J. viewed the citizen child as a holder of rights,⁵⁷ holding that, where consideration is being given to removing non-Irish national parents of minor Irish citizens, the Constitutional and Convention rights of the citizen child should be respected. On appeal however, the Supreme Court rejected the need for the Minister to enquire as to the rights of the citizen child under the IBC/05 Scheme.⁵⁸ The Supreme Court stated that the purpose of the IBC/05 Scheme was not to examine the rights or otherwise of the citizen child. Denham J., delivering the judgment of the Supreme Court, stated that the High Court judgment was ‘misconceived’ in considering human rights arguments.⁵⁹ Ireland, in adopting and implementing immigration policies, was executing a fundamental function of a State. The grant of residency within Ireland on the basis of the IBC/05 Scheme was a mere “*gift*” by virtue of the exercise of executive power.⁶⁰ The IBC/05 Scheme did not set out to analyse whether rights to family life were respected.

⁵⁴ *E.D. (a minor) v Refugee Appeals Tribunal* [2011] 3 I.R. 736.

⁵⁵ *Ibid* at 746. As the refugee definition is now an issue of EU law relevance, see below the Charter section on asylum and immigration law from p. 129.

⁵⁶ There were eight test cases in total and the judgments were appealed to the Supreme Court by the State: (i) *Bode v The Minister for Justice, Equality and Law Reform* [2006] IEHC 341; [2007] IESC 62, (ii) *Oguekwe v The Minister for Justice, Equality and Law Reform* [2006] IEHC 345; [2008] IESC 25 (iii) *Dimbo v The Minister for Justice, Equality and Law Reform* [2006] IEHC 344; [2008] IESC 26 (iv) *Fares v The Minister for Justice, Equality and Law Reform* [2006] IEHC 343; [2007] IESC 65 (v) *Oviawe v The Minister for Justice, Equality and Law Reform* [2006] IEHC 342; [2007] IESC 66 (vi) *Duman v The Minister for Justice, Equality and Law Reform* [2007] IESC 64 (vii) *Adio v The Minister for Justice, Equality and Law Reform* [2006] IEHC 346; [2007] IESC 63 and (viii) Appeal No. 005/200, *Edet v The Minister for Justice, Equality and Law Reform*.

⁵⁷ Compare this with the views of the former Chief Justice in *Lobe & Osayande v Minister for Justice, Equality and Law Reform* [2003] 1 I.R. 1 at 19, wherein Keane CJ viewed minors’ rights being in abeyance until they reached an age wherein they could practically instigate and insist on the respect of their rights.

⁵⁸ *Bode and Others v Minister for Justice, Equality, & Law Reform & Others* [2007] IESC 62.

⁵⁹ *Ibid* at para. 24.

⁶⁰ *Bode and Others v Minister for Justice, Equality, & Law Reform & Others* [2007] IESC 62 at para. 22.

The IBC/05 Scheme was an exercise of executive power by the Minister for Justice, Equality and Law Reform. Issues relating to the Convention rights of the applicants were deemed irrelevant in that context.⁶¹

Denham J. went on to note that within deportation procedures, the Constitutional and Convention rights of the citizen child would be examined.⁶² The rights of the child were therefore relegated to consideration solely within the deportation process.

From a literal reading of the ECHR Act 2003, there is an obligation of the Minister to consider Convention rights in the execution and administration of the IBC/05 Scheme.⁶³ As is outlined below, while Convention rights did not aid the applicants in this case, the subsequent decision of the Court of Justice of the European Union in *Zambrano*, and its implementation by the Irish authorities, now provides residence rights for certain non-EU national parents of Irish (and hence EU) citizens.⁶⁴

In *Gorry v Minister for Justice and Equality*,⁶⁵ the applicant was a Nigerian national who was subject to a deportation order. The applicant had married an Irish national and had been present in Ireland without permission for a four year period.⁶⁶ The Irish Naturalisation and Immigration Service (INIS) refused to revoke the applicant's deportation order, and stated there were no "insurmountable obstacles" to the applicant's husband (an Irish citizen), relocating to Nigeria.⁶⁷ Referring to extensive jurisprudence from the courts of England and Wales on Article 8 of the Convention and family life for transnational spouses,⁶⁸ Mac Eochaidh J. held that the correct test that had to be applied was:

"...between State rights and family rights, and in particular, to decide whether a national of a deporting or excluding State should join his or her partner in a third country is not assessed by reference to an insurmountable obstacles standard, but rather by applying the age-old and most reliable of legal standards in administrative law: is it reasonable to expect a spouse to join the removed or excluded spouse in his or her country of

⁶¹ *Ibid* at para. 24.

⁶² *Bode and Others v Minister for Justice, Equality, & Law Reform & Others* [2007] IESC 62 at para. 25.

⁶³ Under section 2 of the ECHR Act 2003, an "organ of State" specifically excludes the President, either House of the Oireachtas and committees of one or both houses and courts. Government ministers are not excluded. It was accepted in *Bode* that the Minister exercised an executive function in establishing and administering the IBC 05 Scheme. Executive actions are obliged under section 4 of the ECHR Act 2003 to perform its functions in a manner compatible with Ireland's obligations under the Convention.

⁶⁴ See discussion below regarding EU citizenship, the Charter and residence rights on non-EU citizen parents, in the Charter section on asylum and immigration law from p. 129.

⁶⁵ *Gorry & Anor v Minister for Justice & Equality* [2014] IEHC 29.

⁶⁶ *Ibid* at paras. 4-9.

⁶⁷ *Gorry & anor v Minister for Justice & Equality* [2014] IEHC 29 at para. 21.

⁶⁸ In particular, see *R. (Mahmood) v. Home Secretary* [2001] 1 W.L.R. 840, *LM (DRC) v. Home Secretary* [2008] E.W.C.A. Civ. 325 and *V.W. (Uganda) and A.B. (Somalia) v. The Secretary of State for the Home Department* [2009] E.W.C.A. Civ. 5, see [2014] IEHC 29 at paras. 22-30.

residence? Thus the respondent erred in law because he refused to revoke the Deportation Order on the basis of the failure to demonstrate the existence of an insurmountable obstacle to the second named applicant's emigration to Nigeria to take up his family life with his wife. There is no such test."⁶⁹

The decision of INIS was therefore quashed due to its failure to properly assess the Convention and Constitutional rights of the applicant in the field of family life.⁷⁰

Deportation & Removal

In the area of deportation and removal of foreign nationals, a significant amount of case law has emerged as regards the applicability of Convention rights, in particular under Article 3 and Article 8 of the Convention.

Inhuman and Degrading Treatment

The Irish Superior Courts have accepted that Article 3 of the Convention is absolute. Where a foreign national is challenging a deportation order on the basis of Article 3, then leave to challenge this will only be granted where the applicant can show a "*reasonable, rational*" real risk of treatment contrary to Article 3.⁷¹ As determined by Clark J. in the case of *P.B.N. (DR Congo) v Minister for Justice and Equality*, concerning a female applicant from the Democratic Republic of the Congo who sought to principally rely on a report published by a UK charity (entitled 'Unsafe Return – Refoulement of Congolese Asylum Seekers'), such a 'reasonable, rational risk' may be established by country of origin information, that shows a,

*"credible basis for the contention that her life or freedom would be under threat upon her return to the DRC, or that she would suffer irremediable harm."*⁷²

The Court will not generally interfere with the decisions of the Minister for Justice and Equality where the Minister properly concludes that there is not a "*real risk*" of an Article 3 violation.⁷³

While many cases relate to alleged dangers faced by applicants in their countries of origin, the Irish Superior Courts have also had to consider situations where the violation of rights may arise from the lack of treatment of the physical or mental health of an individual in their country of origin. In *Agbonlahor* the issue arose as to whether the deportation of a family with a child with Attention Deficit Hyperactivity Disorder (ADHD), was contrary to the right for

⁶⁹ [2014] IEHC 29 at para. 31.

⁷⁰ [2014] IEHC 29 at para. 56.

⁷¹ *P.B.N. (DR Congo) v Minister for Justice and Equality* [2014] IESC 9 at para. 14.

⁷² *Ibid* at para. 24.

⁷³ *B.S. v Minister for Justice & Ors* [2014] IEHC 502.

respect for private and family life under Article 8 of the Convention in circumstances where it was argued that no sufficient treatment would be available in the State to which the child would be deported.⁷⁴ The Court concluded that State immigration policy is not directed at ensuring a proper standard of living for deportees. Unfortunate personal or medical circumstances will not necessarily result in permission to remain in Ireland. In dismissing the case, Feeney J. noted that the ECtHR had already stated that immigration policy of a contracting state is not reviewable under the Convention.⁷⁵ The judge also noted that, while positive obligations may flow from Article 8 of the Convention,⁷⁶ this did not mean that there was an obligation on the State to continue to allow a foreign national to benefit from medical, social, or other forms of assistance by the expelling State.⁷⁷ Such arguments could only be accepted in the most exceptional of circumstances, such as in *D. v UK*.⁷⁸ The Court stated that in *Agbonlahor*, the child's life was not in danger, but the issue was the absence of educational and medical facilities that would ensure his full development.⁷⁹ The risks of attracting other people in the same position as the applicants were also highlighted⁸⁰, and the Court noted that only in the most exceptional of cases would applicants be able to successfully rely on the Convention in preventing deportation.⁸¹

In *MEO v Minister for Justice, Equality and Law Reform*,⁸² the High Court had to consider whether applicant should be given leave to challenge her removal from the State. A core question was whether the State had an obligation to permit the applicant to continue her medical treatment for HIV, and whether failure to allow this continuation would violate constitutional rights (right to life) and Convention rights (in particular Article 3 and Article 8). In granting leave to challenge her deportation order, Hogan J. distinguished the ECtHR decision in *N*.⁸³ The seriousness of MEO's medical condition⁸⁴ meant that her case was more akin to the circumstances outlined in the decision of the European Commission on Human Rights, in *BB v France*.⁸⁵ Where an applicant displays a suicidal ideation, then Article 3 ECHR may be engaged, but only where:

⁷⁴ *Agbonlahor and ors v Minister for Justice, Equality and Law Reform and ors* [2007] IEHC 166. For a full analysis of the issues within the case, see Thornton, L. "Agbonlahor and ors v Minister for Justice, Equality and Law Reform and ors" [2007] *Oxford Reports on International Law* 820, <http://www.oup.com/online/law/oril/>.

⁷⁵ *Agbonlahor and ors v Minister for Justice, Equality and Law Reform and ors* [2007] IEHC 166 at para. 3.2, relying on *Abdulaziz et al. v UK* [1985] 7 E.H.R.R. 471.

⁷⁶ *Ibid.*

⁷⁷ *Agbonlahor and ors v Minister for Justice, Equality and Law Reform and ors* [2007] IEHC 166 at para. 3.10.

⁷⁸ *Ibid.*

⁷⁹ *Agbonlahor and ors v Minister for Justice, Equality and Law Reform and ors* [2007] IEHC 166 at paras. 3.11-3.12.

⁸⁰ *Ibid* at 3.13.

⁸¹ *Agbonlahor and ors v Minister for Justice, Equality and Law Reform and ors* [2007] IEHC 166 at para. 3.14.

⁸² *MEO v Minister for Justice, Equality and Law Reform* [2012] IEHC 545.

⁸³ *N v United Kingdom* (2008) 47 E.H.R.R. 39.

⁸⁴ *MEO v Minister for Justice, Equality and Law Reform* [2012] IEHC 545 at paras. 7-10.

⁸⁵ *MEO v Minister for Justice, Equality and Law Reform* [2012] IEHC 545 at paras. 41-46.

“(i) ... there then existed to the respondent's knowledge, a real and substantial threat to the applicant's life by suicide as a direct consequence of his decision;

(ii) the applicant's threatened act of suicide could only be forestalled by him acceding to the applicant's request and stopping the process of deportation and not by any other means such as medical intervention;

(iii) the respondent either missed or disregarded, to the point of irrationality, compelling medical and other material evidence of the foregoing.”⁸⁶

The Irish Superior Courts have accepted that where an asylum seeker is to be transferred under the Dublin Convention, this transfer can only be prevented where the applicant shows a “real risk” of an Article 3 violation if so transferred.⁸⁷ The burden of proof for this rests with the applicant.⁸⁸

Private and Family Life

In *Oguekwe v. Minister for Justice*⁸⁹, Denham J. adopted the test set down by the English Court of Appeal⁹⁰ in determining whether removal from the State was a proportionate restriction of rights under Article 8 (and the constitution):

“(1) A state has a right under international law to control the entry of non-nationals into its territory, subject always to its treaty obligations.

(2) Article 8 does not impose on a State any general obligation to respect the choice of residence of a married couple.

(3) Removal or exclusion of one family member from a State where other members of the family are lawfully resident will not necessarily infringe Article 8 provided that there are no insurmountable obstacles to the family living together in the country of origin of the family member excluded, even where this involves a degree of hardship for some or all members of the family.

(4) Article 8 is likely to be violated by the expulsion of a member of a family that has been long established in a state if the circumstances are such that it is not reasonable to expect the other members of the family to follow that member expelled.

⁸⁶ *L.C. v Minister for Justice* [2011] 2 I.R. 133

⁸⁷ *J.M.O. v Refugee Applications Commissioner & Ors* [2014] IEHC 467, citing with approval the ECtHR decision in *M.S.S. v. Belgium and Greece* (App. No. 30696) (21 January 2011). See also, Joined Cases C-411/10 and C-493/10 *N.S./M.E.* [2011] ECR I-865.

⁸⁸ *J.M.O. v Refugee Applications Commissioner & Ors* [2014] IEHC 467 at para. 75. See also, *Wadria v Minister for Justice, Equality & Law Reform* [2011] 3 IR 53. For discussion and analysis on the Charter and removal under the Dublin Convention, see below the Charter section on asylum and immigration law from p. 129.

⁸⁹ *Oguekwe v. Minister for Justice, Equality and Law Reform* [2008] 3 I.R. 795

⁹⁰ *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 W.L.R. 840.

(5) Knowledge on the part of one spouse at the time of marriage that rights of residence of the other were precarious militates against a finding that an order excluding the latter spouse violates Article 8.

(6) Whether interference with family rights is justified in the interests of controlling immigration will depend on (i) the facts of the particular case and (ii) the circumstances prevailing in the State whose action is impugned.”⁹¹

The interests of the State in a managed system of migration and the right to issue a deportation order cannot, generally, be defeated by claims of violation(s) of Article 8 and/or Article 41 of the Irish Constitution rights⁹² unless the decision,

*“absolutely offended logic or was something which...no reasonable decision maker could ever conclude.”*⁹³

Failure by a decision maker to make a clear determination as to whether an applicant had established “private life” within the State, will result in the decision being found to be invalid.⁹⁴ Once a proportionality analysis is conducted by the decision maker, as regards whether private (or family) life is established, it does not automatically follow that removal from the state is a violation of Article 8.⁹⁵ Mac Eochaidh J. in *C.I v Minister for Justice, Equality and Law Reform*⁹⁶, stated, in light of Convention jurisprudence:

“Decision makers are not required to find that a deportation measure offends proportionality because it comprehensively interferes with established private life in Ireland. Given that it is lawful for the State to regulate the presence of non-nationals on its territory and that immigration control does not per se offend rights protected by the Convention, something other than the natural consequence of deportation involving, as it does, the cessation or termination of private life in the deporting state, will be required if the proportionality analysis is to yield a positive result for an applicant. As for family life, the same sort of approach is appropriate, but because persons other than the proposed deportee may be affected, the consequences of the deportation for persons other than

⁹¹ *Oguekwe v Minister for Justice, Equality and Law Reform* [2008] 3 I.R. 795 at 812.

⁹² For a recent application of this, see *Khan & ors v Minister for Justice and Equality* [2014] IEHC 533 at para. 49, and other cases in the Annexes to this Report.

⁹³ *M.R.J. v The Minister for Justice, Equality and Law Reform* (Unreported, High Court, 22nd January, 2014, *ex tempore*).

⁹⁴ See, *R.B v Minister for Justice & Law Reform & anor* [2014] IEHC 570, in particular at para. 38, where Barr J. noted that the Minister had failed to consider whether the consequences for the particular applicant were of such gravity, so as to potentially invoke Article 8(1) ECHR, citing with approval *R (Razgar) v Home Secretary* [2004] 2 A.C. 368. See also, *J.S. & ors v Minister for Justice and Equality & anor* [2014] IEHC 195.

⁹⁵ See above discussion on *Gorry* from p. 64. See also, *Cirpaci (nee McCormack) & anor v The Minister for Justice, Equality & Law Reform* [2005] 4 I.R. 109.

⁹⁶ *C.I. & Others v Minister for Justice, Equality and Law Reform* [2014] IEHC 447.

the deportee and the possibility of relocating family life in another State an: matters which may be appropriate to weigh in the balance in conducting a proportionality analysis where this point is reached."⁹⁷

In line with the approach of the ECtHR and Irish courts, only in the most exceptional of circumstances will this proportionality and rights analysis of the decision maker be interfered with.⁹⁸

The Irish Superior Courts' capacity to review the legality of decisions of the Minister for Justice (in the exercise of her powers under section 3 of the Immigration Act 1999) has been found in *B (a minor)* to be an effective remedy in realising rights of applicants under Article 8 (and Article 13) of the Convention.⁹⁹ Article 13 ECHR, as interpreted via the ECHR Act 2003, does not require an independent review of the exercise of ministerial discretion.¹⁰⁰

Family Reunification

In exercising powers under section 18 of the Refugee Act 1996 (as amended) in relation to family reunification, the Minister for Justice and Equality is obliged to have regard to Convention rights,¹⁰¹ in particular Article 8.¹⁰² Recognised refugees have a right to apply for family reunification. Immediate family members have an automatic right to reunification, *i.e.*, parents (if an applicant is under 18), husband or wife and any children (under 18). Other relatives (defined as "*any grandparent, parent, brother, sister, child, grandchild, ward or guardian of the refugee who is dependent on the refugee or is suffering from a mental or physical disability to such extent that it is not reasonable for him or her to maintain himself or herself fully*") may be admitted into the State at the discretion of the Minister for Justice and Equality. In certain circumstances, grandparents,¹⁰³ nieces and nephews¹⁰⁴ (as well as the nuclear family) may be dependents of the refugee seeking family reunification. Throughout this line of jurisprudence, the Superior Courts have made significant reference to not only the constitutional family, as protected under Article 41, but also the impact of Article 8 of the

⁹⁷ *C.I. & Others v Minister for Justice, Equality and Law Reform* [2014] IEHC 447 at para. 45.

⁹⁸ For examples of when the Irish courts used a proportionality and rights analysis to set aside Ministerial decisions on deportation, see: *B.M. (Eritrea) v The Minister for Justice and Equality* [2013] IEHC 324 and *O'Leary & Ors v The Minister for Justice, Equality and Law Reform* [2012] IEHC 80; *MEO v Minister for Justice, Equality and Law Reform* [2012] IEHC 545; *S and Others v Minister for Justice, Equality and Law Reform* [2010] IEHC 433.

⁹⁹ *B (a minor) v Minister for Justice, Equality and Law Reform* [2010] IEHC 296.

¹⁰⁰ *Ibid* at paras. 7-10.

¹⁰¹ See generally: *Hamza v Minister for Justice, Equality and Law Reform* [2010] IEHC 427; *Ducale & Anor v the Minister for Justice and Equality and the Attorney General* [2013] IEHC 25; *A.A.M. (Somalia) v the Minister for Justice and Equality* [2013] IEHC 68; *A.M.S. v. Minister for Justice and Equality* [2014] IEHC 57 and *F.B. v Minister for Justice* [2014] IEHC 427.

¹⁰² *F.B. v Minister for Justice* [2014] IEHC 427 at para. 42 *et seq.*

¹⁰³ *G.O. & Ors v Minister for Justice, Equality and Law Reform* [2008] IEHC 190.

¹⁰⁴ *Hassan Sheikh Ali v. Minister for Justice, Equality and Law Reform* [2011] IEHC 115.

Convention in recognising relationships of significant dependency, that *may* lead to a finding of a right to family reunification for families of refugees.

In *A.M.S. v. Minister for Justice and Equality*,¹⁰⁵ Mac Eochaidh J. stated that the concept of dependency under section 18(4) of the Refugee Act 1996 should not simply be correlated with financial dependency, something that the Minister had done in rejecting the applicant's request for family reunification. Mac Eochaidh J. stated that when making decisions on whether to grant or refuse family reunification, the decision maker must engage with an explicit proportionality analysis, and should,

*“start by asking whether a negative decision on family reunification would interfere with article 8 rights and then ask whether that interference would have consequences of such gravity as to potentially engage Article 8 rights, bearing in mind the proper meaning of ‘consequences of such gravity’. Following that analysis, the decision maker may decide that the interference is justified notwithstanding the engagement of rights. I should also note that in order for the interference caused by the negative decision to be justified, it must...be necessary in the interests of the economic well-being of the country...If, for example, the state were overwhelmed by applications, one could see how a decision maker might say that refusal is economically necessary. For all of these reasons I uphold the complaint that no lawful proportionality assessment was conducted.”*¹⁰⁶

Therefore, even when exercising a discretionary power, evidence must be forthcoming that a proportionality analysis, as regards Article 8 of the Convention, was substantively engaged with by the decision maker. While recognising the relevance of Article 41 of the Constitution in this regard, the focus of Superior Court decisions has essentially been on exploring Article 8 of the Convention. Mac Eochaidh J. noted:

*“No stronger rights have been argued to exist under the Constitution and thus the failure to expressly weigh the competing rights by reference to Article 41 thereof was harmless error. I do not think it is necessary for me to decide whether a refugee seeking family reunification under section 18(4) is asserting or is entitled to the protections of Constitutional rights under Article 41 or any other provision of the Constitution. I accept of course that the refugee has a statutory right to seek family reunification and any decision on such application must not exceed the statutory scheme or offend the public law rules on decision making.”*¹⁰⁷

¹⁰⁵ *A.M.S. v. Minister for Justice and Equality* [2014] IEHC 57.

¹⁰⁶ *Ibid* at para. 68.

¹⁰⁷ *A.M.S. v. Minister for Justice and Equality* [2014] IEHC 57 at para. 53.

In *F.B v Minister for Justice and Equality*,¹⁰⁸ the decision maker failed to engage in a substantive proportionality analysis of the applicant's Article 8 rights under the Convention.¹⁰⁹ This was a fatal error of law that led to the quashing of the decision to refuse family reunification.

In the field of family reunification, Article 8 of the Convention, along with equivalent constitutional protections, has therefore ensured that substantive rights analysis is engaged in by decision-makers.

Criminal Law

The Irish courts have engaged with a number of core arguments as regards criminal law, criminal procedure and the Convention and the ECHR Act 2003. Most Convention rights arguments have been made in relation to the European Arrest Warrant and compliance with the Convention in individual cases, some of which are considered below.

This section of the chapter provides a selective overview of some of the key criminal related case law. Readers are referred to Annexes 2-4 to this Report for other areas of criminal law that have been considered by the Irish Superior Courts as regards the protection of rights under the Convention, and the impact (if any) of the ECHR Act 2003.

The Imposition of a Life Sentence is not Inhuman and Degrading

In *Lynch and Whelan*¹¹⁰ the plaintiffs challenged the imposition of mandatory life sentences by the courts for the offence of murder under section 2 of the Criminal Justice Act 1990 ('the CJA 1990'). The plaintiffs argued that the automatic imposition of a life sentence was contrary to the Constitution, as it removed the power of a judge to determine the appropriate sentence. The plaintiffs further argued that Article 5 of the Convention was violated, as the Executive encroached on the judicial function in determining when a person sentenced under section 2 of the CJA 1990 would be released. The plaintiffs sought a declaration of incompatibility under section 5 of the ECHR Act 2003. In refusing all grounds of challenge (and focusing on the Convention elements of this decision), Murray C.J stated:

¹⁰⁸ *F.B v Minister for Justice and Equality* [2014] IEHC 427.

¹⁰⁹ *Ibid* at para. 43.

¹¹⁰ See *Lynch and Whelan v Minister for Justice, Equality and Law Reform* [2012] 1 I.R. 1.

*“In Irish law any person detained following the imposition of a life sentence may only be detained for the purpose of giving effect to that punitive sentence. Therefore his or her detention is always and can only “depend upon” and be “by virtue” of the conviction.”*¹¹¹

While the Executive might have a role in determining when a prisoner was to be released, as regards ‘its’ imposition of the “*punitive sentence*”, the ECtHR has stated that the imposition of a,

*“mandatory life sentence as a punitive measure for a serious crime...in accordance with national law does not as such offend against any provision of the Convention provided at least that national law affords the possibility of review with a view to its commutation or conditional release.”*¹¹²

The Supreme Court viewed the “discretionary” nature of compassionate or humanitarian release, as an executive function, unlinked to imposition of a criminal punishment.¹¹³

It should be noted that, in *Vinters v United Kingdom*,¹¹⁴ the ECtHR stated that in light of the margin of appreciation, it was not the task of the Strasbourg Court,

*“to prescribe the form (the executive or judicial) which that review should take. For the same reason, it is not for the Court to determine when that review should take place.”*¹¹⁵

However, the imposition of whole life sentences, without any process or procedures on consideration of applications for release, was held to violate Article 3 ECHR. As Judge Power-Forde stated in her concurring opinion:

“Those who commit the most abhorrent and egregious of acts and who inflict untold suffering upon others, nevertheless retain their fundamental humanity and carry within themselves the capacity to change. Long and deserved though their prison sentences may be, they retain the right to hope that, someday, they may have atoned for the wrongs which they have committed. They ought not to be deprived entirely of such hope.

¹¹¹ *Lynch and Whelan v Minister for Justice, Equality and Law Reform* [2012] 1 IR 1 at 31. The Supreme Court distinguished a line of ECtHR jurisprudence that emerged as regards the United Kingdom’s sentencing and conviction practices, where the decision for release was based on the “dual element of punishment and preventative detention”, see [2012] 1 IR 1 at 33-36.

¹¹² *Ibid* at 35-36, citing *Kafkaris v. Cyprus* (2008) 49 E.H.R.R. 877.

¹¹³ *Lynch and Whelan v Minister for Justice, Equality and Law Reform* [2012] 1 I.R. 1 at 24.

¹¹⁴ *Vinter v United Kingdom* [2013] ECHR 645.

¹¹⁵ *Ibid* at para. 120.

*To deny them the experience of hope would be to deny a fundamental aspect of their humanity and, to do that, would be degrading.*¹¹⁶

Whether this decision will impact on Irish process and procedure as regards life sentencing and decisions on release remains to be seen.

The Impact of the Convention on the Law of Evidence

In *D.P.P (Walsh) v Cash*¹¹⁷, Charleton J. had to consider issues surrounding the obtaining of evidence by Gardaí. After reviewing issues of criminal due process under the Constitution, Charleton J. considered the impact of the Convention on this area of law:

*“A domestic legal obligation arises by virtue of ss.2 and 3 of the European Convention on Human Rights Act 2003. I consider that a rule providing for the automatic exclusion of evidence obtained in consequence of any mistake that infringes any constitutional right of an accused, may be incompatible with Ireland's obligations to provide, for both the accused and the community, a fair disposal of criminal charges.*¹¹⁸

Charleton J. noted that the ECtHR has,

*“...held that it is not a principle of Convention law that unlawfully obtained evidence should not be admissible.*¹¹⁹

Subsequently, in *D.P.P. v JC*¹²⁰, a majority in the Supreme Court revised the exclusionary rule on unconstitutionally obtained evidence. While the majority decision was based on a re-evaluation of constitutional jurisprudence, Convention rights were considered in some of the judgments. In the majority, MacMenamin J. stated:

“The reputation and integrity of the system of justice should not be adversely affected by properly and faithfully applied good faith exception to the rule, constitutionally applied here, as in other jurisdictions. The bar set by the majority judgments herein is significantly higher than that to be found elsewhere in the common law world. It is in no way inconsistent with the ECHR (Schenk v Switzerland (1991) 13 E.H.R.R. 242). It redresses the balance so as to encompass community interests, while ensuring

¹¹⁶ *Vinter v United Kingdom* [2013] ECHR 645 – Separate Opinions – Concurring Opinion of Judge Power-Forde

¹¹⁷ *Director of Public Prosecutions (Walsh) v Cash* [2008] 1 I.L.R.M. 443.

¹¹⁸ *Ibid* at 469; relying on *X and Y v Netherlands* (1986) 8 E.H.R.R. 235 and *Schenk v Switzerland* (1988) 13 E.H.R.R. 242, along with analysis from the courts of England and Wales, the United States, Canada and New Zealand see [2008] 1 I.L.R.M. 443 at 470 *et seq.*

¹¹⁹ *Director of Public Prosecutions (Walsh) v Cash* [2008] 1 I.L.R.M.443 at 470.

¹²⁰ *D.P.P. v JC* [2015] IESC 31.

*that egregious breaches of a suspect's rights and police misconduct are checked. It restores meaning to the terms "deliberate and conscious" which have caused a lack of clarity in the law."*¹²¹

The minority dissents also sought to rely on the Convention.¹²²

Scheme of Criminal Legal Aid

Lawyers cannot utilise Article 6 of the Convention in claiming that there is a right to be placed on the criminal legal aid panel. Legal aid is for the benefit of the accused, and failure by counsel to satisfy prerequisite conditions for gaining entry onto the criminal legal aid panel, does not engage Article 6 of the Convention.¹²³

While an individual has a right to be provided with criminal legal aid, this does not mean a person is entitled to "equality of arms" with the State prosecutor. In *Carmody v Minister for Justice, Equality and Law Reform*,¹²⁴ the plaintiff was charged with 42 criminal offences relating to improper record keeping of cattle, their movements and failure to register control of certain cattle.¹²⁵ If convicted of these offences, the plaintiff could have faced a significant monetary fine or up to two years imprisonment.¹²⁶ He was granted legal aid in the District Court so as to instruct a solicitor to represent him in these criminal proceedings. However, the State sought to utilise both a solicitor and junior counsel.¹²⁷ At that time, a District Court Judge could only grant a defendant a legal aid certificate that limited representation to a solicitor. Carmody argued that his constitutional rights and his rights under Article 6 of the Convention to criminal legal aid were violated, due to the disparity in representation between him as a criminal defendant, who was only entitled to a solicitor, in comparison to the State utilising a solicitor and counsel.¹²⁸

As discussed in chapter 2. the Supreme Court noted that if it accepted the plaintiff's contention that Section 2 of the Criminal Justice (Legal Aid) Act 1962 was incompatible with Ireland's obligations under the Convention, then the only remedy open to the plaintiff would be a declaration of incompatibility (section 5 of the ECHR Act 2003), which would not resolve the issue before the Court, as it would ultimately be for the Oireachtas to determine how to remedy the alleged breach of Ireland's obligations under the Convention. The Court

¹²¹ *D.P.P. v JC* [2015] IESC 31 at para. 78.

¹²² *Ibid* at paras. 60-63 of Hardiman J.'s judgment and paras. 79-83 of Murray J.'s judgment.

¹²³ See, *Walsh v Minister for Justice* [2010] 2 I.R. 463. See for example, *Carmody v. Minister for Justice, Equality and Law Reform* [2005] 2 I.L.R.M. 1; *Murphy v. Director of Public Prosecutions* [2007] 4 I.R. 403; *Carmody v Minister for Justice* [2010] 1 I.R. 635; *Walsh v Minister for Justice* [2010] 2 I.R. 463.

¹²⁴ *Carmody v The Minister for Justice, Equality and Law Reform* [2010] 1 I.R. 635.

¹²⁵ *Ibid* at 640-641.

¹²⁶ *Carmody v The Minister for Justice, Equality and Law Reform* [2010] 1 I.R. 635 at 641.

¹²⁷ *Ibid* at 641.

¹²⁸ *Carmody v The Minister for Justice, Equality and Law Reform* [2010] 1 I.R. 635 at 645-646.

therefore decided to consider the constitutional question first, and resolved the case on this basis.¹²⁹ Murray C.J. for the Supreme Court noted:

*“Sometimes simplistic and unthinking comments surface in the public arena suggesting that fairness and fair procedures at a criminal trial only exist for the benefit of criminals.”*¹³⁰

The Court noted that the amount of imprisonable offences now tried at the District Court level had increased dramatically since the introduction of criminal legal aid in Ireland in 1962.¹³¹ Rather than finding section 2 of the 1962 Act unconstitutional, the Court stated:¹³²

“[T]he absence of a right to apply for legal aid to include counsel in appropriate cases [in the District Court] must properly be considered as stemming from a failure of the State to make, by one means or another, specific provision for such legal aid rather than from any provision, in particular any prohibition, in the Act of 1962.”

The Supreme Court therefore held that it would be unjust and contrary to the Article 38.1 of the Constitution (right to a fair trial) if the prosecution were to proceed, while the applicant did not have the opportunity to apply for legal aid, to include a solicitor and a barrister.¹³³ The Supreme Court held that the State had to put in place a scheme (be it underpinned by legislation or statutory instrument) that provided the plaintiff an opportunity to apply for legal aid, to include both a solicitor and counsel.¹³⁴ The Court was satisfied,

*“that the remedies which are being afforded to the plaintiff in these proceedings are adequate to remedy the complaints which he has made with regard to his constitutional rights to legal aid, and therefore, the question of considering the compatibility of any provision of the Act of 1962 with the European Convention on Human Rights pursuant to s. 5 of the Act of 2003 does not arise.”*¹³⁵

As discussed in chapter 2, therefore, *Carmody* is an important illustration of the Irish courts' approach to sequencing of constitutional and Convention-based rights claims.

¹²⁹ *Ibid* at 649-651.

¹³⁰ *Carmody v The Minister for Justice, Equality and Law Reform* [2010] 1 I.R. 635 at 662.

¹³¹ *Ibid* at 658-660.

¹³² *Carmody v The Minister for Justice, Equality and Law Reform* [2010] 1 I.R. 635 at 667.

¹³³ *Ibid* at 668.

¹³⁴ *Carmody v The Minister for Justice, Equality and Law Reform* [2010] 1 I.R. 635 at 669.

¹³⁵ *Ibid* at 669.

Access to a Solicitor

For over 20 years the High Court and Supreme Court had steadfastly rejected any attempt to interpret constitutional rights to a fair trial as including the right for questioning to be paused prior to an accused/suspect having access to her solicitor.

In the case of *The People (D.P.P.) v Gormley*¹³⁶, the Supreme Court had to consider whether statements made by the accused, after he had requested a solicitor, but before the solicitor was available for consultation, were admissible in evidence. With reference to the approach of the European Court of Human Rights,¹³⁷ the US Supreme Court,¹³⁸ and other common law jurisdictions,¹³⁹ Clarke J. held:

*“There would be little point in giving constitutional recognition to a right of access to a lawyer while in custody if one of the principal purposes of that custody in many cases, being the questioning of the relevant suspect, could continue prior to legal advice being obtained.”*¹⁴⁰

In justifying this approach from previous (and recent) decisions, Clarke J. noted that the Constitution is a “*living document*”.¹⁴¹ Clarke J. stated that the time had now arrived whereby once an accused had requested a solicitor, barring any exceptional circumstances, questioning of the accused should not commence until he has had the opportunity to consult a solicitor.¹⁴²

*“The right to a trial in due course of law encompasses a right to early access to a lawyer after arrest and the right not to be interrogated without having had an opportunity to obtain such advice. The conviction of a person wholly or significantly on the basis of evidence obtained contrary to those constitutional entitlements represents a conviction following an unfair trial process.”*¹⁴³

While not argued in *Gormley*, Clarke J. did note that the jurisprudence of the European Court of Human Rights and the US Supreme Court,

¹³⁶ *The People (D.P.P.) v Gormley* [2014] 1 I.L.R.M. 377. The Supreme Court also decided that there was no requirement for Gardaí to wait for the presence of a solicitor, where, under operation of law, a forensic sample (i.e. blood, saliva, etc.) was requested.

¹³⁷ *Ibid* at 390-395. The Supreme Court in particular discussed the case of *Salduz v Turkey* (2009) 49 E.H.R.R. 19, where the ECtHR held that “Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer...at the initial stages of police interrogation.”

¹³⁸ *The People (D.P.P.) v Gormley* [2014] 1 I.L.R.M. 377 at 395-396.

¹³⁹ *Ibid* at 396-398; including a review of the legal frameworks as regards rights of detained persons to seek assistance of a lawyer in Canada and New Zealand.

¹⁴⁰ *The People (D.P.P.) v Gormley* [2014] 1 I.L.R.M. 377 at 402.

¹⁴¹ *Ibid* at 400.

¹⁴² See also, *D.P.P. v Ryan* [2011] IECCA 6.

¹⁴³ *The People (D.P.P.) v Gormley* [2014] 1 I.L.R.M. 377 at 405.

*“recognises that the entitlements of a suspect extend to having the relevant lawyer present.”*¹⁴⁴

It appears that such a decision of the Supreme Court - to some extent at least - may have been anticipated by the Minister for Justice and Equality.¹⁴⁵ Responding to *Gormley*, the Director of Public Prosecutions issued a practice direction on 7 May 2014, stating that solicitors may be present during the questioning of detained persons in a Garda Station.¹⁴⁶

It has to be highlighted that at no point during this case was the ECHR Act 2003 considered (as the Courts consider constitutionality arguments first, before moving onto arguments relating to the Convention). This nevertheless provides some indication of how Convention jurisprudence can influence constitutional rights, even where the ECHR Act 2003 had not been pleaded.

Criminal Law and Delay: The Impact of the Convention

A significant number of cases have considered the impact of Article 6(1) of the Convention and the rights to a trial within a reasonable period of time.¹⁴⁷ In this arena, the ECtHR has ruled against Ireland on a number of occasions. In *McFarlane v Ireland*¹⁴⁸, the ECtHR held that the 10 year and 6 month delay in the proceeding to trial (before the applicant was acquitted) was a violation of Article 6(1) of the Convention. The ECtHR recalled,

*“its constant case law to the effect that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant.”*¹⁴⁹

Given that the case law of the Irish Supreme Court on delay and prevention of prosecution was developing, the ECtHR therefore held that McFarlane’s challenges were not,

¹⁴⁴ *Ibid* at 404-405.

¹⁴⁵ See for example, Department of Justice and Equality, *Working Group to Advise on a System Providing for the Presence of a Legal Representative During Garda Interviews*, Final Report, July 2013. The Working Group noted at pp. 2-3 that “the trend in the case law of the European Court of Human Rights suggests that Ireland’s policy of not permitting solicitors to be present during interviews will come under pressure in the medium term.”

¹⁴⁶ E. Doocey and J. O’Neill, “Right of access to solicitor in Garda interviews” *Irish Criminal Law Update No. 7* (Bloomsbury, 2014).

¹⁴⁷ See, for example, *Sweetman v D.P.P.* [2004] IEHC 56; *McFarlane v. Director of Public Prosecutions* [2008] 4 I.R. 11; *J. Harris Assemblers v D.P.P.* [2009] IEHC 344, and *McArdle v D.P.P.* [2012] IEHC 286. See also Table 2.1 above for ECtHR jurisprudence on this issue, and in particular, *McFarlane v Ireland* [App. No. 31333/06] [10 September 2009].

¹⁴⁸ *McFarlane v Ireland* (2011) 52 E.H.R.R. 20. See also, *McMullen v Ireland*; *Doran v Ireland*; *O’Reilly and Others v Ireland*, and *Barry v Ireland*, referenced above, at pp. 25-28.

¹⁴⁹ *McFarlane v Ireland* (2011) 52 E.H.R.R. 20 at para. 140.

*“so ill-conceived, and their initiation so unreasonably delayed, that the duration of those actions, should be attributed to the applicant.”*¹⁵⁰

While accepting that certain actions of McFarlane may have contributed to the delay, this was not such so as to justify the 10 year and 6 month delay. Three of the significant periods of delay related to fixing a date for trial.¹⁵¹ Under Article 6(1) of the Convention, the State had a duty to organise court systems and processes in order to deal with issues within “a reasonable period of time.”¹⁵²

On the issue of whether damages would be an effective remedy for delay, following its decision in *Barry v Ireland*,¹⁵³ the ECtHR noted that there was significant uncertainty as to whether a damages claim under the Constitution would succeed.¹⁵⁴ In addition, damages will not be an effective remedy as regards systemic delay in a case.¹⁵⁵ It is important to note that nowhere in its jurisprudence against Ireland has the ECtHR stated that delay in bringing a prosecution should result in the dismissal of criminal charges against a plaintiff.

In *J. Harris Assemblers v D.P.P.*,¹⁵⁶ utilising Article 38.1 of the Constitution and Article 6(1) of the Convention, Hedigan J. held that the State was under an obligation,

*“to conduct the administrative aspects of a criminal investigation efficiently and without undue delay”.*¹⁵⁷

In this case, the High Court held that the delay was excusable.

In determining whether a criminal trial should proceed where there has been prosecutorial delay, the Supreme Court has noted that the ECHR Act 2003 will be of relevance. The Superior Courts will take account of the following factors (where relevant):

- a. *“Inordinate, blameworthy or unexplained prosecutorial delay may breach an applicant’s constitutional entitlement to a trial with reasonable expedition.*
- b. *Prosecutorial delay of this nature may be of such a degree that a court will presume prejudice and uphold the right to an expeditious trial by directing prohibition.*

¹⁵⁰ *Ibid* at para. 148.

¹⁵¹ *McFarlane v Ireland* (2011) 52 E.H.R.R. 20 at para. 152.

¹⁵² *Ibid.*

¹⁵³ See *Barry v Ireland* (App. No. 18273/04) (15 December 2005) at para. 35.

¹⁵⁴ *McFarlane v Ireland* (2011) 52 E.H.R.R. 20 at paras. 117-121.

¹⁵⁵ *Ibid* at paras.122-127.

¹⁵⁶ *J. Harris Assemblers v D. P. P.* [2009] IEHC 344.

¹⁵⁷ *Ibid* at para 29.

- c. *Where there is a period of significant blameworthy prosecutorial delay less than that envisaged at (b), and no actual prejudice is demonstrated, the court will engage in a balancing exercise between the community's entitlement to see crimes prosecuted and the applicant's right to an expeditious trial, but will not direct prohibition unless one or more of the elements referred to in P.M. v. Malone [2002] 2 I.R. 560 and P.M. v. D.P.P. [2006] 3 I.R. 172 are demonstrated.*
- d. *Actual prejudice caused by delay which is such as to preclude a fair trial will always entitle an applicant to prohibition.*"¹⁵⁸

In *Kennedy v D.P.P.*,¹⁵⁹ the applicant sought to prevent his trial on charges of corruption on grounds of delay. Referring to *T.H. v D.P.P.*¹⁶⁰(amongst other cases), Hedigan J. in the High Court noted that while an individual might be entitled to damages for breach of Convention rights under the ECHR Act 2003 (in this case, Article 6 rights), it does not follow that the trial has to be prevented.¹⁶¹

In the Supreme Court, the majority also refused to prevent Mr. Kennedy's trial from proceeding. Clarke J. noted:

*"[I]t does not follow that every case in which the ECtHR finds a breach of the right to a reasonably expeditious trial also involves a finding by that court to the effect that the trial was unfair...It does not, therefore, follow that the ECHR requires, for the avoidance of a breach of its provisions, that a trial be prohibited in every case where there has been a breach of the right to a reasonably expeditious trial."*¹⁶²

Clarke J., relying on decisions of the ECtHR and previous decisions of the Irish courts, expressed the view that the remedies under the Constitution (damages and/or potential prohibition on the trial occurring) were more extensive than the remedies of damages available under the Convention or the ECHR Act 2003.¹⁶³ As the applicant had not pursued a claim of damages under the ECHR Act 2003, the Supreme Court could not rule on this.

The Irish courts have therefore accepted (at least to a degree) that delay in speedy prosecution may result in damages, in criminal or civil proceedings, invoking the protection

¹⁵⁸ *Devoy v D.P.P.* [2008] IESC 13, Kearns J.

¹⁵⁹ *Kennedy v D.P.P.* [2011] IEHC 311 (High Court) and *Kennedy v D.P.P.* [2012] 3 I.R. 744 (Supreme Court).

¹⁶⁰ *T. H. v D.P.P.* [2006] 3 I.R. 520.

¹⁶¹ *Kennedy v D.P.P.* [2011] IEHC 311 at para. 6.5.

¹⁶² *Kennedy v D.P.P.* [2012] 3 I.R. 744 at 792, per Clarke J. Denham CJ delivered a similar assessment at 772-774.

¹⁶³ *Ibid* at 793.

of Article 6(1) ECHR (and the corollary constitutional right).¹⁶⁴ However, as is quite clear from long-standing ECtHR and Irish Superior Courts jurisprudence, there is no requirement for a trial to be prevented from occurring, even if the delay is inexcusable.

Prison Law

A small number of cases have come before the Irish courts as regards prisoners' rights¹⁶⁵ and prison conditions.¹⁶⁶ In *Mulligan v Governor of Portlaoise Prison*¹⁶⁷, McKechnie J. held that slopping out, without any other significant impact on personal space, sleeping space or hygiene issues, did not constitute inhuman and degrading treatment and a violation of private life for the purposes of the ECHR Act 2003. McKechnie J. engaged in a significant review of key prison conditions jurisprudence from the ECtHR.¹⁶⁸ In reviewing the particular case at hand, and the prison conditions Mulligan had been exposed to, McKechnie J. stated that this did not reach the requisite level of severity in order to be viewed as a violation of Article 3 or Article 8 of the ECHR.¹⁶⁹ Concluding, McKechnie J. stated:

*“Violations have been established where there have been what can only be described as extreme conditions of deprivation including the “cumulative vices” of overcrowding, poor hygiene, lack of movement and poor exercise facilities... there was an adequate supply of soap, disinfectant and bleach for use by all the prisoners, and he was able to purchase air fresheners from the prison tuck shop had he wished. Taking the issues individually and cumulatively I am unable to find there is a breach of Article 3 or in conjunction with Article 8 by reference to any established Strasbourg decision.”*¹⁷⁰

European Arrest Warrant

Convention rights have frequently been invoked in cases involving the European Arrest Warrant (EAW). Section 37 of the European Arrest Warrant Act 2003 (EAW Act 2003) provides that a person shall not be surrendered to the requesting State, if the surrender

¹⁶⁴ See in particular, *McCormack & Anor v Rouse* [2014] IEHC 396 and case law cited therein.

¹⁶⁵ *Holland v Governor of Portlaoise Prison* [2004] 2 I.R. 573 (right of prisoner to speak and contact the media); *Gibbons v Governor of Wheatfield Prison* [2008] IEHC 206 (disciplinary proceedings); *Foy v Governor of Cloverhill Prison* [2012] 1 I.R. 37 (non-physical contact with family members, not in contravention of the ECHR).

¹⁶⁶ *Mulligan v Governor of Portlaoise Prison & Anor* [2010] IEHC 269.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Mulligan v Governor of Portlaoise Prison & Anor* [2010] IEHC 269, at paras. 128-143.

¹⁶⁹ *Ibid.* See in particular paras. 44-109.

¹⁷⁰ *Mulligan v Governor of Portlaoise Prison & Anor* [2010] IEHC 269, paras. 161-164. McKechnie J. distinguished the case of *Napier v The Scottish Ministers* [2004] Scots C.S. 100, on the basis that there was significant over-crowding, the authorities had run a “chaotic” slopping out process, a person had to relieve themselves in front of others, and this caused severe physical and mental issues for the prisoners, which the relevant authorities had notice of.

would be incompatible with the State's obligations under the Convention. Given the genesis of the European Arrest Warrant emerging from European Union law, there has also been significant interpretation of the relationship between Irish law and the Charter, discussed below.¹⁷¹

In *Minister for Justice, Equality and Law Reform v McArdle*,¹⁷² the applicant had failed to show any evidence that the Spanish legal system would violate any of his rights under the Convention. In *Minister for Justice, Equality and Law Reform v Stapleton*,¹⁷³ the length of time between the alleged offences (1978/1982) and the request for surrender of the applicant caused some concern for the High Court. Peart J. noted that his role was to ensure that there were adequate reasons for preventing surrender on the basis of the elapsed time between the charge and bringing an accused to trial. Peart J. stated:

*“The concept of what is or is not a reasonable period of time is an objective one to a very large extent, even though there can be subjective considerations to be borne in mind such as the degree to which the respondent himself has contributed to the delay in his arrest and hence his trial. ... [I]n the present case there are perhaps unique circumstances arising from the fact that the earliest of the offences with which the respondent faces trial is May 1978. It is not unreasonable or fanciful in my estimation to suggest that if the respondent was to be surrendered, and everybody concerned worked with some dispatch hereafter in order to ensure as early a trial as possible, such a trial might take place almost thirty years after the earliest of these offences, as a matter of fact.”*¹⁷⁴

In other cases, the lapse of time has also been fatal to an application to surrender an accused:

*“Article 6 is not directed to lapse of time between the commission of an offence and the trial: rather it is directed to ensuring that criminal proceedings, once initiated, are prosecuted without undue delay.”*¹⁷⁵

Where there is a real risk of a violation of Article 3 of the Convention, then the Irish courts will not surrender a respondent to the requesting State. In *Minister for Justice, Equality and Law Reform v Rettinger*,¹⁷⁶ the Supreme Court noted that, once cogent evidence has been presented that a respondent faces a real risk of a violation of Article 3 ECHR if surrendered,

¹⁷¹ For an assessment of the impact of the Charter and the European Arrest Warrant, see, from p.135 *et seq.*

¹⁷² *Minister for Justice, Equality and Law Reform v McArdle* [2005] IEHC 222.

¹⁷³ *Minister for Justice, Equality and Law Reform v Stapleton* [2006] 3 I.R. 26.

¹⁷⁴ *Ibid* at 50.

¹⁷⁵ *Minister for Justice v Corrigan* [2007] 2 I.R. 448.

¹⁷⁶ *Minister for Justice, Equality and Law Reform v Rettinger* [2010] IESC 45.

it is for the requesting State to dispel or disprove this evidence.¹⁷⁷ In *Minister for Justice, Equality and Law Reform v McGuigan*¹⁷⁸ and *Minister for Justice and Equality v Holden*,¹⁷⁹ the Irish High Court refused to surrender the respondents to Lithuania, due to the real risk of torture, inhuman and/or degrading conditions of detention that would have to be endured prior to trial and in the event of any subsequent conviction. In both these cases, the High Court made reference to a wealth of reports (in particular from the Council of Europe's Committee on the Prevention of Torture) on detention and prison conditions in Lithuania.

In *Minister for Justice and Equality v Rostas*,¹⁸⁰ the Irish High Court refused to surrender a Romanian national, who was Roma, on the basis that there would be a "flagrant breach" of Article 6, in conjunction with Article 14 of the Convention. The respondent had been convicted of offences in 1995, and Romania was seeking her surrender to serve the remainder of her sentence. The respondent had provided an account of the unfairness of her trial (no witnesses were called; she had never met her lawyer, she had not been informed of her right to appeal), with the general narrative supported by a lawyer with experience of practising criminal law in Romania at the time.¹⁸¹ Relying on decisions of the ECtHR, independent human rights reports from Amnesty International, Human Rights Watch, and the European Roma Rights Centre, the High Court refused to surrender the respondent. Edwards J. refused surrender on the basis that:

*"There are substantial grounds for believing that there is a real risk that the respondent suffered a flagrant denial of justice with respect to a trial that took place in a very different Romania from today's Romania, can have no implications beyond the case presently before the Court. It represents a decision on the facts of the particular case before the Court which facts are unlikely to be exactly replicated. In so far as future cases are concerned, whether an objection to a respondent's surrender based upon the unfairness of an underlying conviction could similarly succeed would depend on the nature and strength of the evidence adduced in the particular case."*¹⁸²

¹⁷⁷ See in particular Denham J.'s legal analysis of Article 3 ECHR and the European Arrest Warrant, [2010] IESC 45 at para. 27. Denham J. also noted that a trial judge may "attach importance" to human rights documents and reports of governmental and non-governmental bodies.

¹⁷⁸ *Minister for Justice, Equality and Law Reform v McGuigan* [2013] IEHC 216, related to conditions of detention in Lithuania.

¹⁷⁹ *Minister for Justice and Equality v Holden* [2013] IEHC 62.

¹⁸⁰ *Minister for Justice and Equality v Rostas* [2014] IEHC 391. The Charter issues raised in this case are discussed below at p.137.

¹⁸¹ *Ibid* at paras. 107-117.

¹⁸² *Minister for Justice v Rostas* [2014] IEHC 391 at para. 117.

In *Minister for Justice and Equality v Nolan*,¹⁸³ the Supreme Court upheld the decision of the High Court¹⁸⁴ to refuse to surrender the respondent to the United Kingdom, where he would be subject to an indeterminate sentence under a system of sentencing that had been found to contravene Article 5(1) of the Convention by the ECtHR.¹⁸⁵

Another core issue that has arisen with European Arrest Warrant cases is that of the impact of surrender on a respondent (or his/her family) and respect for private and family life under Article 8 of the Convention.¹⁸⁶ In a number of cases, the Irish Superior Courts have noted that only in exceptional circumstances would an interference with family life lead to a decision not to surrender.¹⁸⁷ In *Minister for Justice, Equality and Law Reform v Gheorghe*,¹⁸⁸ Fennelly J. noted:

*“persons sought for prosecution in another state will very often suffer disruption of their personal and family life... No authority has been produced to support the proposition that surrender is to be refused where a person will, as a consequence, suffered disruption, even severe disruption of family relationships.”*¹⁸⁹

Subsequent cases also emphasised that extradition under the European Arrest Warrant would interfere with family life, but that this interference would: (a) be capable of engaging the right to respect for (private or) family life; (b) in accordance with law; (c) pursue a legitimate aim (prosecution of criminal offences); (d) be necessary in a democratic society; and (e) be proportionate to the legitimate aim sought.¹⁹⁰ In *Minister for Justice and Equality v Leskiewicz*,¹⁹¹ the High Court noted:

“The respondent has failed to adduce evidence of sufficient cogency to demonstrate that to surrender him would represent a disproportionate interference with his rights

¹⁸³ *Minister for Justice and Equality v Kelly aka Nolan* [2013] IESC 54.

¹⁸⁴ *Minister for Justice and Equality v Nolan* [2012] IEHC 249.

¹⁸⁵ *Minister for Justice and Equality v Kelly aka Nolan* [2013] IESC 54, per Denham J., referring to the decision of *James, Wells and Lee v. The United Kingdom*, (2013) 56 E.H.R.R. 399.

¹⁸⁶ See chapter 7 for Charter jurisprudence from the Irish courts on family life and implementation of the European Arrest Warrant.

¹⁸⁷ See generally: *Minister for Justice and Equality v Leskiewicz* [2014] IEHC 584; *Minister for Justice and Equality v Craig* [2014] IEHC 460; *Minister for Justice and Equality v O'Donnell* [2014] IEHC 138; *Minister for Justice, Equality and Law Reform v M.M.* [2013] IEHC 330; *Minister for Justice and Equality v B.H.* [2013] IEHC 443; *Minister for Justice and Equality v T.E.* [2013] IEHC 323; *Minister for Justice and Equality v Ostrowski* [2014] 1 I.L.R.M. 88; *Minister for Justice v Machaczka* [2012] IEHC 434; *Minister for Justice v Staniak* [2012] IEHC 508; *Minister for Justice, Equality and Law Reform v Ciechanowicz* [2011] IEHC 106; *Minister For Justice v D.L.* [2011] 3 I.R. 145; *Minister for Justice v Gorman* [2010] 3 I.R. 583 and *Minister for Justice, Equality and Law Reform v Gheorghe & anor* [2009] IESC 76.

¹⁸⁸ *Minister for Justice, Equality and Law Reform v Gheorghe & anor* [2009] IESC 76.

¹⁸⁹ *Ibid* at para. 48.

¹⁹⁰ See in particular, *Minister For Justice v D.L.* [2011] 3 I.R. 145; *Minister for Justice and Equality v Jaroslaw Ostrowski* [2014] 1 I.L.R.M. 88 (in particular pp. 112-120); *Minister for Justice and Equality v Craig* [2014] IEHC 460 and *Minister for Justice & Equality v Leskiewicz* [2014] IEHC 584.

¹⁹¹ *Minister for Justice and Equality v Leskiewicz* [2014] IEHC 584.

*to respect for family life in breach of article 8 of the ECHR. His evidence does not establish, or even come close to establishing either that he personally or that a member of his family would be so profoundly affected by a decision to surrender him such as to outweigh the significant public interest in his extradition...*¹⁹²

In only a small number of cases have respondents successfully argued Article 8 ECHR (family life) as a basis for the courts refusing an order to surrender. In *Minister for Justice, Equality and Law Reform v Gorman*,¹⁹³ Peart J. refused to surrender the respondent to the United Kingdom. The respondent had initially been charged with murder and conspiracy to commit murder in 1992. At the initial trial, the prosecution had been withdrawn and the respondent moved to the Republic of Ireland. Due to a change in the law in the United Kingdom, the respondent was now sought again to stand trial for the 1992 offences. Peart J. provided a detailed background on the “*exceptional*” circumstances in this case. Peart J. noted that the surrender of the respondent to the United Kingdom would have a significant impact on the respondent’s family:

*“[The respondent’s family] would be parted from their friends, family and community and would be required to re-establish themselves in another environment. There are significant matters and ones which this court considers would in all probability result more likely than not in a decision to remain [in Ireland]. That as a matter of probability, in my view, means that a surrender of the respondent [to the United Kingdom] would result in a separation of the respondent from his wife and family, and this court must make its decision on the assumption therefore that his family would not feel able to go and join him.”*¹⁹⁴

Peart J. held that the delay in requesting the respondent’s extradition,¹⁹⁵ coupled with the impact that the extradition would have on family life,¹⁹⁶ given that the respondent may not have reasonably foreseen the possibility of extradition to the United Kingdom, meant that surrender to the United Kingdom would not be ordered.¹⁹⁷

¹⁹² *Minister for Justice and Equality v Leskiewicz* [2014] IEHC 584, at para. 29.

¹⁹³ *Minister for Justice, Equality and Law Reform v Gorman* [2010] 3 I.R. 583.

¹⁹⁴ *Ibid* at 613.

¹⁹⁵ See, *Minister for Justice, Equality and Law Reform v Gorman* [2010] 3 I.R. 583 at 587-588 for a succinct summary of relevant timelines. It should be noted that the challenge of the extradition warrant on grounds of undue/unnecessary delay in issuing the warrant, and bringing the respondent to trial, failed, see pp. 590-594.

¹⁹⁶ Peart J. in particular referenced the decision of *Boultif v Switzerland* (2001) 33 E.H.R.R. 1179 ([2010] 3 I.R. 583 at 610-611) in examining the proportionality of the removal from Ireland for the purposes of extradition. While *Boultif* relates to immigration law, similar principles were applicable in this case.

¹⁹⁷ *Ibid* at 600-614.

In *Minister for Justice and Equality v. T.E.*,¹⁹⁸ the High Court summarised the principal legal considerations that Irish courts must consider when deciding whether or not to surrender a respondent who raises questions on the protection of family life (under the Convention or the Constitution). It is worth setting out in full the 22 considerations and questions which, according to the High Court, have to be considered in any argument that an extradition would violate Article 8 ECHR:

“1. The test imposed by article 8(2) is not whether extradition is on balance desirable but whether it is necessary in a democratic society;

2. There is no presumption against the application of article 8 in extradition cases and no requirement that exceptional circumstances must be demonstrated before article 8 grounds can succeed;

3. The test is one of proportionality, not exceptionality;

4. Where the family rights that are in issue are rights enjoyed in this country, the issue of proportionality involves weighing the proposed interference with those rights against the relevant public interest;

5. In conducting the required proportionality test, it is incorrect to seek to balance the general desirability of international cooperation in enforcing the criminal law and in bringing fugitives to justice, against the level of respect to be afforded generally to the private and family life of persons;

6. Rather, the assessment must be individual and particular to the requested person and family concerned. The correct approach is to balance the public interest in the extradition of the particular requested person against the damage which would be done to the private life of that person and his or her family in the event of the requested person being surrendered;

7. In the required balancing exercise the public interest must be properly recognized and duly rated;

8. The public interest is a constant factor in the horizontal sense, i.e., it is a factor of which due account must be taken in every case;

¹⁹⁸ *Minister for Justice and Equality v. T.E* [2013] IEHC 323. See issues of Charter relevance discussed below at chapter 7.

9. However, the public interest is a variable factor in the vertical sense, i.e, the weight to be attached to it, though never insignificant, may vary depending on the circumstances of the case;

10. No fixed or specific attribution should be assigned to the importance of the public interest in extradition and it is unwise to approach any evaluation of the degree of weight to be attached to it on the basis of assumptions. The precise degree of weight to be attached to the public interest in extradition in any particular case requires a careful and case specific assessment. That said, the public interest in extradition will in most cases be afforded significant weight.

11. The gravity of the crime is relevant to the assessment of the weight to be attached to the public interest. The graver the crime, the greater the public interest. However, the opposite effect, namely 'the lesser the crime the lesser the interest' may not follow in corresponding proportion. Where on the spectrum the subject offence may sit, is an aspect of each case which must also be explored as part of the process.

12. The public interest in extraditing a person to be tried for an alleged crime is of a different order from the public interest in deporting or removing an alien who has been convicted of a crime and who has served his sentence for it, or whose presence in the country is for some other reason not acceptable. This does not mean, however, that the Court is required to adopt a different approach to article 8 rights depending on whether a case is an extradition case or an expulsion case. The approach should be the same, but the weight to be afforded to the public interest will not necessarily be the same in each case.

13. Delay may be taken into account in assessing the weight to be attached to the public interest in extradition;

14. In so far as it is necessary to weigh in the balance the rights of potentially affected individuals on the one hand, with the public interest in the extradition of the requested person, on the other hand, the question for consideration is whether, to the extent that the proposed extradition may interfere with the family life of the requested person and other members of his family, such interference would constitute a

proportionate measure both in terms of the legitimate aim or objective being pursued and the pressing social need which it is suggested renders such interference necessary.

15. It is self-evident that a proposed surrender on foot of an extradition request will, if carried into effect, result in the requested person being arrested, being possibly detained in custody in this State for a period pending transfer to the requesting state, and being forcibly expelled from the State. In addition, he/she may have to face a trial (and may possibly be further detained pending such trial) and/or may have to serve a sentence in the requesting State. Such factors, in and of themselves, will rarely be regarded as sufficient to outweigh the public interest in extradition. Accordingly, reliance on matters which could be said to typically flow from arrest, detention or surrender, without more, will little avail the affected person.

16. Article 8 does not guarantee the right to a private or family life. Rather it guarantees the right to respect for one's private or family life. That right can only be breached if a proposed measure would operate to so as to disrespect an individual's private or family life. A proposed measure giving rise to exceptionally injurious and harmful consequences for an affected individual, disproportionate to both legitimate aim or objective being pursued and the stated pressing social need proffered in justification of the measure, would operate in that way and breach the affected individual's rights under Article 8.

17. It will be necessary for any Court concerned with the proportionality of a proposed extradition measure to examine with great care in a fact specific enquiry how the requested person, and relevant members of that person's family, would be affected by it, and in particular to assess the extent to which such person or persons might be subjected to particularly injurious, prejudicial or harmful consequences, and then weigh those considerations in the balance against the public interest in the extradition of the requested person.

18. Such an exercise ought not to be governed by any predetermined approach or by pre-set formula: it is for the Court seized of the issue to

decide how to proceed. Once all of the circumstances are properly considered, the end result should accurately reflect the exercise.

19. The demonstration of exceptional circumstances is not required to sustain an article 8 type objection because in some cases the existence of commonplace or unexceptional circumstances might, in the event of the proposed measure being implemented, still result in potentially affected persons suffering injury, prejudice or harm. The focus of the court's enquiry should therefore be on assessing the severity of the consequences of the proposed extradition measure for the potentially affected persons or persons, rather than on the circumstances giving rise to those consequences.

20. Where the article 8 rights of a child or children are engaged by a proposed extradition measure the best interests of the child or children concerned must be a primary consideration. They may be outweighed by countervailing factors, but they are of primary importance.

21. If children's interests are to be properly taken into account by an extradition court, it will require to have detailed information about them, and about the family as a whole, covering with all considerations material to or bearing upon their welfare, both present and future. Primary responsibility for the adduction of the necessary evidence rests upon the party raising article 8 rights in support of an objection to their surrender.

22. In an appropriate case, where it is satisfied that there are special features requiring further investigation to establish how the welfare of a child or children might be affected by a proposed extradition measure, and/or as to what the best interests of the child or children in question might require, an extradition court can, of its own motion, seek further evidence.”¹⁹⁹

Overall, the Irish courts have engaged extensively with the jurisprudence of the ECtHR (and, as discussed in chapter 7, the Charter) in determining whether to permit surrender under a European Arrest Warrant. The Irish courts have sought to outline clear tests as regards

¹⁹⁹ *Minister for Justice and Equality v T.E* [2013] IEHC 323. There are no page or paragraph numbers in this judgment to which pointed reference can be made. See discussion in the context of Article 24 of the Charter (rights of the child), below from p.144.

providing substantive reasons for accepting or rejecting a respondent's request not to be surrendered to the requesting State.

Family and Child Law

In the arena of family and child law, the 27 reported cases from the District Court evidence some engagement with the Convention. The Charter can only impact child and family law to the extent that this field is within the scope of European Union law.²⁰⁰

In the area of child care law, where the Health Services Executive, and more recently the Child and Family Agency, have sought various orders under the Child Care Act 1991 Judges of the District Court have emphasised the need for proportionate and limited interference with the rights of the family.²⁰¹ Some key principles emerging from the District Court cases have included:

- The Health Service Executive is an “*organ of the State*” for the purposes of section 1 of the ECHR Act 2003 and must act in a Convention compliant manner.²⁰²
- The District Court is under an obligation to interpret child-care legislation in a Constitutional and Convention compliant manner when exercising its powers.²⁰³
- When exercising powers to grant any form of care order under the Child Care Act 1991 (as amended), there is a requirement under the Constitution and the Convention to have due regard to the rights of the parents and family. There should not be a presumption in favour of permanent separation of a parent-child relationship (unless there are exceptional circumstances).²⁰⁴

As regards sexual abuse allegations, not proved to a criminal standard, the District Court has emphasised that it must be mindful of the rights of the alleged perpetrator under Article 6

²⁰⁰ See discussion of the Charter below, in particular as regards interpretation of Brussels II bis Regulation, from pp.144 onwards.

²⁰¹ See, *Health Service Executive v SK & anor (Costs)* [2010] IEDC 2 (09 June 2010), *Health Service Executive v RB & anor (Care Order - CSA Allegations)* [2011] IEDC 5 (30 September 2011), *Health Service Executive v LL & ors (Full Care Order - NAI)* [2011] IEDC 6 (11 October 2011), *Health Service Executive v ON & anor (Care Order - Corporal Punishment)* [2011] IEDC 8 (01 November 2011) and *Health Service Executive v ED & anor (CO and SO - Neglect and Abuse)* [2012] IEDC 1 (13 January 2012).

²⁰² *SB & anor v Health Service Executive (Direction to Prevent Change of Placement)* [2011] IEDC 10 (08 December 2011)

²⁰³ *Child and Family Agency and JO & Anor (Care Order - Proportionality)* [2014] IEDC 11 (12 August 2014).

²⁰⁴ See, *Child and Family Agency and KC & Anor (Care Order - Proportionality)* [2014] IEDC 12 (22 August 2014), *Tusla: Child and Family Agency and COS & Anor* [2014] IEDC 16 (31 October 2014) and *Tusla: Child and Family Agency and AC & Anor (Care Order - Proportionality)* [2014] IEDC 17 (05 November 2014). In the Charter context, see below, p. 160.

and Article 8 of the ECHR.²⁰⁵ The District Court must be satisfied on the balance of probabilities that such abuse occurred.²⁰⁶ Even where there may be a risk to life of a child, abuse allegations must be disclosed to the alleged perpetrator.²⁰⁷

In *Health Service Executive v M, X & ors*,²⁰⁸ the District Court took its obligations under section 2 of the ECHR Act 2003 into account in refusing to block disclosure of a sexual abuse allegation. The Court noted that there was a positive duty to prevent a loss of life and preserve bodily integrity of the complainant (X). This had to be viewed in light of the alleged perpetrator's (M) significant due process rights. In this case, the high threshold for refusing to disclose information to M had not been met. X had in place significant supports to assist in his dealing with this disclosure of the sex abuse allegation to M.

Issues relating to fair procedures in child care cases, including the right of the child to be consulted in any change of care placement, or in the case of a proposal to grant a full care order, must take cognisance of rights under the Convention.²⁰⁹ The District Court, while mindful of the voice of the child, had refused, in the particular circumstances of the case, to grant a request of two children (15 and 16 years of age) to be provided with legal representation through a solicitor. The judge decided that fair procedures under Article 8 of the Convention (and Article 12 of the Convention on the Rights of the Child) had been respected by appointing a guardian ad litem for the children.²¹⁰

As regards the rights of parents, the District Court, with particular reference to Article 6 and Article 8 of the Convention, has held that in certain circumstances, representation outside the Legal Aid Board scheme must be provided to families involved in care proceedings.²¹¹

In the Superior Courts, issues of child and family law have also been considered as regards the impact of the ECHR Act 2003. In two cases relating to marriage equality and rights of families, the Superior Courts have been cautious in going beyond minimum rights protections established by the ECtHR. In *Zappone & Gilligan v Revenue Commissioners*²¹² (somewhat reflecting the reasoning of the ECtHR in the 2010 case of *Schalk and Kopf v*

²⁰⁵ *Health Service Executive v B & anor (Lifting In Camera Rule)* [2013] IEDC 13 (28 May 2013).

²⁰⁶ *DP v KS (Access Variation and Burden of Proof for Sexual Abuse)* [2009] IEDC 3 (18 May 2009).

²⁰⁷ *Health Service Executive v M, X & ors (Joining of Party)* [2013] IEDC 9 (25 March 2013)

²⁰⁸ *Health Service Executive v M, X & ors (Joining of Party)* [2013] IEDC 9 (25 March 2013)

²⁰⁹ See, *Health Service Executive v SM & anor (Change of Placement and Wishes of Child)* [2010] IEDC 1 (13 May 2010) and *Health Service Executive v AM & anor (Care Order - Mental Illness)* [2013] IEDC 10 (23 April 2013), relying on *Hokkanen v Finland* (1995) 19 E.H.R.R. 139 and *Bronda v Italy* (2001) E.H.R.R. 33.

²¹⁰ *Health Service Executive v M & anor (Children Request Solicitor)* [2010] IEDC 4 (01 November 2010).

²¹¹ *Health Service Executive v SK & anor (Costs)* [2010] IEDC 2 (09 June 2010). See also, *Health Service Executive v OA* [2013] IEHC 172.

²¹² *Zappone & Anor v Revenue Commissioners & Ors* [2006] IEHC 404.

Austria),²¹³ Dunne J. held that there was no right, under the Constitution or the ECHR, for same-sex couples to marry.

In *McD v L*,²¹⁴ the High Court, after an extensive review of ECtHR authorities, concluded that the natural mother of a child, and her lesbian partner, were a “*de facto family*”. Hedigan J. noted that while there was no jurisprudence from the ECtHR (at that time) where a lesbian couple living together and raising a child were considered a *de facto* family, the case of *X, Y and Z v. United Kingdom*,²¹⁵ demonstrated a “substantial movement towards such a finding.” The court considered L, M and D to be a *de facto* family for the purposes of Article 8 of the Convention and, relying on an expert report ordered by the High Court, stated that the child did not have any close contact whatsoever with McD, and therefore McD could not rely on Article 8 in establishing family life with D.²¹⁶

However, on appeal, the Supreme Court rejected that there was any legal protection inhering in the “*de facto family*” by virtue of the Convention and/or the ECHR Act 2003. The reasoning of the High Court came under sustained criticism, with Fennelly J. noting that the judge failed to identify any statutory provision or rule of law to be interpreted in a Convention compliant manner.²¹⁷ Fennelly J. also held that the High Court had attempted to give direct effect to the Convention, which conflicted with Article 29 of the Constitution.²¹⁸ The ECtHR had not (at that particular time)²¹⁹ recognised that homosexual couples could benefit from protections of family life under Article 8. Significantly, Fennelly J. held:

“*The Act of 2003 does not provide an open ended mechanism for our courts to outpace Strasbourg.*”²²⁰

Equality, Social and Employment Rights

Irish courts and tribunals have considered the impact of the ECHR and ECHR Act 2003 in a range of equality, social rights and employment rights fields.²²¹

²¹³ *Schalk and Kopf v Austria* (App No. 30141/04) (22 November, 2010). See also the more recent case of *Hamalainen v Finland* (App. no. 37359/09) (16 July, 2014).

²¹⁴ *McD v L & Another* [2008] IEHC 96.

²¹⁵ *X, Y and Z v. United Kingdom* [1997] 24 E.H.R.R.143.

²¹⁶ In coming to this conclusion, Hedigan J. relied on the European Commission on Human Rights decision in *M. v. Netherlands* (App. no. 16911/90), (8th February, 1993).

²¹⁷ *McD v L* [2010] 2 I.R. 199 at 303.

²¹⁸ *Ibid* at 312.

²¹⁹ As Hedigan J. had predicted, the ECtHR eventually recognized same-sex couples as potentially benefiting from the protection of family life under Article 8 ECHR in *Schalk and Kopf v Austria* [2010] ECHR 995, see paras. 87-95.

²²⁰ *McD v L* [2010] 2 I.R. 199 at 317.

Employment

As regards employment rights, the Labour Court has engaged with the ECHR in a limited manner since the commencement of the ECHR Act 2003.

In *Damery*,²²² the Labour Court held that the Convention could not impact on claims for diplomatic immunity in employment disputes. In two trade union disputes, the Labour Court had occasion to refer to the ECHR or the ECHR Act 2003, without any core consideration of Convention rights.²²³ Within the Superior Courts, employment law related ECHR claims have revolved around issues relating to fair procedures in disciplinary tribunals.²²⁴ This line of case law augments the already strong constitutional fair procedures jurisprudence within employment law. There has been no significant consideration by the Superior Courts of the degree (if any) to which a Convention claim impacts on constitutional fair procedures jurisprudence in the employment setting.

Equality

The Equality Tribunal has explicitly engaged with rights claims under the Convention and/or ECHR Act 2003 on eight occasions.²²⁵ The Equality Tribunal has a duty to interpret Irish law in a Convention compliant manner (in so far as is possible).²²⁶ The ECHR Act 2003 does not extend the jurisdiction of the Equality Tribunal to determine whether breaches of Convention rights have occurred.²²⁷

On just one occasion to date, within the scope of this study, has the Equality Tribunal engaged substantially with jurisprudence of the ECtHR. In *McAteer v South Tipperary County Council*,²²⁸ the Equality Tribunal had to assess whether the complainant was unfairly dismissed on grounds of his religious belief. The Equality Officer reviewed select jurisprudence of the ECtHR relating to rules on expression of religious belief within the work

²²¹ For a substantial review of the approach of the European Court of Human Rights and the Irish courts to issues relating to socio-economic rights and the ECHR and ECHR Act 2003, see Whyte, G. "Public Interest Litigation in Ireland and the European Convention on Human Rights Act 2003" and Thornton, L. "The European Convention on Human Rights: A Socio-Economic Rights Charter?" and in Egan, S., Thornton, L. and Walsh, J. *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Dublin: Bloomsbury, 2014).

²²² Determination No. EDA0417, *Italian Embassy v Damery* (December 2004).

²²³ See, Recommendation No. LCR18364, *Dunnes Stores Tralee and Mandate* (November 2005) and Decision No. REA 1120, *MDY Construction Limited and Building and Allied Trade Unions* (February 2011).

²²⁴ See, *Burns & Anor v. Governor of Castlerea Prison* [2005] IEHC 76, *Kudelska v An Bord Altranais* [2009] IEHC 68, *Webster v The Commissioner of An Garda Síochána, Ireland and the Attorney General* [2014] 2 I.L.R.M. 144 and *Cassidy v Martin Butterly and Company Ltd & ors* [2014] IEHC 203.

²²⁵ See below for the eight cases where the Equality Tribunal explicitly engages with Convention and/or ECHR Act 2003 arguments.

²²⁶ DEC-S2005/200, *Sharkey v Danny Minnie's Restaurant, Donegal*, December 2005.

²²⁷ See generally, DEC-E2013-188, *Mr L v A Medical Technology Enterprise* (20 December 2013), DEC-S2010-053, *A Patient v Health Service Provider and A Hospital* (1 December 2010) and DEC-S2008-113, *Mr Thomas O'Donnell v Roscommon County Council* (2 December 2008).

²²⁸ DEC-E2014-045, *John McAteer v South Tipperary County Council* (24 June 2014).

environment.²²⁹ In this case, the Equality Officer determined that the right to manifest one's religious belief in the workplace is protected under the ECHR, and reasonable limitations may be placed on this right. The Equality Officer noted that the ECtHR accepted in its jurisprudence that the right to manifest one's religious beliefs can be limited so as to avoid undue pressure being placed on work colleagues. Religious belief cannot justify a refusal to carry out otherwise lawful tasks in the employment setting, and for reasons of health and safety manifestation of religious belief may have to be restricted. After reviewing the ECtHR jurisprudence, the Equality Officer determined that the complainant had been unlawfully dismissed on the basis of his religious beliefs and an award of €70,000 was appropriate.²³⁰

The High Court dismissed a claim that, in a case of a four year delay between the Equality Tribunal's receiving a complaint and making a determination (between 2002 and 2006), the Director of the Tribunal had breached his obligations under section 3 of the ECHR Act 2003 and rights under Article 6(1) of the Convention.²³¹

In *D(J) v Residential Institutions Review Committee*²³² the High Court dismissed the applicant's arguments under the ECHR Act 2003 that, by virtue of section 2(1) of the ECHR Act 2003 (the interpretive obligation) and the jurisprudence of the ECtHR under Article 8 and 14, the term "child" in the Residential Institutions Redress Act 2002 should be read as including any person up to the age of 21, as this was the legal definition of childhood at the relevant time of the applicant's complaints. O'Neill J. decided that, given that the events complained of occurred in the 1960s, neither Article 8 nor Article 14 could be engaged.²³³ The Supreme Court upheld this decision.²³⁴

Social Rights (Asylum Seekers)

In *C.A. & T.A.*,²³⁵ the operation of the system of direct provision for asylum seekers in Ireland was considered.²³⁶ Mac Eochaidh J. accepted:

²²⁹ The Equality Officer made reference to the following cases: *Kokkinakis v Greece* (1994) 17 E.H.R.R. 397, *Larissis & others v Greece* [1999] E.H.R.R. 329 and *Eweida and Others v United Kingdom* (App. Nos. 48420/10, 51671/10, 59842/10 and 36516/10) (27 May 2013).

²³⁰ For a discussion of the Charter points raised in this case, see below from p. 148

²³¹ *Kelly v Director of Equality Tribunal* [2008] IEHC 112. The High Court noted that between 2002 and 1 January 2004, the plaintiff's claims under Article 6(1) ECHR could not impact the decision, given that the ECHR Act 2003 was not retrospective.

²³² *D (J) v Residential Institutions Review Committee* [2009] 2 I.L.R.M. 65.

²³³ *D(J) v Residential Institutions Review Committee* [2009] 2 I.L.R.M. 65 at 73-76. The applicant initially succeeded in her claim that the definition of 'child' under the 2002 Act was unconstitutional. This aspect of the High Court's decision was overturned by the Supreme Court on appeal, see [2010] 1 I.R. 262.

²³⁴ *D(J) v. Residential Institutions Review Committee* [2010] 1 I.R. 262.

²³⁵ *C.A. & anor v Minister for Justice and Equality & ors* [2014] IEHC 532. For more detailed consideration of this judgment, see Thornton, L. "C.A & T.A.: The Direct Provision Case" (2014) 4 *Irish Journal of Family Law* 116-118.

“[W]here an applicant claims that ‘direct provision’ is having such adverse effects on her life as to cause serious harm and where such circumstances are backed up by appropriate medical and other independent evidence, a Court would be entitled to grant appropriate relief, even if the only remedy for the wrong involved the expenditure of additional resources by the State.”²³⁷

Unannounced room inspections, monitoring of presence and the requirement to notify intended absences, rules against having guests in bedrooms, and the overall complaints handling process by the Reception and Integration Agency were deemed to be violations of Article 8 ECHR as well as of constitutional rights.²³⁸ However, the core claim, that the treatment suffered by the applicant and her son in the system of direct provision was inhuman or degrading, or a violation of the right to private and family life, was rejected.

Mac Eochaidh J. analysed the key ECtHR jurisprudence in this area (in particular the case of *M.S.S. v Belgium and Greece*²³⁹). The facts presented by the applicant, as regards her life in direct provision, were in “*stark contrast*” to the total lack of reception conditions in *M.S.S v Belgium and Greece*. As evidence from the applicant could not be tested in this case (as the case was not a plenary action), it was not possible for the Court to assess whether the direct provision system is a breach of Article 3 ECHR. Similarly, as regards Article 8 ECHR, communal living in direct provision does impair the right to enjoy family life. However, the applicants failed to prove such impairment in relation to this case:

“No professional evidence was sought to be adduced which would suggest an injury to family life occasioned by direct provision...[T]he applicants have failed to establish that ‘direct provision’, as experienced by them, unlawfully interferes with family life.”²⁴⁰ [Emphasis added.]

As regards the “*abnormal circumstances*” that the child applicant is being reared in, Mac Eochaidh J. stated that, although instinctively he felt direct provision is not an ideal environment for rearing a child due to a lack of proof from the applicants he could not find a breach of Convention and/or corollary Constitutional rights.²⁴¹

²³⁶ For more on the human rights concerns with the direct provision system, see, Thornton, L. “Social Welfare Law and Asylum Seekers in Ireland: An Anatomy of Exclusion” (2013) 20(2) *Journal of Social Security Law*: 66; Thornton, L. “The Rights of Others: Asylum Seekers and Direct Provision in Ireland” (2014) 3(2) *Irish Community Development Law Journal* 22 and Thornton, L. “Direct Provision and the Rights of the Child in Ireland” (2014) 17(3) *Irish Journal of Family Law* 68.

²³⁷ *C.A. & anor v Minister for Justice and Equality & ors* [2014] IEHC 532 at para. 12.6.

²³⁸ *Ibid* at paras 8.1-9.11.

²³⁹ *M.S.S. v Belgium and Greece* (App. No. 30696) (21st January, 2011).

²⁴⁰ *C.A. & anor v Minister for Justice and Equality & ors* [2014] IEHC 532, at para. 9.18

²⁴¹ *Ibid* at para. 9.19. For a consideration of the Charter issues raised in this case, see below from p.118.

Social rights (including Housing Law)

The Superior Courts have handed down a number of significant judgments applying the Convention/the ECHR Act 2003 to housing law, and to duties on local authorities under the Housing Acts.²⁴² The case law has focused on two core issues:

- The right for those in local authority (social) housing to be afforded an opportunity to challenge a proposed eviction order under section 62 of the Housing Acts;
- Failure of the local authority to act in a Convention compliant manner as regards housing need allocation.

Section 62 of the Housing Act

In a series of cases,²⁴³ culminating in the Supreme Court decision in *Donegan v Dublin City Council*,²⁴⁴ a declaration of incompatibility under section 5 of the ECHR Act 2003 was made as regards section 62 of the Housing Act 1996 (as amended).

In *Leonard v Dublin City Council*²⁴⁵ the applicant suffered from heroin addiction and was a local authority tenant. As part of the applicant's agreement to live in local authority housing, the applicant agreed that her partner would not be allowed to enter the house. Under section 62 of the Housing Acts, the applicant could not challenge the facts as presented by the local housing authority (although in this case, the facts were not in dispute).²⁴⁶ The District Court duly granted the housing authority's application for the applicant to vacate the premises. The applicant, in sum, contended that provisions of the ECHR Act 2003 were not complied with because she did not have legal representation at the District Court hearing (Article 6), the State failed to respect the applicant's home (Article 8), there was no effective remedy to challenge the alleged breach of Convention rights (Article 13) and she was treated differently than a private tenant would have been in the same circumstances (Article 14).

Dunne J., after considering ECtHR and UK jurisprudence on related issues,²⁴⁷ concluded that there was no breach of Convention rights under the ECHR Act 2003. In relation to the

²⁴² The issue of retrospectivity in *Dublin City Council v Fennell* [2005] 1 IR 604, was considered in the previous chapter.

²⁴³ *Leonard v Dublin City Council & Others* [2008] IEHC 79, *Donegan v Dublin City Council* [2008] IEHC 288, *Dublin City Council v Gallagher* [2008] IEHC 354 and *Pullen & Others v. Dublin City Council* [2008] IEHC 379.

²⁴⁴ *Donegan v Dublin City Council* [2012] 3 I.R. 600.

²⁴⁵ *Leonard v Dublin City Council & Others* [2008] IEHC 79 (31/03/2008). There are no page or paragraph numbers in the judgment to which pointed reference can be made.

²⁴⁶ Section 62 of the Housing Act 1996.

²⁴⁷ *Harrow London Burrow Council v Qazi* [2004] 1 A.C. 98; *Begum v London Bureau of Tower Hamlets* [2003] UKHL 5; *Kay and Others v. Lambeth London Borough Council* and *Leeds City Council v Price and Others* [2006] 2 A.C. 465; *Albert and Le Compte v Belgium* [1983] 5 E.H.R.R. 533; *Bryan v United Kingdom* [1995] 21 E.H.R.R. 342; *Blecic v Croatia* [2004] 41 E.H.R.R. 185 and *Connors v United Kingdom* [2005] 40 E.H.R.R. 189.

claim under Article 6, Dunne J. concluded that if there was any procedural unfairness, the applicant could challenge this by way of judicial review; however, this was not proven on the facts of the case. The applicant's claim also failed under Article 8, since the local authorities had complied with the statutory methods of removing a tenant from local authority housing. Noting the decision in *Connors v United Kingdom*, Dunne J. stated that a number of Article 8 principles on housing emerged from these provisions, including: (a) there is a wide margin of appreciation for the State in housing matters; (b) a court should respect the legislature's decision of protecting the community interest in housing; (c) judicial review was available to the applicant as a procedural safeguard and found that there was no violation of Article 13. In relation to the argument that the applicant's Article 14 rights (in conjunction with Article 6 and/or Article 8) were breached, due to different procedures in place for public tenants and private tenants, the High Court stated that the,

"fact that a private tenant in this jurisdiction may have greater security of tenure than a local authority tenant is not in my view an element of discrimination but is merely one of the incidents of being a local authority tenant and is a reflection of the importance of the prudent management of the limited availability of local authority housing."

In May 2008, however, section 62 of the Housing Acts 1966-1998 was successfully challenged before the High Court. In *Donegan v Dublin City Council*²⁴⁸ the applicant claimed that the procedure for removing a local authority tenant from his house was contrary to Articles 6, 8 and 13 of the ECHR. In this case, the plaintiff was being removed from his house because of the actions of his son, who was a drug user and allegedly engaged in drug dealing. The allegation of drug dealing against his son was strenuously denied by the applicant. Laffoy J., distinguishing *Leonard*, stated that on the facts of this case:

"...judicial review does not constitute a proper procedural safeguard where the tenant's contention that the Council was not entitled to terminate his tenancy is based on a dispute as to the facts."

Laffoy J., after extracting principles from the ECtHR decisions in *Blecic*²⁴⁹ and *Connors*,²⁵⁰ and noting relevant differences to the case at hand, stated that the failure to provide a local authority tenant the opportunity to challenge the reasons for termination of his right to live in local authority housing before the District Court or an independent housing tribunal is not,

²⁴⁸ *Donegan v Dublin City Council* [2008] IEHC 288 (8 May 2008). There are no page or paragraph numbers in the judgment to which pointed reference can be made.

²⁴⁹ [2004] 41 E.H.R.R. 185.

²⁵⁰ [2005] 40 E.H.R.R. 189.

“proportionate to the need of the housing authority to manage and regulate its housing stock in accordance with its statutory duties and the principles of good estate management.”

Laffoy J. therefore granted a declaration that section 62 of the Housing Acts 1966-1998 was incompatible with the State’s obligations under Article 8 of the ECHR.²⁵¹

In *Gallagher v Dublin City Council*,²⁵² O’Neill J. held that a District Court Judge could not interpret section 62 of the Housing Acts (as amended) as permitting the judge to explore the merits or procedure utilised to remove a local authority tenant. A defendant local authority tenant could not challenge the merits or procedure set down under section 62 in the District Court. Section 2 of the ECHR Act 2003 did not place on a local housing authority an obligation to provide evidence justifying its termination of the tenancy. Therefore, the only remedy available to Gallagher was a declaration of incompatibility (section 5 of the ECHR Act 2003) that section 62 of the Housing Acts (as amended) infringed the defendants’ rights under Article 8 of the ECHR.

The Supreme Court upheld the High Court decisions in *Donegan* and *Gallagher*.²⁵³ The Supreme Court engaged in a detailed analysis of ECtHR jurisprudence,²⁵⁴ and an analysis of relevant jurisprudence from the courts in England and Wales.²⁵⁵ McKechnie J., giving judgment for the Supreme Court, concluded that in light of Ireland’s obligations under the ECHR, as a result of the ECHR Act 2003, it was not possible to interpret section 62 of the Housing Acts in a Convention compliant manner.²⁵⁶ The only remedy available therefore was a declaration on incompatibility.²⁵⁷ The ECtHR had made clear²⁵⁸ that where there is a factual dispute as regards the removal of a tenant from local authority housing, there must be some forum for assessing whether this is a proportionate interference with Convention

²⁵¹ Similar decisions were subsequently rendered by the High Court in *Dublin City Council v Gallagher* [2008] IEHC 354. This case originated from questions posed by a District Court judge by way of a case stated to the High Court. O’Neill J. held that a declaration of incompatibility could be granted in this manner, and there was not a requirement for Mr. Gallagher to bring a judicial review. See also, *Pullen & Others v. Dublin City Council* [2008] IEHC 379.

²⁵² *Dublin City Council v Gallagher* [2008] IEHC 354 (11 November 2008).

²⁵³ *Donegan v Dublin City Council and Gallagher v Attorney General* [2012] 3 I.R. 600. Issues relating to interpretative obligations are explored in the previous chapter.

²⁵⁴ *Ibid* at 646-651.

²⁵⁵ *Donegan v Dublin City Council and Gallagher v Attorney General* [2012] 3 I.R. 600 at 651.

²⁵⁶ *Ibid* at 645-646.

²⁵⁷ *Donegan v Dublin City Council and Gallagher v Attorney General* [2012] 3 I.R. 600 at 655-660.

²⁵⁸ See in particular, *Connors v United Kingdom* (2005) 40 E.H.R.R. 189 and *McCann v United Kingdom* (2008) 47 E.H.R.R. 40.

rights. Judicial review, in this instance, did not form constitute an adequate remedy, even if it could assess (in an overall sense) the proportionality of the decision.²⁵⁹ McKechnie J. held:

*“Certainly the court, on judicial review, could not enter into an assessment of the facts or personal circumstances behind the application, such matters are not even within the consideration of the District Court Judge. Judicial review of a s. 62 application could in no way be capable of resolving a conflict of fact between the Council and a person subject to the application...I do not believe that the remedy of judicial review gives any comfort in the context of the State's obligation to show respect for the right to one's home within article 8 of the Convention.”*²⁶⁰

The declaration of incompatibility in *Donegan* was remedied by Part 2 of the Housing (Miscellaneous Provisions) Act 2014, which was commenced in April 2015.²⁶¹

Housing Authorities Acting in a Convention Compliant Manner: Provision and Adequacy of Accommodation

In *O'Donnell v South Dublin County Council*²⁶² the applicants, members of the Traveller Community who were living on a halting site, sought orders that their rights under the ECHR Act 2003 were violated. The respondents had failed to provide adequate accommodation for a fifteen year old child who suffered from cerebral palsy and was confined to a wheel chair. The applicants argued that the failure to provide a disability friendly caravan resulted in a breach of Article 3 and/or Article 8 rights under the ECHR.²⁶³ The accommodation the family occupied was overcrowded and cramped and both sides agreed that the conditions the family were living in were unfit for human habitation. The respondents argued that accommodation was provided to the applicants in the recent past; however they gave away one caravan and failed to maintain the other caravan in a suitable state of repairs.

Edwards J., while appreciating the point of view of the council, stated that nevertheless the Convention rights of the child at issue must be vindicated. He stated that overcrowding alone, while unfortunate, is,

²⁵⁹ *Donegan v Dublin City Council and Gallagher v Attorney General* [2012] 3 I.R. 600 at 652-655, see arguments presented on the basis of *Meadows v Minister for Justice* [2010] 2 I.R. 701.

²⁶⁰ *Donegan v Dublin City Council and Gallagher v Attorney General* [2012] 3 I.R. 600 at 653-654.

²⁶¹ See S.I. No. 121 of 2015, Housing (Miscellaneous Provisions) Act 2014 (Commencement of Certain Provisions) Orders 2015.

²⁶² *O'Donnell & Others v South Dublin County Council & Others* [2008] IEHC 454. Pointed reference cannot be made to page or paragraph numbers in the judgment. This case should not be confused with *O'Donnell v South Dublin County Council* [2007] IEHC 204 - different applicants were involved in both cases.

²⁶³ An argument that the State violated Article 3 and/or Article 8 of the ECHR in conjunction with Article 14 (discrimination on ethnic grounds) was not substantiated.

“to be endured on a “grin and bear it” as it would not be regarded as crossing the threshold between merely regrettable circumstances as opposed to breaching fundamental rights.”

Quoting the 2007 judgment of Laffoy J. in *O'Donnell v South Dublin County Council*, Edwards J. held that the State had failed in its Article 8 duties towards the child at issue. The judge then proceeded to make a declaration requiring South Dublin County Council to provide temporary accommodation to relieve the housing conditions of the family (in particular the child at issue). However, he stated that he would not order that this temporary accommodation be provided by means of a caravan, and it would be for South Dublin County Council to decide how best to carry out the effect of the court's declaration. Damages for a breach of the Convention rights of the child at issue were to be decided at a subsequent hearing.

On appeal, MacMenamin J. in the Supreme Court considered the duties of the local authority under section 6, section 9 and section 10 of the Housing Act 1988, in light of the Constitution and the Convention.²⁶⁴ The minor applicant/respondent was living in accommodation that was “unfit for human habitation”, living in “overcrowded accommodation”, had a reasonable requirement for separate accommodation, was in need of accommodation for “medical or compassionate reasons” and was unable to meet the cost of the accommodation or to obtain other suitable accommodation.²⁶⁵ Relying on Costello J.'s unreported decision in *O'Brien v Wicklow Urban District Council*,²⁶⁶ MacMenamin J. stated that the obligations on the Council had to be considered in the light of constitutionally protected rights and the exceptional circumstances of this case, known to the council since 2005.²⁶⁷ The Supreme Court accepted that Ms. O'Donnell was subjected to inhuman and degrading accommodation conditions, infringing on private and family life, and compromising the applicant's/respondent's rights to “autonomy, bodily integrity and privacy”.²⁶⁸ MacMenamin J. noted that while the minor applicant/respondent's parents could be viewed as having some responsibility for this, the County Council “when faced with clear evidence of inhuman and degrading conditions, [had] to ensure it carried out its statutory duty”²⁶⁹ in order to vindicate constitutional rights under Article 40 and Article 40.3 of the Constitution, with Convention rights being considered only where the constitutional claim does not succeed. The Council's powers under section 10 of the Housing Act 1988, “*could have*” been exercised and

²⁶⁴ *O'Donnell & Others v South Dublin County Council & Others*, [2015] IESC 28 at paras. 35-53.

²⁶⁵ *Ibid* at para. 60.

²⁶⁶ *O'Brien v Wicklow Urban District Council*, (Unreported, High Court, 10 June 1994).

²⁶⁷ [2015] IESC 28 at para. 65.

²⁶⁸ *Ibid* at para. 68.

²⁶⁹ [2015] IESC 28 at para. 70.

executed by making offers of financial assistance, having repairs carried out at the Council's expense, and/or,²⁷⁰

“lending a second caravan so as to make temporary accommodation space for Ellen, her brothers and sisters.”

MacMenamin J. did not find that other family members' constitutional rights or rights under the ECHR Act 2003 had been violated. As regards the one minor applicant/respondent, MacMenamin J. varied the order of the High Court to a degree, making a declaration that the minor applicant/respondent was entitled to damages, which may be “*moderate*”, for the Council's breach of statutory rights.²⁷¹

In *Dooley v Killarney*²⁷² the applicants claimed that their Article 3 and/or Article 8 rights (also in conjunction with Article 14) under the ECHR were violated by the respondents' failure to provide them with adequate housing. The High Court noted that the applicants were on the lowest priority list for housing, however this was in line with standards applied to all persons, whether members of the Traveller or settled communities. Mr. Justice Peart stated that Article 3 and Article 8 of the ECHR would only be breached where,

“it can be established...that the respondents are simply permitting the applicants to needlessly languish, without any justification, in conditions which are such as to amount to inhuman or degrading treatment, or lacking in respect for their private and family life.”

Peart J. went on to state that the local housing authority, which is required to respect Convention rights, also has a margin of appreciation to vindicate those rights with reference to their housing budget.²⁷³

²⁷⁰ [2015] IESC 28 at para. 74.

²⁷¹ [2015] IESC 28 at para. 86.

²⁷² *Dooley & Others v Killarney Town Council and Another* [2008] IEHC 242. No page or paragraph numbers are contained within the judgment; therefore it is not possible to make pointed references.

²⁷³ See also, *Lawrence & Others v. Ballina Town Council & Others* (Unreported, High Court, Murphy J., 31 July, 2008). For analysis of other similar and subsequent cases, see Whyte, G. “Public Interest Litigation in Ireland and the European Convention on Human Rights Act 2003” in Egan, S., Thornton, L. and Walsh, J. *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Dublin: Bloomsbury, 2014).

Chapter Five: The EU Charter of Fundamental Rights - Overview and Relationship with Domestic Law

Introduction: Background to the Charter

As is well-known, in its original incarnation, the EEC Treaty made no mention of the protection of fundamental rights. While the Convention and EEC Treaty had a significant commonality of higher purpose – achieving greater unity within Europe - their methods of achieving this (aligning economic interests, versus ensuring protection of human rights) were very different.

The story of the metamorphosis of the EEC, in the intervening years, to a European Union “founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights” (Article 2, Treaty on European Union (TEU)) is well-known.¹ In essence, from the 1960s onwards, the Court of Justice of the European Union (CJEU) stepped into the breach caused by the Treaty’s silence, by developing its own doctrine of respect for human rights as a general principle of (what is now) EU law. Thus, in early cases such as *Stauder*², for instance, the Court of Justice rejected a claim that a European Commission decision, which made the receipt of reduced prices for butter conditional on the identification of the recipient, breached the German constitutional right to dignity. Noting that identification was not in fact required by the decision, the Court of Justice observed that,

*“interpreted in this way the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court.”*³

In this way, the Court of Justice not only “discovered” the existence of a general principle of respect for fundamental rights within the Treaty, but also became the ultimate arbiter of the content of that general principle, *i.e.*, the Court was responsible for deciding which rights were protected, and in which way. However, it frequently drew, and draws, on what it terms the constitutional traditions common to the EU Member States in support of its conclusions

¹ On the history of the gradual evolution of the EU’s human rights rules, see, G. de Búrca, “The Evolution of EU Human Rights Law” in P. Craig and G. de Búrca (eds.) *The Evolution of EU Law* (2nd ed., Oxford, 2011). On the Charter generally, see S. Peers, T. Hervey, J. Kenner, and A. Ward (eds), *The Charter of Fundamental Rights: A Commentary* (Hart, 2014).

² Case 29/69 *Stauder* [1969] E.C.R. 419

³ Case 29/69 *Stauder* [1969] E.C.R. 419, at para. 7.

in that regard, as well as from international human rights treaties, with the Convention of “*special significance*” for this purpose.⁴ Indeed, the Convention was given special status in the EU Treaties with the Maastricht Treaty of 1992, which referred expressly to the Convention as a source of inspiration in the EU’s own respect for fundamental rights. Nevertheless, in developing the EU’s general principle of respect for fundamental rights, the Court of Justice remained free to diverge from the Convention as interpreted by the case law of the ECtHR, and indeed went beyond the Convention’s requirements at times.⁵

At the same time, the Court of Justice was mindful that, even though the EU is (still) not itself a party to the Convention, the ECtHR has made clear that it will keep watch on the EU’s compliance with Strasbourg standards indirectly, through the actions of EU Member States (who are, of course, also Convention contracting parties).⁶ In its so-called *Bosphorus* doctrine, the ECtHR held that, while the EU’s human rights regime in general could be considered to be “*equivalent*” to the Strasbourg regime, the presumption that EU Member States implementing EU law were Strasbourg-compliant could be rebutted if, in a particular case, the protection of rights was shown to be manifestly deficient.⁷

The landscape of human rights protection within the EU changed significantly on 1 December 2009, however, when the Treaty of Lisbon entered into force. Since that day, the EU’s Charter of Fundamental Rights, first drawn up in 2000, has enjoyed binding force with the same status as primary EU law, *i.e.*, on equal footing with the foundational Treaties of the EU, the TEU and the Treaty on the Functioning of the EU (TFEU). Although some had questioned whether the Charter would make much substantive difference to the level of rights protection within the EU, the CJEU’s rapidly developing jurisprudence interpreting the Charter in the intervening period can leave no doubt that the Charter marks, in the words of the Vice-President of the CJEU, Koen Lenaerts, a “*new stage in the process of European integration*”.⁸ This new stage will also be marked by the accession of the EU to the Convention, the terms of which are currently under re-negotiation following the CJEU’s rejection of the draft accession agreement put before it in *Opinion 2/13*. While the Treaty of Lisbon contained a specific provision enabling the EU to accede to the Convention, the Court of Justice in that Opinion held that the draft accession agreement, in the terms

⁴ See, for instance, Case 222/84 *Johnston v RUC* [1986] E.C.R. 1651; Case C-260/89 *ERT* [1991] E.C.R. I-2925; Case C-299/95 *Kremzow v Austria* [1997] E.C.R. I-2629.

⁵ See, for instance, in relation to data protection, Case C-28/08 *Commission v Bavarian Lager* [2010] E.C.R. I-6055.

⁶ See *Matthews v UK*, (App. No. 24833/94) (18 February 1999).

⁷ *Bosphorus Airways v. Ireland* (App. No. 45036/98) (30 June 2005).

⁸ K. Lenaerts, “Exploring the Limits of the EU Charter of Fundamental Rights” (2012) 8 *European Constitutional Law Review* 375, at 375.

presented to the Court at that time, was not compatible with the EU Treaties and would, therefore, be unconstitutional as a matter of EU law.⁹

The attribution of binding status to the Charter, as primary EU law, is clearly a significant change in the architecture of the EU's human rights protection, which further adds to the plurality of human rights sources of potential application to individual cases coming before Irish judges: constitutional, Convention, EU general principles, and now the EU Charter. Given that the EU Charter covers virtually all the substantive rights of the Convention and, as considered below, goes significantly further in some fields (for instance, economic and social rights),¹⁰ it also raises the practical question: which instrument should be relied upon in which case?

Scheme and Content of the Charter

It is notable that the scheme of the Charter does not adopt the traditional division between political/civil rights and economic and social rights: all are contained in one single document. Nevertheless, a distinction is made between rights and "*principles*", with principles having, according to Article 52(5) of the Charter, a lower legal status:

"The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality."

The substantive rights in the Charter are set out in six Titles, namely:

- Title I on Dignity (Articles 1-5), which contains the right to human dignity, the right to life, the right to the integrity of the person, the prohibition of torture and inhuman and degrading treatment, and the prohibition of slavery and forced labour;
- Title II on Freedom (Articles 6-19), which contains many of the traditional civil and political rights, including the right to liberty, the right to private life, the right to freedom of expression, the right to property, in addition to certain more "modern"

⁹ Opinion 2/13, Opinion of 18 December 2014. By the Opinion procedure, the CJEU gives a ruling, prior to signature of an international agreement, on whether the EU has the competence to enter into that agreement. See generally, J. Polakiewicz, "EU Law and the ECHR: Will EU accession to the European Convention on Human Rights square the circle?", forthcoming *European Journal of International Law*.

¹⁰ For instances where the Convention may impact on economic and social rights, see above, pp.93-100.

rights such as the right to the protection of personal data. Certain socio-economic rights, including the right to work and the right to education are also included.

- Title III on Equality (Articles 20-26), which contains traditional equality rights such as non-discrimination on grounds of sex, race, sexual orientation, religion *etc.*, which were largely contained in the EU Treaty prior to the Treaty of Lisbon;
- Title IV on Solidarity (Articles 27-38), which contains social rights and “*principles*” such as the right to collective bargaining and action, including the right to strike and protection against unjustified dismissal, the right to fair working conditions, and “recognition” of social security and social assistance. This Title is for obvious reasons controversial in certain Member States, notably the UK, which negotiated a Protocol stating *inter alia* that this Title does not contain “justiciable rights” in UK national law;¹¹
- Title V on Citizens’ rights (Articles 39 to 46), which by and large reproduces rights for EU citizens already contained in the EU Treaties;
- Title VI on Justice (Articles 47 to 50), which includes the right to an effective remedy and to a fair trial, the right to be presumed innocent and the right of defence, and the principle of legality and proportionality of criminal offences. As discussed in chapter 7, these rights have been some of the most widely invoked before the Irish courts.

These substantive rights are coupled with the so-called “horizontal provisions”, Articles 51-54 of the Charter, which contain important clarifications of the scope of application of the Charter, as well as its relationship with other human rights provisions in, for instance, the Convention and national law. Important provisions here include:¹²

- Article 51 on the field of application of the Charter, discussed below;
- Article 52 on the scope and interpretation of rights and principles, which includes the proportionality test for limitations on Charter rights (Article 52(1)); confirmation that the rights included therein apply subject to the limits set out in the EU Treaties (Article 52(2)); a provision on the relationship with the Convention (Article 52(3)) and with national constitutional rights (Article 52(4)), each discussed below; and clarification of the status of “*principles*” (Article 52(5)), discussed above;

¹¹ Protocol No. 30 on the application of the Charter to Poland and the UK.

¹² For discussion and explanation of the scope of the Convention, see above from p. 18 *et seq.*

- Article 53, on the level of protection of Charter rights compared to international, Convention and national rights, discussed below; and,
- Article 54 prohibiting abuse of rights.

The Charter is accompanied by Explanations to which, as Article 6(1) TEU states, “due regard” must be paid when interpreting the Charter’s provisions (see similarly Article 52(7) of the Charter).

Status of the Charter and Convention in the Irish courts compared

As already noted, post-Lisbon, the Charter has the “same legal value” as the EU Treaties (Art 6(1) TEU). By virtue of its status as EU primary law, the Charter has two main functions.¹³

First, the Charter can serve as an interpretative tool for EU law, as well as for Irish law falling within the substantive scope of EU law. This would include, for instance, reliance on Charter rights as justification for Member State measures that would otherwise breach EU internal market law – such as in the well-known *Omega* example, where Germany successfully justified a ban on laser quest-style games, involving “playing at killing”, on the ground of the need to respect the right to human dignity.¹⁴

Secondly, by virtue of its status as a provision of EU primary law, the Charter can serve as a ground of invalidity of EU actions, as well as of Member State actions that fall within the scope of EU law, insofar as its provisions are sufficiently precise and impose binding obligations.¹⁵ By virtue of the twin constitutional doctrines of supremacy and direct effect of EU law as developed by the CJEU, this imposes a duty on national judges to dis-apply conflicting national law, including national primary legislation.¹⁶

¹³ The discussion here focuses on the specific functions the Charter enjoys by virtue of its post-Lisbon status as primary EU law. Of course, the Charter may have broader functions, for instance, it may serve as persuasive authority for courts applying purely national rights. The two subsequent chapters include discussion of some instances in which the Charter has played this role to date in Ireland.

¹⁴ Case C-36/02 *Omega Spielhallen und Automat Enaufstaltungs GmbH v Obersburgermeisterin der Bundesstadt Bonn* [2004] E.C.R. I-9609.

¹⁵ This is not the case, for instance, with what the Charter terms “principles”, as distinct from “rights”, which distinction is discussed below.

¹⁶ From the EU courts’ perspective at least, it even obliges national judges to dis-apply conflicting national constitutional provisions. See, e.g., Case C- 11/70 *International Handelsgesellschaft v Einfuhr und Vorratsstelle Getreide* [1970] E.C.R. 1125. However, this aspect of the supremacy doctrine has received pushback from national constitutional courts in many Member States, and has never resulted in disapplication of a provision of the Irish Constitution by an Irish court.

This represents a critical distinction between the status of the Charter, and that of the Convention, in Ireland. Specifically, the effect of the Convention in Ireland is subject, as chapter 2 discusses, to the terms of the ECHR Act 2003.¹⁷ This reflects of course the fact that the Convention is still considered by Irish law as an instrument of international law, such that its effect in our legal order is dependent on, and dictated by, its domestic law instrument of transposition. This fundamentally dualist approach to international law is expressed unambiguously in Article 29.6 of the Constitution, which provides,

“No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas.”

As discussed in chapter 2, the implications of this for the ECHR have long been made clear by the Irish courts, from the historic Supreme Court judgment in *Re O Laighléis*¹⁸ to, more recently, its judgment *McD v L*,¹⁹ which emphatically rejected any argument that, following the ECHR Act 2003, the Convention could be said to be directly effective in Irish law (overturning the judgment of Hedigan J. in the High Court on this point, who had sought to apply the Strasbourg concept of the *de facto* family in resolving the dispute before him, despite the fact that this concept was unknown as a matter of Irish constitutional law).²⁰

This is in distinct contrast to the effect of (most of) EU law in the Irish legal order where, as long as the conditions for direct effect developed in the CJEU’s jurisprudence are fulfilled by the particular provision at issue,²¹ it takes effect automatically and without the need for domestic law transposition in the Irish legal order, *i.e.*, it is directly effective. Combined with the doctrine of supremacy of EU law, the potential ramifications of these seminal doctrines remain far-reaching, even years after their development by the CJEU. As a matter of Irish law, the direct effect of EU law is made possible by the enabling provisions contained in

¹⁷ See above at pp. 29-32. For general analysis, F. de Londras and C. Kelly, *The European Convention on Human Rights Act 2003* (Round Hall, 2010); O. Doyle and D. Ryan, “Judicial Interpretation of the European Convention on Human Rights Act 2003: Reflections and Analysis” (2011) *Dublin University Law Journal* 1:369; and F. de Londras, “Using the ECHR in Irish Courts: More Whisper than Bang?”, paper delivered to the Public Interest Law Alliance, 13 May 2011. For subject-specific analysis, see P. A. McDermott and M. W. Murphy, “No Revolution: The Impact of the ECHR Act 2003 on Irish Criminal Law” (2008) *Dublin University Law Journal* 1: 1; M. Cahill, “McD v L and the Incorporation of the European Convention on Human Rights” (2010) *Irish Jurist* 1: 221.

¹⁸ [1960] I.R. 93, discussed above at p. 29. See the remarks of Maguire C.J., “No argument can prevail against the express command of section 6 of Article 29 of the Constitution before judges whose declared duty it is to uphold the Constitution and the laws.”

¹⁹ *McD v L* [2010] 2 I.R. 199. Discussed above at p.91. See especially the judgment of Murray C.J., at para. 24: “The European Convention on Human Rights may only be made part of domestic law through the portal of Article 29.6 and then only to the extent determined by the Oireachtas and subject to the Constitution. The Oireachtas may also, if it chooses, legislate to provide for express statutory protection of particular Convention rights as a means of fulfilling Convention obligations.” The subsequent 14 paragraphs of the Chief Justice’s judgment set out a classic exposition of the conditions of, and limits to, the effectiveness of international law in a dualist system such as Ireland’s. See also, the judgment of Fennelly J., at para. 88 *et infra*.

²⁰ See, *W. O’R v E.H. (Guardianship)* [1996] 2 I.R. 248.

²¹ That is, the provision must be sufficiently clear, precise and unconditional. See, B. de Witte, “Direct Effect, Primacy, and the Nature of the Legal Order” in P. Craig and G. de Búrca (eds.) *The Evolution of EU Law*, *op. cit.*

Article 29.4 specific to the EU, particularly Article 29.4.6°. ²² The doctrine of supremacy of EU law remains, however, more controversial, particularly in cases where the conflict with EU law is at the constitutional level – although this is a difficulty in no way particular to Ireland. ²³

Given the lack of direct effect of the Convention, the provisions of the ECHR Act 2003, as interpreted by the Irish courts, are critical to understanding the impact, and future impact, of the ECHR in Ireland. As discussed in the preceding chapters, however, the first ten years since the entry into force of the ECHR Act on 1 January 2004 have made the limitations of these provisions clear. Specifically, two of its three central provisions, sections 2, 3 and 5, have been shown to have weaknesses which significantly limit their impact in terms of human rights protection. For instance, the section 2 interpretative obligation imposed on courts ²⁴ applies only where there is a “*statutory provision or rule of law*” that falls to be interpreted, ²⁵ and is “*subject to*” the Irish rules of statutory interpretation. ²⁶

Where the problem is an incompatibility between a statute and Convention law that cannot be solved via section 2 interpretation, the limits of the ECHR Act 2003 are also evident. As discussed in the preceding chapters, the critical weaknesses of section 5 declarations of incompatibility are well-known: we are still awaiting legislation in one of the two cases in which a declaration has been granted to date, ²⁷ even years following such declaration. As the Supreme Court’s judgment in *Carmody* has emphasised, in bringing human rights-based challenges to Irish primary legislation (in that case, section 2 of the Criminal Justice (Legal Aid) Act 1962), the court must consider any arguments as to the constitutionality of the legislation prior to considering a claim for a declaration of incompatibility under section 5 of the ECHR Act, primarily because such a declaration could not be said to constitute a “*remedy which would resolve the issue between the parties*” (per Murray C.J., at para. 46). ²⁸

²² The relevant extract from Article 29.4.6° provides, “*No provision of this Constitution...prevents laws enacted, acts done or measures adopted by...the European Union...or institutions thereof...from having the force of law in the State.*”

²³ See Fennelly J., writing in his extra-judicial capacity that the application of the doctrine of supremacy of EU law in the constitutional context “*represents an entirely novel and radical invasion of the principles of sovereignty enshrined in that Constitution from the outset of Irish national independence.*” (N. Fennelly, “Human Rights and the National Judge: His Constitution; The European Union; The European Convention” (2011) *ERA Forum* 12: 87, at 94.

²⁴ Section 2(1) of the ECHR Act 2003 provides, “*In interpreting and applying any statutory provision or rule of law, a court shall, in so far as possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State’s obligations under the Convention provisions.*”

²⁵ See Fennelly J., *McD v L*, *op. cit.*, at para. 87.

²⁶ See, e.g., *Donegan v D.C.C.* [2012] IESC 18, per McKechnie J., at para.105: “*Even in cases of doubt, an interpretation in conformity with the Convention should be preferred over one incompatible with it. However, this task must be performed by reference to the rules of law regarding interpretation.*”

²⁷ Namely, *Lydia Foy v An tArd-Chlaraitheoir* [2012] 2 I.R. 1 and *Donegan v Dublin City Council*, *op. cit.* See above from p. 106.

²⁸ *Carmody v Minister for Justice, Equality and Law Reform* [2010] 1 I.R. 653. This case is discussed above at pp.74-75.

It should be recognised, however, that in cases where the problem is an act of an organ of the State, section 3 of the ECHR Act has been shown to have relatively strong force, albeit with remedies limited to damages.²⁹

Aside from these distinctions in function, the Charter's status as binding EU primary law has the further vital practical effect of giving access to very different routes of access to justice than those available under Convention law. As is well-known, if they are faced with an issue of EU law that is necessary to decide the case, national judges may use the Article 267 TFEU preliminary reference procedure to refer the matter to the Luxembourg court; if they are the judge of last resort in the case (*i.e.*, no appeal is possible), they are obliged to make this reference. Contrary to Convention cases, there is no requirement that the plaintiff has exhausted all domestic remedies.³⁰ This enables (or requires there to be) access to the Court of Justice in a time-frame that is far shorter than that required to access the Strasbourg court.³¹

Further, depending on the facts of the case, it may be possible to access the Luxembourg court even more speedily through the expedited preliminary reference procedure (Article 105 of the Rules of Procedure of the Court of Justice), or the urgent preliminary reference procedure (Article 107 of the Rules of Procedure of the Court of Justice), which applies in the area of freedom, security and justice (the so-called "PPU" procedure). Use of these procedures is normally requested by the referring court (although not all such requests are granted), but may be used by the Court of Justice of its own motion. The PPU procedure has been used in a variety of cases involving Charter rights, including the reference from the Irish Supreme Court in *McB*,³² where judgment was given by the Court of Justice only two months from the date of receipt of the reference.³³

Brief Overview of the EU Courts' Approach to the Charter to Date

Since 2009, the Charter has become the primary point of reference for the Court of Justice in considering fundamental rights claims. It might reasonably have been thought that, given

²⁹ See the judgment of Irvine J. in *Pullen (No. 2)* [2009] 2 I.L.R.M. 484, denying the availability of injunctive relief for breach of section 3 of the ECHR Act 2003 (discussed above, pp.50). See further, Doyle and Ryan, *op. cit.*

³⁰ On the principle of subsidiarity, see above, p.23.

³¹ Even looking purely at the time-frame once the matter gets to Luxembourg/Strasbourg, the average length of a CJEU preliminary reference procedure is around 16 months (2013 Annual Report of the Court of Justice, available at www.curia.europa.eu). This can be contrasted with the long delays typical of cases lodged with the ECtHR, due to its case overload (which, as of 2012, stood at a backlog of 152,000 cases: see generally, Statement of the European Law Institute, "Case Overload of the European Court of Human Rights" (Vienna, 2012).

³² *J. McB. v L.E* [2010] IESC 48.

³³ Case C-400/10 PPU *J. McB v L.E.* [2010] E.C.R. I- 8965.

that the CJEU already recognised respect for human rights as one of the general principles of EU law, which (judge-recognised) principles already enjoyed a status equivalent to primary Treaty law in the EU's legal hierarchy, the Charter would not add much to the protection of rights in the EU. The brief answer, at least from the evidence to date, is that the Charter is making a real difference in the CJEU's case law. The President of the Court of Justice has described the Charter as of "*primary importance in the recent case law of the CJEU*",³⁴ and this approach can be seen clearly in the case law. Empirically, research has shown that, from December 2009, the Charter was quickly embraced by the Court of Justice as the main, independent source of EU human rights law, with reliance on ECtHR case law becoming rare. Thus, between December 2009 and December 2012, the Court of Justice referred to the Charter in 122 cases; of these, only 20 referred to the ECHR; and of these, only 10 referred to ECtHR case law.³⁵

In a variety of significant judgments, the Court of Justice has shown its willingness to forge its own distinct path in developing human rights protection in Europe. Perhaps the most high-profile recent examples have been its ground-breaking judgments interpreting Article 7 of the Charter, on the right to respect for private and family life, and Article 8 of the Charter on the right to the protection of personal data. A robust interpretation of these rights led, in the Grand Chamber's April 2014 judgment in *Digital Rights Ireland*, to the annulment of the 2006 Data Retention Directive.³⁶ Perhaps more controversially, it also led, in the Grand Chamber's May 2014 judgment in *Google Spain*, to an interpretation of the EU Data Protection Directive in a manner that requires internet search engines to ensure a "right to be forgotten" on the internet, subject to certain conditions.³⁷ In other areas, however, the Court of Justice has continued to consider and rely on ECtHR jurisprudence (such as, for instance, its ruling that the architecture of the EU's competition regime does not as such breach the right to a fair trial, where the Court discussed ECtHR jurisprudence in detail, after noting however that it was not bound by such jurisprudence).³⁸

³⁴ Joint Communication from Presidents Costa and Skouris, Strasbourg and Luxembourg, 24 January 2011.

³⁵ G. de Búrca, "After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?", forthcoming, *Maastricht Journal of European and Comparative Law*. As the subject of the present report is case law of the Irish courts applying the Charter, these paragraphs are necessarily a brief overview and do not purport to deal in any detail with the extensive jurisprudence of the CJEU and General Court applying the Charter. For full discussion of this topic, see Peers, Hervey, Kenner and Ward, *op. cit.*

³⁶ Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland*, judgment of 8 April 2014, not yet reported.

³⁷ Case C-131/12 *Google Spain*, judgment of 13 May 2014, not yet reported.

³⁸ Case C-501/11P *Schindler* [2013] E.C.R. I-522.

The Scope of Application of the Charter

The Charter contains an express provision explaining its scope, and the entities which it binds: Article 51(1), which provides,

“The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States when they are implementing Union law...”

This provision is coupled with Article 51(2) of the Charter, which provides,

“The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.”

As the Explanations to the Charter confirm,³⁹ Article 51(1) was not intended as any dramatic change in the scope of application of EU human rights law, but rather followed “*unambiguously*” from the CJEU’s pre-existing case law, such as *ERT*, where national rules were considered to fall within the “*scope*” of EU law (and thus subject to compliance with EU human rights standards) where they fell within the substantive scope of EU internal market law (in that case, free movement of services), even if they were not enacted by the Member States with the specific purpose of implementing EU law.⁴⁰

Nonetheless, some commentators interpreted Article 51(1) more narrowly, meaning that Charter rights only applied where the Member State measure was brought in with the express aim of giving effect to EU law – an obvious example being national measures to transpose Directives. This narrow interpretation of Article 51(1) was, however, decisively rejected by the Grand Chamber of the CJEU in its February 2013 judgment in *Fransson*⁴¹ - contrary to the submissions of a variety of Member States, including Ireland. In affirming the *ERT* line of case law, the CJEU held that the Swedish rules on penalties and criminal proceedings for breach of tax law should be evaluated for compliance with the EU Charter (in that case, the *ne bis in idem* principle contained in Article 50 of the Charter), because the penalties/proceedings were “*connected in part*” to Mr. Fransson’s breach of obligations to

³⁹ OJ 2007 C 303/17. Article 6(1) TEU specifies that the rights, freedoms and principles in the Charter “*shall be interpreted*” “with due regard to” the explanations. The Preamble to the explanations further specifies that they “do not as such have the status of law” but rather constitute a “*valuable tool of interpretation intended to clarify the provisions of the Charter.*”

⁴⁰ Case C-260/89 *ERT* [1991] E.C.R. I-2925.

⁴¹ Case C-617/10 *Fransson*, judgment of 26 February 2013, not yet reported (see especially, para. 27).

declare VAT, and therefore were “*intended to implement*” Member States’ general obligation to take all necessary measures to ensure the collection of VAT on their territories.⁴² Adopting a broad reading of Article 51(1), the CJEU emphasised that the fact that the national legislation upon which those tax penalties and criminal proceedings are founded had not been adopted to transpose the EU VAT Directive did not change matters, as its application was “*designed to penalise an infringement of that directive*.”⁴³

Since *Fransson*, the Court of Justice has handed down a considerable number of other judgments further clarifying the scope of application of the EU Charter, and the meaning of Article 51(1) of the Charter. The Court has reaffirmed the *Fransson* extensive interpretation of Article 51(1) in cases like *Pfleger*, where the Court confirmed that Member States derogating from a free movement provision (in that case, by restricting gambling activities) must do so in a Charter-compliant manner.⁴⁴ It has also provided some clarity in the factors that may be relevant in assessing whether a case falls within the scope of EU law for this purpose, namely,

“*whether [the national legislation] is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it...*”⁴⁵

Further, even where national rules do not fall within the scope of EU law as such, the Charter will still apply where the national rules were intended to make a *renvoi* to EU law (*i.e.*, effectively to transplant EU rules into a purely national context), within the meaning of the Court’s long-standing case law. This will occur when the *renvoi* made by the national law to EU rules is direct and unconditional, and do not allow the interpretation of those rules by the Court of Justice to be departed from.⁴⁶

In other cases, the Court has refused jurisdiction to deal with the matter on the grounds that the case does not fall within the scope of EU law, or at least that the national court’s Order for Reference does not specify how it could fall within the scope of EU law. In *Pelckmans Turnhout*,⁴⁷ for instance, reference was rejected as inadmissible, because the Belgian court

⁴² *Ibid* at paras. 24, 25 and 27.

⁴³ Case C-617/10 *Fransson*, judgment of 26 February 2013, not yet reported at para. 27.

⁴⁴ Case C-390/12 *Pfleger*, judgment of 30 April 2014, not yet reported. See similarly, Case C-418/11 *Texdata*, judgment of 26 September 2013, not yet reported (system of penalties for failure to comply with EU law-based accounting obligations that must comply with the Charter).

⁴⁵ Case C-206/13 *Siragusa*, judgment of 6 March 2014, not yet reported (national law requiring restoration of a site to its former state not within scope of the Charter).

⁴⁶ Case C-313/12 *Romeo*, judgment of 7 November 2013, not yet reported, and jurisprudence cited therein.

⁴⁷ Case C-483/12, judgment of 8 May 2014, not yet reported.

had not explained how a generally applicable ban on Sunday trading fell within the scope of the free movement of goods.

Of particular practical interest in this context is the judgment in *Torralbo Marcos*, where the Court of Justice was asked whether the Spanish system of court fees in employment cases infringed the right to an effective remedy under Article 47 of the Charter. Refusing jurisdiction, the Court of Justice distinguished between national cases to enforce rights provided by EU law (which fall under Article 47 of the Charter), and national cases to enforce rights provided by national law alone (which do not fall under Article 47 of the Charter).⁴⁸ As Mr. Torralbo Marcos' claim did not fall within the scope of any EU Directive, the reference was inadmissible. Nonetheless, this still leaves a wide potential scope for the application of Article 47 of the Charter, *i.e.*, anywhere a claim is based on EU law (see similarly, the judgment in *DEB*).⁴⁹ In contrast, in *Érsekcsanádi*, the Court refused jurisdiction to consider whether farmers had a Charter right to compensation for profit lost following national measures prohibiting movement of birds potentially affected by avian influenza. Interpreting the EU Decisions establishing measures for the control of the virus, the Court held that these Decisions did not establish any system of compensation for damage caused by these measures, and thus the matter fell outside the scope of EU law.⁵⁰

The Relationship between the Charter and the ECHR: The ECHR as a Floor, but not a Ceiling, for European Rights Protection

Many of the rights in each document are identical, or almost so: for instance, Article 4 of the Charter is identical to Article 3 of the ECHR on the prohibition of torture. Other rights are similar in essence but significantly expanded in form in the Charter: the principle underlying Article 8(1) ECHR on the right to respect for private and family life, finds expression in the Charter not only in Article 7 on right to respect for private and family life, but also in Article 3 on right to integrity of the person, and Article 8 on the right to protection of personal data. Still other rights are found in the Charter that go far beyond the substantive areas covered by the Convention: one might think here of the right to asylum contained in Article 18 of the Charter, which draws on the Geneva Convention; Article 24 on the rights of the child, which draws on the New York Convention on the rights of the child; or the workers' rights contained in chapter IV of the Charter, such as the Article 28 right of collective bargaining. Broadly speaking, therefore, the Charter goes much further in terms of substantive rights than the

⁴⁸ Case C-265/13 *Torralbo Marcos*, judgment of 27 March 2014, not yet reported, at paras. 33-34.

⁴⁹ Case C-279/09 *DEB* [2010] E.C.R. I-811.

⁵⁰ Case C-56/13 *Érsekcsanádi*, judgment of 22 May 2014, not yet reported.

Convention, as can be seen clearly from the Explanations, which detail the inspiration for the Charter rights. Of course, the greater substantive reach of the Charter is no surprise given that, by definition, the EU Member States already have a large amount in common in many of these areas by virtue of the EU acquis.

Nonetheless, in order to counter the risk of diverging interpretations from Luxembourg and Strasbourg on those rights which are similar in each document, Article 52(3) of the Charter provides:

“In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.” (Emphasis added)

Linked to this, Article 53 of the Charter provides:

“Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the [ECHR], and by the Member States’ constitutions.”

It is clear, therefore, that the Convention protection, as interpreted by the ECtHR, is a minimum level of protection below which the EU cannot venture. This provision will be of particular importance in assessing the extent to which the EU as such is in compliance with its Convention obligations following its accession to the Convention, which was enabled by the Lisbon Treaty, but which as noted above is at the time of writing on hold pending the Court of Justice’s rejection of the draft accession agreement in *Opinion 2/13* as contrary to EU constitutional law.⁵¹

⁵¹ See fn. 9 *op cit.*

The Relationship between the Charter and National Human Rights Law: Article 53 of the Charter

Article 53 of the Charter provides:

“Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions.”

From this, it might reasonably be thought that, as a matter of EU law, the Charter represents a minimum level of rights protection, above which Member States are free to go according to their particular national constitutional traditions. While this is indeed the general principle, as confirmed by the Explanations to the Charter, an important caveat should be added in the light of the Court of Justice’s judgment in *Melloni*,⁵² where the CJEU held that Spain was not entitled to apply its (higher) constitutional protection of human rights in that case, because the area was harmonised by the European Arrest Warrant. In other words, where there is applicable harmonising EU legislation which the Court of Justice interprets as covering the area exhaustively, leaving no scope for Member States’ discretion, Member States will not be free to apply their own (higher) level of constitutional rights protection.

⁵² Case C-399/11 *Melloni* [2013] E.C.R. I-107.

Chapter Six: The Charter before the Irish Courts – Horizontal Issues

Having considered the differences in principle between the status of the Convention and the Charter in Ireland, this chapter gives an overview¹ of the Irish case law on the Charter to date concerning what may be termed “horizontal” issues, in the sense of cross-cutting issues that are not specific to one substantive area of law, but which have arisen across a range of fields. The horizontal issues covered are:

- (1) The scope of application of the Charter;
- (2) Relationship between Charter, constitutional and Convention arguments;
- (3) Article 47 of the Charter on the right to an effective remedy; and
- (4) Article 41 of the Charter on the right to good administration.

Scope of Application of the Charter

As with the EU courts, the issue of whether or not the Charter applies, in the sense of Article 51 of the Charter, has been a key area of controversy to date before the Irish courts.

Once again, Article 51 of the Charter, entitled “*Field of application*”, provides:

“1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.”

¹ The discussion in the present chapter does not purport to cover in an exhaustive manner all cases in which the Charter played a role. An extensive summary of cases in which the Charter has been raised and argued before the Irish courts up to 31 December 2014 is contained in the Annex to this report.

For the interpretation of this provision by the CJEU, see chapter 5.

In the Irish courts, the scope of application of the Charter has received particularly significant consideration in asylum and immigration cases, due to the fact that, while asylum law may have started out as a field of domestic and/or international law, the amount of EU law occupying the field has increased dramatically over the years, as EU legislation in the field of justice and home affairs has increased. Many judgments have emphasised the continuing nature of certain powers – for instance, the power to deport - as sovereign to the State (meaning that the Charter does not apply; for instance, the Article 7 right to respect for private and family life).² In *Smith v Minister for Justice and Equality*,³ for instance, Cooke J. took this position, noting that,

*"It is true of course that Article 7 of the Charter corresponds to Article 8 of the Convention in that it affirms that "everyone has the right to respect for his or her private and family life, home and communication". However, as Article 51 of the Charter makes clear, its provisions are addressed to the institutions of the European Union and its agencies; and to the Member States "only when they are implementing Union law". The revocation of a deportation order made under s. 3 of the Immigration Act 1999, does not involve, as such, any implementation of Union law. It is the exercise by the State of its sovereign entitlement to decide who shall remain within the territory of the State. The removal of a third country national from the State does, of course, also remove the individual from the territory of the European Union. In circumstances such as those in the present case, however, it is only where the principle of the Zambrano judgment is applicable that the Member State comes under any obligation derived from Union law not to effect the removal."*⁴

In other words, it is only where the individual falls within the scope of EU law that the Charter applies, including where this is the case due to the *Zambrano* principle whereby EU citizens must not, as a result of Article 21 TFEU, be deprived of the genuine enjoyment of the substance of their right as EU citizens. In *Zambrano*⁵ and subsequent case law developing this doctrine such as *Dereci*, the CJEU ruled that, in the case of an EU citizen child, this would be the case where the child was dependent on the individual liable to deportation, and would have as a result of the deportation to leave the territory of the EU.⁶

² See above, chapter 2.

³ *Smith v Minister for Justice and Equality & ors* [2012] IEHC 113.

⁴ *Ibid* at para. 24.

⁵ Case C-34/09.

⁶ Case C-256/11. For discussion on the impact of the Convention pre-*Zambrano*, see above from p. 64.

Cooke J.'s judgment was upheld on appeal to the Supreme Court, although Clarke J. did not consider the Charter in his judgment in that court.⁷

See also, *Troci v Minister for Justice and Equality*⁸, where O'Keeffe J. rejected the applicant's attempts to rely on Article 7 of the Charter in connection with a challenge to a deportation decision, on the grounds that, absent the circumstances set out in *Zambrano* and subsequent CJEU case law such as *Dereci*, the Charter had no application to such decisions (see similarly Cooke J. in *Lofinmakin (an infant) & Others v. The Minister for Justice, Equality and Law Reform*;⁹ and Cooke J. in *S.P. v Minister for Justice*¹⁰).

In *Mallak v MJELR*,¹¹ Fennelly J. in the Supreme Court expressly found it unnecessary to consider whether or not Article 41 of the Charter, on the right to good administration, applied to a decision refusing the applicant a certificate of naturalisation. The argument in that case, on which Fennelly J. did not take a view, was that the matter fell within the scope of EU law because, by so depriving the applicant, he was also deprived of EU citizenship.

Perhaps the closest consideration of the scope of the application of the Charter in the Irish courts to date is that given by Hogan J. in *AO v Minister for Justice, Equality and Law Reform (No. 3)*, which concerned an application for injunction of execution of a deportation order. Hogan J. noted that the meaning of Article 51 of the Charter was still being worked out by the EU courts; while certain cases were clearly within the scope of EU law:

“Less straightforward cases present more difficulty. It may well be that where, for example, the State exercises a discretionary power pursuant to the European Arrest Warrant Act 2003 that the Charter will apply, although this matter is not at all free from difficulty, as Edwards J. acknowledged in Minister for Justice and Equality v. D.L. [2011] IEHC 248. Other difficult questions may possibly arise regarding the scope of application of the Charter where this is said to be triggered by the presence of possibly accidental factors of nationality and free movement in circumstances which might otherwise suggest the happening of events purely internal to this Member State. Might the Charter apply to the issues in the present case if, for example, Ms. K. happened to be a Belgian national who was exercising free movement rights in this State?”

⁷ *Smith & Ors (minors) -v- Minister for Justice and Equality & Anor* [2013] IESC 4.

⁸ *Troci & Anor v The Minister for Justice and Equality and Ors* [2012] IEHC 542.

⁹ *Lofinmakin (an infant) & Others v. The Minister for Justice, Equality and Law Reform* [2011] IEHC 116.

¹⁰ *S.P. v Minister for Justice and Equality & ors* [2012] IEHC 18.

¹¹ [2012] IESC 59

*It is not necessary for me to examine these wider questions because, as I have already noted, the right of Ms. K. and Baby C to reside in this State derives entirely from Article 9 of the Constitution by virtue of their status as Irish citizens. Neither can the deportation power of the State be said to derive from European Union law, since as reflected in the Immigration Act 1999 - it is rather a legislative expression of the inherent right of all states under international law to regulate and control their own borders: see, e.g., the comments of Keane J. and Denham J. in *Laurentiu v. Minister for Justice* [1999] 4 IR 26.”¹²*

See also, *Dos Santos v Minister for Justice*, where MacEochaidh J. held the Charter to be of no application in a case of deportation where no EU citizens were involved.¹³

In a significant judgment, MacEochaidh J. in *C.A. v Minister for Justice and Equality*¹⁴ held that the Charter was of no application to a claim that the State’s direct provision system for subsidiary protection applicants breached fundamental rights, including Charter rights. In so holding, he based his reasoning on the fact that Ireland had, pursuant to Protocol No 21 to the TFEU, an opt out of measures in the field of freedom, security and justice. While Ireland had chosen to opt in to certain measures in asylum law, including the Qualification Directive and the Procedures Directive, it had not opted in to the Reception Conditions Directive. He concluded:

“11.9. To uphold the applicants’ position on the applicability of the Charter would be to create an EU law obligation for Ireland in respect of the manner in which it provides for protection applicants in the teeth of Protocol No. 21 which says that a Directive such as the Reception Directive has no application in Ireland unless a positive decision is taken by the State to be governed by such a measure. The manner in which Ireland provides material support to protection applicants is not any form of implementation of Union law and therefore, in accordance with Article 51 of the Charter, that Charter does not govern Ireland’s actions in this area. The manner in which material support is provided is well within the sphere of national autonomy. Though the obligation to provide support for destitute protection applicants is related to the EU obligation that such persons be allowed to seek protection (as stated in para 9.4 above), this does not mean that the provision of material support to protection applicants implements EU law. The provision of the support certainly facilitates Ireland’s implementation of the Qualifications Directive in that it allows

¹² *A.O. v Minister for Justice, Equality and Law Reform (No. 3)* [2012] IEHC 104, at paras. 31-32.

¹³ *Dos Santos v Minister for Justice* [2013] IEHC 237.

¹⁴ *C.A. & Anor. v Minister for Justice and Equality and Ors* [2014] IEHC 532

persons to stay in Ireland until their request for protection is determined but the provision of support is not thereby the implementation of EU law.

11.10. The combined effect of Protocol 21 TFEU and Article 51 of the Charter is that protection applicants in Ireland do not have Charter rights in relation to their reception conditions.”¹⁵

In *D.F. v Garda Commissioner*¹⁶ Hogan J. ruled that claims for a jury trial and, subsequently, damages for false imprisonment by Gardaí fell outside the scope of application of the Charter, reasoning that,

“Even taking the broadest possible view of the meaning of the phrase “implementing” Union law, it is well nigh impossible to see how the Charter could come into play in relation to events which are wholly internal to this State and in respect of which Union law plays no role or part.”¹⁷

In other cases, the Charter has been taken into account without any discussion of whether or not the matter satisfies the requirements of Article 51 of the Charter, *i.e.*, falls within the scope of EU law. See, for instance, *Health Service Executive v C.B. (Care Order – Neglect and Abuse)*, where Articles 7 and 24 of the Charter were taken into account in the context of an application for a care order pursuant to s. 18 of the Child Care Act 1991, although the nexus to EU law is not immediately evident.¹⁸ It is fair to say, however, that the reference to the Charter does not seem to have affected the substantive outcome of these cases.

¹⁵ *Ibid* at para. 11.9.

¹⁶ [2013] IEHC 5

¹⁷ *Ibid* at para. 14 (application on motion to determine whether jury trial was required). Note this quotation was reiterated in *D.F. v Garda Commissioner & Ors (No. 3)* [2014] IEHC 213 at para. 43 (determination of substantive damages claim).

¹⁸ *Health Service Executive v C.B. (Care Order – Neglect and Abuse)* [2012] IEDC 5. See also, *Health Service Executive v A.M. (Care Order – Mental Illness)* [2013] IEDC 10, paragraph 38 (“*The Court must have regard to the legislation and to the constitutional rights of the parents and the children, as well as to the rights of the parents and children set out in the Charter of Fundamental Rights of the European Union and to the rights to private and family life set out in Article 8 of the European Convention of Human Rights. Where there is a conflict of rights a balance must be struck.*”)

Relationship between Charter, Constitutional and Convention Arguments

There has not yet been any equivalent judgment to *Carmody*¹⁹ in relation to the Charter, *i.e.*, it has not been explicitly held that constitutional rights must be considered prior to Charter rights, as is the case for proceedings raising Convention and constitutional issues (see chapters 2 and 3). However, certain cases indicate that *de facto* this is occurring in many instances. See, for instance, *A.P. v Minister for Justice and Equality (No. 2)* where, in the case of failure to give reasons for a naturalisation decision for a declared refugee, McDermott J. relied solely on the Supreme Court's decision finding a constitutional duty to give reasons in *Mallak v Minister for Justice, Equality and Law Reform*²⁰, and did not consider it necessary to consider the submissions relating to breach of Article 41 of the Charter.²¹

As regards the Charter/Convention relationship, as already discussed, in many cases judges have engaged in substantive reasoning on whether or not the matter falls within the scope of EU law in deciding which provision to apply. However, in other cases, judges have simply applied the ECHR even in circumstances where it would seem likely that the Charter might apply, without giving any reason for such decision. See, for instance, the discussion of European Arrest Warrant cases such as *Ostrowski*,²² *Jermolajevs*²³ and *Ciesielski*²⁴ in chapter 6.

Article 47 of the Charter: The Right to an Effective Remedy

Article 47 of the Charter, on the right to an effective remedy, constitutes a key article of horizontal relevance. It is unsurprising that, within the cases surveyed, this provision constitutes the Article most frequently invoked in the Irish case law in the period surveyed.

Article 47 provides,

¹⁹ [2010] 1 I.R. 653

²⁰ *Mallak v Minister for Justice, Equality and Law Reform* [2012] IESC 59

²¹ *A.P. v Minister for Justice and Equality (No. 2)* [2014] IEHC 241.

²² [2013] IESC 24

²³ [2013] IEHC 102

²⁴ [2013] IEHC 101

“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.

Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

Looking at the components of Article 47 in turn, the question of the right to a fair and public hearing within a reasonable time (Article 47(2)) has been raised in a number of cases.

In *Minister for Justice, Equality, and Law Reform v Adam*,²⁵ a case concerning surrender pursuant to Part 3 of the EAW Act 2003, Edwards J. considered that the question whether the matter fell within the scope of EU law or not (which he accepted was probably the case on the facts) was,

“to a large extent academic in the circumstances of this case because the respondent’s right to an expeditious trial is more or less identical regardless of whether it derives from Article 47 of the Charter, or from Article 6 of the Convention. Moreover while Article 47 of the Charter speaks expressly of “the right to an effective remedy” where “rights and freedoms guaranteed by the law of the Union are violated”, Article 13 of the convention covers similar ground in guaranteeing “an effective remedy before a national authority” for “everyone whose rights and freedoms ... are violated.”

Nevertheless, drawing on previous Convention case law and applying it in the Charter context, Edwards J. concluded that,

“In circumstances where both Ireland and the Czech Republic are members of the European Union and are obliged by the Charter to respect fundamental rights when acting “in the scope of Union law”; and also in circumstances where both Ireland and the Czech Republic are signatories to, and have ratified, the Convention; it is strongly to be presumed by this Court that the respondent will have available to him an

²⁵ *Minister for Justice, Equality, and Law Reform v Adam* [2011] IEHC 68. There are no page or paragraph numbers in this judgment therefore specific reference cannot be made to particular quotations. See similarly, considering Article 47 together with Article 6 ECHR in relation to the right to reasonable expedition in having one’s case heard, *Minister for Justice and Equality v Gordon* [2013] IEHC 515.

effective remedy before the Courts of the Czech Republic in respect of any historical, or continuing, breaches of his expeditious trial right. That such a presumption should operate is consistent in this Court's view with the principles and objects recited in the preamble to the framework decision when it refers to mutual recognition of judicial decisions, judicial cooperation and a high level of confidence between member states."

In those circumstances, the applicant bore,

"what is, in effect, an evidential burden to provide this Court with cogent evidence tending to suggest that that might not be so, before this Court would be put on enquiry as to what remedies might or might not be available to the respondent before the courts of the Czech Republic."

In *S.K.T. (DRC) v Refugee Appeal Tribunal*,²⁶ Eager J. applied *inter alia* Article 47 of the Charter in quashing the RAT's decision to affirm a finding of ineligibility for refugee status on the ground of inordinate and unreasonable delay in holding the RAT hearing, and in issuing the decision after such hearing. Eager J. noted that, while the specific provision on appropriate time limits for consideration of refugee applications in the Procedures Directive, as implemented by s. 13 of the Refugee Act 1996, only applied to first instance decisions, Article 47 of the Charter was of broader application.²⁷ Nevertheless, it should be noted that, as a matter of Irish law, the principle that the RAT must act with reasonable promptitude in carrying out its functions has long been well-established.²⁸

Concerning access to justice and *locus standi*, in *Digital Rights Ireland v Minister for Communications*,²⁹ McKechnie J. relied on Article 47 of the Charter, as well as the general principle of effectiveness of EU law, in holding that the plaintiff – despite being a corporation - had *locus standi* to bring its claim, as:

"...the Courts may be required to take a more liberal approach to the issue of standing so that a person's rights thereunder are not unduly hampered or frustrated. The rules on standing should be interpreted in a way which avoid making it "virtually impossible", or "excessively difficult", or which impedes or makes "unduly difficult", the capacity of a litigant to challenge EU measures of general application under Art. 267 TFEU...That is not to say that where questions of EU law are raised and a preliminary reference requested, the Court is automatically precluded from refusing a

²⁶ *S.K.T. (DRC) v Refugee Appeal Tribunal* [2014] IEHC 572

²⁷ *Ibid* at para. 24.

²⁸ See the overview at paragraph 28 ff of the *SKT* judgment.

²⁹ *Digital Rights Ireland Ltd -v- Minister for Communication & Ors* [2010] IEHC 221.

plaintiff standing. However, as was the case with regards to the power to grant interim relief in The Queen v. Secretary of State for Transport, ex parte Factortame Ltd & Ors. [1990] ECR I-2433, if the Court would be otherwise minded to allow standing in relation to the questions raised, but for a strict application of the national rules on locus standi, the Court should nonetheless grant standing where to do otherwise would render the plaintiff's Community rights effectively unenforceable."³⁰

By contrast, in *An Taoiseach v Commissioner for Environmental Information*,³¹ O'Neill J. held *inter alia* that Article 47 of the Charter did not mean that the Commissioner for Environmental Information must be entitled to dis-apply national law which was in conflict with EU law, as long as there was some access to the courts. In that case, such access was expressly guaranteed by the relevant implementing regulations on access to environmental regulation, which provided for a referral on a point of law to the High Court. As a result, the Commissioner was not entitled to hold that the government's refusal to allow access to cabinet discussions on greenhouse gas emissions was contrary to EU law.

Concerning the right of defence and due process, in *Dellway Investments v NAMA*,³² Macken J. noted the relevance of Article 47 of the Charter in finding that the applicant had a right to make representations prior to, as in that case, NAMA's decision to take over his loans from affected banks. Nevertheless, Macken J. noted that the Constitution remained the primary source of the right to make such representations, as while Article 47,

"patently grants a right to be heard in respect of properly invoked rights. Its ambit is not, however, clearly spelt out. Although it suggests a hearing must be "public", there is no guidance on what precisely is meant by or is included in "rights" in the first paragraph of Article 47."³³

See similarly, in relation to Article 47 and the right to an effective remedy in the subsidiary protection context, the judgment of Cross J. in *OJ (Nigeria) v Minister for Justice and Equality*,³⁴ holding that the constitutional protection conferred by Article 40.2.3, insofar as relevant to that case, was at least as extensive as that conferred by Article 47.

In *Celtic Salmon Atlantic (Killary) v Aller Acqua (Ireland)*³⁵, Hogan J. interpreted the provisions of the Brussels I Regulation in the light of Articles 41, 47 and 48 of the Charter, to hold that the plaintiffs in that case were not precluded from raising by way of counterclaim an

³⁰ *Ibid* at para. 46.

³¹ *An Taoiseach v Commissioner for Environmental Information* [2010] IEHC 241.

³² *Dellway Investments & ors -v- NAMA & ors* [2011] 4 I.R. 1

³³ *Ibid* at para. 487.

³⁴ *OJ (Nigeria) v Minister for Justice and Equality* [2012] IEHC 71.

³⁵ *Celtic Salmon Atlantic (Killary) v Aller Acqua (Ireland)*, [2014] IEHC 421

issue which they had failed to raise in Danish proceedings on the matter. In so holding, Hogan J. held that the plaintiff had not had the chance properly to exercise its right of defence in the Danish proceedings which led to that judgment because, pursuant to Danish procedural law, only expert evidence which had been ordered by the Danish court was admissible. This meant that an Irish company such as the plaintiff could not have effectively complied with this requirement so far as evidence-gathering in Ireland was concerned, which in turn meant that it was effectively impossible for the plaintiff to have advanced its counterclaim in the Danish courts. As a result, denying the plaintiff the possibility to bring the counterclaim in the Irish courts would be manifestly contrary to public policy for the purposes of Article 34.1 of the Brussels I Regulation.³⁶

The question whether judicial review satisfies the Article 47 requirements of an effective remedy has been raised in a large number of cases. It has been accepted that Article 47 does not in itself require a full *de novo* hearing, but rather an effective remedy, in which (at least post-*Meadows*)³⁷ judicial review will normally suffice: see *VN (Cameroon) v Minister for Justice*³⁸, where Cooke J. noted that,

*“the [Article 47 right to an effective remedy] is provided for in Irish law by the availability of judicial review and, as has been held in a number of judgments of the Court, that remedy is adequate to guarantee the validity, reasonableness and lawfulness of a determination of subsidiary protection. (P.M v MJELR (Unreported, High Court, Hogan J. 28th October 2011) [2011] IEHC 409, ISOF v Minister for Justice (Unreported, High Court, Cooke J. 17th December 2010) [2010] IEHC 457, and Lofinmakin v Minister for Justice ((Unreported, High Court, Cooke J. 1st February 2011) [2011] IEHC 38).”*³⁹

In *A.A. v Minister for Justice*,⁴⁰ Cooke J. held that the meaning of Article 47 of the Charter should be interpreted according to any applicable EU legislation (in that case, the Procedures and Qualification Directives in the asylum context):

“[Article 47] does not mean however, in the view of the Court, that Article 47 in conjunction with Article 51 constitutes the source of a stand-alone right in favour of individuals against Member States independently of the terms and contents of the law being implemented. Where, as in the case of the Procedures Directive, the Union legislator has given effect to the requirement of Article 47 by obliging, in Article 39,

³⁶ *Ibid* at para. 124.

³⁷ This decision is discussed in detail above, from p. 59 and below at p. 152.

³⁸ *V.N. (Cameroon) v Minister for Justice and Law Reform & Anor* [2012] IEHC 62

³⁹ *Ibid* at para. 21.

⁴⁰ [2012] IEHC 222

the Member States to provide for an effective remedy against specific decisions and has defined its scope in paragraph 1 of that article, Article 51 does not, in the view of the Court, provide a legal basis upon which an applicant can require a Member State to provide a different or more extensive remedy which goes further than the law in question requires. A Member State must respect relevant rights and principles of the Charter when adopting the national rules, conditions, time limits and other matters which Article 39 requires. Otherwise, however, the extent of the respect for the right to an effective remedy required by Article 47 is that defined by the Union legislator in the Procedures Directive and in Article 39 thereof in particular. Because the Charter is addressed primarily to the institutions, including especially the legislating institutions of the Union, it falls to the Union legislator when adopting a law, the implementation of which may affect the rights and freedoms of individuals, to ensure that a relevant right such as that of Article 47 is adequately safeguarded by the manner in which the scope and application of the law is defined.”⁴¹

However, this judgment should now be read in light of the CJEU’s subsequent judgment in, for instance, *M.M.*, which demonstrates that, even in a field covered in part by EU legislation, Article 47 may provide stand-alone rights.⁴²

A further debate has concerned the fact that, in the case of reliance on judicial review as an effective remedy, it is not possible for the judge to take into account facts that arose after the original decision, and does not entail automatic suspensive effect of the decision at issue. In *M v L*, Clark J. refused an application for leave on, inter alia, these grounds.⁴³ In *Okunade v Minister for Justice, Equality and Law Reform*⁴⁴ the Supreme Court applied the requirements for the grant of an interlocutory injunction preventing the respondent from deporting the applicants pending determination of an application for subsidiary protection in the light of Article 47 of the Charter.⁴⁵

As regards the right to legal aid, in *Minister for Justice, Equality and Law Reform v McGuinness*,⁴⁶ the High Court dismissed the respondent’s argument that the Attorney General’s scheme did not, due to its non-statutory and administrative nature, satisfy the requirements of Article 47(3) of the Charter (although substantive reasoning was not provided justifying this conclusion, as distinct from the similar conclusion reached on the basis of the EAW Framework Decision).

⁴¹ *Ibid* at para. 15.

⁴² Case C-277/11 *M.M.*, judgment of the CJEU of 22 November 2012.

⁴³ *M v L* [2012] IEHC 485.

⁴⁴ *Okunade v Minister for Justice, Equality and Law Reform* [2012] IESC 49.

⁴⁵ *Ibid* at para. 10.7.

⁴⁶ *Minister for Justice, Equality and Law Reform v McGuinness* [2011] IEHC 289.

It is important that the Charter is expressly pleaded. See, for instance, *A (a minor) v Minister for Justice, Equality and Law Reform*, where an application for a certificate for leave to appeal to the Supreme Court and/or a reference to the CJEU was refused by Smyth J. on the basis that the relevant provisions of the Charter (Articles 18 and 24) had not been expressly pleaded.⁴⁷

It is of note that, in *Pringle v Government of Ireland*,⁴⁸ Laffoy J. held in the High Court that the Treaty establishing the European Stability Mechanism (the “ESM Treaty”) was consistent with Article 47 of the Charter;⁴⁹ upon reference by the Supreme Court to the CJEU, however, the CJEU held that in fact Article 47 was of no application to Treaties concluded outside the architecture of the EU Treaties, as the ESM Treaty was.⁵⁰

Article 41 of the Charter: The Right to Good Administration

Article 41 of the Charter provides, insofar as relevant:

“1. Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.

2. This right includes:

(a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;

(b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;

(c) the obligation of the administration to give reasons for its decisions.”

In *C.A. v Minister for Justice and Equality*,⁵¹ MacEochaidh J. noted that the right contained in Article 41 of the Charter is not present, at least in the same way, in the Constitution or Convention.⁵²

⁴⁷ *A (a minor) v Minister for Justice, Equality and Law Reform* [2011] IEHC 323. See similarly, *S (a minor) v Minister for Justice, Equality and Law Reform* (Hogan J) [2011] IEHC 31.

⁴⁸ *Pringle v The Government of Ireland & Ors* [2012] IEHC 296.

⁴⁹ *Ibid* at para. 89.

⁵⁰ Case C-370/12 *Pringle*, judgment of 27 November 2012.

⁵¹ *C.A. v Minister for Justice and Equality* [2014] IEHC 418. The judge specifically noted at para. 11.8 that Article 41 had not been pleaded in that case, which concerned the legality of the State’s direct provision system.

In *H.N. v Minister for Justice, Equality and Law Reform*,⁵³ the Supreme Court referred the question whether it was compatible with the Qualifications Directive in EU asylum law for Irish law to provide that an application for subsidiary protection will not be considered unless the applicant has already applied for and been refused refugee status.⁵⁴ The CJEU held that, while this did not breach the Qualifications Directive, it was a requirement of the principle of effectiveness of EU law and Article 41 of the Charter that the entirety of the procedure thereby established was concluded within a reasonable period of time:

“...where, in the main proceedings, a Member State implements EU law, the requirements pertaining to the right to good administration, including the right of any person to have his or her affairs handled impartially and within a reasonable period of time, are applicable in a procedure for granting subsidiary protection, such as the procedure in question in the main proceedings, which is conducted by the competent national authorities.

51 *It is therefore necessary to ascertain whether the right to good administration precludes a Member State from including in its national law a procedural rule to the effect that an application for subsidiary protection must be covered by a separate procedure and can be made only after an asylum application has been refused.*

52 *As regards, in particular, the requirement for impartiality, that requirement encompasses, inter alia, objective impartiality, in so far as there must be sufficient guarantees to exclude any legitimate doubt as to bias on the part of the national authorities concerned (see, by analogy, Case C-439/11 P Ziegler v Commission EU:C:2013:513, paragraph 155).*

53 *It should be noted, first of all, that in circumstances such as those in the main proceedings, the fact that, before commencing the examination of an application for subsidiary protection, the national authorities inform the applicant that they are considering making a deportation order cannot, of itself, be construed as a lack of objective impartiality on the part of those authorities.*

54 *It is in fact common ground that the reason for that disclosure on the part of the competent authorities is that it has been found that the third country national does not qualify for refugee status. That finding does not, therefore, mean that the*

⁵² *Ibid.* The judge specifically noted at para. 11.8 that Article 41 had not been pleaded in that case, which concerned the legality of the State's direct provision system.

⁵³ *H.N. v Minister for Justice, Equality and Law Reform* [2012] IESC 58.

⁵⁴ Case C-604/12 *H.N.*, judgment of 8 May 2014.

competent authorities have already adopted a position on whether that third country national satisfies the requirements for being granted subsidiary protection.

55 Accordingly, the procedural rule at issue in the main proceedings is not at odds with the requirement of impartiality pertaining to the right to good administration.

56 Nevertheless, that right ensures, in the same way as the requirements imposed by the principle of effectiveness [of EU law] that the entire procedure for considering an application for international protection does not exceed a reasonable period of time.”⁵⁵

Upon return to the Supreme Court, the application was rejected as, on the facts of that case, the applicant had refused to make an application for refugee status and where the delay had largely been as a result of the applicant’s own judicial review proceedings, and had resulted in a benefit for him in terms of changed circumstances which were favourable to his application.⁵⁶ As a result, O’Donnell J. in the Supreme Court refused the application and, with it, the claim for damages for breach of Article 41.

In *Tagni v Minister for Justice, Equality and Law Reform*,⁵⁷ Edwards J. granted a declaration that the respondent failed to render his decision on the applicant’s resident permit application within a reasonable time, contrary to Article 41 of the Charter. In so holding, Edward J. noted that the relevant Directive on free movement of EU citizens, plus the implementing national regulations, provided that such a decision should in principle be made within six months.

In *O’Connor v The Environmental Protection Agency*⁵⁸ and *No2GM v The Environmental Protection Agency*⁵⁹, Hogan J. relied on the right to be heard pursuant to Article 41 of the Charter in rejecting the applicant’s claim, made on an *ex parte* basis, that they should be assured that they would not be liable to costs at a level that was prohibitively expensive within the meaning of Article 9(4) of the Aarhus Convention.⁶⁰

⁵⁵ *Ibid* at paras. 50-56.

⁵⁶ *Nawaz v. Minister for Justice, Equality and Law Reform & Anor.* [2014] IESC 30

⁵⁷ *Tagni v Minister for Justice, Equality and Law Reform* [2010] IEHC 85.

⁵⁸ *O’Connor v The Environmental Protection Agency & Anor* [2012] IEHC 370

⁵⁹ *No2GM Ltd v The Environmental Protection Agency & Anor* [2012] IEHC 369

⁶⁰ Affirmed on appeal (without consideration of the Charter) in *Applications by Coffey & ors v Environmental Protection Agency & anor* [2013] IESC 31.

Chapter Seven: The Charter before the Irish Courts – Sectoral Issues

This chapter focuses on the use of the Charter before the Irish Courts in six substantive fields in which the Charter has, to date, had perhaps most impact, namely:

- (1) Asylum and immigration law;
- (2) European Arrest Warrant and criminal law;
- (3) Data protection law;
- (4) Family and child law;
- (5) Companies' rights;
- (6) Social and employment rights.

Asylum and Immigration

The Charter has had perhaps its greatest impact in the Irish courts to date in the asylum and immigration context, and there is potential for it to have even greater impact in the coming years.¹

An early example is *M.E.*, where a reference from the Irish High Court (Clark J.) subsequently led, along with a reference from the English Court of Appeal, to the Court of Justice's seminal judgment in *N.S./M.E.*² In that instance, the Court ruled that Article 4 of the Charter, prohibiting torture and inhuman or degrading treatment, meant that Member States, including national courts, may not transfer asylum seekers back to the Member State of first entry into the EU as would normally occur under the Dublin II Regulation, in circumstances where they could not fail but to be aware that systemic deficiencies in the asylum procedure and reception conditions in that Member State would mean that there

¹ While asylum and immigration law are evidently distinct fields of law, they are considered here together due to significant overlaps in the issues arising before the Irish courts, and judicial treatment of said issues, from a Charter perspective.

² Joined Cases C-411/10 and C-493/10 *N.S./M.E.* [2011] ECR I-865.

would be substantial grounds for believing that the asylum seeker would face a real risk of having his/her Article 4 rights breached.

In *F.O. v Refugee Appeals Tribunal*, O'Malley J. applied *N.S.* to overturn the decision of the Refugee Appeals Tribunal that the asylum seeker in that instance should have first applied for asylum in Greece and/or the UK, on grounds that the Tribunal should have considered whether he had made out reasonable grounds for applying for asylum first in Ireland.

Conversely, the Charter has also frequently been used as a “sword” in the Irish courts to reject arguments that other Member States do not offer a sufficient level of rights protection.³

In *J.M.O. v Refugee Applications Commissioner*,⁴ McDermott J. noted:

*“...in rebutting the presumption of compliance with European Union law and Article 4 by the responsible receiving Member State, cogent evidence is required. The onus is on the applicant to rebut the presumption and to establish on the balance of probabilities the facts from which the inference may be drawn that substantial grounds were established for concluding that the applicant faced a “real risk” of being subject to a breach of Article 4 (or Article 3) rights, if returned. In contrast to the overwhelming body of evidence concerning the Greek cases, the nature and extent of the evidence available to the Commissioner adduced by the applicant and from the inquiries made by the Commissioner, was minimal in support of the applicant’s contention.”*⁵

On this basis, he rejected the argument that the respondent was obliged, pursuant to *N.S.*, to refuse to transfer the applicant back to Slovakia pursuant to the Dublin II Regulation, in circumstances where the applicant argued that the Slovak authorities did not grant asylum to people in the applicant’s position, and transferred Chechen people back to Russian in breach of the principle of *non-refoulement*.

A plethora of judgments have considered the compatibility of Ireland’s bifurcated system of international protection for refugees with EU law, including the Charter.

In *M.M. v Minister for Justice, Equality and Law Reform*,⁶ one of the issues that arose was the compatibility of this system with the Article 41(2) Charter right to be heard and the Article 47 right to an effective remedy. This case constitutes a good illustration of the inherent

³ See, for instance, *J.G. v Refugee Applications Commissioner* [2013] IEHC 248 (McDermott J); *Minister for Justice and Equality v Strzelecki (No. 2)* [2013] IEHC 477; *Minister for Justice and Equality v Eglitis* [2013] IEHC 215; *Minister for Justice, Equality and Law Reform v Marjasz* [2012] IEHC 233.

⁴ *J.M.O. v Refugee Applications Commissioner* [2014] IEHC 467.

⁵ *Ibid* at para. 68.

⁶ *M.M. v Minister for Justice, Equality and Law Reform* [2013] IEHC 9.

uncertainty that making a reference to the Court of Justice brings into litigation, as the Luxembourg court may potentially offer an answer to a question that was not expressly posed, or phrase its response in a way that goes well beyond the facts of the particular case at hand. In that case, following a reference to the Court of Justice by Hogan J., the Luxembourg court went beyond the express terms of the reference “*in order to provide the referring court with a useful answer*”, holding that a further “*hearing*” must be held in the context of the second (subsidiary protection) procedure.⁷ In so holding, however, the Luxembourg court appeared, at least on the face of it,⁸ to have misunderstood the workings of the Irish asylum procedure, as in fact a written hearing was given to subsidiary protection applicants – but not an oral hearing. Hogan J.’s subsequent judgment, applying the Court of Justice’s judgment to the facts of the case, is interesting for its attempts to reconcile the Luxembourg court’s judgment with the realities of the Irish system, by *inter alia* examining different language versions of the Luxembourg judgment, concluding that the subsidiary protection regime as it then functioned did not entail an effective hearing, particularly as regards findings of credibility.⁹ This ultimately led to a change in the Irish asylum procedure with the European Union (Subsidiary Protection) Regulations 2013. A further reference in the *M.M.* case, this time from the Supreme Court, is currently pending before the CJEU.

M.M. was followed by a reference from the Supreme Court - on the compatibility of the Irish asylum procedure with the Article 41 Charter right to good administration - in the *H.N.* case, considered in chapter 6; specifically, the compatibility of the requirement to have applied first for refugee status in order to be eligible to apply for subsidiary protection. Upon reference, the Court of Justice ruled that such a system is compatible with the right to good administration, provided that both applications can be submitted at the same time, and if this does not mean that the application for subsidiary protection is considered only after an unreasonable length of time.¹⁰

A variety of cases have considered the question whether Articles 7 and/or 24 of the Charter have been appropriately considered by decision-makers in circumstances where the case involves an EU citizen child which may be deprived of the genuine enjoyment of the substance of his/her citizenship rights as a result of the decision, pursuant to the *Zambrano* doctrine. It is clear that, in such cases, the courts will examine carefully whether the

⁷ Case C-277/11 *MM* [2012] ECR I-744.

⁸ See, for instance, at para. 80 “*With regard more particularly to the right of the applicant to be heard before a decision is adopted, the High Court has stated in its order for reference that, according to national case-law, it is not necessary to observe that procedural requirement when dealing with an application for subsidiary protection made following rejection of an asylum application, given that the applicant will already have been heard in the examination of his asylum application and given that the two procedures are closely linked*”.

⁹ *M.M. v Minister for Justice* [2013] IEHC 9.

¹⁰ Case C-604/12 *H.N.*, judgment of 8 May 2014, not yet reported.

Zambrano criteria (dependency, deprivation of the genuine enjoyment of the substance of EU citizenship rights) are in fact fulfilled.

In *J.S. v Minister for Justice and Equality*,¹¹ for instance, McDermott J. rejected the applicability of Articles 7 and 24 of the Charter in a case of affirmation of a deportation order, reasoning that,

*“The provisions of s. 3(1) and 3(11) of the Immigration Act 1999, are part of domestic legislation concerned with the implementation of immigration policy. Having regard to the fact that the state is not precluded from deporting a third party national even though that person is a parent of a European citizen child, when that child is not dependent upon the applicant and will not be deprived of the genuine enjoyment and substance of his/her rights as a European Union citizen by reason of that deportation, I am satisfied that Article 7 has no application.”*¹²

In *A.N. v Minister for Justice and Equality*, Clark J. rejected the argument that the judgment of the CJEU in *Zambrano* and the rights which flow from Article 20 TFEU precluded the Minister from considering whether it would be reasonable to expect an EU citizen to relocate outside of the EU to maintain family life with a non-EEA national in the event of his / her deportation. In so holding, Clark J. considered that it remains a matter for the Minister to weigh all relevant facts and circumstances in the balance so far as they are known to him and to reach a reasonable and proportionate decision on a case-by-case basis; and that this was compatible with Article 8 of the Convention, which she considered to be equivalent to Article 7 of the Charter.¹³

The equivalence of Article 7 of the Charter to Article 8 of the Convention was also considered in *B. & Ors. v Minister for Justice and Equality*,¹⁴ in which McDermott J. considered that, where the respondent had taken Article 8 ECHR considerations into account, this sufficed in that case to show consideration of Article 7 of the Charter also:

“54. In interpreting Article 7 and Article 24 of the Charter, Article 52(3) provides that insofar as the Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be “the same as those laid down by the said Convention”. This does not prevent European Union law providing more extensive

¹¹ *J.S. v Minister for Justice and Equality* [2014] IEHC 195.

¹² *Ibid* at para. 33.

¹³ *A.N. v Minister for Justice and Equality* [2013] IEHC 480.

¹⁴ *B & ors v Minister for Justice and Equality* [2013] IEHC 246. For cases of Convention relevance, see above from p. 66.

*protection for children but it is a tool of interpretation. There is an extensive body of jurisprudence in relation to the application of Article 8 of the European Convention on Human Rights in respect of deportation orders and applications to revoke them under s. 3 of the Immigration Act 1999. The jurisprudence of the European Court of Human Rights is, as a matter of course, applied in such cases (as indeed it was in this case) to considerations of the applicants' rights to private and family life under Article 8. This assessment was carried out prior to the making of the deportation order and in the course of the consideration of both applications to revoke the deportation order, as is evident from a reading of the examination of file and the considerations of the file carried out by the officials in this case. That process has never been the subject of challenge by way of leave to apply for judicial review or otherwise by the applicants. Though the applicants contend that a different test should have been applied in the application of Article 7 of the Charter in respect of the private and family lives of the applicants on the application to revoke, the applicants have not advanced to the court any test different to that which was applied in respect of Article 8 of the European Convention throughout this process. The court is satisfied having regard to Article 52(3) of the Charter that the meaning and scope of Article 7 is the same as the meaning and scope of Article 8. The court is not satisfied that there is any stateable ground upon which it can be argued that Article 7 of the Charter of Fundamental Rights was in any respect misconstrued or breached. The best interests of the child were considered both in relation to the children's constitutional rights and Convention rights in accordance with the principles laid down in *Boultif and Uner*."*¹⁵

McDermott J. reached a similar conclusion of equivalence in relation to Article 24 of the Charter and the requirements of the Constitution and the ECHR, refusing leave to apply for judicial review on this ground.¹⁶

In *TD v Minister for Justice, Equality and Law Reform*,¹⁷ the Supreme Court considered the question whether the 14 day time limit for bringing an application for leave to issue judicial review proceedings under s. 5 of the Illegal Immigrants (Trafficking) Act 2000 breached the EU law principle of equivalence of remedies for breach of national and EU law rights. In the High Court, Hogan J. had answered in the affirmative to this question, comparing the 14 day period with the comparator 8 week period for planning and development applications. Allowing the appeal, Fennelly J. noted that,

¹⁵ *Ibid* at para. 54. Also discussed above at p.66.

¹⁶ *B & Ors. V. Minister for Justice and Equality* at para. 56.

¹⁷ [2014] IESC 29.

“The areas of power or jurisdiction which are indisputably within the competence of the European Union are, firstly, all matters concerning the free movement of persons within the EU, i.e., between Member States, and, secondly, asylum and refugee status and international protection generally. It is almost certain that any proceeding whereby an individual claims rights either pursuant to the law of free movement or of asylum will be the subject of EU law.”¹⁸

Albeit dissenting on the specific issue on whether or not planning/development law was an appropriate comparator to EU asylum law for the purposes of the principle of equivalence, Murray J.’s judgment is interesting for its strong rights-based approach to refugee law, based on Article 18 of the Charter. Murray J. noted that, while the right to asylum had originally been derived from national/international law, it now constituted an EU law right:

“...the right to asylum and refugee status is now guaranteed by Article 18 of the Charter of Fundamental Rights of the European Union and Ireland, along with other Member States, has a duty to grant refugee status to those who qualify as refugees in accordance with the criteria set out in Directive 2004/83/EC (the Qualifications Directive). The rights which the respondents seek to assert derive exclusively from the law of the European Union since the State is obliged to give effect to European law and it cannot, by way of legislation or otherwise, deny or limit the rights conferred by the Charter and the relevant Directives given the primacy which is accorded by the Constitution to the law of the European Union.”¹⁹

Murray J. went on to specify that, albeit that it was passed prior to the Charter, the Refugee Act 1996 now constituted the means by which Ireland complied with its Charter and EU law obligations in the field of refugee and asylum law.²⁰ The judgment clearly recognises that the right to refugee status is an “*autonomous fundamental right*” under EU law,²¹ and represents a significant confirmation that refugee law was about giving effect to this fundamental right, not about border control:

“143. The purpose of the proceedings in this case is to claim an autonomous right to a status, refugee status, which is a fundamental right. In short, these proceedings are not about controlling borders but about a right to a status guaranteed by the Charter.”²²

¹⁸ *Ibid* at para. 12.

¹⁹ [2014] IESC 29, at para. 18.

²⁰ *Ibid* at para. 82.

²¹ [2014] IESC 29 at paras. 120, 133.

²² *Ibid* at para. 143.

In *A.M. v Refugee Appeals Tribunal*,²³ McDermott J. relied upon Article 10 of the Charter, on freedom of conscience, in interpreting the definition of refugee in the Refugee Act 1996, holding that the Qualification Directive, which includes the definition of refugee, must be interpreted in line with the Charter. Further, section 2 of the Refugee Act 1996 interpreted in line with the Constitution and with the ECHR Act 2003 gave a similar result. Nevertheless, the applicant's application to quash the refusal to grant her refugee status was refused in circumstances where a provision existed in Israeli military law for her to apply for an exemption from military service on grounds of conscience.²⁴

In *D. (a minor) v Refugee Appeals Tribunal*,²⁵ Hogan J. relied on, *inter alia*, Article 14 of the Charter, on the right to education, in holding that the potential denial of a basic education to the applicant, who was of Roma origin, if returned to their country of origin constituted a sufficiently severe violation of basic human rights amounting to persecution within the meaning of section 2 of the Refugee Act 1996.

The Charter has also been successfully used to quash a decision to transfer a heavily pregnant woman by ferry to the UK under the Dublin II Regulations (held in *Aslam* to be contrary to Article 1 of the Charter),²⁶ and the view has been expressed by Hogan J. that Article 24 of the Charter, on the rights of the child, "*might yet have considerable implications for immigration law and practice*".²⁷

European Arrest Warrant and Criminal Law

The Charter has also featured prominently in a number of recent cases concerning European Arrest Warrants (EAWs), due in part to the fact that the relevant EU legislation, the EU EAW Framework Decision,²⁸ refers expressly to the Charter in its preamble.²⁹

The first reported case in which the Charter was substantively discussed in the Irish courts was, indeed, an EAW case dating from 2005. In *Dundon v The Governor of Cloverhill Prison*,³⁰ the Supreme Court considered the Charter in interpreting a time limit in the EAW Act 2003, which in turn was based on the EU EAW Framework Decision. The plaintiff's case

²³ [2014] IEHC 388.

²⁴ *A.M. v Refugee Appeals Tribunal* [2014] IEHC 388.

²⁵ *D. (a minor) -v- Refugee Appeals Tribunal & anor* [2011] IEHC 431. See discussion on Convention application above from p. 63.

²⁶ *Aslam v Minister for Justice and Equality* [2011] IEHC 512.

²⁷ *AO v Minister for Justice and Equality (No. 3)* [2012] IEHC 104 holding however that there was no entitlement to rely on the Charter in that case, because the conditions of Article 51(1) of the Charter were not made out.

²⁸ Framework Decision 2004/584/JHA OJ 2002 L 190/1.

²⁹ For a discussion on the Convention and the European Arrest Warrant, see above from p. 79.

³⁰ *Dundon v The Governor of Cloverhill Prison* [2005] IESC 83.

was that the expiry of this time limit, read in conjunction with chapter VI of the Charter, meant that he had an automatic right to be released at that point.

Dismissing this claim, Fennelly J. in the Supreme Court noted that, although the interpretation of the Framework Decision was far from clear, at that point it was not possible for the Supreme Court to make a preliminary reference to the ECJ as Ireland had not made the relevant declaration which was, at the time, necessary in order to empower the Irish Supreme Court to seize the ECJ in a criminal case. Nevertheless, in that case, Fennelly J. considered that it was clear that the provision at issue did not have direct effect as a matter of EU law such as to confer rights on individuals.

More recently, the Charter has been increasingly expressly been taken into account in judgments concerning EAWs.

In *Minister for Justice, Equality & Law Reform v Pollak*,³¹ Peart J. applied Articles 18 and 19(2) of the Charter in holding that the State could not surrender, pursuant to an EAW, an individual to his country of origin in circumstances where he held refugee status in the State. However, Peart J. also relied heavily on Article 3 of the Convention, interpreting s. 37 of the EAW Act 2003 in the light of that provision (and not in the light of the Charter).

In other cases, the existence of the Charter has meant that the Irish courts have undertaken a more stringent review of conditions in the state of transfer where that state is a non-EU state, as compared to an EU state where the principle of mutual trust justifies a strong presumption of rights compatibility. In *Attorney General v O’Gara*³², for instance, Edwards J. noted, in the context of arguments that the risk of rape in the US prison system justified a refusal to extradite, that,

“though it is by no means perfect, there is. by virtue of the fact that all member states operating the European arrest warrant system are signatories to the Convention, a greater common understanding between the States operating the European arrest warrant system of what constitutes an individual’s fundamental rights, and what is required to be done to defend and vindicate those rights. Such is the level of mutual trust and confidence in other member states who are parties to the European arrest warrant system that the Oireachtas has given statutory effect to the presumption that arises -in s.4A of the European Arrest Warrant Act 2003 (as inserted by s.69 of the Criminal Justice (Terrorist Offences) Act 2005). S.4A provides that “It shall be presumed that an issuing state will comply with the requirements of ‘the Framework

³¹ *Minister for Justice, Equality & Law Reform v Pollak* [2010] IEHC 209.

³² *Attorney General v O’Gara* [2012] IEHC 179

Decision, unless the contrary is shown” Neither the Extradition Act 1965, nor the Washington Treaty contains a comparable provision. That is not to say that no presumption at all arises, but as the Court has stated it is very much weaker and more easily rebutted than is the case under the European arrest warrant system.”³³

This kind of reasoning displays much similarity with that of the CJEU in *Melloni*, discussed in chapter 5.

Conversely, in *Minister for Justice and Equality v Marjasz*,³⁴ Edwards J. held that, notwithstanding the principle of mutual recognition, it might be possible, in an exceptional case, for a respondent to resist surrender on foot of an EAW seeking his or her surrender for the purpose of executing a sentence, on the basis that the underlying conviction was the result of an unfair trial. In so doing, he relied on Article 6 of the Convention as well as Article 47 of the Charter, but noted that,

“having appropriate regard to the implications of the s.4A [of the EAW Act 2003] presumption for the way in which an issuing state / issuing judicial authority is required to conduct itself; the principles of mutual trust and confidence between member states; the further principle that there should be mutual recognition of judicial decisions and actions; and the aforementioned duty of utmost good faith, this Court considers that it is entitled to expect in respect of any conviction which is the subject of a European arrest warrant that the issuing judicial authority would not knowingly seek a respondent's rendition in circumstances where he had not received a fair trial (as judged against widely accepted norms such as those expressed in provisions such as Article 6 of the European Convention on Human Rights, to which instrument all member states operating the European arrest warrant are signatories; alternatively Article 47 of the Charter of Fundamental Rights which is also binding on such member states post the coming into force of the Lisbon Treaty), and that it is therefore to be presumed that the respondent did in fact receive a fair trial that respected his fundamental rights. Such a presumption is, of course, capable of being rebutted in any particular case but the Court would require to have adduced before it very cogent and compelling evidence tending to rebut that presumption before it would be put upon enquiry and be justified in seeking to look behind the presumption.”³⁵

³³ *Ibid* at para. 10.3.

³⁴ *Minister for Justice and Equality v Marjasz* [2012] IEHC 233.

³⁵ *Ibid*. There are no page or paragraph numbers provided in this judgment, therefore specific reference cannot be made to particular sections.

In *Minister for Justice and Equality v Rostas*,³⁶ Edwards J. held that this presumption had been rebutted, and the respondent would not be surrendered, in circumstances where the evidence showed that there were substantial grounds for believing that there is a real risk that the respondent suffered, as a person of Roma ethnicity, a flagrant denial of justice with respect to her trial in Romania in the 1990s, resulting in the conviction and sentence to which the European arrest warrant relates.

In other cases, Charter-based arguments have been considered but have proven unsuccessful. In *Minister for Justice, Equality and Law Reform v Biggins*, Peart J. considered but rejected arguments that execution of the EAW in that case was contrary to the requirement of non-discrimination set out in Article 23 of the Charter, as well as Article 14 of the Convention.³⁷ In *Minister for Justice, Equality and Law Reform v Dillon*,³⁸ Peart J. applied Article 50 of the Charter, on the basis of *ne bis in idem*, in holding that the High Court was not precluded from consenting to the surrender of an individual to the UK pursuant to an EAW in circumstances where that person had originally been acquitted, but fresh DNA evidence had subsequently become available allowing an appeal in the English courts of that acquittal.

In *O'Sullivan v The Chief Executive of the Irish Prison Service*,³⁹ McKechnie J. rejected the argument that the insertion of s. 16(12) into the EAW Act 2003, by which certification from the High Court was necessary in order to appeal an EAW judgment to the Supreme Court, breached, *inter alia*, Article 47 of the Charter on the right to an effective remedy. McKechnie J. held that s. 16 did in fact provide an effective remedy within the Charter and Convention sense, in that it provided for:

- (a) A fair and public hearing;
- (b) An independent tribunal; and
- (c) An effective remedy.

While the first two requirements concerned the issue of systemic and actual bias, the final requirement constituted an “*extension of the right of access*”, in that

“it is fundamental to governance based on the rule of law that access to the courts be both meaningful and purposeful. For such right to have any substance this must of

³⁶ *Minister for Justice and Equality v Rostas* [2014] IEHC 391. For discussion on Convention aspects of this case, see above from p. 81.

³⁷ *Minister for Justice, Equality and Law Reform v Biggins* [2006] IEHC 351.

³⁸ *Minister for Justice, Equality and Law Reform v Dillon* [2010] IEHC 196.

³⁹ *O'Sullivan v The Chief Executive of the Irish Prison Service & Ors* [2010] IEHC 301.

course include the potential for an effective remedy...the threshold of “exceptional public importance ... in the public interest” is not insurmountable...it is clear that notwithstanding the possibility of an appeal, s. 16 itself is an effective remedy which an applicant may use to vindicate his rights. Again, there have been many cases in which persons have successfully challenged an EAW seeking their surrender.”⁴⁰

In sum, therefore, McKechnie J. considered that the effective remedy requirement was satisfied by the very existence of section 16 of the EAW Act 2003, and did not require a further possibility of appeal following an initial judgment.

As in the asylum context, the implications of Article 24 on the rights of the child have been raised and considered in a number of EAW cases, but Article 24-based arguments have been unsuccessful to date.⁴¹ This issue will undoubtedly be developed further in the future.

See, for instance, in *Minister for Justice and Equality v T.E.*,⁴² in which the Court noted that, while Ireland (in contrast to the UK) had not incorporated the UN Convention on the Rights of the Child into its domestic law, by virtue of Article 24 of the Charter, read in conjunction with its Explanations, that Convention nevertheless had some effect in the Irish courts.⁴³

In *Minister for Justice v D.L.*⁴⁴, the High Court considered whether Article 24 of the Charter applied to the question whether, in taking a decision to surrender an individual pursuant to an EAW, humanitarian grounds (in that case, the fact that the accused’s daughter was seriously ill) for postponing the decision on surrender applied. The Court discussed the issue of the scope of application of the Charter in some detail, concluding that, on balance in that case, it was unnecessary to rely on the Charter:

“The Court, in making an assessment as to whether a postponement is warranted, in circumstances where Article 8 [of the Convention] is engaged and prejudice to a child of the proposed extraditee is relied upon as constituting the humanitarian grounds, is entitled, and is indeed obliged having regard to the jurisprudence of the ECtHR, to have regard to the best interests of the child as “a” primary consideration. The Court agrees with counsel for the applicant that it is not necessary for the respondent to rely on the Charter in this regard.

⁴⁰ *Ibid* at para. 91.

⁴¹ See, e.g., *Minister for Justice and Equality v P.G.* [2013] IEHC 54. See also, *Minister for Justice and Equality v T.E.* [2013] IEHC 323.

⁴² *Minister for Justice and Equality v T.E.* [2013] IEHC 323

⁴³ *Ibid* at para. 121.

⁴⁴ [2011] IEHC 248.

While the Charter has been relied upon by the respondent it is not necessary for the purpose of giving judgment in this case for the Court to decide definitively whether or not it may be relied upon in the European arrest warrant context, and if so in what circumstances it may be relied upon. The Court will not decide a moot. That said, and subject to the possibility of being persuaded otherwise after full argument in a future case in which the issue requires to be adjudicated on definitively, I see no reason at the present time to deviate from a provisional view which I have expressed previously in an obiter dictum in Minister for Justice, Equality and Law Reform v Adam (No 1) [2011] IEHC 68 (Unreported, High Court, Edwards J., 3rd March, 2011), that in an appropriate case (i.e., where a right is being relied upon rather than a principle) the Charter can be relied upon in the European arrest warrant context.

The Court holds its provisional view notwithstanding that the Charter must be regarded as forward looking and therefore did not apply at the time of the legislative implementation of the Framework Decision in terms of the enactment by the Oireachtas of the Act of 2003. However, the Court tends to agree with the respondent that in operating the Act of 2003 which incorporates the underlying Framework Decision, the Court, as a relevant Member State authority, is ostensibly acting within the scope of EU law. However, the Court also tends to agree with counsel for the applicant that Article 24(2) of the Charter contains an expression of principle rather than the enumeration of a right that can be relied upon directly. Be all of that as it may, these issues are academic in the circumstances of this case because under the Convention the Court is obliged in any event to have regard to the best interests principle.”

However, the application for postponement was refused in that case.

The Charter has frequently been relied upon in conjunction with constitutional and Convention arguments; in some cases, the relevant constitutional right has been considered to go further. In *Minister for Justice, Equality & Law Reform v Nolan*,⁴⁵ for instance (which concerned the issue of the obligation to surrender for the purposes of preventative detention), Edwards J. considered that the constitutional right not to be deprived of liberty save in accordance with the law went further than analogous rights under the Charter and Convention:

“The Court is further reinforced in its view that the right in Article 40.4.1 ° is a truly fundamental right that is intended to benefit a citizen both within and without the

⁴⁵ *Minister for Justice, Equality & Law Reform v Nolan* [2012] IEHC 239

*national territory, by the fact that rights framed in a broadly analogous way are also guaranteed both by Article 5 of the ECHR and Article 6 of the Charter of Fundamental Rights of the European Union. However, the right to liberty is guaranteed in somewhat stronger terms under Article 40.4.1 °, or perhaps it is more correct to say that it is less heavily circumscribed. It is presumably for this reason that counsel for the respondent has focused the entirety of his argument on Article 40.4.1...*⁴⁶

In still other cases, while the Charter has been argued, the Court has overlooked the Charter in its judgment and reasoned solely on the basis of the relevant Convention right, without providing any reason for so doing.⁴⁷

In *Minister for Justice and Equality v Ostrowski*⁴⁸, the Supreme Court was asked to consider whether a decision to surrender an individual pursuant to a European Arrest Warrant was compatible with Article 8 of the Convention, in circumstances where it was alleged that surrender would be disproportionate due to the trivial nature of the offence at issue. The Supreme Court rejected this argument on grounds that a decision to surrender that otherwise fell within the terms of the EU Framework Decision on the EAW would only exceptionally be reviewed for proportionality. It would seem that the court was only asked to consider compliance with Convention and constitutional rights, and compliance with the Charter was apparently not pleaded.⁴⁹

Finally, it is of interest that, in *Gilligan*, MacMenamin J. relied on Article 49(3) of the Charter, requiring that penalties be proportionate to the criminal offence, when considering the sentencing power of the judiciary in a purely domestic criminal law context.⁵⁰

Data Protection

The relevance of Article 8 of the Charter, on protection of personal data, was raised before the High Court in *Digital Rights Ireland*, which resulted in the reference and important judgment of the Court of Justice annulling the EU's 2006 Data Retention Directive.⁵¹ McKechnie J. relied on Article 47 of the Charter, as well as the general principle of

⁴⁶ *Ibid* at para. 119.

⁴⁷ See, for instance, *Minister for Justice and Equality v Jermolajevs* [2013] IEHC 102 (Edwards J.); *Minister for Justice and Equality v Ciesielski* [2013] IEHC 101. See further cases discussed above from p. 80 *et seq.*

⁴⁸ *Minister for Justice and Equality v Ostrowski* [2013] IESC 24

⁴⁹ *Ibid*; see judgment of McKechnie J. at para. 38 and (considering the Charter in interpreting the principle of proportionality of criminal penalties) at para. 82.

⁵⁰ *Gilligan v Ireland & ors* [2013] IESC 45, at para. 40.

⁵¹ *Digital Rights Ireland Ltd -v- Minister for Communication & Ors* [2010] IEHC 221.

effectiveness of EU law, in holding that the plaintiff – despite being a corporation - had *locus standi* to bring its claim, as,

“the Courts may be required to take a more liberal approach to the issue of standing so that a person’s rights thereunder are not unduly hampered or frustrated. The rules on standing should be interpreted in a way which avoid making it ‘virtually impossible’, or ‘excessively difficult’, or which impedes or makes ‘unduly difficult’, the capacity of a litigant to challenge EU measures of general application under Art. 267 TFEU...That is not to say that where questions of EU law are raised and a preliminary reference requested, the Court is automatically precluded from refusing a plaintiff standing. However, as was the case with regards to the power to grant interim relief in The Queen v. Secretary of State for Transport, ex parte Factortame Ltd & Ors. [1990] ECR I-2433, if the Court would be otherwise minded to allow standing in relation to the questions raised, but for a strict application of the national rules on locus standi, the Court should nonetheless grant standing where to do otherwise would render the plaintiff’s Community rights effectively unenforceable.”⁵²

More recently, in *Schrems*, the High Court has referred the question whether the Irish Data Commissioner is bound, (notwithstanding Articles 7 and 8 of the Charter,) by the decision of the European Commission of July 2000, implementing the 1995 Data Protection Directive, which provides that the data protection regime in the United States is adequate and effective where the companies which transfer or process the data to the United States self-certify that they comply with the principles set down in this Commission decision, *i.e.*, the Safe Harbour regime.⁵³ The applicant has claimed in the Irish proceedings that the Irish Data Protection Commissioner should exercise their statutory powers to direct that transfer of personal data from Facebook Ireland, who was a designated data controller under the EU regime, to its parent company in the US should cease. The Commissioner, however, has argued that they are bound by the terms of the European Commission decision. The case is pending before the CJEU.⁵⁴

It is of interest that, in the referring judgment, Hogan J. considered that the position under EU law as regards the rights to privacy and data protection is equally clear and parallels the position under Irish law, albeit “perhaps that the safeguards for data protection under the EU

⁵² *Ibid* at para. 46.

⁵³ *Schrems v Data Protection Commissioner* [2014] IEHC 310.

⁵⁴ Case C-362/14.

Charter of Fundamental Rights thereby afforded are perhaps even more explicit than under our national law.”⁵⁵ He continued to offer the following view,

“...it is not immediately apparent how the present operation of the Safe Harbour Regime can in practice satisfy the requirements of Article 8(1) and Article 8(3) of the Charter, especially having regard to the principles articulated by the Court of Justice in Digital Rights Ireland. Under this self-certification regime, personal data is transferred to the United States where, as we have seen, it can be accessed on a mass and undifferentiated basis by the security authorities. While the FISA Court doubtless does good work, the FISA system can at best be described as a form of oversight by judicial personages in respect of applications for surveillance by the US security authorities. Yet the very fact that this oversight is not carried out on European soil and in circumstances where the data subject has no effective possibility of being heard or making submissions and, further, where any such review is not carried out by reference to EU law are all considerations which would seem to pose considerable legal difficulties. It must be stressed, however, that neither the validity of the 1995 Directive nor the Commission Decision providing for the Safe Harbour Regime are, as such, under challenge in these judicial review proceedings.

The Safe Harbour Regime was, of course, not only drafted before the Charter came into force, but its terms may also reflect a somewhat more innocent age in terms of data protection. This Regime also came into force prior to the advent of social media and, of course, before the massive terrorist attacks on American soil which took place on September 11th, 2001. Outrages of this kind - sadly duplicated afterwards in Madrid, London and elsewhere - highlighted to many why, subject to the appropriate and necessary safeguards, intelligence services needed as a matter of practical necessity to have access to global telecommunications systems in order to disrupt the planning of such attacks.”⁵⁶

Family and Child Law

The Charter ‘s impact has also been felt in family law, in cases that have primarily focused on the implications of Article 7 on the right to respect for private and family life, and Article 24 on the rights of the child.

⁵⁵ *Schrems v Data Protection Commissioner* [2014] IEHC 310 at para. 58.

⁵⁶ *Ibid* at paras. 62-63.

In *J. McB v L.E.*,⁵⁷ the Supreme Court referred a question using the urgent PPU preliminary reference procedure, in a case concerning *inter alia* the compatibility with EU law of the Irish law requirement of an agreement or court order in order for an unmarried father to have custody rights of a child. The Court of Justice held such requirement to be compatible with the Brussels II bis Regulation, interpreted in the light of Article 7 of the Charter. Importantly, the CJEU held there to be no significant difference between the requirements of Article 7 of the Charter and Article 8 of the Convention in this respect.

In *M.N. v R.N.*,⁵⁸ Finlay Geoghegan J. used Article 24 of the Charter to interpret the Brussels II bis Regulation to hold that a six year old child must have the opportunity to be heard in an application to be returned to his place of habitual residence (a principle which has subsequently been affirmed by the Supreme Court).

By contrast, in *R v R*,⁵⁹ Sheehan J. took Article 24 of the Charter into account in holding that the age and maturity of the minor at issue in that case were such that it was appropriate to have her views taken into account in deciding whether or not to order a return of an unlawfully removed child pursuant to the Hague Convention on the Civil Aspects of Child Abduction and the Brussels II bis Regulation, in circumstances where the child objected to such return.

In *M.N. v R.N.*,⁶⁰ Sheehan J. considered, again, that the child at issue was of an age and maturity such that it would be appropriate to take into account his views in circumstances where he had been unlawfully removed from the country of residence of his father. However, he relied on Article 24(3) of the Charter, which provides that,

“Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.”

Sheehan J. held that the child’s wish to remain with his mother must be treated with care as,

“While it is clearly important to take the objections of the child into account, one has to be careful when considering the views of a young male child who has expressed a preference for his mother. The importance of a father’s role in a child’s upbringing may not be sufficiently appreciated by a young person, and is something that this

⁵⁷ *J. McB. v L.E.* [2010] IESC 48.

⁵⁸ *M.N. v R.N.* [2009] 1 I.R. 388.

⁵⁹ *R v R* [2008] IEHC 162.

⁶⁰ *M.N. v R.N.* [2009] IEHC 213. Considered in *Li. v La.* [2009] IEHC 585.

Court is obliged to acknowledge. Indeed, this seems to be implicit in Article 24(3) of the Charter of Fundamental Rights of the European Union...

In light of the above I hold that the child's views in this case cannot be determinative, particularly when one takes into account his young age.”⁶¹

In *M.H.A. v A.P.*,⁶² Finlay Geoghegan J. ruled that Article 24(2) of the Charter must be taken into consideration in an interlocutory application by a father for an order for return of his child to Ireland pending a full custody hearing and decision on the question of custody. Similarly, in *V. v U.*,⁶³ MacMenamin J. expressly took Article 24(3) of the Charter into account (as interpreted by the CJEU in *McB*)⁶⁴ in holding that the best interests of the children in that case militated in favour of keeping the children in a jurisdiction where they had access to two parents, rather than just one.

The reliance on the Charter is also evident in family law decisions at District Court level: see, for instance, *Health Service Executive v A.M. & H.I.*,⁶⁵ where Article 24 was relied upon in a judgment on a care order under section 18 of the Child Care Act 1991 (*i.e.*, a purely domestic context).⁶⁶

Companies' Rights

The implications of the Charter for companies' rights have also come before the Irish courts.

In *McDonagh v Ryanair*, the Dublin Metropolitan District Court referred a question to the Court of Justice on the rights compatibility of the EU rules requiring airlines, subject to certain conditions, to provide passengers with compensation in the event of flight cancellation. Ryanair challenged these rules in the context of the airspace closure following the Icelandic volcanic eruption, arguing *inter alia* that this breached its Article 16 Charter freedom to conduct a business, and its Article 17 Charter right to property. In rejecting this argument, the Court of Justice emphasise the need to strike a “*fair balance*” between competing rights, *viz.* the Article 38 Charter requirement that Union policies ensure a “*high level of consumer protection*”.⁶⁷

⁶¹ *M.N. v R.N.* [2009] IEHC 213 at para. 32.

⁶² *M.H.A. v A.P.* [2013] IEHC 611.

⁶³ *V. v U.* [2011] IEHC 519.

⁶⁴ Case C-400/10 PPU [2010] E.C.R. I- 8965

⁶⁵ *Health Service Executive v A.M. & H.I.* [2013] IEDC 10.

⁶⁶ For an overview of further District Court cases on child law and the Convention, see above from p. 87.

⁶⁷ Case C-12/11 [2013] ECR I-43.

The relevance of the right to have one's intellectual property protected, contained in Article 17(2) of the Charter, was considered in *EMI Records (Ireland) Ltd v Data Protection Commissioner*, in the context of the need to balance the right to privacy of internet subscribers against the right of recording companies to protect their intellectual property.⁶⁸ However, the Charter was not decisive in the outcome of that case.

In *Dowling v Minister for Finance*,⁶⁹ in the context of an interlocutory application to prevent the Minister for Finance from selling off Irish Life Group, the applicant argued that the conditions for granting interlocutory injunctions as a matter of Irish law were so strict as to breach the Article 47 Charter right to an effective remedy. While the Supreme Court rejected that argument, the judgment of Clarke J. discusses the relevant requirements and implications of EU law in detail.⁷⁰ In a subsequent judgment,⁷¹ the High Court decided to make a preliminary reference to the CJEU on a substantive issue of the compatibility of the Directions Order of the High Court made pursuant to the Credit Institutions (Stabilisations) Act 2010 with, *inter alia*, the Second Company Law Directive. The Directions Order had the effect of recapitalising Irish Life and Permanent via an injection of €2.3 billion by the State, in return for shares, thus severely reducing the value of the equity held by existing shareholders. The applicant had argued, *inter alia*, that this breached Article 17 of the Charter on the right to property.

Social and Employment Rights

A final field in which the impact of the Charter has begun to be felt is that of social/employment rights. This is particularly noticeable in the determinations of the Labour Court and the Equality Tribunal, which have cited the Charter in a number of important rulings.

In *Ms Z v A Government Department*,⁷² the Equality Tribunal rejected the complainant's claim that the respondents discriminated against her on the grounds of gender and disability contrary to sections 6(2)(a) and (g) of the Employment Equality Acts 1998 to 2011, by not granting her either paid maternity leave or paid leave similar to adoptive leave on the birth of her daughter to a surrogate mother. This conclusion followed a preliminary reference which had been made by the Equality Authority to the CJEU raising, *inter alia*, the questions

⁶⁸ *EMI Records (Ireland) Ltd & Ors -v- The Data Protection Commissioner & Anor* [2012] IEHC 264.

⁶⁹ [2013] IESC 37

⁷⁰ *Ibid.* See also *Okunade v Minister for Justice* [2012] IESC 49 for the immigration context.

⁷¹ *Dowling & ors v Minister for Finance* [2014] IEHC 418.

⁷² DEC-E2014-050 (9 July 2014).

whether the relevant EU Directives, Directive 2006/54 on equal treatment of men and women in employment and occupation, and the broader Directive 2000/78 on equal treatment in employment and occupation, should be interpreted to mean that the respondent's refusal constituted unlawful discrimination and, if not, whether such Directives were invalid. The complainant relied, *inter alia*, on Articles 21, 26 and 34 of the Charter (on non-discrimination, integration of persons with disabilities, and social security and social assistance, respectively).

In its ruling on the reference made to the CJEU by the Equality Tribunal⁷³, the CJEU (Grand Chamber) ruled that the situation of a commissioning mother did not fall within the scope of Directive 2006/54. As a result, the CJEU held it to be unnecessary to examine the question of the compatibility of these Directives with the Charter. Further, while the fact that the commissioning mother did not have a uterus constituted a disability in the broad sense, it was not a relevant disability in the sense of Directive 2000/78, as it did not hinder her access to employment. However, the CJEU held that the Directives must be interpreted, so far as possible, in the light of the UN Convention on the Rights of Persons with Disabilities.

Applying the CJEU's ruling to the facts of the case upon its return, the Authority ruled that there had been no discrimination in the case at hand.

In *Trailer Care Holdings v Healy*,⁷⁴ which concerned a claim of pregnancy-related discrimination in the form of dismissal from employment, the Labour Court noted that, while the principle prohibiting discrimination on grounds of pregnancy as a form of sex discrimination had long been established by the EU courts:

“Equality on grounds of gender is now expressly guaranteed by Article 23 of the Charter of Fundamental Rights of the European Union. Article 33.2 of that Charter also incorporates the prohibition of dismissal on grounds of pregnancy established in jurisprudence of the CJEU. It provides: -

To reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

The Charter is now incorporated in the Treaty on the Functioning of the European Union (the Lisbon Treaty) and has the same legal standing as all preceding and

⁷³ Case C-363/12

⁷⁴ Determination No. EDA128 (16 March 2012).

current Treaties. It can thus be properly regarded as part of the primary legislation of the European Union.”

The Labour Court further noted that, in recent CJEU jurisprudence on pregnancy-related discrimination, the CJEU had referred to Article 23 of the Charter.⁷⁵

In *John McAteer v South Tipperary County Council*, the Equality Tribunal awarded the complainant €70,000 in a claim brought by an evangelical Christian for discrimination in relation to his conditions of employment and dismissal from the Council contrary to section 6(1) & 6(2)(e) and in terms of section 8 of the Employment Equality Acts, 1998, on grounds of manifestation of religion (see also, the discussion of the ECHR analysis in chapter 4 above). Specifically, the complainant had been instructed to desist from speaking about his faith during normal working hours. The Equality Tribunal first considered the question whether discrimination on grounds of religion was covered by the Employment Equality Acts and the EU Directive 2000/78 on equal treatment in employment. The Authority noted that, while discrimination on grounds of manifestation of religion was not expressly covered by the Directive, Article 10(1) of the Charter provides,

“Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.”

For this reason (and also in light of Article 9 ECHR), the Equality Tribunal held that discrimination on grounds of manifestation of religion should be considered as covered by the Employment Equality Acts. On the facts, the *prima facie* evidence of indirect discrimination on this ground had not been rebutted, as the respondent had failed to show that it was objectively justifiable to maintain a ban on the complainant speaking about his religion when there was no evidence that it had any impact on him carrying out his duties for the Council or that what he was doing was either offensive or inappropriate, or constituted harassment.⁷⁶

⁷⁵ See similarly *Ger Lally v Siniacka Rusek* Determination No. EDA1314 (23 July 2013); *Gillick t/a Twist Foods v Rosploch* ;Determination No. EDA1329 (11 November 2013); *Moonlite Cleaning Services Limited v Drabik* Determination No. EDA1416 (12 May 2014).

⁷⁶ DEC-E2014-045 (24 June 2014). The Convention aspects of this decision are discussed above at p.92.

Chapter Eight: Conclusions - European Rights in Irish Courts

Overview

This Report explored the extent to which the Irish Superior Courts, the District Court and select tribunals have engaged with rights-based arguments under the Convention, ECHR Act 2003 and the Charter over the 10 years from 2004 to 2014.

As the figures show, Convention/Charter issues have been considered in 581 cases in the Superior Courts during this time period (see chapter 1 and the statistics provided in Annex 1 to this Report). From a purely numerical perspective, this unquestionably represents a significant level of engagement with European rights in our courts. Notably, the figures show that the level of reliance on Convention/Charter rights before the Irish Superior Courts has increased markedly over this period.

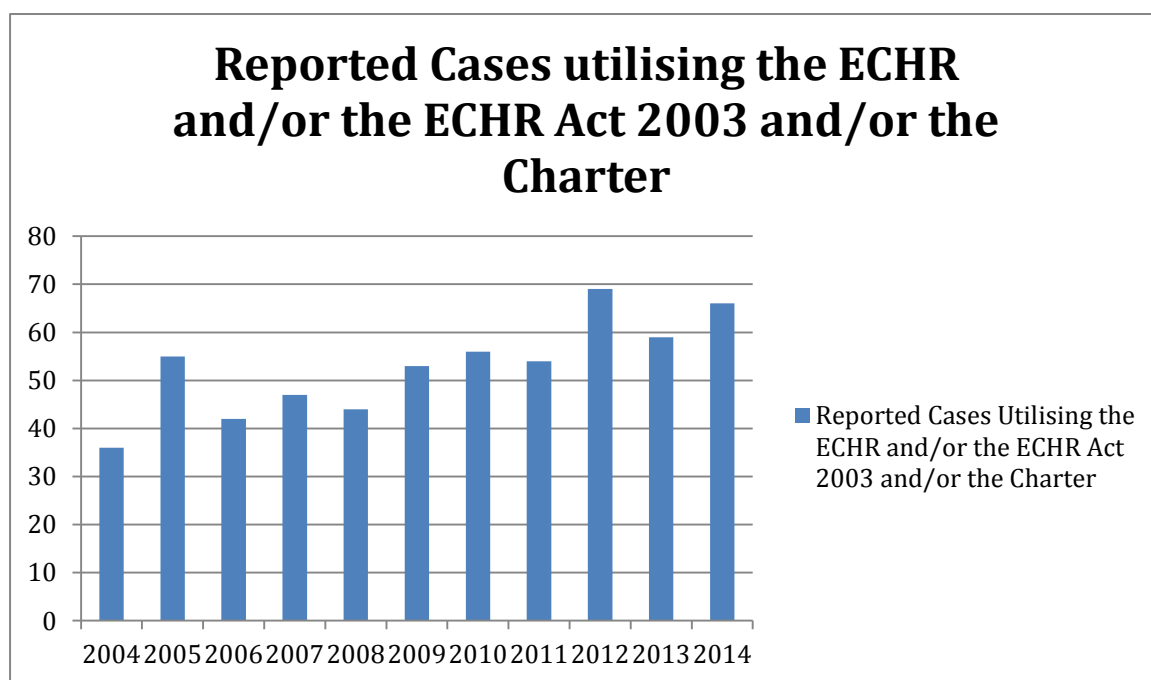


Figure 8.1

Drilling down into these figures, however, reveals that much of this increase has been due to reliance on Charter arguments, with references to Convention arguments remaining relatively stable over the 10-year period.

References to the EU Charter of Fundamental Rights in Irish Superior Court judgments, 2005-2014

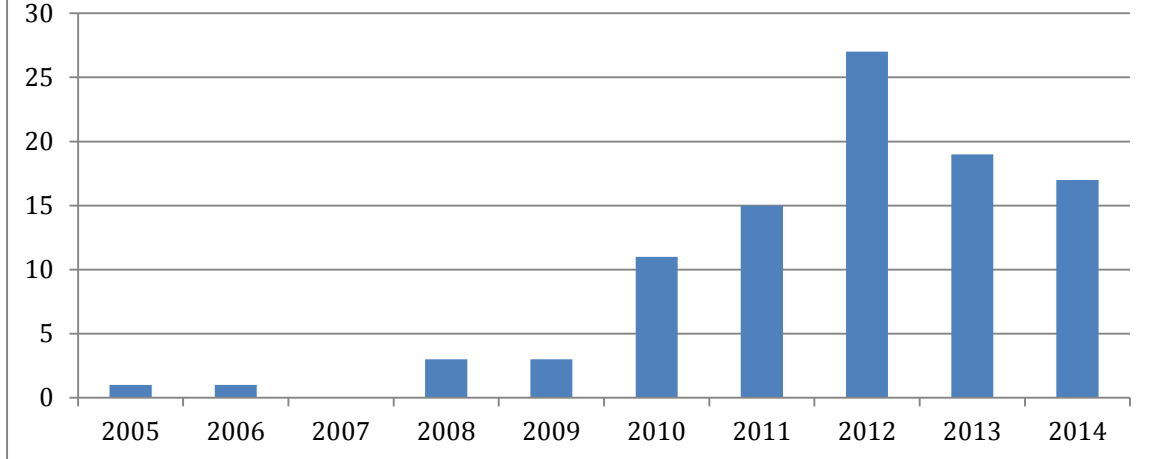


Figure 8.2

While Convention arguments have been considered across a greater variety of fields of law than Charter arguments, it is striking that the highest level of engagement with European rights is to be found, for both the Convention and the Charter, in the fields of asylum/immigration law and the European Arrest Warrant.

Conversely, areas such as housing law and mental health law show high levels of engagement with the Convention, but not with the Charter as these fields at present largely lie outside the scope of EU law. Other fields, such as employment law, show a higher degree of reliance upon Charter rights, drawing on the long-established body of case law on discrimination in employment rights which developed in EU law even prior to the attribution of binding force to the Charter in 2009.

The Convention and ECHR Act 2003

Writing in 2003, Hogan believed that the ECHR Act 2003 would not result in any “*huge*” or “*immediate*” improvement to the existing corpus of constitutional rights¹ and this could lead to either a “*levelling up*” or “*levelling down*” of rights protection.²

This Report demonstrates that Irish courts have, overall, sought to substantially engage with the Convention within the limits of our constitutional framework (see chapter 2 above). While there may be areas in which this rights analysis is not as piercing or as rights-orientated as one might expect, at times this is due to limitations in the ECtHR’s own jurisprudence (see, for instance, in the mental health law field, *L v Kennedy*, considered in chapter 4 above).

At other times, problems have emerged in the Irish courts due to a lack of clarity in the ECtHR’s jurisprudence. For instance, the significant differences between the High Court and Supreme Court decisions in *Bode* in defining the precise requirements of the Convention on immigration and family issues, discussed in chapter 4, are in some ways mirrored by the very confused Strasbourg jurisprudence on these issues.

Further, the Irish courts have been cognisant of the limits placed on the effectiveness of the Convention by the ECHR Act 2003 (see, for instance, *McD v L*, considered in chapter 3 above). Crucially, as *McD* illustrates, the Convention does not have direct effect in the Irish courts.

The courts’ cautious approach to the interpretive obligation provided under section 2 of the ECHR Act 2003 (see further, chapter 3) emphasises traditional rules of and approaches to statutory construction. The courts have often exercised significant restraint when invited by applicants to read a statutory provision in a manner which may seek to imbue this provision with a more Convention-compatible interpretation (see, for instance, *Ryan v Clare County Council*, discussed in chapter 3). Similar restraint is evidenced in the housing law cases of *O’Donnell* (2007), *O’Donnell* (2008) and *O’Donnell* (2015) (discussed in chapter 4). The Supreme Court in particular has cautioned against courts contemplating “*judicial legislation*”,³ and interpreting legislation well beyond the bounds of what the Oireachtas

¹ Hogan, G. “Incorporation of the ECHR: Some Issues of Methodology and Process” in Kilkelly, U. (ed.) *ECHR and Irish Law* (Cork; Jordans, 2004), p. 16.

² *Ibid.* In relation to the ECHR Act 2003 as a whole, Hogan and Whyte have called the declaration of incompatibility provisions as “cumbersome (albeit ingenuous)”. Hogan, G. and Whyte, G. *J.M. Kelly: The Irish Constitution* (Dublin: Lexis Nexis Butterworths, 2004), p. 800 at para. 6.2.105.

³ This particular phrase was recently utilised by MacMenamin J. in *O’Donnell v South Dublin County Council* [2015] IESC 28 at para. 74.

intended. The cautious approach of the courts towards the “interpretative duty” under section 2 of the ECHR Act 2003 will be viewed by some as a carefully calibrated and reflective approach towards the constitutional separation of powers (see further, chapter 3). To others, it may be viewed as a lost chance for a more rights-orientated approach.

While the approach of the Superior Courts to their interpretative obligations is, in certain cases, disappointing, this has not prevented engagement with the core content of substantive rights. The references to the Convention/ECHR Act 2003 by the District Court (to the extent these judgments are published), as well as by some of the tribunals examined by this Report, show a promising permeation of rights discourse across the judicial spectrum. In the Superior Courts, chapter 4 provides numerous examples of cases where, even when Convention/the ECHR Act 2003 arguments do not result in a preferred outcome for an individual litigant, the Superior Courts have engaged with Convention/ECHR Act 2003 arguments in a substantive and thoughtful manner.

One of the most striking contributions of the Convention and the ECHR Act 2003 to Irish law has been the move to a more rights-based judicial review process post-*Meadows*. While *Meadows* is also, of course, a constitutional rights case, the judgment of Fennelly J. in particular shows the clear influence of the Convention, holding that, in assessing the effectiveness of a remedy (in that case, judicial review),⁴

“...it is relevant that s. 3 of the European Convention of Human Rights Act 2003 places an obligation on every organ of the State to perform its functions in a manner compatible with the State's obligations under the provisions of the Convention. In the Convention context, we must be conscious that the European Court of Human Rights is influenced by the effectiveness of legal remedies against administrative decisions, when it considers the effectiveness of a national remedy pursuant to article 13.”

Meadows means that where issues of constitutional or Convention rights arise, first-instance decision-makers should now feel the impact of human rights norms and standards on their substantive decision-making function. While *Meadows* relates to the field of asylum and immigration law, its impacts will still be felt across many of the legal fields discussed in this Report.

The potential cross-fertilisation of constitutional rights with Convention rights is also evidenced by cases such as *Gormley*, where the Supreme Court relied significantly on ECtHR jurisprudence in re-interpreting the extent of constitutional rights of an accused to

⁴ *Meadows v Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701 at 826.

consult a lawyer prior to questioning continuing. In addition, the right to have a lawyer present during questioning, while not specifically argued in *Gormley*, now appears to have a constitutional grounding, supplemented by Convention jurisprudence. This cross-fertilisation is not solely limited to the criminal sphere. As the 2015 Supreme Court decision in *O'Donnell* and the 2014 High Court decision in *C.A and T.A* show, there has been more of a tendency to interpret constitutional rights in light of Ireland's obligations under the Convention, through the prism of the ECHR Act 2003 (see further chapters 3 and 4).

Other clear examples of the engagement of the Irish courts, such that Convention arguments have made a real difference, include the following:

- In asylum/immigration law, family rights under Article 8 of the Convention now need to be explicitly considered by administrative immigration authorities: see in particular the discussion of *Gorry* and *F.B* in chapter 4.
- In criminal law, ECtHR jurisprudence has been important in a variety of judgments concerning the admissibility of evidence, the question whether whole life sentences are inhuman and degrading, the scheme of criminal legal aid, and access to a solicitor, discussed in chapter 4;
- In family and child law, the District Court has recognised the usefulness of the Convention in balancing the best interests of the child, with the rights and obligations of parents and guardians. The courts have, as seen in the Supreme Court decision of *McD v L* and the High Court decision in *Zappone*, been wary of going beyond the strict confines of ECtHR decisions (see also, chapter 2).
- In equality, housing and social rights cases, there has been some re-evaluation (see *C.A. and T.A.* and the *O'Donnell* cases) of the potential applicability of the Convention/ECHR Act 2003 to social and economic rights. However, as evidenced in *Dooley* (see chapter 4), again, the Superior Courts will be cautious about applying a Convention right beyond the strict confines of ECtHR decisions.

This does not mean that the engagement with substantive Convention rights jurisprudence has been all positive. The issue of delays in accessing justice in the criminal and civil spheres still occur. The difficulty in identifying what precisely individuals' rights are (in particular in immigration and asylum law, and also in relation to social rights) is evidenced in our discussion of the case law in chapters 3 and 4 above.

Remedies to date provided by Irish courts as regards Convention compliance have been somewhat limited: see for instance our discussion of injunctions in chapter 3. Further, where courts have made declarations of incompatibility, this has not to date resulted in a speedy resolution of a successful rights claim, as seen in chapters 3 and 4. However, this is attributable more to the failure of the *Oireachtas* to bring Irish law into Convention compliance with any reasonable expedition, rather than to the approach of the courts. Indeed, the scheme of the ECHR Act 2003 specifically envisaged the *Oireachtas* in having a substantial role in bringing Irish law into line with Convention obligations. As is noted in chapter 2 (see particularly the list of ECtHR cases brought against Ireland at Table 2.1), and in our discussion of remedies in chapter 3, recourse to the ECtHR may therefore be the only option for some litigants.

The Charter

Overall, the evidence to date shows that the Charter is making a real difference to judicial rights protection in Ireland in many cases, although judicial approaches to the Charter are not yet entirely consistent.

At its most basic level, some idea of the increasing impact of the Charter before the Irish courts may be gauged from Figure 8.2 above, showing an explosion in cases in which the Charter has been raised before the Superior Courts, particularly since becoming legally binding *qua* EU primary law in December 2009. As chapters 6 and 7 demonstrate, since this date, the Irish Superior Courts, and the legal representatives appearing before these courts, have largely embraced the Charter and have been generally willing to add it to the ultimate sources of fundamental rights protected by the Irish courts, within its scope of application.

Further, such influence has by no means been confined to the Superior Courts. In particular, the level of reliance of the Labour Court and Equality Tribunal on the Charter as a relevant source of rights protection during the period surveyed is striking (drawing on, as noted above, a rich vein of previous EU law jurisprudence on non-discrimination in employment). The openness of the Equality Tribunal to the influence of EU law in this respect is particularly remarkable in its important preliminary reference in the *Z* case, concerning *inter alia* the question whether the refusal to grant maternity leave to a commissioning mother in case of surrogacy infringed EU law, as interpreted in light of the Charter.⁵

⁵ See chapter 6.

Nevertheless, the case law highlights some key issues of controversy in evaluating the Charter as a source of rights protection within Ireland.

First, it is clear that the question of the scope of application of the Charter remains, in many cases, a critical issue. As discussed in chapter 6, in many instances, Charter-based arguments have failed on this ground. In some such cases, the lack of nexus with EU law has been evident: see, for instance, the comments of Hogan J. in the right to jury case, *D.F. v Garda Commissioner*.⁶ Conversely, in other cases, the Charter has been applied in cases where there is no apparent link with EU law, such as the child-care field.

In still other cases, the Charter has not been applied, because (it would seem) it was not pleaded in the particular case at hand, and the Charter is as a result not mentioned. This gives rise to an inconsistency of application of Article 51 of the Charter and, ultimately, of rights protection before the Irish Courts. This is, in our view, probably best seen as a teething problem which is to some extent inevitable with the addition of a major source of fundamental rights law to the already existing constitutional and ECHR sources. As judges and counsel become more familiar with the function and content of the Charter, and as CJEU jurisprudence develops giving meat to those Charter rights, it may be assumed that the Charter will be overlooked in fewer cases.

In other cases, while the Charter has been invoked, what may have seemed like promising efforts to invoke the Charter in individual cases have failed on the ground that they do not satisfy the requirements of Article 51 of the Charter, in circumstances where was not necessarily evident that this was so. This is a particular problem in cases in fields which are in part, but not entirely, covered by EU law, especially where such coverage may be increasing. As chapter 7 notes, the asylum/immigration field is a classic example, where the Irish opt-out from measures in the freedom, security and justice field adds further complication to the mix.

Much of this uncertainty may, however, be traced to the parallel uncertainty in the CJEU's jurisprudence on the meaning of Article 51 which, as Hogan J. has noted in *AO v MJELR (No. 3)*,⁷ is currently in a rapid state of development (see further, chapter 6). Just as we noted in the case of the Convention, therefore, a not insignificant part of the confusion in the Irish courts as to the meaning of Article 51 may stem from the ambiguities and lack of clarity in the CJEU's own jurisprudence on this issue.

⁶ See chapter 5.

⁷ *Ibid.*

Nevertheless, it may reasonably be predicted that, as the EU *acquis* continues to grow, these difficult questions of Charter applicability will spread to other fields of EU law such as, for instance, criminal law.

Secondly, linked to this, the relationship between the ECHR, constitutional and Charter rights continues to be worked out before the Irish courts. As noted in chapter 5, Articles 52 and 53 indicate that Charter rights will generally be interpreted consistently with relevant ECHR and constitutional rights, although the Charter may go further than the ECHR in its rights protection. While the Irish courts have not yet had an explicit *Carmody* turn in relation to the Charter, holding that constitutional rights must be considered prior to Charter rights, they have effectively adopted this position *de facto* in certain cases: see chapter 6. In many cases, as shown in chapters 6 and 7, however, the Irish courts have considered Charter rights alongside constitutional rights, and have read the relevant Irish constitutional jurisprudence and Charter jurisprudence, as Article 52(4) suggests, “*in harmony*” with each other.

In other cases, the relevant constitutional right has been held to go further than the Charter right: see, for instance, the discussion of the right to liberty in *Minister for Justice v Nolan* (see chapter 7). Perhaps the strongest role for the Charter, therefore, is likely to occur in fields where no equivalent constitutional right exists, or where the equivalent constitutional right is less strongly phrased, or has been interpreted less forcefully by the Irish courts than the CJEU’s interpretation of the Charter right. A prime example of the first category is Article 41 on the right to good administration, discussed in chapter 6, which does not have a constitutional equivalent. A further example is the right to protection of personal data, which is provided for expressly in the Charter (Article 8) but not in the Convention. Irish preliminary references have to date been central to the CJEU’s rapidly developing case law on this issue (see *Digital Rights Ireland* and *Schrems* (pending), each referred by the Irish High Court).

Needless to say, a critical test of the Irish courts’ approach to the Charter would arise in circumstances where a constitutional right and a Charter right were in conflict. No such case has yet arisen, and it may be recalled that, in the last instance where the possibility of a conflict between a right contained in the Constitution and a right of primary EU law emerged (in that case, the constitutional right to life of the unborn, and the economic right of free movement in the internal market), the CJEU deftly avoided the conflict by holding the relevant EU right to be inapplicable on the facts.⁸

⁸ Case C-159/90 *SPUC v Grogan* [1991] E.C.R. I- 4685.

Thirdly, a further remarkable feature of the engagement of the Irish courts and tribunals with the Charter over the past years has been the willingness to make preliminary references raising Charter issues to the CJEU. Such prominent references, discussed in chapters 6 and 7, have included:

- The reference from the High Court in *M.E.*, on the interpretation of the Dublin II Regulation in light of Article 4 of the Charter (2010);⁹
- The reference from the District Court in *McDonagh v Ryanair*, on the compatibility of EU rules on airline passenger compensation with Articles 16 and 17 of the Charter (2011);
- The reference from the High Court in *M.M.*, on the compatibility of the Irish bifurcated system for international protection in asylum law with Articles 41/47 of the Charter (2011);
- The reference from the Supreme Court in *Pringle*, on *inter alia* the compatibility of the ESM Treaty and other elements of the EU's response to the financial crisis with Article 47 of the Charter (2012);
- The reference from the Supreme Court in *H.N.*, on the compatibility of the asylum procedure with Article 41 of the Charter (2012);
- The reference from the Equality Tribunal in *Z*, on the interpretation of EU non-discrimination legislation in the surrogacy context and in light of Articles 21, 26 and 34 of the Charter (2012);
- The reference from the High Court in *Digital Rights Ireland v Minister for Communications*, on the compatibility of the EU Data Retention Directive with, *inter alia*, Articles 7, 8 and 52(1) of the Charter (2012);
- The reference from the High Court in *Schrems v Data Protection Commissioner*, on the compatibility of the Irish Data Protection Commissioner's refusal to order Facebook to cease transfer of data to the US with Articles 7 and 8 of the Charter (2014).

Certain of these cases have been dealt with via the CJEU's expedited mechanisms available in cases where an urgent response is necessary (see *M.E.* and *Pringle*). Notably,

⁹ Dates indicated represent the date in which the referring order was made, not the subsequent CJEU judgment.

McDonagh v Ryanair and *Z* illustrate that judges and decision-makers of all levels have been willing to make preliminary references; again, this is a possibility of direct access to the CJEU in a manner which is distinctive to EU law, and which does not exist within the Convention's architecture of judicial protection.

Overall, therefore, the evidence shows that the importance of the Charter in Irish jurisprudence is already considerable in fields such as asylum/immigration law, European Arrest Warrant law, data protection, family law, and social/employment law, but its importance has also been felt in the field of companies' rights, for instance. As the scope of EU law expands, it is undoubtedly the case that the influence of the Charter will continue to grow to include fields currently considered to be purely domestic in nature.

In sum, while the ECHR Act 2003 has had significantly more bedding-in time in comparison to the Charter, judges and decision-makers at all levels have certainly become more confident in their interpretation and application of European (Convention and Charter) rights during the 10 years reviewed. In turn, this reflects increased practitioner engagement and awareness with these rights, to which it is hoped this Report will contribute.

