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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

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Dr Liam Thornton, University College Dublin

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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
Treaty on the Functioning of the European Union	TFEU
Treaty on European Union	TEU

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, 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 an 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 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, 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 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 rights and employment rights.

Chapter 5 provides a background to the Charter, its scheme and content, and compares the status of the Charter and Convention in the Irish courts. It also considers the scope of application of the Charter and the relationship between the Charter, 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 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, ECHR Act 2003 and 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, 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 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	ECHR & ECHR Act 2003 Mentioned	Convention, not 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 field 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 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 on the ECHR 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.

[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).

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

> *"(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 2014 Act.

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]

[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.

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:

- 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:

---

[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].
.

- 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);
- 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 Charter[19] are only addressed to the institutions, bodies and offices of the European Union, and to EU Member States when implementing EU law[20] 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]

[18] See for example, *Hatton v United Kingdom* (2002) 34 E.H.R.R. 1 at para. 97.
[19] See below, pp. 104-108.
[20] See further discussion on scope and limitations on the application of the Charter below, pp. 111-113.
[21] Article 1 of the ECHR.
[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.

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 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 ECtHR[25] 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 groups[26] 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]

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[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.
[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 ECHR.
[26] Article 34 of the ECHR.
[27] Article 33 of the ECHR.
[28] Article 46 of the ECHR.
[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 EHRR 305, para. 24 and *McFarlane v Ireland* [2010] E.C.H.R. 1272 at para. 112.

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:[33]

> *"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 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."*

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 Convention[35]

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

When examining positive obligations a fair balance has to be struck between an individuals' 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 State[39] and non-state actors.[40] States are under a 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).*

[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.
[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 EHRR 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 EHRR 13, at para. 229.

*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, 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

[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, at p. 105.

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 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 1950[49] 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 have 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.

[46], Applic. No. 45036/98, *Bosphorus v Ireland*, 30 June 2005, at para. 149-150.
[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 Applic. No. 43643/10, *Hanzelkovi v Czech Republic*, judgment of the ECtHR (Fifth Chamber) 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.]

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
Applic. No. 332/57, *Lawless v Ireland* (*No. 1*; *No. 2* & *No. 3*), 1960-1961	Article 7	No Violation		Criminal Law
Applic. No. 6289/73, *Airey v Ireland*, 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 as amended)	Access to Justice (Civil Legal Aid)
Applic. 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
Applic. No. 10581/83, *Norris v Ireland*, 26 October 1988.	Article 8	Article 8	Criminal Law (Sexual Offences) Act, 1993	Private Life, Gender, Sexuality
Applic. 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
Applic. 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
Applic. No. 16969/90, *Keegan v Ireland*, 26 May	Article 6.1, Article 8, Article 14	Article 6.1 and Article 8	Adoption Act 1988	Family Law

[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).

1994.				
Applic. 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, *Quinn v. O'Leary and Others* [2004] IEHC 103	Criminal Law
Applic. 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
Applic. No. 31253/96, *McElhinney v Ireland*, 21 November 2011.	Article 6.1	No Violation		Tort, Public International Law
Applic. 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
Applic. No. 44179/98, *Murphy v Ireland*, 10 July 2003.	Article 10	No Violation		Media Law
Applic. 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: *Barry v Ireland*; *Mc Mullen v Ireland* and *O'Reilly v Ireland* below).	Property Law, Court Procedure, Delay.
Applic. 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.

Applic. No. 42297/98, *McMullen v Ireland*, 29 July 2004.	Article 6.1	Article 6.1	No clear compliance evidenced.	Court Procedure, Delay.
Applic. No. 55120/00, *Independent News and Media v Ireland*, 16 June 2005.	Article 10	No Violation		Tort, Defamation, Damages
Applic. No. 45036/98, *Bosphorus v Ireland*, 30 June 2005.	Protocol 1, Article 1	No Violation		Property Law, Sanctions
Applic 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.
Applic. 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 of judgments of the ECtHR* in May 2015. [53]	Criminal Law, Court Procedure, Delay
Applic. No. 41130/06, *Kelly v Ireland*, 14 December 2010	Article 6 Article 13	No Violation		Criminal Law
Applic. 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
Applic. No. 7812/04, *Superwood Holdings PLC and*	Article 6.1	Article 6.1.	No clear compliance evidenced.	Court Procedure, Delay

[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)

others v Ireland, 08 September 2011.				
Applic. No. 19165/08, *Donohue v Ireland*, 12 December 2013.	Article 6	No Violation		Criminal Law, Evidence
Applic. No. 35810/09 *O'Keeffe 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 *Department for Execution of judgments of the ECtHR* since January 2015.	Tort, Child Law

The Convention and Irish Law

In *Re O' 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:

> *"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."*

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.

[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.

In *Gilligan v Criminal Assets Bureau*,[55] 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:[56]

> *"…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…"*

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.[57]

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.

The European Convention of Human Rights Act 2003: An Overview

The European Convention of Human Right Act 2003 (hereinafter the ECHR Act 2003) indirectly incorporated the Convention into Irish law.[58] 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*[59] 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."*

[55] *Gilligan v Criminal Assets Bureau* [1998] 3 I.R. 69.
[56] *Gilligan v Criminal Assets Bureau* [1998] 3 I.R. 69 at 102.
[57] See, *Mahon v Post Publications* [2007] 2 I.L.R.M. 1.
[58] 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.
[59] *Foy v An tArd-Chlaraitheoir* [2007] IEHC 470 (19 October 2007) at para. 93

The 2003 Act was prospective in nature.[60] The ECHR Act 2003 came about, in part, as a result of the *Belfast Agreement*[61] and the pledge for comparable human rights protections on both sides of the border within the island of Ireland.[62]

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.[63] Under section 4 of the ECHR Act 2003 Irish courts (but not tribunals)[64] must take judicial notice of judgments, decisions, declarations and advisory opinions of bodies that include the European Court of Human Rights.[65] Section 2 of the ECHR Act 2003 poses 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 before and after the coming into operation of the 2003 Act.[66]

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.[67] 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

[60] 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 2003 Act, which obliges the Court to interpret legislation in a Convention compliant manner, the 2003 Act was not retrospective in nature.
[61] 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").
[62] 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.
[63] Section 3(2) of the ECHR Act 2003. Damages are limited to that available within each Court as if it exercising its tort jurisdiction.
[64] See below, p. 46 *et seq*.
[65] In addition, 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.
[66] 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.
[67] Section 5(1) of the ECHR Act 2003.

will continue in operation.[68] 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.[69] The Government in its sole discretion will then consider whether any payment will be made.[70]

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 proceedings.[71]

Unlike the Charter when areas of European Union law are under judicial scrutiny in Irish Courts,[72] the Convention does not have the potential to be directly effective in Irish law.[73] 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).

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.

[68] Section 5(2)(b) of the ECHR Act 2003 states that a declaration of incompatibility does not prevent an individual from bring a case against Ireland before the European Court of Human Rights (ECtHR).
[69] To date, one such *ex gratia* payment of "*about €50,000*" has been made. Mac Cormaic, R. "Compensation paid to Lydia Foy over gender recognition failures", *Irish Times*, 03 November 2014.
[70] 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.
[71] Section 6 of the ECHR Act 2003. For role of the Irish Human Rights and Equality Commission, see above p. 13 *et seq*.
[72] The relationship between the Charter and the Convention in Irish law is explored in more depth below, see pp. 113-116.
[73] The distinction between the Charter and Convention as regards direct effect of EU law is discussed below, see pp. 104-107.

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 ECHR 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;

Declarations of incompatibility and the ECHR Act 2003

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

The Irish Constitution contains a number of rights, explicitly or implicitly, which *prima facie* overlap with rights contained in the Convention. For instance, Ireland's constitution, *Bunreacht na hEireann* (1937), 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:[8]

> *"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*

[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] *McD v L* [2010] 2 I.R. 199 at 248.
[8] *McD v L* [2010] 2 I.R. 199 at 255.

in law for applying article 8 of the Convention to the status of the respondents or any 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."

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 entertained by the court. Denham C.J. stated:[10]

"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.'"

Cross-fertilisation between Rights Protected in the Constitution, the Convention and the ECHR Act 2003

Writing extra-judicially in 2014, Hogan states:[11]

[9] *M.D. (a minor) v Ireland* [2012] IESC 10, in particular see paras. 57-64.
[10] *M.D. (a minor) v Ireland* [2012] IESC 10 at para. 59.
[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.

> *"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."*

The extent of cross-fertilisation of rights standards between the Convention and 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 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:[13]

> *"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."*

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]

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[12] *The People (D.P.P.) v Gormley* [2014] 1 I.L.R.M. 377. Discussed in more detail below at p. 74.
[13] [2014] 1 I.L.R.M. 377 at 404.
[14] *C.A. & anor v Minister for Justice and Equality & ors* [2014] IEHC 532.
[15] [2014] IEHC 532, para 7.2 (Article 3 and the Constitution); paras 8.1-8.6 (Article 8 and the Constitution); para 8.9 (Article 8 (home), and Article 40.5). This case is discussed in more detail below, pp. 93 and 104, etc.

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. MacMenamin J., however, stated that the rights of the minor applicant should have been considered firstly "*in light of the Constitution*". MacMenamin J. noted:[21]

> "*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*

[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, involve different plaintiffs.
[17] For discussion on Convention points for this and other similar cases, see below pp. 98-100.
[18] [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.
[21] [2015] IESC 28 at para. 68

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."*

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)."

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 (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."[22]

However, the Supreme Court ruled,

"…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.[23]

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)*, 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.[24] 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 disproportionate in the circumstances outlined as would breach either of these*

[22] [2015] IESC 28 at para. 74.
[23] [2015] IESC 28 at paras. 85-87.
[24] [2012] 2 I.R. 1 at 11.

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." [25]

In *Foy (No. 2),*[26] 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,[27] McKechnie J. again rejected the constitutional arguments,[28] holding,[29]

"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 are the same are applicable to the Act of 2004, remain binding on the applicant."

McKechnie J. noted the impact of the enactment of the ECHR Act 2003[30] and the significant shift in Convention interpretation and jurisprudence on transgender issues since *Foy (No. 1)*.[31] 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

[25] *Foy v An tArd-Chlaraitheoir (No. 1)* [2002] IEHC 116, at paras 173-174.
[26] *Foy (No. 2) v An tArd-Chlaraitheoir* [2012] 2 I.R. 1.
[27] [2012] 2 I.R. 1 at 23-31 and 39-63.
[28] [2012] 2 I.R. 1 at 11.
[29] [2012] 2 I.R. 1 at 38.
[30] [2012] 2 I.R. 1 at 23-31.
[31] [2012] 2 I.R. 1 at 39-58. McKechnie J. noted in particular the decision of the European Court of Human Rights in *Goodwin v United Kingdom* (2002) 35 EHRR 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."[32]

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 facilitates 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."[33]

In granting this declaration of incompatibility, McKenchie 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 in still very much a matter for the Oireachtas and not this court."

The other declaration of incompatibility issued to date was issued by the Supreme Court in *Donegan v Dublin City Council*,[34] which concerned section 62 of the Housing Acts. The constitutionality of this section had been upheld previously,[35] with the Supreme Court holding in *Dublin City Council v Fennell*:[36]

[32] [2012] 2 I.R. 1 at 59.
[33] [2012] 2 I.R. 1 at 60.
[34] *Donegan v Dublin City Council* [2012] 3 I.R. 600.
[35] *The State (O'Rourke) v Kelly* [1983] I.R. 58
[36] *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."*[37]

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.[38] The substantive elements of this case are discussed in chapter four.[39]

Convention Rights, Retrospectivity and the ECHR Act 2003

In *Fennell*,[40] 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.[41] 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*

[37] *Dublin City Council v Fennell* [2005] 1 I.R. 604 at 614, per Kearns J.
[38] *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.
[39] See below, pp. 94-100.
[40] *Dublin City Council v Fennell* [2005] 1 I.R. 604.
[41] See also, *Rooney v Minister for Agriculture, Food and Forestry & Ors* [2004] IEHC 305. As de Londras and Kelly note (p. 47), as per section 2 of the 2003 Act, pre-existing legislation/ common law etc. even if enacted prior to the enforcement of the 2003 Act, 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."*[42]

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…"*[43]

Therefore, administrative actions occurring prior to the entry into force of the 2003 Act 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*,[44]

> *"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."*[45]

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.

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[42] [2005] 1 I.R. 604 at 615.
[43] [2005] 1 I.R. 604 at 338-339.
[44] *Byrne v An Taoiseach* [2011] 1 I.R. 190.
[45] *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:[46]

- The Irish courts are bound to continue applying the rules of statutory construction which applied prior to the 2003 Act;
- 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*";[47]
- 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 2003 Act,

> *"…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."*[48]

Murray C.J. analysed the section 2 of the 2003 Act 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) that*

[46] See generally: *Donegan v Dublin City Council* [2012] 3 I.R. 600.
[47] *McD v L* [2010] 2 I.R. 199 at 316, per Fennelly J.
[48] *McD v L* [2010] 2 I.R. 199 at 250-251.

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'"[49]

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."[50]

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*",[51] 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*. Section 34(8)(f) of the Planning and Development Act 2000 (hereinafter the 2000 Act) provides that if a planning authority is silent as regards a planning application within eight weeks, 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."[52]

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

Clare County Council argued on appeal that section 34(8)(f) of the 2000 Act had to be read in a Convention-compliant manner, namely, in conformity with Articles 6 and 8, and with

[49] *McD v L* [2010] 2 I.R. 199 at 315 at 252.
[50] *McD v L* [2010] 2 I.R. 199 at 315.
[51] *Ryan v Clare County Council* [2014] IESC 67 at para. 54.
[52] *Ibid.*

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 2003 Act.[53] 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 2003 Act did not make it possible,

> *"to construe the section so as to provide the form of protection of potential [Convention] right[s]…"*[54]

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 2000 Act 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)**'"*[55]

To interpret the 2000 Act in such a manner would have obliged the Court to adopt a construction of section 34(8)(f) of the 2000 Act 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."*[56]

In *M.O.I v Refugee Appeals Tribunal*[57] 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 2003 Act obliged the Tribunal Member to have regard to the substance of Convention rights in interpreting the Refugee Act 1996. Mac Eochaidh J. rejected this argument, holding that:

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[53] [2014] IESC 67 at para. 47.
[54] [2014] IESC 67 at para. 54.
[55] [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.
[56] In any event MacMenamin J. stated *obiter* that he did not believe Convention rights were necessarily engaged in this particular case, see: [2014] IESC 67 at para. 55.
[57] *M.O.I v Refugee Appeals Tribunal* [2014] IEHC 291.

> *"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."*[58]

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."*[59]

As well as the Tribunal not being obliged to consider Convention rights, Mac Eochaidh J. further held that section 4 of the 2003 Act did not oblige Tribunal Members to take "*judicial notice*" of Convention jurisprudence from the ECtHR.[60]

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.

[58] *M.O.I v Refugee Appeals Tribunal* [2014] IEHC 291 at paras. 10-11.
[59] *M.O.I v Refugee Appeals Tribunal* [2014] IEHC 291 at para. 18.
[60] *M.O.I v Refugee Appeals Tribunal* [2014] IEHC 291 at para. 22.

Remedies for Rights Violations under the 2003 Act

Damages

To date, damages have been awarded on a number of occasions under section 3(2) of the 2003 Act.[61] There has been one *ex gratia* payment made to Dr Lydia Foy.[62]

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*[63] where MacMenamin J. stated that Ms. O'Donnell's parents may have "*potential legal liability or part liability*"[64] 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.[65] MacMenamin J. also noted that neither the Charter, nor the EU's accession to the UN Convention on the Protection of Persons with Disabilities, could have been considered by the High Court in assessing damages, as these instruments were not pleaded.[66] Therefore, it remains to be seen how the High Court will calculate damages under the 2003 Act in light of these clarified principles from the Supreme Court.

Injunctions

In *Donegan*, 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*[67], 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:

> *"[If] 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, coupled with the fact that the Council cannot recover possession of the dwelling*

[61] 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.
[62] Mac Cormaic, R. "Compensation paid to Lydia Foy over gender recognition failures", *Irish Times*, 03 November 2014.
[63] *O'Donnell & ors v South Dublin County Council & ors* [2015] IESC 28.
[64] [2015] IESC 28, at para. 87.
[65] [2015] IESC 28, at para. 87.
[66] [2015] IESC 28, at para. 86.
[67] *Gifford v Dublin City Council* [2007] IEHC 387.

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."[68]

However, in *Byrne v Dublin City Council*[69] (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 jurisprudence[70] 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."[71]

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)."*[72]

Murphy J. noted that, unlike in 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

[68] *Gifford v Dublin City Council* [2007] IEHC 387.
[69] *Byrne v Dublin City Council* [2009] IEHC 122.
[70] 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 Arzte fur das Leben v Austria* (1991) 13 E.H.R.R. 204, *Conka v Belgium* (2002) 34 E.H.R.R. 1298 and Applic. No. 61444/00, *Krasuski v Poland*, judgment of 14 June 2005.
[71] *Byrne v Dublin City Council* [2009] IEHC 122 at para. 5.2.4.
[72] *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."*[73]

However, just a number of weeks later, in *Pullen v Dublin City Council* (No. 2),[74] 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 case[75] 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."*[76]

While the applicants were subsequently awarded damages,[77] 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

[73] [2009] IEHC 122 at sections 7 and 8.
[74] *Pullen v Dublin City Council (No. 2)* [2009] I.L.R.M. 484.
[75] *Pullen v Dublin City Council (No. 1)* [2009] IEHC 452.
[76] *Pullen v Dublin City Council (No. 2)* [2009] I.L.R.M. 484 at 503.
[77] *Pullen v. Dublin City Council (No. 3)* [2009] IEHC 452.

particular peculiar facts at play, where the actions of the local authority were protected under legislation. Where an organ of State fails to act in a Convention-compliant manner in performing a statutory function or exercising a statutory discretion,[78] 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*[79] the applicant, who had been the victim of sexual abuse perpetrated by a national school teacher, argued[80] that Ireland failed to meet its positive obligations under Article 3 and Article 8 of the Convention, 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.[81] 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…"*[82]

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.[83] The Strasbourg Court was not convinced that the remedies under Irish law were effective.[84]

Declarations of Incompatibility to Date

As noted above, to date two declarations of incompatibility have been issued under section 5 of the ECHR Act 2003, in the fields of housing law[85] and concerning the failure of the State

[78] De Londras F. and Kelly, C. *The European Convention on Human Rights Act 2003* (Round Hall, 2010), at para. 7-48.
[79] Applic. No. 35810/09, *O'Keeffe v Ireland*, 28 January 2014.
[80] For the 2008 Supreme Court decision in this case, see *O'Keeffe v Hickey* [2008] IESC 72.
[81] Applic. No. 35810/09, *O'Keeffe v Ireland*, 28 January 2014, at paras 123-129.
[82] Applic. No. 35810/09, *O'Keeffe v Ireland*, 28 January 2014,at paras 146-147.
[83] 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*.
[84] Applic. No. 35810/09, *O'Keeffe v Ireland*, 28 January 2014, at paras. 183-186.

to permit transgender persons to recognition of actual gender.[86] The time taken to remedy 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.

[85] 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 at pp. 39-40 and on Convention law, see below, pp. 94-100.
[86] *Foy v Registrar of Births, Deaths and Marriages* [2012] 2 I.R. 1. See above, pp.37-39.

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 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 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 centre[1] 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*

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

"designated centre") for the 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 coming into force of the Criminal Law (Insanity) Act 2010 allowing for the enforcement of conditional discharge orders.

[3] See now, 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* [1979/1980] 2 EHRR 387 and *Johnson v United Kingdom* [1999] 27 E.H.R.R. 296.

[5] In this case, the ECtHR at para. 63 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 did find 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] *L. v Kennedy* [2011] 2 I.R. 124 at 127.

ECHR. He no longer suffered from a mental disorder at the date of the hearing,[8] but had 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 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 MX*[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 fair and quality processes and procedures must be adhered to,

[8] *L. v Kennedy* [2011] 2 I.R. 124 at 128.
[9] *L. v Kennedy* [2011] 2 I.R. 124 at 145 and 152.
[10] *L. v Kennedy* [2011] 2 I.R. 124 at 150.
[11] *Kolanis v United Kingdom* (2005) 42 EHRR 12.
[12] *L. v Kennedy* [2011] 2 I.R. 124 at 152-153.
[13] *L. v Kennedy* [2011] 2 I.R. 124 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 Section 2, Section 4 and Section 57 of the Mental Health Act 2001 (as amended).
[17] *Health Services Executive v M.X.* [2012] 1 I.R. 81 at 85.

given the significant abridgment of personal rights that may necessarily have to occur to instigate treatment.[18]

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

> *"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

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[18] Relying on *Shtukaturov v Russia* (2012) 54 EHRR 27, see *Health Services Executive v M.X.* [2012] 1 I.R. 81 at 86-87.
[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

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 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:

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[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 [2012] 3 IR 254 at 272-277.
[23] *X v Finland* [2012] ECHR 1371, discussed [2014] 1 I.L.R.M. 170 at 181-183.
[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] *E.T. v. Clinical Director, Central Mental Hospital* [2010] 4 I.R. 403 at 412-413.
[29] [2010] 4 I.R. 403 at 413.
[30] [2010] 4 I.R. 403 at 413-415, in particular: *Aleksanyan v Russia* [2011] ECHR 841 and *Grori v Albania* [2009] ECHR 1076, as well as the more general "detention conditions" jurisprudence.

"(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;

(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

[31] [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.

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 migrants[34]

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,[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.

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 protection,[38] 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.[39] In *I. v. Minister for Justice*, 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*

[33] *Vilvarajah and Others v United Kingdom* [1991] 14 EHRR 248, para. 102 and repeated in *Ahmed v Austria* [1997] 24 EHRR 278, 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 pp. 130-136.
[35] *D v UK* (1997) 24 EHRR 423 at para. 49.
[36] *Saadi v United Kingdom* (2007) 44 EHRR 50.
[37] For an analysis of key issues from a Charter perspective, see below: right to an effective remedy, at pp.121-127; right to good administration, pp. 127-129 and Charter jurisprudence on asylum and immigration law, at pp. 130-136.
[38] This more so due to European Union law and the Charter, see below, p. 124-126.
[39] On subsidiary protection and the Charter, see below, p. 124.

that this could arise in circumstances of manifest error disclosing a reasonable possibility on the facts that the original decision was wrong."[40]

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."[41]

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.[42] In *Meadows v Minister for Justice, Equality and Law Reform*,[43] 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.[44] 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,

[40] *I. v. Minister for Justice, Equality and Law Reform* [2008] 1 I.R. 208 at 213-214.
[41] *Denny v Minister for Social Welfare* [1998] 1 I.R. 34 at 37-38, per Hamilton C.J.
[42] 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 pp. 116-119 (unless it concerns a *Zambrano* parent, *see further,* p. 133).
[43] *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, see p. 121.
[44] *Meadows v Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701 at 806-809, which provides a full timeline of decisions reached and reasons proffered for rejecting the applicant's refugee claim.

> *"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?"*[45]

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."*[46]

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.'"*[47]

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."*[48]

[45] *Meadows v Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701 at 709.
[46] *Meadows v Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701 at 741.
[47] *Meadows v Minister for Justice, Equality and Law Reform* [2010] 2 IR 701 at 823.
[48] *Meadows v Minister for Justice, Equality and Law Reform* [2010] 2 IR 701 at 826.

While "*matters of policy are for the Minister*",[49] the majority in *Meadows* seem to accept that, in issues of rights, the proportionality of the interference, and 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".* [50]

In *Efe*,[51] 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), Hogan J. interpreting *Meadows* stated:

> *"a majority of the Court was prepared to apply a general proportionality test in respect of all decisions affecting fundamental rights."*[52]

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.

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[49] *Meadows v Minister for Justice, Equality and Law Reform* [2010] 2 I.R. 701 at 831.
[50] *F. & Ors v Minister for Justice, Equality and Law Reform* [2010] IEHC 457.
[51] *Efe v Minister for Justice, Equality and Law Reform* [2011] I.L.R.M. 411.
[52] *Efe v Minister for Justice, Equality and Law Reform* [2011] I.L.R.M. 411 at para. 28.

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*[53] 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."*[54]

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 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*:[55]

> *"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."*[56]

[53] *M.C.A. v Refugee Appeals Tribunal & Ors* [2014] IEHC 504
[54] *M.C.A. v Refugee Appeals Tribunal & Ors* [2014] IEHC 504 at para. 27.
[55] *E.D. (a minor) v Refugee Appeals Tribunal* [2011] 3 I.R. 736.
[56] *E.D. (a minor) v Refugee Appeals Tribunal* [2011] 3 I.R. 736 at 746. As the refugee definition is now an issue of EU law relevance, Hogan J. also relied upon the Charter in coming to this conclusion, see below, p. 136-136.

Administrative Immigration Schemes and Convention Rights

In *Bode v The Minister for Justice, Equality and Law Reform*,[57] 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,[58] 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.[59] 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.[60] 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.[61] The IBC/05 Scheme did not set out to analyse whether rights to family life were respected. 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.[62]

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[57] 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 (14 November 2006) (High Court); [2007] IESC 62 (20 December 2007) (Supreme Court). (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.*

[58] Compare this with the views of the former Chief Justice in *L* and O 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, [2003] 1 I.R. 1 at 19.

[59] *Bode and Others v Minister for Justice, Equality, & Law Reform & Others* [2007] IESC 62 (20 December 2007).

[60] [2007] IESC 62 at para. 24.

[61] [2007] IESC 62, at para. 22.

[62] [2007] IESC 62 at para. 24.

Denham J. went on to note that within deportation procedures, the Constitutional and Convention rights of the citizen child would be examined.[63] 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.[64] 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.[65]

In *Gorry v Minister for Justice and Equality*,[66] 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.[67] 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.[68] Referring to extensive jurisprudence from the courts of England and Wales on Article 8 of the Convention and family life for transnational spouses,[69] 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 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*

[63] [2007] IESC 62 at para. 25.
[64] 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 2003 Act to perform its functions in a manner compatible with Ireland's obligations under the ECHR.
[65] See discussion below as regards EU citizenship, the Charter and residence rights on non-EU citizen parents, pp. 119 , p. 133 and pp. 132-136.
[66] *Gorry & Anor v Minister for Justice & Equality* [2014] IEHC 29.
[67] *Gorry & anor v Minister for Justice & Equality* [2014] IEHC 29 at paras 4-9.
[68] *Gorry & anor v Minister for Justice & Equality* [2014] IEHC 29 at para. 21.
[69] In particular, *R. (Mahmood) v. Home Secretary* [2001] 1 W.L.R. 840, *LM (DRC) v. Home Secretary* [2008] EWCA Civ 325 and *V.W. (Uganda) and A.B. (Somalia) v. The Secretary of State for the Home Department* [2009] EWCA Civ 5, see [2014] IEHC 29 at paras. 22-30.

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."[70]

The decision of INIS was therefore quashed due to their failure to properly assess the Convention and Constitutional rights of the applicant in the field of family life.[71]

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.[72] 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."[73]

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.[74]

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 respect for private and family life under Article 8 of the ECHR in circumstances where it was argued that no sufficient treatment would be available in the State to which the child would

[70] [2014] IEHC 29 at para. 31.
[71] [2014] IEHC 29 at para .56.
[72] P.*B.N. (DR Congo) v Minister for Justice and Equality* [2014] IESC 9 at para. 14.
[73] *Ibid* at para. 24.
[74] *B.S. v Minister for Justice & Ors* [2014] IEHC 502.

be deported.[75] 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.[76] The judge also noted that, while positive obligations may flow from Article 8 of the Convention,[77] 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.[78] Such arguments could only be accepted in the most exceptional of circumstances, such as in *D. v UK*.[79] Feeney J. 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.[80] The risks of attracting other people in the same position as the applicants were also highlighted by the judge.[81] Feeney J. finally noted that only in the most exceptional of cases would applicants be able to successfully rely on the Convention in preventing deportation.[82]

In *MEO v Minister for Justice ,Equality and Law Reform*,[83] 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*.[84] The seriousness of MEO's medical condition[85] 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*.[86] Where an applicant displays a suicidal ideation, then Article 3 ECHR may be engaged, but only where:

> *"(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;*

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[75] *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/ .
[76] [2007] IEHC 166 at para. 3.2., relying on *Abdulaziz et al. v UK* [1985] 7 E.H.R.R. 471.
[77] *Ibid.*
[78] [2007] IEHC 166 at para. 3.10.
[79] *Ibid.*
[80] [2007] IEHC 166 at paras. 3.11-3.12.
[81] [2007] IEHC 166 at para.. 3.13.
[82] [2007] IEHC 166 at para. 3.14.
[83] *MEO v Minister for Justice, Equality and Law Reform* [2012] IEHC 545.
[84] *N v United Kingdom* (2008) 47 EHRR 39.
[85] *MEO v Minister for Justice, Equality and Law Reform* [2012] IEHC 545,at paras. 7-10.
[86] *MEO v Minister for Justice, Equality and Law Reform* [2012] IEHC 545 at, paras. 41-46.

(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."[87]

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.[88] The burden of proof for this rests with the applicant.[89]

Private and Family Life

In *Oguekwe v. Minister for Justice*[90], Denham J. adopted the test set down by the English Court of Appeal[91] 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.

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

[88] *JMO v Refugee Applications Commissioner & Ors* [2014] IEHC 467, citing with approval the ECtHR decision in *M.S.S. v. Belgium and Greece* (App 30696) (Grand Chamber, judgment, January, 21st 2011). See also, Joined Cases C-411/10 and C-493/10 *N.S./M.E*. [2011] ECR I-865.

[89] *JMO v Refugee Applications Commissioner & Ors* [2014] IEHC 467, para. 75. See also, *Wadria v Minister for Justice* [2011] 3 IR 53. For discussion and analysis on the Charter and removal under the Dublin Convention, see below, pp. 116 *et seq*.

[90] *Oguekwe v. Minister for Justice* [2008] 3 I.R. 795

[91] *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."[92]

The interests of the State to a managed system of migration and the right to issue a deportation order cannot, generally, be defeated by claims of violation of Article 8 and/or Article 41 of the Irish Constitution rights,[93] unless the decision,

"absolutely offended logic or was something which…no reasonable decision maker could ever conclude."[94]

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.[95] 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.[96] Mac Eochaidh J. in *C.I* v Minister for Justice, Equality and Law Reform[97], 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

[92] *Oguekwe v Minister for Justice, Equality and Law Reform* [2008] 3 I.R. 795 at p. 812.
[93] For a recent application of this, see *Khan & ors v Minister for Justice and Equality* [2014] IEHC 533 and other cases in the Annex to this report.
[94] *M.R.J. v The Minister for Justice, Equality and Law Reform* (Unreported, High Court, 22nd January, 2014, *ex tempore*), at para. 32.
[95] See, *R.B v Minister for Justice & Law Reform & anor* [2014] IEHC 570, in particular 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
[96] See above, discussion on *Gorry*, p. 63. See also, *Cirpaci (nee McCormack) & anor v The Minister for Justice, Equality & Law Reform* [2005] 4 IR 109.
[97] *C.I. & Others v Minister for Justice, Equality and Law Reform* [2014] IEHC 447

deportee may be affected, the consequences of the deportation for persons other than 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."[98]

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.[99]

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.[100] Article 13 ECHR, as interpreted via the ECHR Act 2003, does not require an independent review of the exercise of ministerial discretion.[101]

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,[102] in particular Article 8.[103] 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,[104] nieces and nephews[105] (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

[98] *C.I. & Others v Minister for Justice, Equality and Law Reform* [2014] IEHC 447, para. 45.
[99] 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.
[100] *B (a minor) v Minister for Justice, Equality and Law Reform* [2010] IEHC 296.
[101] *B (a minor) v Minister for Justice, Equality and Law Reform* [2010] IEHC 296,at paras. 7-10.
[102] 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.
[103] *F.B. v Minister for Justice* [2014] IEHC 427, para. 42 *et seq*.
[104] *G.O. & Ors v Minister for Justice, Equality and Law Reform* [2008] IEHC 190.
[105] *Hassan Sheikh Ali v. Minister for Justice, Equality and Law Reform* [2011] IEHC 115.

constitutional family, as protected under Article 41, but also the impact of Article 8 of the 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*,[106] 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,[107]

> *"… 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."*

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 regards, the focus of Superior Court decisions have essentially explored Article 8 of the Convention. Mac Eochaidh J. noted,[108]

> *"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*

[106] *A.M.S. v. Minister for Justice and Equality* [2014] IEHC 57.
[107] [2014] IEHC 57, para. 68.
[108] [2014] IEHC 57, para. 53.

decision on such application must not exceed the statutory scheme or offend the public law rules on decision making."

In *F.B v Minister for Justice*,[109] the decision maker failed to engage in a substantive proportionality analysis of the applicant's Article 8 rights under the Convention.[110] 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, have 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 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, which case law is 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 impact (if any) of the ECHR Act 2003.

The Imposition of a Life Sentence is not Inhuman and Degrading

In *Lynch and Whelan*[111] the plaintiffs challenged the imposition of mandatory life sentences by courts for the offence of murder under section 2 of the Criminal Justice Act 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 1990 Act would be released. The plaintiffs sought a declaration of incompatibility under section 5 of the ECHR 2003 Act. In refusing all grounds of challenge (and focusing on the Convention elements of this decision), Murray C.J stated:

[109] [2014] IEHC 427.
[110] [2014] IEHC 427, at para. 43.
[111] See, *Lynch and Whelan v Minister for Justice* [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*." [112]

While the Executive might have a role in determining when a prisoner was to be released, the imposition of the "*punitive sentence*",the ECtHR has permitted 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."[113]

The Supreme Court viewed the "discretionary" nature of compassionate or humanitarian release, as an executive function, unlinked to imposition of a criminal punishment.[114]

It should be noted that, in *Vinters v United Kingdom*,[115] 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."[116]

However, the imposition of whole life sentences, without any process or procedures on consideration of applications for release, violated 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. To deny them the experience of hope would be to deny a fundamental aspect of their humanity and, to do that, would be degrading."

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[112] [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.
[113] [2012] 1 I.R. 1 at 35-36, citing *Kafkaris v. Cyprus* (2008) 49 E.H.R.R. 877.
[114] [2012] 1 I.R. 1 at 24.
[115] *Vinter v United Kingdom* [2013] E.C.H.R. 645.
[116] [2013] E.C.H.R. 645 at para. 120.

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 *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 that egregious breaches of a suspect's rights and police misconduct are checked. It*

[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] [2008] 1 I.L.R.M.443 at 470.
[120] *D.P.P. v JC* [2015] IESC 31.

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 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 European Convention on Human Rights, then the only

[121] *D.P.P. v JC* [2015] IESC 31 at para. 78.
[122] *D.P.P. v JC* [2015] IESC 31, in particular, 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] [2010] 1 I.R. 635 at 640-641.
[126] [2010] 1 I.R. 635 at 641.
[127] [2010] 1 I.R. 635 at 641.
[128] [2010] 1 I.R. 635 at 645-646.

remedy open to the plaintiff would be a declaration of incompatibility (Section 5 of the European Convention on Human Rights 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 ECHR. The Court 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]

[129] See further, [2010] 1 I.R. 635 at 649-651.
[130] [2010] 1 I.R. 635 at 662.
[131] [2010] 1 I.R. 635 at 658-660.
[132] [2010] 1 I.R. 635 at 667.
[133] [2010] 1 I.R. 635 at 668.
[134] [2010] 1 I.R. 635 at 669.
[135] [2010] 1 I.R. 635 at 669.

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.

Access to a Solicitor

For 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 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 some 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*

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[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 the presence of a solicitor, where, under operation of law, a forensic sample (i.e. blood, saliva etc.) was requested.
[137] [2014] 1 I.L.R.M. 377 at 390 -395. The Supreme Court in particular discussed the case of *Salduz v Turkey* (2009) 49 E.H.R.R. 19, where the European Court of Human Rights 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] [2014] 1 I.L.R.M. 377 at 395-396.
[139] [2014] 1 I.L.R.M. 377 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] [2014] 1 I.L.R.M. 377 at 402.
[141] [2014] 1 I.L.R.M. 377 at 400.
[142] See also, *D.P.P. v Ryan* [2011] IECCA 6.

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

"recognises that the entitlements of a suspect extend to having the relevant lawyer present."[144]

It appeared from the decision of the Supreme Court that 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,

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[143] [2014] 1 I.L.R.M. 377 at 405.
[144] [2014] 1 I.L.R.M. 377 at 404-405. See also the
[145] See for example, *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 "he 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, Applic. No. 31333/06, *McFarlane v Ireland*, 10 September 2009.
[148] (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. 24-27.

> *"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 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,

> *"…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 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.

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[149] (2011) 52 EHRR 20 at para. 140.
[150] (2011) 52 E.H.R.R. 20 at para. 148.
[151] (2011) 52 E.H.R.R. 20 at para. 152.
[152] (2011) 52 E.H.R.R. 20 at para. 152.
[153] See, *Barry v Ireland* (18273/04) 15 December 2005 at para. 35.
[154] (2011) 52 E.H.R.R. 20 at paras. 117-121.
[155] (2011) 52 E.H.R.R. 20 at paras.122-127.
[156] *J. Harris Assemblers v D. P. P.* [2009] IEHC 344.
[157] *J. Harris Assemblers v D. P. P.* [2009] IEHC 344, para 29.

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.*

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]

[158] Judgment of Kearns J. in *Devoy v D.P.P.* [2008] IESC 13.
[159] *Kennedy v D.P.P.* [2011] IEHC 311 (HC) and [2012] 3 I.R. 744 (SC).
[160] *T. H. v D.P.P.* [2006] 3 I.R. 520.
[161] [2011] IEHC 311 at para. 6.5.
[162] [2012] 3 I.R. 744 at 792. Denham CJ delivered a similar assessment, [2012] 3 I.R. 744 at 772-774.

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 damages remedies 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 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' rights[165] and prison conditions.[166] In *Mulligan v Governor of Portlaoise Prison*, 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 ECHR Act 2003. McKechnie J. engaged in a significant review of key prison conditions jurisprudence from the ECtHR.[167] In reviewing the particular case at hand, and the prison conditions Mulligan had been exposed to,[168] 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 ECHR. 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*

[163] [2012] 3 I.R. 744 at 793.
[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] *Mulligan v Governor of Portlaoise Prison & Anor* [2010] IEHC 269, at paras. 128-143.
[168] *Mulligan v Governor of Portlaoise Prison & Anor* [2010] IEHC 269, see in particular paras. 44-109.

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."[169]

European Arrest Warrant

Convention rights have frequently been invoked in cases involving the European Arrest Warrant. Section 37 of the European Arrest Warrant Act 2003 provides that a person shall not be surrendered to the requesting State, if the surrender 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.[170]

In *Minister for Justice, Equality and Law Reform v McArdle*,[171] 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*, 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

[169] *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.

[170] For an assessment of the impact of the Charter and the European Arrest Warrant, see, pp. 136-142.

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

might take place almost thirty years after the earliest of these offences, as a matter of fact."[172]

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."[173]

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*,[174] 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, it is for the requesting State to dispel or disprove this evidence.[175] In *Minister for Justice, Equality and Law Reform v McGuigan*[176] and *Minister for Justice and Equality v Holden*,[177] 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*,[178] 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.[179] Relying on decisions of the ECtHR,

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[172] *Minister for Justice, Equality and Law Reform v Stapleton* [2006] 3 IR 26 at 50.
[173] *Minister for Justice v Corrigan* [2007] 2 IR 448.
[174] *Minister for Justice, Equality and Law Reform v Rettinger* [2010] IESC 45.
[175] 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.
[176] *Minister for Justice, Equality and Law Reform v McGuigan* [2013] IEHC 216, related to conditions of detention in Lithuania.
[177] *Minister for Justice and Equality v Holden* [2013] IEHC 62.
[178] *Minister for Justice and Equality v Rostas* [2014] IEHC 391. The Charter issues raised in this case are discussed below, at p. 139.
[179] *Minister for Justice and Equality v Rostas* [2014] IEHC 391 at paras. 107-117.

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."*[180]

In *Minister for Justice and Equality v Nolan*,[181] the Supreme Court upheld the decision of the High Court[182] 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.[183]

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.[184] 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.[185] In *Minister for Justice, Equality and Law Reform v Gheorghe*, 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*

[180] *Minister for Justice v Rostas* [2014] IEHC 391 at para. 117.
[181] *Minister for Justice and Equality v Kelly aka Nolan* [2013] IESC 54.
[182] *Minister for Justice and Equality v Nolan* [2012] IEHC 249.
[183] *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.
[184] See, pp. 140-142 for Charter jurisprudence from the Irish courts on family life and implementation of the European Arrest Warrant.
[185] 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 (discussed below, at p. 140); *Minister for Justice and Equality v Ostrowski* [2014] 1 I.L.R.M. 88 (discussed below, p.142); *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.

surrender is to be refused where a person will, as a consequence, suffered disruption, even severe disruption of family relationships."[186]

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.[187] In *Minister for Justice and Equality v Leskiewicz*,[188] 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 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…"*[189]

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*,[190] 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*

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[186] *Minister for Justice, Equality and Law Reform v Gheorghe & anor* [2009] IESC 76 at para. 48.
[187] 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.
[188] *Minister for Justice and Equality v Leskiewicz* [2014] IEHC 584..
[189] *Minister for Justice and Equality v Leskiewicz* [2014] IEHC 584, at para. 29.
[190] *Minister for Justice, Equality and Law Reform v Gorman* [2010] 3 I.R. 583.

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."[191]

Peart J. held that the delay in requesting the respondent's extradition,[192] coupled with the impact that the extradition would have on family life,[193] 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.[194]

In *Minister for Justice and Equality v. T.E.*,[195] 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:[196]

> *"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*

[191] *Minister for Justice, Equality and Law Reform v Gorman* [2010] 3 I.R. 583 at 613.
[192] 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.
[193] 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.
[194] *Minister for Justice v Gorman* [2010] 3 I.R. 583 at 600-614.
[195] *Minister for Justice and Equality v. T.E* [2013] IEHC 323 (Unreported, High Court, Edwards J., 21st June, 2013). See issues of Charter relevance discussed below at p. 140.
[196] *Minister for Justice and Equality v. T.E* [2013] IEHC 323 at pp 110-115 of unreported decision.

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;

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."[197]

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 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 this field is within the scope of European Union law.[198]

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 rights of the family.[199] 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 2003 Act and must act in a Convention compliant manner.[200]

- The District Court is under an obligation to interpret child-care legislation in a Constitutional and Convention compliant manner when exercising its powers.[201]

[197] See discussion in context of Article 24 of the Charter (rights of the child), below, pp. 140-143.
[198] See discussion of the Charter below, in particular as regards interpretation of Brussels II bis Regulation at pp. 145 *et seq*.
[199] 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).
[200] *SB & anor v Health Service Executive (Direction to Prevent Change of Placement)* [2011] IEDC 10 (08 December 2011)

- 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).[202]

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 and Article 8 ECHR.[203] The District Court must be satisfied on the balance of probabilities that such abuse occurred.[204] Even where there may be a risk to life of a child, abuse allegations must be disclosed to the alleged perpetrator.[205]

In *Health Service Executive v M, X & ors,*[206] 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.[207] The District Court, while mindful of the voice of the child, has 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

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[201] *Child and Family Agency and JO & Anor (Care Order - Proportionality)* [2014] IEDC 11 (12 August 2014).
[202] See, *Child and Family Agency and KC & Anor (Care Order - Proportionality)* [2014] IEDC 12, *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. 146.
[203] *Health Service Executive v B & anor (Lifting In Camera Rule)* [2013] IEDC 13 (28 May 2013).
[204] *DP v KS (Access Variation and Burden of Proof for Sexual Abuse)* [2009] IEDC 3 (18 May 2009).
[205] *Health Service Executive v M, X & ors (Joining of Party)* [2013] IEDC 9 (25 March 2013)
[206] *Health Service Executive v M, X & ors (Joining of Party)* [2013] IEDC 9 (25 March 2013)
[207] 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.

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.[208]

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.[209]

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* (somewhat reflecting the reasoning of the ECtHR in the 2010 case of *Schalk and Kopf v Austria*),[210] Dunne J. held that there was no right, under the Constitution or the ECHR, for same-sex couples to marry.[211]

In *McD v L*, the High Court,[212] 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*,[213] 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.[214]

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

[208] *Health Service Executive v M & anor (Children Request Solicitor)* [2010] IEDC 4 (01 November 2010).
[209] *Health Service Executive v SK & anor (Costs)* [2010] IEDC 2 (09 June 2010). See also, *Health Service Executive v OA*, judgment of O'Malley J., 12 April 2013.
[210] *Schalk and Kopf v Austria* [2010] E.C.H.R. 995. See also the more recent case of *Hamalainen v Finland* [2014] E.C.H.R. 787.
[211] *Zappone & Anor v Revenue Commissioners & Ors.* [2006] IEHC 404.
[212] *McD v L & Another* [2008] IEHC 96.
[213] *X, Y and Z v. United Kingdom* [1997] 24 E.H.R.R.143.
[214] In coming to this conclusion, Hedigan J. relied on the European Commission on Human Rights decision in Application no. 16911/90, *M. v. Netherlands* (8th February, 1993).

compliant manner.[215] 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.[216] The ECtHR had not (at that particular time)[217] 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."*[218]

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.[219]

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*, the Labour Court held that the Convention could not impact on claims for diplomatic immunity in employment disputes.[220] In two trade union disputes, the Labour Court had occasion to refer to the ECHR or ECHR Act 2003, without any core consideration of Convention rights.[221] Within the Superior Courts, employment law related ECHR claims have revolved around issues relating to fair procedures in disciplinary tribunals.[222] This line

[215] *McD v L* [2010] 2 I.R. 199 at 303.
[216] *McD v L* [2010] 2 I.R. 199 at 312.
[217] 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] E.C.H.R. 995, see paras. 87-95.
[218] *McD v L* [2010] 2 IR 199 at 317.
[219] 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 in Egan, S., Thornton, L. and Walsh, J. *Ireland and the European Convention on Human Rights: 60 Years and Beyond* (Dublin: Bloomsbury, 2014).
[220] Determination No.EDA0417, *Italian Embassy v Damery* (December 2004).
[221] 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).
[222] 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.

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.[223] The Equality Tribunal has a duty to interpret Irish law in a Convention compliant manner (in so far as is possible).[224] The ECHR Act 2003 does not extend the jurisdiction of the Equality Tribunal to determine whether breaches of Convention rights have occurred.[225]

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*,[226] 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 environment.[227] 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.[228]

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[223] See below for the eight cases where the Equality Authority explicitly engages with Convention and/or ECHR Act 2003 arguments.
[224] DEC-S2005/200, *Sharkey v Danny Minnie's Restaurant, Donegal*, December 2005.
[225] 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).
[226] DEC-E2014-045, *John McAteer v South Tipperary County Council* (24 June 2014).
[227] The Equality Officer made reference to the following cases: *Kokkinakis v Greece* (1994) 17 E.H.R.R. 397, *Larissis & others v Greece* [1999] EHRR 329 and *Eweida and Others v United Kingdom* [2013] E.C.H.R. 37.
[228] For a discussion of the Charter points raised in this case, see below, pp. 149-150.

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.[229]

In *D(J) v Residential Institutions Review Committee*[230] 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.[231] The Supreme Court upheld this decision.[232]

Social Rights (Asylum Seekers)

In *C.A. & T.A*,[233] the operation of the system of direct provision for asylum seekers in Ireland was considered.[234] Mac Eochaidh J. accepted:

> *"…[W]here an applicant claims that 'direct provision' is having such adverse affects 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*."[235]

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[229] *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.
[230] *D(J) v. Residential Institutions Review Committee* [2009] 2 I.L.R.M. 65.
[231] *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 IR 262.
[232] *D(J) v. Residential Institutions Review Committee* [2010] 1 I.R. 262.
[233] *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.
[234] 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.
[235] *C.A. & anor v Minister for Justice and Equality & ors* [2014] IEHC 532, para. 12.6.

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.[236] 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*[237]). 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."*[238] [Emphasis added.]

As regards the "*abnormal circumstances*" that the child applicant is being reared in, Mac Eochaidh J. stated[239] 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.[240]

Social rights (including Housing Law)

The Superior Courts have handed down a number of significant judgments applying the ECHR/ECHR Act 2003 to housing law, and to duties on local authorities under the Housing Acts.[241] The case law has focused on two core issues:

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[236] *C.A. & anor v Minister for Justice and Equality & ors* [2014] IEHC 532, paras 8.1-9.11.
[237] *M.S.S. v. Belgium and Greece* (App 30696) (Grand Chamber, judgment, January, 21st 2011)
[238] *C.A. & anor v Minister for Justice and Equality & ors* [2014] IEHC 532, para. 9.18
[239] *C.A. & anor v Minister for Justice and Equality & ors* [2014] IEHC 532, para. 9.19.
[240] For a consideration of the Charter issues raised in this case, see below, p. 119-120.
[241] The issue of retrospectivity in *Dublin City Council v Fennell* [2005] 1 IR 604, was considered in the previous chapter.

- 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,[242] culminating in the Supreme Court decision in *Donegan*,[243] a declaration of incompatibility under section 5 of the 2003 Act was made as regards section 62 of the Housing Act 1996 (as amended).

In *Leonard v Dublin City Council*[244] 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).[245] 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).

Ms. Justice Dunne, after considering ECtHR and UK jurisprudence on related issues,[246] concluded that there was no breach of Convention rights under the ECHR Act 2003. In relation to the 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

[242] *Leonard v Dublin City Council & Others* [2008] IEHC 79, *Donegan v Dublin City Council* [2008] IEHC 288 (08 May 2008), *Dublin City Council v Gallagher* [2008] IEHC 354 and *Pullen & Others v. Dublin City Council* [2008] IEHC 379.
[243] *Donegan v Dublin City Council* [2012] 3 I.R. 600.
[244] *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.
[245] Section 62 of the Housing Act 1966.
[246] H*arrow London Burrow Council v Qazi* [2003] 3 L.R. 792; *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 AC 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.

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. 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*[247] 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 been 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. Ms. Justice Laffoy, 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* and *Connors*, 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,

> *"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."*

[247] *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.

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.[248]

In *Gallagher*,[249] 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 2003 Act 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 2003 Act) 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*.[250] The Supreme Court engaged in a detailed analysis of ECtHR jurisprudence,[251] and an analysis of relevant jurisprudence from the courts in England and Wales.[252] 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.[253] The only remedy available therefore was a declaration on incompatibility.[254] The ECtHR had made clear[255] 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 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.[256] 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*

[248] Similar decisions were subsequently rendered by the High Court in *Dublin City Council v Gallagher* [2008] IEHC 354 (11 November 2008) by Mr. Justice O' Neill. This case originated from questions posed by a District Court judge by way of a case stated to the High Court. Mr. Justice O'Neill 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 (12 December 2008).
[249] *Dublin City Council v Gallagher* [2008] IEHC 354 (11 November 2008).
[250] *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.
[251] *Donegan v Dublin City Council* [2012] 3 I.R. 600 at 646-651.
[252] *Donegan v Dublin City Council* [2012] 3 I.R. 600 at 651.
[253] *Donegan v Dublin City Council* [2012] 3 I.R. 600 at 625 and 645-646.
[254] *Donegan v Dublin City Council* [2012] 3 I.R. 600 at 655-660.
[255] 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.
[256] See arguments presented on the basis of *Meadows v Minister for Justice* [2010] 2 I.R. 701; [2012] 3 I.R. 600 at 652-655.

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."[257]

The declaration of incompatibility in *Donegan* was remedied by Part 2 of the Housing (Miscellaneous Provisions) Act 2014, which was commenced in April 2015.[258]

Housing Authorities Acting in a Convention Compliant Manner: Provision and Adequacy of Accommodation

In *O'Donnell v South Dublin County Council*[259] 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.[260] 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,

"…*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 judgment of Ms. Justice Laffoy in *O'Donnell v South Dublin County Council* (2007), Edwards J. held that the State had failed in its Article 8 duties towards the child at

[257] *Donegan v Dublin City Council* [2012] 3 I.R. 600 at 653-654.
[258] See also, S.I. No. 121 of 2015, Housing (Miscellaneous Provisions) Act 2014 (Commencement of Certain Provisions) Orders 2015.
[259] *O'Donnell & Others v South Dublin County Council & Others* [2008] IEHC 454 (11 January 2008). 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 (22 May 2007), different applicants were involved in both cases.
[260] 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.

issue. The High Court 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.[261] 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.[262] Relying on Costello J.'s unreported decision in *O'Brien v Wicklow Urban District Council*,[263] 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.[264] 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*".[265] 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"*[266]

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 executed by making offers of financial assistance, having repairs carried out at the Council's expense, and/or,[267]

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[261] *O'Donnell & Others v South Dublin County Council & Others,* [2015] IESC 28, paras. 35-53.
[262] [2015] IESC 28, para. 60.
[263] *O'Brien v Wicklow Urban District Council,* ex tempore, unreported High Court, 10 June 2014.
[264] [2015] IESC 28, para. 65.
[265] [2015] IESC 28, para. 68.
[266] [2015] IESC 28, para. 70.
[267] [2015] IESC 28, para. 74.

> *"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.[268]

In *Dooley v Killarney*[269] 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.[270]

[268] [2015] IESC 28, para. 86.
[269] *Dooley & Others v Killarney Town Council and Another* [2008] IEHC 242 (15 July 2008). No page or paragraph numbers are contained within the judgment; therefore it is not possible to make pointed references.
[270] See also, *Lawrence & Others v. Ballina Town Council & Others* (unreported judgment, 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

[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, paragraph 7.

the constitutional traditions common to the EU Member States in support of its conclusions 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 on 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*, ECtHR, Grand Chamber, 18 February 1999, Application No 24833/94.
[7] *Bosphorus Airways v. Ireland*, ECtHR, Grand Chamber, 30 June 2005, Application no. 45036/98.
[8] K. Lenaerts, "Exploring the Limits of the EU Charter of Fundamental Rights" (2012) *European Constitutional Law Review* 8: 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

[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.

freedom of expression, the right to property, in addition to certain more "modern" 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, pp. 18-23.

- 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 disapply conflicting national law, including national primary legislation.[16]

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

[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] [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 disapply conflicting national constitutional provisions See, e.g., *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.

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

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[17] See above, pp. 28-30. 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 p. 28. See 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 IR 199. Discussed above, p. 91. See especially the judgment of Murray C.J., at §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 §§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*.

law, the direct effect of EU law is made possible by the enabling provisions contained in 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 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

[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*, §87.

[26] See, e.g., *Donegan v D.C.C.* [2012] IESC 18, per McKechnie J., at §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, pp. 97-98.

"*remedy which would resolve the issue between the parties*" (*per* Murray C.J., at §46).[28] 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*, where judgment was given by the Court of Justice only two months from the date of receipt of the reference.

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[28] This case is discussed above, pp. 73-74. *Carmody v Minister for Justice, Equality and Law Reform* [2010] 1 I.R. 653. (See also, 2009 [IESC] 71.)

[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. 46-49). See further, Doyle and Ryan, op. cit.

[30] On the principle of subsidiarity, see above, p. 19.

[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).

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 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*",[32] 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.[33]

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 annulment of the 2006 Data Retention Directive.[34] 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.[35] 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

[32] Joint Communication from Presidents Costa and Skouris, Strasbourg and Luxembourg, 24 January 2011.
[33] 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*.
[34] Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland*, judgment of 8 April 2014, not yet reported.
[35] Case C-131/12 *Google Spain*, judgment of 13 May 2014, not yet reported.

trial, where the Court discussed ECtHR jurisprudence in detail, after noting however that it was not bound by such jurisprudence).[36]

[36] 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 hew power or task for the Union, or modify powers and tasks as defined in the Treaties*."

As the Explanations to the Charter confirm,[37] 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.[38]

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*[39] - 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 fell 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

[37] 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*."
[38] Case C-260/89 *ERT* [1991] E.C.R. I-2925.
[39] Case C-617/10 *Fransson*, judgment of 26 February 2013, not yet reported (see especially, §27).

obligations to 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.[40] 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*."[41]

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.[42] 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…*"[43]

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.[44]

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*

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[40] *Ibid*, §§24, 25 and 27.
[41] *Ibid*, §27.
[42] 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 must comply with the Charter),
[43] 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).
[44] Case C-313/12 *Romeo*, judgment of 7 November 2013, not yet reported, and jurisprudence cited therein.

Turnhout,[45] for instance, reference was rejected as inadmissible, because the Belgian court 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).[46] 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*).[47] 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.[48]

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 Article 3 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

[45] Case C-483/12, judgment of 8 May 2014, not yet reported.
[46] Case C-265/13 *Torralbo Marcos*, jdugmetn of 27 March 2014, not yet reported, paras. 33-34.
[47] Case C-279/09 *DEB* [2010] E.C.R. I-811.
[48] Case C-56/13 *Érsekcsanádi*, judgment of 22 May 2014, not yet reported.

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 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.

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*, 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.[49] 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.

[49] 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 overview[1] 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*, 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*."[3]

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* 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.[4]

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[2] See above, chapter 2.
[3] *Smith v Minister for Justice and Equality & ors* [2012] IEHC 113, at para. 24.
[4] Case C-34/09; Case C-256/11, CJEU. For discussion on the impact of the Convention pre-*Zambrano*, see above, p. 68.

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.[5]

See also, *Troci v Minister for Justice and Equality*[6], 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*;[7] and Cooke J. in *S.P. v Minister for Justice*[8]).

In *Mallak v MJELR*, 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 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?*

[5] *Smith & ors (minors) -v- Minister for Justice and Equality & anor* [2013] IESC 4.
[6] *Troci & Anor v The Minister for Justice and Equality and Ors* [2012] IEHC 542.
[7] *Lofinmakin (an infant) & Others v. The Minister for Justice ,Equality and Law Reform* [2011] IEHC 116.
[8] *S.P. v Minister for Justice and Equality & ors* [2012] IEHC 18.

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*."[9]

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.[10]

In a significant judgment, MacEochaidh J. in *C.A. v Minister for Justice and Equality*[11] 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

[9] *A.O. v Minister for Justice ,Equality and Law Reform (No. 3)* [2012] IEHC 104, at paras. 31-32.
[10] *Dos Santos v Minister for Justice* [2013] IEHC 237.
[11] *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."[12]

In *D.F. v Garda Commissioner*, 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*."[13]

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.[14] It is fair to say, however, that the reference to the Charter does not seem to have affected the substantive outcome of these cases.

[12] *Ibid* at para. 11.9.
[13] [2013] IEHC 5, para. 14 (application on motion to determine whether jury trial was required); [2014] IEHC 213, para. 43 (determination of substantive damages claim). The citation appears in both judgements.
[14] *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* 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*[15], and did not consider it necessary to consider the submissions relating to breach of Article 41 of the Charter.[16]

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*, *Jermolajevs* and *Ciesielski* 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,

> "*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.*

[15] *Mallak v. Minister for Justice, Equality and Law Reform* [2012] IESC 59
[16] *A.P. v Minister for Justice and Equality (No. 2)* [2014] IEHC 241.

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*,[17] 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 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*

[17] *Minister for Justice, Equality, and Law Reform v Adam* [2011] IEHC 68. 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 (Edwards J.).

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*, 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.[18] Nevertheless, it should be noted that, as a matter of Irish law, the principle that the RAT must act with reasonable promptitude in carrying outs its functions has long been well-established.[19]

Concerning access to justice and *locus standi*, in *Digital Rights Ireland v Minister for Communications*,[20] 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 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*

[18] *S.K.T. (DRC) v Refugee Appeal Tribunal* [2014] IEHC 572, at para. 24.
[19] See the overview at paragraph 28 ff of the *SKT* judgment.
[20] *Digital Rights Ireland Ltd -v- Minister for Communication & Ors* [2010] IEHC 221.

> *rules on* locus standi*, the Court should nonetheless grant standing where to do otherwise would render the plaintiff's Community rights effectively unenforceable*."[21]

By contrast, in *An Taoiseach v Commissioner for Environmental Information*,[22] 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 disapply 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*,[23] 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*."

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*,[24] 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)[25], 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 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

[21] *Ibid* at para. 46.
[22] *An Taoiseach v Commissioner for Environmental Information* [2010] IEHC 241.
[23] *Dellway Investments & ors -v- NAMA & ors* [2011] IESC 4, at [487].
[24] *OJ (Nigeria) v Minister for Justice and Equality* [2012] IEHC 71.
[25] *Celtic Salmon Atlantic (Killary) v Aller Acqua* (Ireland), [2014] IEHC 421

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 Regulation.[26]

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*)[27] judicial review will normally suffice: see *VN (Cameroon) v Minister for Justice*[28], 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)*."[29]

In *A.A. v Minister for Justice*, 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, 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*

[26] *Ibid* at para. 124.
[27] This decision is discussed in detail above, pp.43-49 and below, p. 154.
[28] *V.N. (Cameroon) v Minister for Justice and Law Reform & anor*, [2012] IEHC 62
[29] *Ibid* at para. 21.

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."[30]

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.[31]

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.[32] In *Okunade v Minister for Justice, Equality and Law Reform*, 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.[33]

As regards the right to legal aid, in *Minister for Justice, Equality and Law Reform v McGuinness*,[34] Edwards J. 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 he did not give substantive reasoning justifying this conclusion, as distinct from the similar conclusion reached on the basis of the EAW Framework Decision).

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

[30] [2012] IEHC 222, paragraph 15.,
[31] Case C-277/11 *M.M*., judgment of the CJEU of 22 November 2012.
[32] *M v L* [2012] IEHC 485.
[33] *Okunade v Minister for Justice, Equality and Law Reform* [2012] IESC 49 (Clarke J), at para. 10.7.
[34] *Minister for Justice, Equality and Law Reform v McGuinness* [2011] IEHC 289.

the basis that the relevant provisions of the Charter (Articles 18 and 24) had not been expressly pleaded.[35]

It is of note that, in *Pringle v Government of Ireland*, Laffoy J. held in the High Court that the ESM Treaty was consistent with Article 47 of the Charter;[36] 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.[37]

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*, 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.[38]

In *H.N. v Minister for Justice, Equality and Law Reform*, 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

[35] *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.
[36] *Pringle v The Government of Ireland & Ors* [2012] IEHC 296, at para. 89.
[37] Case C-370/12 *Pringle*, judgment of 27 November 2012.
[38] *C.A. v Minister for Justice and Equality* [2014] IEHC 418. The judge specifically noted that Article 41 had not been pleaded in that case, which concerned the legality of the State's direct provision system: paragraph 11.8.

the applicant has already applied for and been refused refugee status.[39] 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 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.*

[39] *H.N. v Minister for Justice, Equality and Law Reform* [2012] IESC 58.

> *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*."[40]

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.[41] 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*, 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.[42] 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*[43] and *No2GM v The Environmental Protection Agency*[44], 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.[45]

[40] Case C-604/12 *H.N*., judgment of 8 May 2014.
[41] [2014] IESC 30 (2015).
[42] *Tagni v Minister for Justice, Equality and Law Reform* [2010] IEHC 85.
[43] *O'Connor v The Environmental Protection Agency & Anor [2012] IEHC 370*
[44] *No2GM Ltd v The Environmental Protection Agency & Anor* [2012] IEHC 369
[45] 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.*, ruling 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, where they cannot be unaware that systemic deficiencies in the asylum procedure and reception conditions in that Member State

[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.

mean there are substantial grounds for believing that the asylum seeker would face a real risk of having his/her Article 4 rights breached.[2]

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.[3]

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.[4] In *J.M.O. v Refugee Applications Commissioner*, 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 raft of judgments have concerned the compatibility with EU law, including the Charter, of Ireland's bifurcated system of international protection for refugees.

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

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[2] Joined Cases C-411/10 and C-493/10 *N.S./M.E*. [2011] ECR I-865.
[3] *F.O. v Refugee Appeals Tribunal* [2014] IEHC 123.
[4] 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 (Edwards J); *Minister for Justice and Equality v Eglitis* [2013] IEHC 215 (Edwards J); *Minister for Justice, Equality and Law Reform v Marjasz* [2012] IEHC 233.
[5] *J.M.O. v Refugee Applications Commissioner* [2014] IEHC 467, at para. 68.
[6] *M.M. v Minister for Justice, Equality and Law Reform* [2013] IEHC 9.

47 right to an effective remedy. This case constitutes a good illustration of the inherent 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 5; 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

[7] Case C-277/11 *MM* [2012] ECR I-744.
[8] See, for instance, paragraph 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, judgment of Hogan J.
[10] Case C-604/12 *H.N*., judgment of 8 May 2014, not yet reported.

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 *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*, 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*."[11]

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.[12]

The equivalence of Article 7 of the Charter to Article 8 of the Convention was also considered in *B. v Minister for Justice and Equality*, [13] 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*

[11] *J.S. v Minister for Justice and Equality* [2014] IEHC 195, at para. 33.
[12] *A.N. v Minister for Justice and Equality* [2013] IEHC 480.
[13] *B & ors v Minister for Justice and Equality* [2013] IEHC 246. For cases of Convention relevance, see above, pp. 64-68.

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 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."[14]

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.[15]

In *TD v Minister for Justice, Equality and Law Reform*, 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

[14] *Ibid* at para. 54. [Also discussed above at pp. 65-67.]
[15] *Ibid* at para. 56.

period with the comparator 8 week period for planning and development applications. Allowing the appeal, Fennelly J. noted that,

> "*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.*"[16]

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*."[17]

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.[18] The judgment clearly recognises that the right to refugee status is an "*autonomous fundamental right*" under EU law,[19] and represents a significant confirmation that refugee law was about giving effect to this fundamental right, not about border control:

[16] [2014] IESC 29, paragraph 12.
[17] [2014] IESC 29, at para. 18.
[18] *Ibid* at para. 82.
[19] *Ibid* at paras. 120, 133.

> "*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*."

In *A.M. v Refugee Appeals Tribunal*, 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.[20]

In *D. (a minor) v Refugee Appeals Tribunal*,[21] 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),[22] and the view has been expressed *obiter* 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*".[23]

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,[24] refers expressly to the Charter in its preamble.[25]

[20] *A.M. v Refugee Appeals Tribunal* [2014] IEHC 388.
[21] *D. (a minor) -v- Refugee Appeals Tribunal & anor* [2011] IEHC 431. See discussion on Convention application above, p.61.
[22] *Aslam v Minister for Justice and Equality* [2011] IEHC 512 (Hogan J.).
[23] *AO v Minister for Justice and Equality (No. 3)* [2012] IEHC 104 (Hogan J), 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.
[24] Framework Decision 2004/584/JHA OJ 2002 L 190/1.
[25] For a discussion on the Convention and the European Arrest Warrant, see above, pp. 79-82.

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*,[26] the Supreme Court considered the Charter in interpreting a time limit in the European Arrest Warrant Act 2003, which in turn was based on the EU EAW Framework Decision. The plaintiff's case 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*,[27] 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*[28], 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*

[26] *Dundon v The Governor of Cloverhill Prison* [2005] IESC 83.
[27] *Minister for Justice, Equality & Law Reform v Pollak* [2010] IEHC 209.
[28] *Attorney General v O'Gara* [2012] IEHC 179

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 he presumed that an issuing state will comply with the requirements of 'the Framework 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."[29]

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*,[30] 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 a European arrest warrant 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*

[29] *Ibid* at para. 10.3.
[30] *Minister for Justice and Equality v Marjasz* [2012] IEHC 233 (no paragraph numbers in judgement).

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."

In *Minister for Justice and Equality v Rostas*,[31] 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.[32] In *Minister for Justice, Equality and Law Reform v Dillon*,[33] Peart J. applied Article 50 of the Charter, on *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*,[34] 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.

[31] *Minister for Justice and Equality v Rostas* [2014] IEHC 391. For discussion on Convention aspects of this case, see above, pp. 81 *et seq*.
[32] *Minister for Justice, Equality and Law Reform v Biggins* [2006] IEHC 351.
[33] *Minister for Justice, Equality and Law Reform v Dillon* [2010] IEHC 196.
[34] *O'Sullivan v The Chief Executive of the Irish Prison Service* & ors [2010] IEHC 301.

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 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*."[35]

In sum, therefore, McKechnie J. considered that the effective remedy requirement was satisfied by the very existence of section 16, 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.[36] This issue will undoubtedly be developed further in the future.

See, for instance, the judgment of Edwards J. in *Minister for Justice and Equality v T.E.*, in which he 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.[37]

In *Minister for Justice v D.L.*[38], Edwards J. 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. Edwards J. 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*

[35] *Ibid* at para. 91.
[36] See, e.g., *Minister for Justice and Equality v P.G*. [2013] IEHC 54 (Edwards J.). See also, *Minister for Justice and Equality v T.E*. [2013] IEHC 323 (Edwards J).
[37] *Minister for Justice and Equality v T.E.* [2013] IEHC 323, at para. 121.
[38] *[*2011] IEHC 248.

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.

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*,[39] 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

[39] *Minister for Justice, Equality & Law Reform v Nolan* [2012] IEHC 239

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 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…*"[40]

In still other cases, while the Charter has been argued, the Court has ignored the Charter in its judgment and reasoned solely on the basis of the relevant Convention right, without providing any reason for so doing.[41]

In *Minister for Justice and Equality v Ostrowski*[42], 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.[43]

Finally, it is of interest that, in *Gilligan*, the Supreme Court (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.[44]

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[40] *Ibid* at para. 119.
[41] 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 (Edwards J.). See further cases discussed above, pp. 82 *et seq*.
[42] *Minister for Justice and Equality v Ostrowski* [2013] IESC 24
[43] *Ibid*; see judgment of McKechnie J. at para. 38 and (considering the Charter in interpreting the principle of proportionality of criminal penalties) para. 82.
[44] *Gilligan v Ireland & ors* [2013] IESC 45, at para. 40.

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.[45] 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 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."*[46]

More recently, in *Schrems*, the High Court (Hogan J) 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. [47] The applicant has claimed in the Irish proceedings that the Irish Data Protection Commissioner should exercise his 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

[45] *Digital Rights Ireland Ltd -v- Minister for Communication & Ors* [2010] IEHC 221.
[46] *Ibid* at para. 46.
[47] *Schrems v Data Protection Commissioner* [2014] IEHC 310.

argued that he is bound by the terms of the European Commission decision. The case is pending before the CJEU.[48]

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 Charter of Fundamental Rights thereby afforded are perhaps even more explicit than under our national law*." 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*."[49]

[48] Case C-362/14.
[49] *Schrems v Data Protection Commissioner* [2014] IEHC 310, at paras. 62-63.

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.

In *J. McB v L.E.*,[50] 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*., 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).[51]

By contrast, in *R v R*,[52] 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*.,[53] 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,

[50] *J. McB. -v- L.E.* [2010] IESC 48.
[51] *M.N. v R.N.* [2009] 1 I.R. 388.
[52] *R v R* [2008] IEHC 162.
[53] *M.N. v R.N*. [2009] IEHC 213. Considered in *Li. v La.* [2009] IEHC 585 (Edwards J.).

> "*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 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*." [54]

In *M.H.A. v A.P*., 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. [55] Similarly, in *V. v U*., MacMenamin J. expressly took Article 24(3) of the Charter into account (as interpreted by the CJEU in *McB*) 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.[56]

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*.,[57] 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).[58]

Companies' Rights

The implications of the Charter for companies' rights have also come before the Irish courts.

In *McDonogh 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

[54] *M.N. v R.N*. [2009] IEHC 213 at para. 32.
[55] *M.H.A. v A.P*. [2013] IEHC 611.
[56] *V. v U*. [2011] IEHC 519.
[57] *Health Service Executive v A.M. & H.I*. [2013] IEDC 10.
[58] For an overview of further District Court cases on child law and the Convention, see above, pp. 88-90.

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*".[59]

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.[60] However, the Charter was not decisive in the outcome of that case.

In *Dowling v Minister for Finance*, 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.[61] In a subsequent judgment, the High Court has 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 has argued, inter alia, that this breached Article 17 of the Charter on the right to property.[62]

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 Authority, which have cited the Charter in a number of important rulings.

In *Ms Z v A Government Department*, the Equality Authority rejected the complainant's claim that the respondents discriminated against her on the grounds of gender and disability

[59] Case C-12/11 [2013] ECR I-43.
[60] *EMI Records (Ireland) Ltd & Ors -v- The Data Protection Commissioner & Anor* [2012] IEHC 264 (Charleton J).
[61] *Dowling & ors v Minister for Finance* [2013] IESC 37. See also, *Okunade v Minister for Justice* [2012] IESC 49 (in the immigration context).
[62] *Dowling & ors v Minister for Finance* [2014] IEHC 418 (O'Malley J.).

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 Authority to the CJEU raising, *inter alia*, the questions 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 in Case C-363/12, 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.[63]

In *Trailer Care Holdings v Healy*, 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.*

[63] DEC-E2014-050 (9 July 2014).

> *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 current Treaties. It can thus be properly regarded as part of the primary legislation of the European Union*."[64]

The Labour Court further noted that, in recent CJEU jurisprudence on pregnancy-related discrimination, the CJEU had referred to Article 23 of the Charter. See similarly, *Ger Lally v Siniecka Rusek*; [65] *Gillick t/a Twist Foods v Rosploch*;[66] *Moonlite Clearning Services Limited v Drabik*.[67]

In *John McAteer v South Tipperary County Council*, the Equality Authority 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 Authority 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 Authority 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

[64] Determination EDA128 (March 2012).
[65] Determination EDA1314 (July 2013).
[66] Determination EDA1329 (November 2013).
[67] Determination EDA1416 (May 2014).

the Council or that what he was doing was either offensive or inappropriate, or constituted harassment.[68]

[68] DEC-E2014-045 (24 June 2014). The Convention aspects of this decision are discussed above, pp. 92-92.

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 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.

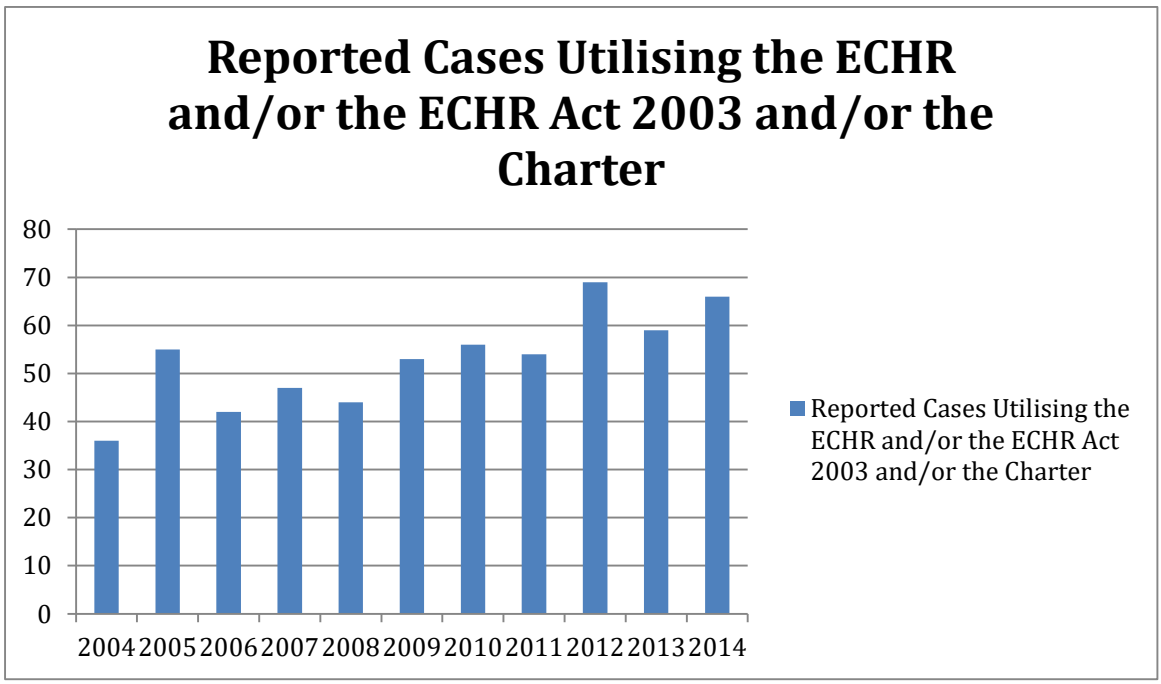


Figure 8.1

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.

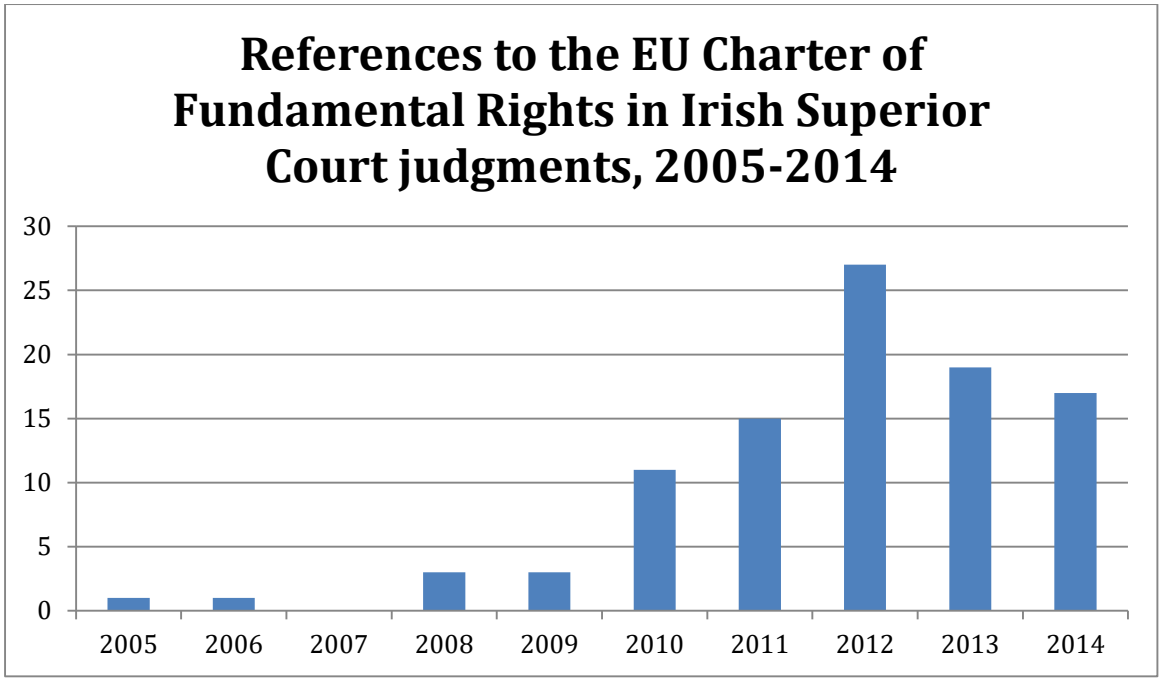


Figure 8.2

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 rights[1] 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. (editor) *ECHR and Irish Law* (Cork; Jordans, 2004), p. 16.
[2] *Ibid.* In relation to the 2003 Act as a whole, Hogan and Whyte have called the declaration of incompatibility provisions as "cumbersome (albeit ingenuous)", see *supra.* fn. 54 at p. 800, 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/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 therefore 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 IR 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 seems 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 seem in Supreme Court decision of *McD v L* and 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 *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 our discussion of injunctions in chapter 3, for instance. 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 Authority 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 Authority 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 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 by Edwards J. 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]

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. Prominent such 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 *McDonogh 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 Authority 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

[8] Case C-159/90 *SPUC v Grogan* ECLI:EU:C:1991:378.
[9] Dates indicated represent the date in which the referring order was made, not the subsequent CJEU judgment.

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, *McDonogh 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.

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A Report on the Application of the European Convention on Human Rights Act 2003 and the European Charter of Fundamental Rights: Evaluation and Review

Dr Suzanne Kingston/Dr Liam Thornton, UCD

July 2015

ANNEXES

Annex 1: Statistics on use of European rights before Irish courts and tribunals 2004-2014

For the research methodology used in compiling these statistics, see chapter 1 of the Report.

These tables were prepared by Dr Suzanne Kingston and Dr Liam Thornton with the assistance of Leanne Caulfield, LLM Candidate, UCD School of Law, who was research assistant for this Report.

Articles of the Convention Referred to in Judgments of Irish Superior Courts (Where Explicitly Identified in Judgment Only)

Article	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	17	18	35	41	46	A1P1	A2P1	A4P2	A1P4	A2P7	A2P4	A3P7	A4P7	A3P4
2004	1	3	1	0	2	15	0	7	1	4	1	0	4	2	0	0	0	0	0	0	1	1	0	0	0	0	0	0	0
2005	0	3	3	0	3	24	0	9	0	3	1	0	4	2	0	1	1	1	0	0	2	1	0	0	0	0	0	1	0

2006	0	0	2	0	2	22	1	14	0	0	1	1	2	6	0	0	0	0	0	0	1	0	0	0	0	0	0	0	1
2007	1	1	7	0	4	15	0	20	0	2	0	1	2	6	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2008	1	2	6	0	3	10	1	22	0	1	0	0	9	5	0	0	0	1	0	0	1	0	0	0	0	0	0	0	0
2009	2	2	4	0	2	22	0	24	0	1	0	0	5	4	0	0	0	0	0	0	0	0	0	1	0	0	1	0	0
2010	0	2	8	0	3	15	1	31	1	3	1	2	8	3	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2011	0	1	6	0	7	20	1	17	0	0	0	0	12	3	0	0	0	0	1	1	0	1	0	0	0	0	0	0	0
2012	0	2	13	0	5	18	1	29	0	3	0	0	14	3	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
2013	0	4	7	0	2	9	0	26	0	0	0	0	5	3	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0
2014	1	0	11	0	4	15	0	32	1	1	0	0	5	3	1	0	0	0	0	0	1	0	1	0	0	1	0	0	0
Total	**6**	**20**	**68**	**0**	**37**	**185**	**5**	**231**	**3**	**18**	**4**	**4**	**70**	**40**	**1**	**1**	**1**	**2**	**1**	**1**	**6**	**3**	**1**	**1**	**1**	**1**	**1**	**1**	**1**

Articles of the Charter Referred to in Judgments of the Irish Superior Courts

Article	1	2	3	4	6	7	8	9	10	11	14	15	16	17	18	19	20	21	23	24	33	41	45	47	48	49	50	51	52
2006																			1										
2008																				3									
2009			1																	2									
2010						3	1			1					1	1		1		1		2		4			1		1

2011	1					2					1				1					9		1		4					1
2012	1			1	1	3	1	1		1			1	2				2		3	1	4		13		2		6	
2013		1		2		5		2	2		1	1						1		5	1	2	2	5		1		4	1
2014	1		2	3	1	7	1		1			1		1	1		2	1		6		4		3	2	1		5	3
Total	**3**	**1**	**3**	**6**	**2**	**20**	**3**	**3**	**3**	**2**	**2**	**2**	**1**	**3**	**3**	**1**	**2**	**5**	**1**	**29**	**2**	**13**	**2**	**29**	**2**	**4**	**1**	**15**	**6**

Judgments of the Irish Superior Courts referencing European Rights per legal field 2004-2014 (Note: There May be More than One Relevant Legal Field Per Case)

Area of Law	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Administrative Law	13	21	3	5	7	11	5	2	10	9	7
Company Law	2	0	0	0	0	1	0	0	0	0	0
Constitutional Law	4	8	7	11	6	11	12	4	6	1	5
Contract Law	1	1	0	1	0	0	1	1	0	0	1
Criminal Law (including extradition, European Arrest Warrant and Bail)	15	18	16	12	6	12	13	20	21	20	12
Employment Law	0	1	1	0	0	1	0	0	0	1	1
Family and Child Law (including adoption, custody)	0	0	3	4	4	6	4	4	3	3	3
Gender Law	0	0	0	1	0	0	0	0	1	0	0
Health Law (including Medical Law)	1	0	0	0	1	2	2	2	1	6	0
Housing (including Landlord and Tenant)	1	2	2	4	5	2	3	1	2	1	1
Immigration and Asylum Law	5	10	14	13	18	16	20	19	26	18	34

Insurance Law	1	0	0	0	0	0	0	0	0	0	0
Legal Aid (Criminal and Civil)	1	2	0	1	0	3	1	1	0	1	1
Legal Procedure	3	5	6	1	3	3	4	1	4	5	0
Media Law	2	4	1	0	0	1	1	0	2	0	1
Property Law (including Succession & Planning Law)	0	2	0	0	3	0	2	2	1	2	2
Revenue Law (incl. Criminal Assets)	2	0	0	1	0	1	2	3	2	1	2
Torts	3	2	1	2	0	0	0	1	3	1	4

Tribunal Engagement with the Convention, ECHR Act 2003 and Charter (2004-2014)

Body (2004-2014)	Convention and/or ECHR Act 2003 Referred to	Charter Only Referred to	Convention and/or ECHR Act 2003 AND Charter Referred to	Convention/Charter Articles Engaged With (Number of Mentions)
Broadcasting Commission of Ireland	1	0	0	None Specified
Labour Court	3	4	0	Article 23 EUCFR (3) Article 33 EUCFR (3) ECHR: None Specified (3) ECHR Act 2003 (1)
Equality Tribunal	6	1	1	Article 10 EUCFR (1) Article 21 EUCFR (1) Article 23 EUCFR (1) Article 26 EUCFR (1) Article 33 EUCFR (1) Article 34 EUCFR (1) Article 52 EUCFR (1) Article 3 ECHR (1) Article 6 ECHR (1) Article 8 ECHR (4) Article 9 ECHR (1) Article 14 ECHR (2) ECHR Act 2003 (4)
Irish Information Commissioners Decisions	1	0	0	Article 8 ECHR (1) ECHR Act 2003 (1)

Irish Data Protection Commission	2	0	0	Article 8 (1) Article 10(1) ECHR Act 2003 (1)
Competition Authority of Ireland	0	0	0	N/A

Concurrent application of Convention and/or ECHR Act 2003 and Charter to in judgments of the Irish Superior Courts 2004-2014

Year	Convention and/or ECHR Act 2003 AND Charter Mentioned
2004	0
2005	0
2006	1
2007	0
2008	1
2009	0
2010	9
2011	13
2012	18
2013	18
2014	11

District Court (Child Care Law) Engaging with European Rights Instruments

District Court	ECHR Referred to	ECHR Act Referred to	ECHR & EUCFR Referred to
2009-2014	22	2	3

Annex 2: Irish Superior Court judgments referencing European Convention on Human Rights, European Convention on Human Rights Act 2003 & Charter of Fundamental Rights of the European Union 2004-2014

2004

Case	Articles of ECHR Considered in Decision	Sections of the ECHR Act 2003 Considered in	EU Charter Article	Core Summary	Court	Core Legal Area

		the Decision				
Sweetman v DPP [2004] IEHC 56; [2004] 4 JIC 0102	Article 6(1) Article 8	Section 3		Leave for judicial review not granted. Complaint centred around time delay in proceeding to trial.	HC	Criminal Law Judicial Review
NWR FM Ltd. v. Broadcasting Commission of Ireland [2004] IEHC 109; [2004] 4 IR 50	Article 1, Protocol 1	None specified		No breach of property rights under the ECHR by the BCI refusing to grant the applicants a broadcasting licence.	HC	Media Law Administrative Law
Quinn v Judge O'Leary & Others [2004] IEHC 232;[2004] IEHC 103; [2004] 3.I.R. 128; [2004] 4 JIC 2306	Article 1 Article 6 Article 10 Article 13			It was in the interests of justice that an order of certiorari would issue in respect of the conviction entered against the applicant.	HC	Constitutional Law Administrative Law
Dublin City Council v. McGrath [2004] IEHC 111; [2004] IEHC 45;	Article 8	Section 2(1) Section 3(1)		In granting an injunction the court must take the European Convention on	HC	Tort Law (Trespass) Housing Law

[2004] 1 IR 216				Human Rights into account in addition to considering whether there was a fair question to be tried, whether damages were an alternative remedy and where the balance of convenience lay.		
Maguire v. Director of Public Prosecutions [2004] IESC 53; [2004] 3 IR 241; [2005] 1 ILRM 53	Article 5 Article 6	Section 2(1)		If the court were to be limited to the factors set out in s2 of the Bail Act 1997 when considering an application for bail, it would be a breach of the applicant's right to liberty or to a speedy trial in this case.	SC	Bail Refusal Legal Practice and Procedure
Cronin v The Minister for Education and Science	Article 13 Article 2 Protocol 1	None specified		Granted a mandatory injunction on an interlocutory basis	HC	Constitutional Law (Education rights)

[2004] IEHC 255; [2004] 3 IR 205				directing the first named defendant to for some of the plaintiff's special education needs.		
C(S) and others v Minister for Justice, Equality and Law Reform: C(T) and C(A) v Minister for Justice, Equality and Law Reform:*Joined cases* [2004] IEHC 399	Article 8 Article 14	None specified.		Deportation order made against RC would be quashed as citizenship of daughter and wife had not been considered. In the case of AC it could not be said that his deportation was not lawful or was contrary to the European Convention on Human Rights and relief would be denied.	HC	Asylum and Immigration Law
O'Donoghue v. Legal Aid Board and Others [2004] IESC 413; [2006] 4 IR 204	Article 6			Granted relief in relation to legal aid against the Minister for Justice and the Attorney General but not	HC	Constitutional Law Legal Aid

				the Legal Aid Board as it had done everything in its power to provide for the plaintiff and not acted negligently nor in breach of its statutory duty.		
Desmond v. Moriarty [2004] IESC 3; [2004] 1 IR 334	Article 10			Dismissed the appeal and affirmed the order of the High Court refusing the relief sought by the applicant concerning the references by the Tribunal to the Glackin Report.	SC	Administrative Law Criminal Law (political corruption)
F. (P.) & Anor v. Minister for Justice, Equality and Law Reform [2004] IEHC 8	Article 8			Refused the application for leave for an order quashing the decision of the Minister to refuse to revoke a deportation order	HC	Asylum and Immigration Law

				and also refused the further reliefs sought to amend the statement of claim and for interlocutory relief.		
McMullen v. Farrell & Ors [2004] IESC 6	Article 6.1			Dismissed both appeals for review of taxation for want of prosecution and affirmed the two orders of the High Court as the plaintiff has ample opportunity to re-enter the proceedings but failed to do so.	SC	Revenue Law
H. (T.) v. D.P.P. & Anor [2004] IEHC 76	Article 5.1 Article 6			Granted the injunction sought as it was believed that if this trial should proceed that there would be a real risk of the accused person not obtaining a trial in	HC	Criminal Law Administrative Law

				due course of law.		
Morris & Anor v. Farrell [2004] IEHC 600;	Article 2			No formal declaratory order in the terms of the first relief sought by the applicants as they had failed to establish grounds warranting the quashing of the verdict of the jury in the inquest in this case.	HC	Administrative Law
Superwood Holdings Plc & Ors v. Sun Alliance and London Insurance Plc t/a Sun Alliance Insurance Group & Ors [2004] IESC 19; [2004] 2 ILRM 124	N/A			The court was satisfied that there was no alternative to striking out the plaintiffs' appeal as they had not placed before the court any evidence of a realistic programme under which the necessary monies for security of costs would be	SC	Insurance Law Contract Law Company Law

				raised within a reasonable time.		
Re Eurofood IFSC Ltd. [2004] IEHC 607	Article 6			An order for the winding up of the company was made as the court was satisfied that on the evidence. Eurofood was grossly insolvent and that the creditors were entitled to have it wound up in accordance with the legislation in force in this state.	HC	Company Law
S. (J.) v. D.P.P [2004] IEHC 100	Article 6			Held that the capacity of the applicant to defend himself was impaired to such an extent that the trial should be halted as there was a risk of an unfair trial.	HC	Criminal Law
Livingstone & Ors	Article 13			Held that the	HC	Criminal Law

v. Minister for Justice & Ors [2004] IEHC 58				plaintiffs have a right to discovery of documents relevant to their claim but that the court must balance that right with the public interest in not disclosing documents in respect of which public interest immunity and privilege is claimed. Disclosure was made in relation to categories 5, 6, 7 and 8 of the documents.		Law of Evidence
Ramsayer v. Mahon (Acting Coroner for the County of Offaly) [2004] IEHC 70	Article 2 Article 13			Application for disclosure refused as it was held that there was no evidence that hat the applicant was prejudiced by the absence of such	HC	Administrative Law Inquest Law

				disclosure.		
L. (M.J.) v. Minister for Justice, Equality and Law Reform [2004] IEHC 81; [2004] 2 IR 178	Article 2 Article 3	Section 3		The plaintiff's application for an amendment to enable the challenge of a deportation order was refused due to lack of arguable grounds, let alone substantial grounds, required for such a challenge.	HC	Asylum and Immigration Law
C. (D.) v. D.P.P. [2004] IEHC 245	Article 6			Refused the relief sought as the court was not satisfied that the applicant had advanced a strong case or one likely to succeed if given leave.	HC	Criminal Law
Holland v. Governor of Portlaoise Prison [2004] IEHC 97; [2004] 2 IR 573	Article 8 Article 9 Article 10 Article 11			Set aside the relevant decisions of the respondent Governor not to allow access to the	HC	Administrative Law Criminal Law

				media to facilitate an investigation of an alleged miscarriage of justice taking the view that such an agency as investigative journalism is and can be a productive and probative vehicle in the overall administration of justice.		
Ochre Ridge v Cork Bonded Warehouses [2004] IEHC 160	Article 8			It was concluded that all of the documentation, excluding the account related correspondence, was privileged on the basis of legal advice privilege only and not litigation privilege.	HC	Law of Evidence
Rooney v. Minister for	N/A	N/A		An order was made dismissing	HC	Constitutional Law

Agriculture, Food and Forestry & Ors [2004] IEHC 305				the proceedings as the plaintiff established no actionable wrong or liability for damages, the ECHR could not be relied on as it could not be applied retrospectively and his claim for damages for alleged breach of his constitutional right to privacy was wholly unstateable and devoid of merit.		Agricultural Law
Margine v. Minister for Justice and Law Reform & Ors [2004] IEHC 127	Article 8	Section 2 Section 3 Section 4		Refused the relief sought of a declaration allowing the applicant to remain in the state or at least to remain while his residency application was	HC	Asylum and Immigration Law

				considered having considering the merits of the application.		
Foley v. Smith [2004] IEHC 299	Article 6			The request for an order dismissing the plaintiff's claim on the grounds that the matters herein are res judicata, was denied as an injustice would be caused to the plaintiff if the Court were to allow the decree of the District Court to overrule the High Court proceedings.	HC	Legal Practice and Procedure Administrative Law
PJ Carroll & Co Ltd & Ors v. Minister for Health and Children & Ors [2004] IEHC 310	N/A			Held that it is not open to the defendants to seek to lead evidence in respect of facts which have been admitted.	HC	Public Health Law
McGonnell v.	Article 6			Dismissed the	HC	Law of Evidence

A.G. & Anor [2004] IEHC 312				claims as it was held that the overall system of taking and reading breath specimens does not infringe any constitutional or legal rights of the plaintiffs, that a further safe guard exists and that there was no real prospect of an injustice or of an unfair trial in respect of the charges still pending against the plaintiffs.		Road Traffic Law
Criminal Assets Bureau v. S. (P.) [2004] IEHC 351; [2009] 3 IR 9	Article 6 Article 14			It was held against the defendant on each of the claims that the Criminal Assets Bureau Act 1996 was unconstitutional. A judgment for the amount claimed	HC	Revenue Law Criminal Law

				was given.		
O'Brien v. Moriarty [2004] IEHC 362	None specified			Held that the Applicant was not entitled to the reliefs sought at paragraph (xii) of the Reliefs Sough in the Statement of Grounds as the evidence failed to disclose a fair issue to be tried. The Applicant was not entitled to any further or other relief as sought at paragraph (xiii) of the Reliefs Sought in the Statement of Grounds.	HC	Administrative Law (Appeal heard by the SC in 2005)
Smyth (An Infant) v. Ward & Ors [2004] IEHC 370	Article 6(1)			Held that it was in the interests of justice to direct that a further period of two years should elapse before the action be listed for	HC	Tort Law Legal Practice and Procedure

				hearing to enable the prognosis in respect of the Plaintiff to be rendered more certain.		
D.P.P.-v- Mark Desmond [2004] IE CCA 46	Article 6	Schedule 1		Rejected the other grounds of appeal put forward on behalf of the Applicant, but granted leave to appeal on the basis of the refusal to consider the application for the adjournment and ordered a retrial.	CCA	Criminal Law Administrative Law
Gilroy -v- Flynn [2004] IESC 98; [2005] 1 ILRM 290		None specified		Allowed the appeal, set aside the order of the High Court and substituted for it an order giving the plaintiff one week from today's date to file a statement of claim on the	SC	Tort Law Administrative Law

				basis of the circumstances of the case.		
O'Hara v. D.P.P. & Anor [2004] IEHC 386	Article 6			Application dismissed as it was held that the applicant's submission imposed an unreasonable burden on the Gardaí and went far beyond what is suggested in the Braddish judgment.	HC	Law of Evidence Criminal Law
Murphy v. British Broadcasting Corporation [2004] IEHC 420; [2005] 3 IR 336	Article 6 Article 10	None specified		The BBC was not entitled to a jury as the right to a fair trial is fully achievable without a jury.	HC	Criminal Law Administrative Law

2005

Case	Articles of ECHR Considered in Decision	Sections of the ECHR Act 2003 Considered in the Decision	EU Charter Article	Core Summary	Court	Core Legal Area
Dublin City Council v Fennell [2005] IESC 33; [2005] 1 I.R. 604	Article 6 Article 8 Article 13 Article 1, Protocol 1	Section 2 Section 3		The ECHR Act 2003 does not have retrospective effect	SC	Housing Law
Carmody v. Minister for Justice, Equality and Law Reform [2005] IEHC 10; [2005] 2 ILRM 1	Article 5 Article 6 Article 14	Section 2 Section 5		Absence of parity as regards legal representation provided for under the criminal legal aid scheme to an accused, did not violate Article 6 ECHR.	HC	Criminal Law Legal Aid
Arra v Governor of Cloverhill Prison [2005] IEHC 12; [2005] 1 JIC 2601	Article 5	Section 5(1)		Application refused. Held that the European Convention was not to be read as if it were a revenue statute or criminal provision	HC	Criminal Law

				and the applicant's interpretation of a document embodying principles of protection of rights was too technical.		
Moldovan v Minister for Justice, Equality and Law Reform [2005] IEHC 141; [2005] 4 JIC 2903	Article 6(3)(d)			Refused leave to apply for judicial review seeking an order of certiorari quashing the decision of the RAT refusing refugee status and a declaration that s. 16(11)(a)(i) of the Refugee Act 1996 was repugnant to the Constitution as there was not sufficient evidence before the Court to support the applicant's contentions	HC	Asylum and Immigration Law

Clifford v Minister for Education and Science and others [2005] IEHC 288	Article 2 Article 3 Article 5 Article 8 Article 13 Article 17 Article 18 Article 2 Protocol 1	Section 2 Section 3		Order allowing the applicant to amend the pleadings to include a claim pursuant to the European Convention on Human Rights Act 2003 and varying orders related to discovery.	HC	Constitutional Law Education
Foley v. Sunday Newspapers Ltd. [2005] IEHC 14; [2005] 1 IR 88	Article 10	None specified.		Refused the interlocutory prohibitory injunctive relief sought restraining the defendant newspaper from publishing material which the plaintiff alleged constituted a real and serious risk to his life and/or bodily integrity for various reasons.		Constitutional Law Media Law
Adams v. Reilly	Article 6			It was held	HC	Criminal Law

[2005] IEHC 133; [2005] 3 IR 190				refusing to grant leave, that an application for judicial review should not be entertained mid-trial.		
Cogley v. Radio Telefis Eireann [2005] IEHC 180; [2005] 4 IR 79	None specified.			Refused an interlocutory injunction to prevent the broadcast of a documentary on nursing home care by RTE.	HC	Constitutional Law Media Law
Gallagher v. Casey [2005] IEHC 342; [2005] 3 IR 548	Article 6	Section 2		Interim ruling on the appeal, that while there were defects in the issuing of the civil bill against the third defendant but they did not render the proceedings a nullity for reasons including that there was no	HC	Legal Practice and Procedure

				requirement under the European Convention on Human Rights for a court to give reasons for its decisions at an interim stage during the course of a hearing.		
J.F. v. Director of Public Prosecutions [2005] IESC 24; [2005] 2 IR 174	Article 6			Allowed the appeal striking out the relevant paragraphs of the statement of opposition and the supporting affidavits of the psychologist and the relevant parts of the complainant's affidavit.	SC	Criminal Law
The People (Director of Public Prosecutions) v. Laide	Article 8			Allowed the appeal on the conviction for manslaughter and directed a retrial	CCA	Criminal Law

[2005] IECCA 24; [2005] 1 IR 209				and refusing the appeal on the conviction of violent disorder against the first accused and allowed the appeal of the second accused and didn't order a retrial.		
Sweetman v Director of Public Prosecutions [2005] IEHC 435; [2005] 12 JIC 2004	Article 6(1)	None specified		Prohibited the further prosecution of the offences as prejudice in matters of excessive delay could be presumed in the absence of any specific prejudice and that the applicant had been deprived of his right to an expeditious trial under the	HC	Criminal Law Administrative Law

				constitution, common law and article 6(1) of the ECHR.		
Ngangtchang -v- Refugee Appeals Tribunal & anor [2005] IEHC 441		Section 5(1)		Application for leave to seek judicial review of the decision to refuse refugee status was refused as no error of principle was evident in the case.	HC	Asylum and Immigration Law
C.E.S. (Nee I.) v. Minister for Justice [2005] IEHC 104; [2006] 2 IR 95	Article 8	Section 2 Section 4		Granted leave to seek judicial review as it was arguable that the decision of the respondent infringed the applicants' rights, protected by the Constitution and/or the Convention (article 8).	HC	Asylum and Immigration Law
Brady v.	Article 6			Granted	SC	Criminal Law

Houghton and Others [2005] IESC 54; [2006] 1 IR 1				declaratory relief restraining the transmission of a mobile phone data to the Minister for Justice for onward transmission to the United Kingdom authorities.		Law of Evidence
F. (T.) v. D.P.P & Anor [2005] IEHC 31	Article 6			Granted relief on the basis that there had been a clear breach of the applicant's constitutionally protected right to a trial with reasonable expedition.	HC	Criminal Law Administrative Law
D.P.P.-v- Colm Murphy [2005] IECCA 1; [2005] 2 IR 125	Article 8	None specified		The court set aside the conviction of the accused on the two grounds successfully argued and direct a retrial.	CCA	Criminal Law

O'Brien v. Personal Injuries Assessment Board [2005] IEHC 100; [2007] 2 IR 1	Section 3	Article 6.1		Held that tghe respondent in declining to accept or act upon the authorisation dated 16th August, 2004 by corresponding directly with the applicant is acting in breach of s. 7 of the Personal Injuries Assessment Board 2003, or without authority under any other provision of the Act.		Personal Injuries Law Administrative Law
McConnell & Anor v. Dublin City Council & Ors [2005] IEHC 21	None specified	None specified		Allowed the stay sought but limited it to ten days from that date so that the matter didn't drag its' feet and made its way with expedition to the	HC	Housing Law Administrative Law

				Supreme Court.		
Law Society of Ireland -v- Malocco [2005] IESC 5	Article 6(1) Article 4, Protocol 7	None specified		Rejected all of the appellant's contentions in this case and dismissed the appeals as no basis had been identified nor could there be any logical argument to suggest that where a professional person has been convicted of a criminal offence that the facts giving rise to such conviction could not be considered by a professional disciplinary body to ascertain whether or not the professional person had committed	SC	Criminal Law

				professional misconduct.		
In the Matter of Article 26 of The Constitution & In the Matter of the Health (Amendment) (No. 2) Bill 2004 [2005] IESC 7, [2005] 1 IR 105	None specified			Held that the retrospective provisions of the Bill contained in s. 1(b) which provide for the insertion of subsections (5), (6) and (7), and subsection (11) insofar as it defines "relevant charge", in s. 53 of the Act of 1970, are repugnant to the Constitution and in particular Articles 43 and 40.3.2 thereof.	SC	Constitutional Law
Albatros Feeds Ltd -v- Minister for Agriculture & Food & Ors [2005] IEHC 65	None specified			Certiorari was granted to quash the Instructions of the Minister in respect to a quantity of a good that the applicant tried to import into	HC	Agricultural Law Administrative Law

				the State.		
Potts v. Minister for Defence [2005] IEHC 72	Article 6	None specified		Granted the reliefs sought for various reason including that it did not seem to be premature to consider whether the conduct of the process in accordance with the clear statutory rules laid out may breach the applicant's right either under the convention or under the constitution.	HC	Defence Law
Burns & Anor v. Governor of Castlerea Prison [2005] IEHC 76	None specified	None specified		Held that the applicant prison officers were denied natural or constitutional justice, the procedure was fatally flawed and the applicants	HC	Employment Law Administrative Law

				were entitled to succeed.		
McCoppin v. Kennedy & Anor [2005] IEHC 194; [2005] 4 IR 66	Article 6 Article 13	Section 5		Quashed the order of the first named respondent made on 21st April, 2004 in so far as the costs element of that order is concerned. No order for costs was made against any party.	HC	Administrative Law Civil Procedure
Stephens v. Paul Flynn Ltd. [2005] IEHC 148	None specified	None specified		Dismissed the proceedings on the basis of the weight to be attributed to both the delay and its excusability coupled with the moderate degree of prejudice and the minor weighting attributable to the limited inaction on	HC	Administrative Law Legal Practice and Procedure *(Appeal heard by the SC in 2008)*

				the part of the Defendant		
D.P.P. -v- Martin Kelly [2005] IECCA 50	Article 6			The argument that the Applicant did not receive a fair trial was rejected. Refused leave to appeal.	CCA	Criminal Law
Minister for Justice, Equality and Law Reform v. McArdle [2005] IEHC 222	Article 13 Article 35			Held that an order would be made to surrender the respondent. There was nothing to suggest that in surrendering the Respondent for trial in Spain his constitutional rights or the rights enshrined in the European Convention on Human Rights would be abrogated.	HC	European Arrest Warrant
Equality Authority v. Portmarnock Golf Club & Ors	Article 11	None specified.		Held that the plaintiffs' constitutional	HC	Equality Law Constitutional Law

[2005] IEHC 235				arguments cannot prevail. Held that the Club shall not be considered a discriminating Club for the purposes of s. 8 of the Equal Status Act, 2000.		
M M -v- DPP [2005] IEHC 204	Article 6			Rejected the relief sought as it was held that the delay in the matter was such as to not deprive the applicant of his right to an expeditious trial.	HC	Administrative Law Criminal Law
Cirpaci (nee McCormack) & anor -v- The Minister for Justice, Equality & Law Reform [2005] IESC 42; [2005] 4 IR 109	Article 8			Dismissed the appeal and affirmed the order of the High Court as the Minister had been shown to have given due weight to all relevant information placed	SC	Asylum and Immigration Law

				before him, it had not been shown that he acted in pursuit of a fixed or inflexible policy or that his decision was unreasonable or disproportionate. Furthermore, his decision fell well within the margin of appreciation allowed to Member States by the European Convention.		
Talbot & Anor v. Bord Pleanala & Ors [2005] IEHC 215		None specified		Refused the application for leave to seek judicial review in respect of the reliefs sought and on the grounds disclosed in the Statement of Grounds, on the basis that no	HC	Planning and Development Law

				benefit could result in any event from success in the application at the end of the day.		
Rogers v. Michelin Tyre plc & Anor [2005] IEHC 294		None specified. Held not to be relevant.		Dismissed the proceedings in their entirety as against the Pension Trust but in part only as against Michelin allowing to continue that aspect of the claim which is dependent upon the plaintiff establishing, independent of the representations made, an entitlement.	HC	Administrative Law Equity Contract Law
Superwood Holdings plc & Ors v. Ireland &	Article 6 Article 1, Protocol 1	Section 6		Dismissed Superwood's motion for	HC	Court Practice and Procedure Administrative

Anor [2005] IEHC 232; [2005] 3 IR 398	Article 14			judgment in default of defence under O. 27, r. 8 on the grounds that the statement of claim therein disclosed no reasonable cause of action against the State.		Law
A. (P. P.) v. Refugee Appeals Tribunal & Ors [2005] IEHC 237	Article 6(1)	None specified.		Held that the applicants were entitled to judicial review of the refusal to give them access to previous determinations made by the Refugee Appeals Tribunal, albeit on the narrow and confined grounds outlined.	HC	Asylum and Immigration Law
K. (M.) v. Minister for Justice, Equality & Law Reform & Ors	Article 6.1	Section 3 Section 5(1)		Refused leave as leave to apply for judicial review is a discretionary	HC	Asylum and Immigration Law

[2005] IEHC 247				remedy and requires the appropriate elements of the burden of proof to be discharged by the applicant.		
D.P.P. v. Independent Newspapers (Ireland) Ltd. & Ors [2005] IEHC 353; [2006] 1 IR 366	Article 10			Held that the articles complained of in this case in respect of the respondents were a contempt of court in that they were highly prejudicial to the notice party thus interfering in the administration of justice.	HC	Media Law
Campbell v. O'Donnell & Ors [2005] IEHC 266		Section 3		Held that the Plaintiff was not entitled to issue these proceedings without the authorisation of the Personal	HC	Tort Law Personal Injuries Law

				Injuries Assessment Board.		
A. -v- Governor of Cloverhill Prison & Ors [2005] IEHC 483; [2008] 1 IR 43	Article 8			Held that the applicant was not entitled to any of the reliefs claimed as the situation was very largely attributable to the applicant's own actions and failure to take elementary and sensible steps to prevent a foreseeable situation.	HC	Asylum and Immigration Law Constitutional Law
Fowley v. Conroy [2005] IEHC 269; [2005] 3 IR 480		Section 3		Dismissed the case as the applicant had not met the exceptionally high threshold that would be necessary to entitle her to an order of the type she sought in this	HC	Administrative Law

				case.		
R. (E.) v. D.P.P. [2005] IEHC 290	Article 6			Held that the applicant was not entitled to the relief sought as he had, by his conduct, caused the delay which has resulted in the absence of the evidence which he then said he wished to adduce.	HC	Criminal Law Administrative Law
Mahon & Ors v. Post Publications Ltd. t/a The Sunday Business Post [2005] IEHC 307	Article 10			Reliefs sought were refused as there was no sound legal basis for the wide ranging form of order which was sought in these proceedings.	HC	Tribunal Law Media Law
Magee -v- Farrell & Ors [2005] IEHC 388	Article 2 Article 13	Section 3		Held that due to the unfortunate circumstances of the plaintiff in the present case, fair procedures under	HC	Legal Aid Administrative Law Constitutional Law

				the Constitution require that she be provided with legal aid for the purpose of being adequately represented at the forthcoming inquest into her son's death.		
Bolger v. Haughton & Ors [2005] IEHC 364	Article 6			An order was made for the release of the applicant/plaintiff under s. 50(2)(bbb) of the 1965 Act, as amended.	HC	Extradition Law Administrative Law
Hickey v O Dwyer & Ors [2005] IEHC 365, [2006] 2 ILRM 81	None specified			Various decisions were made in relation to the two issues concerned. It was deemed that it was not necessary to express any view on the ECHR questions in these	HC	Succession Law Property Law

				proceedings.		
H. (I.) v. Minister for Justice, Equality and Law Reform [2005] IEHC 463	Article 3			Held that there was no other basis for considering that the Minister was in any way legally wrong in coming to the conclusion that a deportation order should be issued.	HC	Asylum and Immigration Law
Makumbi v. Minister for Justice, Equality and Law Reform [2005] IEHC 40; [2008] 4 IR 417	Article 2	Section 2 Section 3		Granted injunction restraining the respondent from taking any steps to transfer the applicant to the United Kingdom pending the determination of the application made on the 28th July, 2005, not to implement the Transfer Order as well as making	HC	Asylum and Immigration Law

				other declarations.		
D.C. -v- DPP [2005] IESC 77; [2006] 1 ILRM 348; [2005] 4 IR 281	Article 6			Affirmed the decision of the High Court and dismissed the appeal of the applicant to prohibit his trial on the basis that there is a serious risk of an unfair trial.	SC	Criminal Law Administrative Law
F. (S.) v. D.P.P. [2005] IEHC 410	Article 6			Held that the applicant was entitled to the relief which he sought as there had been inordinate and excessive delay on the part of R.S. in reporting the offences and the delay was not referable to the conduct of the applicant.	HC	Criminal Law Administrative Law
Ramseyer -v-		None specified		Allowed the	SC	Administrative

Mahon [2005] IESC 82; [2006] 1 IR 216,				appeal and set aside the order of the High Court to the extent indicated. Held that it was not necessary to consider the Appellant's arguments based on the European Convention of Human Rights.		Law Inquest Law
D. (C.) v. D.P.P. [2005] IEHC 431	Article 6			Declined the relief sought as it was held that the applicant did not suffer specific prejudice by reasons of the absence of the evidence specified and will not be exposed to the risk of an unfair trial on that ground.	HC	Criminal Law
Atherton v.	Article 8	Section 2		Held that the	HC	Law of Evidence

D.P.P. [2005] IEHC 429; [2006] 1 IR 245		Section 4		evidence by the complainant by means of the video surveillance referred to was not in breach of the constitutional rights of the accused and that the evidence was not obtained unlawfully.		
Law Society of Ireland v. Competition Authority [2005] IEHC 455; [2006] 2 IR 262	Article 6	Section 1(1) Section 5		Order of certiorari quashing a notice which offered guidance to businesses and legal practitioners on the respondent's policy in relation to the legal representation of persons attending before it as the Competition Act did not empower it to issue such a	HC	Constitutional Law

				notice.		
Dundon -v- The Governor of Cloverhill Prison [2005] IESC 83; [2006] 1 IR 518; [2006] 1 ILRM 321			Chapter VI	Dismissed the appeal for delay for several reasons including that the time limits of sixty days and ninety days have no relevance to individual rights in individual cases.	SC	European Arrest Warrant
Kozhukarov v Minister for Justice, Equality & Law Reform [2005] IEHC 424; [2005] 12 JIC 1403	Article 8			Only entitled to challenge Minister's deportation order decision insofar as amounted to a disproportionate interference with the applicants' rights as guaranteed under Article 8 of the Convention.	HC	Asylum and Immigration Law

2006

Case	Articles of ECHR Considered in Decision	Sections of the ECHR Act 2003 Considered in the Decision	EU Charter Article	Core Summary	Court	Core Legal Area
Minister for Justice v Stapleton [2006] 3 IR 26; [2006] IEHC 43	Articles 3 and 6			The court should not order the surrender of a requested person if to do so was not compatible with the State's obligations under the Convention. In this case, the length of time between the alleged offence, suggested the applicant may not get a fair trial in England.	HC	European Arrest Warrant
Dada v Minister for Justice [2006] IEHC 140	Article 3 Article 8	Section 2(1) Section 5(1)		The weight which would have to be given to the upholding of the Asylum and	HC	Asylum and Immigration Law

				Immigration Laws of the State in striking a balance between any Article 8 rights, in this case would be such, that no demonstrable ground shown for contending that the correct balance was no struck.		
Crowley v Roche Products (Ireland) Ltd. [2006] IEHC 6	Article 6	None specified		A delay of three years from accrual of the cause of action was prima facie a breach of the defendant's entitlement to a hearing within a reasonable time pursuant to Article 6 of the European Convention of Human Rights.	HC	Legal Practice and Procedure
McFarlane (applicant) v	Article 6(1)			Refused relief as no evidence had	HC	Criminal Law Administrative

Director of Public Prosecutions (respondent) [2006] IEHC 389				been adduced by the applicant that any risk of an unfair trial flowed from the delay which interfered with his right to an expeditious trial.		Law
W (M) v DPP [2006] IEHC 21	Article 6(1)	None specified		There was unexplained and excessive prosecutorial delay, in violation of Article 6(1) of the European Convention on Human Rights.	HC	Criminal Law Constitutional Law
Elukanlo and Elukanlo (applicants) v The Minister for Justice, Equality and Law Reform (respondent) [2006] IEHC 211	Article 8			Certain of the relief sought by the first named applicant could not be the subject of judicial review as the applicant never argued that there was a failure by the respondent to observe	HC	Asylum and Immigration Law

				appropriate procedures up to the date of the making of the deportation order and the relief sought amounted to an attack on the deportation order itself. the second named applicant was entitled to argue that the respondent did not consider at all the rights of the second named applicant in reaching his decision under s.3(1) and s.3(11) of the Immigration Act 1999.		
Fares (applicant) v Minister for Justice, Equality and Law Reform (respondent)	Article 8	Section 3(1)		The decision by the Minister on the application under the scheme had been taken in	HC	Asylum and Immigration Law

[2006] IEHC 343				breach of the second applicant's rights under Article 40.3 of the Constitution and under section 3(1) of the European Convention on Human Rights Act 2003 as it had been taken in a manner incompatible with the State's obligations to the Irish citizen child under article 8 of the Convention.		
Irish Municipal Public and Civil Trade Union v Ryanair Ltd [2006] IEHC 118; [2007] 1 ILRM 45	Article 11	Section 2 Section 4		Ryanair's application for an order striking out the proceedings on several grounds including that that there was no obligation under the Constitution or the	HC	Industrial Relations Law Legal Practice and Procedure

				European Convention on Human Rights for an employer to negotiate with a union was dismissed. The proceedings involved the investigation of questions of general importance in the context of recent changes in domestic law, which raised issues as to the impact of the State's international obligations on its domestic law.		
Menton v DPP [2006] 1EHC 234	Article 6	None specified		Relief refused as applications as to delay such as that in this case should only proceed by	HC	Administrative Law Legal Practice and Procedure

				way of judicial review in exceptional circumstances.		
Adio (applicant) v Minister for Justice, Equality and Law Reform (respondent) [2006] IEHC 346	Article 8 Article 14	Section 3		Held that the Minister's refusal was to consider the application was an interference with the child's right to respect for his private life within the meaning of article 8.1 of the European Convention on Human Rights.	HC	Asylum and Immigration Law
Obende v Minister for Justice, Equality and Law Reform [2006] IEHC 162; [2006] 3 IR 218	Article 5	Schedule 1		Ordered the release of the applicant who had a deportation order made against herself on terms that the applicant had established a serious question	HC	Asylum and Immigration Law

				to be tried on the application for leave to seek judicial review.		
P.H. v. Ireland [2006] IEHC 40; [2006] 2 IR 540	Article 6 Article 7.1			Dismissed the applicant's claim that the retrospective nature of certain provisions of the Sex Offenders Act 2001 was in breach of his rights under the Constitution and the Convention.	HC	Constitutional Law Criminal Law
B (D.O.) (applicant) v Minister for Justice, Equality and Law Reform (respondent) [2006] IEHC 341	Article 8 Article 14	Section 3		Granted relief to parents of an Irish citizen that had applied for residency in the State under an administrative scheme established by the Minister for Justice ("the IBC05 scheme").	HC	Asylum and Immigration Law

A.G. v. Dowse & Anor Dowse v. An Bord Uchtala [2006] IEHC 64 and 65; [2006] 2 IR 507 (joined cases)	Article 6(1)			Cancelled the registration of the adoption, maintaining the child's Irish citizenship, granting sole guardianship and custody of the child to his natural mother and making orders in respect of maintenance and succession rights as against the applicants.	HC	Adoption Law
O'N -v- Director of Public Prosecutions [2006] IEHC 184; [2007] 4 IR 481	Article 5(3) Article 6(1) Article 13	Section 3		Issued an order of certiorari quashing the order of return for trial on the grounds of prosecution delay and the want of fair procedures on the part of the DPP in reversing his decision not to	HC	Criminal Law Administrative Law

				prosecute.		
Minister for Justice v. Corrigan [2006] IEHC 101 [2007] 2 IR 448	Article 6			Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms was not directed to the lapse of time between the commission of an offence and the trial but was directed to ensuring that criminal proceedings, once initiated, were prosecuted without undue delay	HC	European Arrest Warrant
McDonagh & Others (applicants) v Kilkenny County Council (respondents)	Article 6 Article 8			Held that the right of inviolability of the dwelling did not entitle the traveller applicants to	HC	Constitutional Law t Law Criminal Law

[2007] IEHC 350				invade the lands of another. The orders of criminal trespass made did not breach the rights of the applicants. It was therefore held that there was no basis for orders of certiorari or mandamus against the first named respondent and that the exercise by the second named respondent of the powers conferred by s. 19 of the Criminal Justice (Public Order) Act, 1994 did not infringe any of the applicants' constitutional rights or rights		

				under the ECHR or any other legal right and so relief was refused.		
Caldwell v. Mahon [2006] IEHC 86; [2007] 3 IR 542	Article 8	Section 2 Section 3		The constitutional right to privacy was not an absolute right but was subject to the exigencies of the common good and any constitutional right to privacy in business dealings, in particular dealings carried on through incorporated companies, could only exist at the outer reaches of the core personal right to privacy.	HC	Constitutional Law
The People (Director of Public Prosecutions) v. Matthews	Article 6	None specified		Refused the application for leave to appeal a conviction related	CCA	Criminal Law

[2006] IECCA 103; [2007] 2 IR 169				to possession of explosives.		
Doherty v. South Dublin County Council [2006] IESC 57; [2007] 1 ILRM 241; [2007] 1 IR 246		Section 3		Dismissed the appeal in holding that the Equality Authority had the statutory power to intervene in court proceedings.	SC	Constitutional Law Legal Practice and Procedure
The People (Director of Public Prosecutions) v. Binead [2006] IECCA 147; [2007] 1 IR 374	Article 6			Refused the application for leave to appeal on claims related to the evidence relied on in the case.	CCA	Criminal Law Law of Evidence
Zappone v. Revenue Commissioners [2006] IEHC 404; [2008] 2 IR 417	Article 8 Article 12 Article 14	None specified		The legal provisions in relation to the right to marry and to capacity to marry in this jurisdiction were not incompatible with the provisions of the European Convention on	HC	Constitutional Law

				Human Rights. If there was any form of discriminatory distinction between same sex couples and opposite sex couples by reason of the exclusion of same sex couples from the right to marry, then Article 41 in its clear terms as to guarding the family provided the necessary justification.		
Allergan Pharmaceuticals (Ireland) Ltd. v. Noel Deane Roofing [2006] IEHC 215; [2009] 4 IR 438	Article 6(1)			The court had an independent obligation pursuant to article 6 of the European Convention on Human Rights to ensure that civil cases were	HC	Legal Practice and Procedure *On the 18th June, 2009, the Supreme Court dismissed the plaintiff's appeal ex tempore.*

				determined within a reasonable time.		
John E Shirley & Ors v A O Gorman & Ors [2006] IEHC 27	Article 1, Protocol 1 Article 13 Article 14	Section 4		Dismissed the plaintiff's claim for various reasons including that the very detailed provisions contained in the provisions as to what factors are to be taken into account and what factors are to be excluded from consideration represented a balanced approach to valuation of the residual interest of the landlord, and that the figure arrived at ensured that fair, reasonable and appropriate compensation		Landlord and Tenant Law

				would be paid to the landlord for that interest.		
Cosma v The Minister for Justice Equality and Law Reform [2006] IEHC 36	Article 8	None specified		The EHCR Act 2003 could not be applied retrospectively but was not irrelevant. Dismissed the application as the applicant had not demonstrated any defect or shortcoming in the decision making process detrimental to the applicant's legal or constitutional rights.	HC	Asylum and Immigration Law
D.P.P.-v- E.D. [2006] IECCA 3; [2007] 1 IR 484	Article 6	Schedule 1		Dismissed the application for leave to appeal as it was held that no miscarriage of justice had actually occurred.	CCA	Criminal Law
Thorpe -v- Dpp	Article 6			Held on the basis	HC	Criminal Law

[2006] IEHC 319; [2007] 1 IR 502				of *Cunningham* that a breach of the peace contrary to common law is an offence known to common law, that the offence may be prosecuted by the District Court and that the penalty resultant on conviction is a matter for the District Court acting within the sentencing limits of the District Court.		Court Practice and Procedure
D.T v F.L [2006] IEHC 98	Article 6			Refused the reliefs sought by the respondent as it was held that the argument based on Article 39 of the EC Treaty was not sustainable for	HC	Family Law

				various reasons.		
Agbonlahor & Ors -v- Minister for Justice & Anor [2006] IEHC 56; [2007] 1 ILRM 58	Article 8	Schedule 1		Granted leave to seek an order of certiorari by way of Judicial Review on the sole ground that on the evidence before him, the decision of the Minister not to revoke the deportation orders made by him in respect of the Applicants was a violation of their rights under Article 8(1) of the First Schedule of the ECHR Act, 2003.	HC	Asylum and Immigration Law
Byrne & Anor v. Radio Telefis Eireann [2006] IEHC 71; [2006] 2 ILRM 375	Article 6			It was held that the defendant was not entitled to the relief for defamation sought in this case.	HC	Tort Law Media Law
Arisukwu -v- The	Article 6(1)			Affirmed the	SC	Asylum and

Minister for Justice, Equality and Law Reform & ors [2006] IESC 13	Article 14			judgment of the High Court and dismissed the three grounds of appeal advanced in this case in view of the circumstances of the case.		Immigration Law
Curtin -v- Dail Éireann [2006] IESC 14; [2006] 2 ILRM 99; [2006] 2 IR 556	Article 6			Dismissed the appeal and affirmed the order of the High Court on several grounds including that the adoption of the amending Act of 2004 was a clearly defined and lawful means by which, in the circumstances of this case, a committee of the Oireachtas, in the exercise of its constitutional powers, could	SC	Constitutional Law

				require an individual to produce his own property insofar as it is lawfully available to him.		
Minister for Justice, Equality & Law Reform v. Biggins [2006] IEHC 351	Article 14		Article 23	Held that the Court was required to make the order sought pursuant to s. 16(1) of the Act, having rejected the points raised by way of objection by the respondent.	HC	European Arrest Warrant
D. (G.) (A Minor) & Ors v. Minister for Justice, Equality & Law Reform [2006] IEHC 344	Article 8	Section 3		Held that the process by which the decision was taken was in breach of the first named applicant's rights and the respondent's constitutional and statutory obligations.	HC	Asylum and Immigration Law

				Granted orders of certiorari of the decisions to refuse residency and order deportation.		
O. (C.P.) & Ors v. Minister for Justice, Equality & Law Reform & Ors [2006] IEHC 345	Article 6	Section 3		Held that the questions set out in the judgment were not addressed in the examination on file and accordingly the decision taken must be considered to be in breach of the citizen child's right to respect for his private /or family life under article 8 and that the respondent in breach of s. 3 of the ECHR Act of 2003.	HC	Asylum and Immigration Law
Hakizimana v		None specified		Relief refused as	HC	Asylum and

Minister for Justice Equality and Law Reform & Ors [2006] IEHC 355; [2009] 4 IR 474				it was held that the second named Defendant had not erred in law and had not acted contrary to the Applicant's right to fair procedures under Article 40.3 of the Constitution or under the ECHR Act 2008. It was also held that there had not been any unlawful exercise of discretion contrary to the Refugee Act 1996.		Immigration Law
E. (A.) (A Minor) & Anor v. Minister for Justice, Equality & Law Reform [2006] IEHC 347	Article 3, Protocol 4 Article 8	Section 3		Dismissed the application as of the submissions made under s. 3 of the ECHR Act 2003 or Article 8 ECHR supported a mandatory obligation on the	HC	Asylum and Immigration Law

				Minister to include in administrative procedures determined to "revised arrangements for considering applications for permission to remain in the State" to people not resident in the State at the date of application under the scheme.		
Oviawe & Ors v. Minister for Justice, Equality & Law Reform & Ors [2006] IEHC 342	Article 8	Section 3(1)		The decision of the Minister on the IBC/05 application of Oviawe was unlawful as it was in breach of the Minister's obligations under s. 3(1) of the ECHR Act, 2003 as it was not taken in a manner	HC	Asylum and Immigration Law

				of which was compatible with the State's obligations under article 8 of the Convention.		
D. (G.D.) & Ors v. MJELR [2006] IEHC 348	Article 8	Section 3(1)		It was held that the decisions of the Minister on the applications under IBC/05 of the first and second named applicants communicated were unlawful as they were taken in breach of the Minister's obligations under section 3(1) of the ECHR Act, 2003, as they were taken in a manner which is not compatible with the State's obligations to the third named	HC	Asylum and Immigration Law

				applicant under article 8 of the Convention.		
A.D v The Director of Public Prosecutions [2006] IEHC 135	None specified			Held that the applicant was entitled to a declaration that the continued prosecution of the applicant was in breach of Article 38.1 of the Constitution of Ireland and the European Convention on Human Rights.	HC	Criminal Law
Director of Public Prosecutions -v- Sean Kenny [2006] IEHC 330	Article 6			Held that it would not be appropriate for the court to find the accused guilty both of an offence under Section 49(4) and Section 50 of the 1961 Road Traffic Act as the proper and effective	HC	Criminal Law Road Traffic Law

				exercise of the discretion in this regard is necessary to comply with the constitutional requirement of fair procedures and the provisions of Article 6 of the First Schedule of the ECHR.		
Heywood v The Attorney General [2006] IEHC 455	Article 6			The Court considered the application of Article 6 ECHR and stated that must be borne in mind that the ECtHR had determined that Article 6 of the Convention is not applicable to extradition decisions, given that such cases	HC	European Arrest Warrant

				do not concern the determination of a person's civil rights or obligations or of a criminal charge.		

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Case	Articles of ECHR Considered in Decision	Sections of the ECHR Act 2003 Considered in the Decision	EU Charter Article	Core Summary	Court	Core Legal Area
Gifford v Dublin City Council [2007] IEHC 387	Article 6 Article 8 Article 13 Article 14	Section 2 Section 5		Interlocutory relief refused as regards preventing DCC from taking possession of plaintiff's property	HC	Housing Law
Agbonlahor v. Minister for Justice, Equality and Law Reform [2007] IEHC 166; [2007] 4 IR 309	Article 3 Article 8	Section 3		The deportation of a family with a child with Attention Deficit Hyperactivity Disorder (ADHD), was not contrary to the right for respect for private and family life under Article 8 of ECHR.	HC	Asylum and Immigration Law
Foy v An tArdChlaraitheoir & Ors (No 2) [2007] IEHC 470;	Article 8 Article 12	Section 2 Section 3 Section 5		The court issued a declaration of incompatibility pursuant to	HC	Gender Law

[2012] 2 IR 1.				Section 5 of the 2003 Act against Sections 25, 63 and 64 of the Act of Civil Registration Act 2004, as the applicant's right to private and family life (as regards recognition of her acquired gender) was violated. Existing laws could not be interpreted in a Convention compliant manner.		
O'Donnell (minor) v. South Dublin County Council [2007] IEHC 204; [2011] 3 IR 417.	Article 8	Section 2 Section 3 Section 5		In failing to provide for the plaintiffs' housing needs, the defendants had breached the applicant's right to private and family life. In remedying breach, damages were awarded to enable the	HC	Housing Law

				plaintiffs to buy a mobile home.		
Doherty and ors v South Dublin County Council and ors [2007] IEHC 4; [2007] 2 IR 696	Article 8	Section 2 Section 3 Section 5		The failure to provide an elderly Traveller couple with caravan accommodation, when bricks and mortar accommodation was offered, was not contrary to Article 8 ECHR.	HC	Housing Law
His Honour Judge Mahon v Post Publications Ltd. [2007] IESC 15; [2007] 2 ILRM 1; [2007] 3 IR 338	Article 10(2)			The confidentiality orders sought would restrict freedom of expression and were not required by law pursuant to Article 10(2) of the European Convention on Human Rights.	SC	Constitutional Law
T (G) v O (K.A.) [2007] IEHC 326	Article 8 Article 14	Section 2 Section 3 Section 4 Section 5		An unmarried father, who has performed duties and accepted	HC	Family and Child Law

				responsibilities in relation to his child - which are indistinguishable from those carried out by a married father, should be recognised for the purposes of article 2 of the Regulation as having `rights of custody' in respect of that child pursuant to article 8.		
His Honour Judge Mahon v Keena and Kennedy [2007] IEHC 348	Article 10			Relief granted to tribunal as defendants' privilege against disclosure of sources was overwhelmingly outweighed by the pressing social need to preserve public confidence in the Tribunal.	HC	Constitutional Law
Banzuzi		Section 3(1)		Held that credibility	HC	Asylum and

(applicant) v Refugee Appeals Tribunal, Minister for Justice, Equality and Law Reform, Attorney General, Ireland (respondents) [2007] IEHC 2				and adverse findings were deduced by the Tribunal since the applicant's version of events was not plausible.		Immigration Law
Director of Public Prosecutions (Walsh) (prosecutor) v Cash (accused) [2007] IEHC 108; [2008] 1 ILRM 443	Article 6 Article 8			A system of exclusion of improperly obtained evidence had to be implemented on the basis of a balancing on interests in light of Article 6 ad 8 of the European Convention on Human Rights. The entire rationale for the exclusionary rule had been replaced. Evidence resulting from a	HC	Constitutional Law Criminal Law Law of Evidence

				detention based upon a suspicion that could not be proved as entirely lawful was not for that reason unlawful.		
Director of Public Prosecutions v Monaghan [2007] IEHC 92	Article 8			The fact that the a different person complained that the person ultimately prosecuted or the fact that the person who first complained was himself prosecuted, did not affect the ultimate interest of the community in having crime punished.	HC	Criminal Law
Minister for Justice v. Busjeva [2007] IEHC 341; [2007] 3 IR 829	Article 3			It was necessary for clear and cogent evidence to be established of such inhuman or	HC	European Arrest Warrant

				degrading treatment or punishment and that mere speculation or uncorroborated assertions were insufficient.		
Ward v. Minister for Justice [2007] IEHC 39; [2007] 2 IR 726	Article 6(3)(b)	Section 1		The applicant had been afforded all reasonable access to his legal advisors to have private consultations and that the actions of the prison authorities in requiring the applicant to remain handcuffed even if he wished to speak with his legal advisors was not unreasonable or in breach of his legal or constitutional	HC	Constitutional Law Criminal Proceedings

				rights.		
The Health Service Executive (plaintiff) v S.S. (A minor) represented by his Guardian Ad Litem and next friend M.L. (defendant) [2007] IEHC 189; [2008] 1 IR 594	Article 3 Article 5	None specified.		In order to comply with rights under the Convention and the Constitution the rationale for an order for detention must be clearly identified, must have a therapeutic or welfare purpose, and be exercised only in circumstances where it is for the minimum duration. The jurisdiction to detain a minor may only be exercised on an interim or interlocutory basis and only, with regular review by the courts.	HC	Constitutional Law Family and Child Law
Grace (plaintiff) v Ireland (defendant)	Article 6.1	Section 3		Dismissed the plaintiff's claim that a declaration of	HC	Constitutional Law

[2007] IEHC 90; [2007] 2 ILRM 283				incompatibility with the State's obligations under article 6 of the European Convention on Human Rights of the relevant requirements in section 85(4) of the Act of 1988 before he could be discharged from bankruptcy.		
SOC (minor) (plaintiff) v The Minister for Education and Science & Others (defendants) [2007] IEHC 170	None specified	Section 3		The Minister for Education did not fail to provide for education for an autistic child. The Minister is obliged under the Constitution to 'provide for education' not to 'provide education'. As long as provision is made by the	HC	Constitutional Law (Education)

				Minister for 'appropriate education' the constitutional duty is discharged. General and special damages were ordered in some categories.		
Murphy v. Director of Public Prosecutions [2007] IEHC 349; [2007] 4 IR 403	Article 6(1)			Refused the relief sought as insofar as there was delay in this period, it was entirely the fault of the applicant who failed to lodge his grounds of appeal or progress his application for legal aid expeditiously.	HC	Criminal Law
O (O) (plaintiff) v Minister for Justice, Equality and Law Reform (defendant) [2007] IEHC 275	Article 8 Article 14	Section 3(1)		Granted leave but refused the application for an interlocutory injunction pending the determination	HC	Asylum and Immigration Law

				of the proceedings as the threshold by which the reliefs were considered was the low one of arguability and not that of substantial grounds.		
Nascimento v. MJELR [2007] IEHC 358; [2011] 1 IR 1	Article 5	Section 5		Refused to give an order quashing the transfer order as the Convention on the Transfer of Sentenced Persons did not confer an automatic right of transfer on a sentenced person and that the decision had not been ultra vires or irrational.	HC	Criminal Law
Faherty -v- Minister for Defence & ors [2007] IEHC 371	Article 6(1)			The Court struck out the proceedings on the basis of inordinate and inexcusable	HC	Administrative Law

				delay.		
B. -v- Minister for Justice Equality and Law Reform & ors [2007] IEHC 273		Section 2 Section 3 Section 5 Section 6		Refused the applicant leave and an order for costs was made in respect of the respondents as the judge did not accept that the proposition that the refusal of asylum was based upon her failure to establish that she is from Liberia.	HC	Asylum and Immigration Law
Bode (A Minor) v Minister for Justice [2007] IESC 62; [2008] 3 IR 663	Article 8 Article 14	Section 3(1)		The IBC 05 scheme did not address any constitutional or conventional rights; there was no interference with those. The making of a deportation order under s. 3 of the Act of 1999 was a	Supreme Court	Asylum and Immigration Law

				sufficiently wide ranging process for the respondent to exercise his duty to consider the constitutional or convention rights of the applicants, which had yet to be done in this case.		
GT v KAO [2007] IEHC 326; *[2007] IESC 55*; [2008] 3 I.R. 567	Article 8 Article 14	Section 2 Section 5		SC dismissed the appeal and substituting for the order of the High Court a single declaration that the retention by the respondent of the children in England was a wrongful retention within the meaning of article 3 of the Hague Convention as it was in breach of rights of custody attributed to the	HC SC	Family and Child Law

				District Court.		
Whelan v. Minister for Justice [2007] IEHC 374; [2008] 2 IR 142	Article 3 Article 5 Article 6	Section 2 Section 5		Refused the relief sought by the plaintiffs who had been convicted of murder holding amongst other things that hat the mandatory life sentence provided for by s. 2 of the Act of 1990 did not constitute inhuman or degrading treatment so as to offend article 3 of the European Convention on Human Rights.	HC	Constitutional Law
S.S. (A Minor) v. Health Service Executive [2007] IEHC 189; [2008] 1 IR 594	Article 3 Article 5			The court discharged the minor to a high support unit subject to a very high level of therapeutic and educational care and with provision	HC	Constitutional Law

				for psychiatric and psychological supervision.		
D.F. v. McGarty [2007] IEHC 467; [2009] 3 IR 142	Article 6	None specified		In circumstances where a plaintiff, as a matter of probability, had difficulties with repressed memory and of coming to terms with the nature and extent of alleged abuse as perpetrated upon him or her, delay by him or her in prosecuting his claim even if inordinate, might be excusable.	HC	Legal Practice and Procedure Institutional abuse
Rockrohan Estate Ltd & Richard Wood (applicants) v Assistant Examiner Kinironis (respondent) [2007] IEHC 112	Article 6	Schedule 1 Section 5		It was held in refusing the reliefs sought that there was no issue of unfairness arising.	HC	Banking Law

Mannion -v- Legal Aid Board & Ors [2007] IEHC 413	Article 6 Article 13 Article 14	None specified		Refused the relief sought as it was held that there was no failure on the part of the respondents to meet the requirements of natural or constitutional justice. It was held that no case had been made out to show that the provisions of the Act were repugnant to the Constitution or that the applicant's constitutional rights have been violated in anyway by any of the respondents.	HC	Legal Aid
Shanaghan & Ors -v- P J carroll & Ors	Article 8	None specified		Held that there was no alternative but to dismiss the	HC	Tort Law Administrative Law

[2007] IEHC 229				plaintiff's claim for want of prosecution by reason of lapse of time pursuant to the inherent jurisdiction of the Court.		
Comcast International Holdings Inc. & Ors -v- Minister for Public Enterprise & Ors [2007] IEHC 297	Article 6	None specified		Dismissed the plaintiff's claim against the State as it was held that for the Court to be asked in 2009 to determine primarily issues of fact that would have occurred at the time of the prospective hearing date some 14 years previously, gave rise to a basic unfairness of procedures, undermined the defendants' ability		Criminal Law Administrative Law

				to have a fair trial, created a clear and patent unfairness in asking the defendants to defend the action, and clearly failed to provide the defendants with a hearing within a reasonable time of the alleged cause of action having occurred.		
A. & Anor -v- MJELR & Ors [2007] IEHC 393	Article 1 Article 2 Article 3 Article 8	None specified		Held that the order restraining deportation of the applicants must be discharged: it is a matter for the Minister to decide on the place, time and manner of deportation of the first named applicant. Also held that there was	HC	Asylum and Immigration Law

				no “substantial ground” for contending that the Minister’s decision was “invalid or ought to be quashed”. Relief refused.		
S.K. & Anor -v- Minister for Justice Equality & Law Reform & Ors [2007] IEHC 216	Article 8	Section 3(1)		The application based on the applicant’s claim for a right of residency was dismissed as the applicant could have argued that his application should be examined in this State rather than Belgium but chose not to do so. Furthermore, it was held that he was being transferred to a jurisdiction that would	HC	Asylum and Immigration Law

				acknowledge, respect and have due regard to his rights under the ECHR and there was no evidence of any difficulty in his EU citizen wife joining him in Belgium.		
M. & Anor -v- MJELR & Ors [2007] IEHC 234	Article 3 Article 8			Held that the Minister had not acted in breach of constitutional justice and that the first named applicant had not been subjected to degrading treatment under Article 3 of the ECHR. Further, it was held that the degree of delay in the case had not so prejudiced the applicants as to breach their rights	HC	Asylum and Immigration Law

				under Article 41 of the Constitution, and under Article 8 of the ECHR. Application dismissed.		
I. -v- Refugee Appeals Tribunal & Ors [2007] IEHC 72		Section 5(1)		Leave to seek judicial review was granted for various reasons including that the adverse findings contained in the decision may not have been put to the applicant and so it was held that there is an arguable case that issues of fair procedures and Convention rights apply in this regard.	HC	Asylum and Immigration Law
McD (J) V L (P)M(B) [2007] IESC 81; [2010] 2 I.R. 199	Article 8	**Section 2** Section 3 Section 4 Section 5		The High Court had no jurisdiction to apply Article 8 as to the status of the respondents	HC SC	Family Law Constitutional Law

				and the child. The concept of a de facto family did not exist under Irish law, pursuant to Article 8 ECHR. Article 8 was not engaged as regards the relationship between the father and the child. SC upheld.		
S. & Ors -v- MJELR [2007] IEHC 398	Article 8			Refused relief as it was held that there had been no breach of S's rights under the ECHR or the Constitution and that the decision of the Minister was taken pursuant to the lawful operation of immigration control.	HC	Asylum and Immigration Law
Kennedy -v-		Section 3		The application for		Criminal Law

D.P.P. & Anor [2007] IEHC 3				judicial review and for directions as brought in these proceedings was refused for various reasons.		Corruption Law
MJELR -v- Raustys [2007] IEHC 370	None specified			Held that the respondent had not established the facts necessary to ground his submission that there were reasonable grounds for believing that his fundamental rights would be breached if he were surrendered to Lithuania. Surrender ordered.	HC	European Arrest Warrant
D.P.P.-v- Vincent Kelly [2007] IECCA 110	Article 6			Leave to appeal was refused as it was held that each of the circumstances surrounding the	CCA	Criminal Law

				applicant's arrest considered in isolation, whilst of themselves not capable of leading to a conviction, nonetheless formed part of a matrix of facts to which the court was entitled to have regard together with other evidence and all of which taken together would be sufficient for a jury properly directed to convict.		
S. -v- Refugee Applications Commissioner & Ors [2007] IEHC 338	None specified			Refused the application as it was held that there were no substantial grounds for arguing that the Applicant's Convention rights	HC	Asylum and Immigration Law

				had been breached by the application of the *O'Keeffe* principles.		
MJELR -v- M. [2007] IEHC 443	None specified			An order for surrender was made as it was held that there was no reason under Part III of the Act or the Framework Decision to prohibit the surrender of the respondent.	HC	European Arrest Warrant
Fingal County Council -v- Gavin & Ors [2007] IEHC 444	None specified			Dismissed the defendants' counterclaim as it was held that the manner in which the plaintiff council had conducted itself in the circumstances of this case cannot be seen as an infringement or breach of its	HC	Housing Law

				ECHR obligations and duties to the defendants, provided that in deciding upon its policies and decisions the Council had acted reasonably which it had.		
Muldarry -v- The Officer Commanding 29th Infantry Group Kosovo & Ors [2007] IEHC 57	Article 6			Refused the application for judicial review as it was held that the applicant's repatriation was for legitimate administrative purposes.	HC	Defence Law Administrative Law
D.P.P.-v- Kenneth Donohue [2007] IECCA 97; [2008] 2 IR 193	Article 6			Held that the applicant had not made out a case that the decision involved a point of law of exceptional public importance or that it was desirable in the	CCA	Criminal Law

				public interest that an appeal should be taken to the Supreme Court pursuant to Section 29 of the Courts of Justice Act 1924.		
Domican v Axa Insurance Limited [2007] IEHC 14		None specified		The Court was of the opinion that the actions of AXA could not be said to be in breach of the right to privacy guaranteed by the ECHR as applied in Ireland by the ECHR Act 2003. Dismissed the plaintiff's claim.	HC	Tort Law Constitutional Law
O. & Ors -v- MJELR & Ors [2007] IEHC 289	Article 8			Held that no substantial grounds had been established by the applicants for relief by way of declaration, or damages or	HC	Asylum and Immigration Law

				otherwise on the Article 8 ECHR ground.		
B. -v- Commission to Inquire into Child Abuse [2007] IEHC 376	Article 6			The refusal of the respondents to furnish the record of Mr. B's evidence was not a breach of the applicant's rights under Article 6(1) as it was held that the absolute prohibition in s. 27(1) of the Commission to Inquire into Child Abuse Act of 2002 is there for sound reasons of public policy and it does not infringe any provision of the Constitution of Ireland or of the ECHR and correctly construed means that the respondents could	HC	Institutional/Child Abuse Law Administrative Law

				not lawfully grant the applicant's request for the record of Mr. B.'s evidence. Relief refused.		
Wymes v. Roche & Ors [2007] IEHC 411	Article 8			The Court accepted that Article 8 of the ECHR did not support the plaintiff's claim to maintain these proceedings.	HC	Contract Law
G. -v- Minister for Justice Equality & Law Reform [2007] IEHC 231	Article 8			It was held that an injunction would not be granted as the applicant's Article 8 ECHR argument ignored the fact that there was a valid deportation order in existence and no steps had been taken to challenge it or to seek its revocation on the	HC	Asylum and Immigration Law

				grounds that it was excessive or disproportionate or otherwise. Moreover, it was not clear that the deportation of the applicant would see the family being sundered apart.		

2008

Case	Articles of ECHR Considered in Decision	Sections of the ECHR Act 2003 Considered in the Decision	EU Charter Article	Core Summary	Court	Core Legal Area
Stephens v Paul Flynn [2008] IESC 4; [2008] 4 IR 31; [2008] 4 IR 3	Article 6	Referred to enactment giving effect to ECHR		Following ECHR Act 2003, the courts, quite independently of the action or inaction of the parties, have an obligation to ensure that rights and liabilities, civil or criminal, are determined within a reasonable time.	SC	Legal Practice and Procedure (Delay)
Donegan v Dublin City Council [2008] IEHC 288	Article 8	Section 2 Section 3 Section 5		S. 62 of the Act of 1966 was incompatible with Article 8 ECHR and the incompatibility could not be circumvented by reason of s. 2 of the Act of 2003. S.	HC	Constitutional Law Housing Law

				3 of the Act of 2003 provided no comfort to the plaintiff. May be remedy for damages pursuant to s5(4) of 2003 Act.		
Oguekwe v Minister for Justice [2008] IESC 25; [2008] 3 IR 795	Article 8	Section 3		The Minister is required in this process to consider the constitutional and Convention rights of the applicants. This includes express consideration of, and a reasoned decision on, the rights of the Irish citizen child.	SC	Asylum and Immigration Law

Pullen & Others v Dublin City Council & Others [2008] IEHC 379	Article 6 Article 8 Article 14 Article 1 Protocol 1	Section 2 Section 3(1) Section 5		The defendants were an organ of the State for the purposes of s. 3 of the Act of 2003 and the use of s. 62 of the Housing Act did not afford the plaintiffs an opportunity to dispute the lawfulness or the proportionality of the decision of the defendant to evict them and was thus in breach of Article 8 ECHR.	HC	Housing Law Landlord and Tenant Law
B.J.N. v Minister for Justice [2008] IEHC 8; [2008] 3 IR 305	Article 2 Article 8 Article 5 Article 13	Section 2 Section 3		In the absence of a positive obligation on the State to provide medical treatment, there was no interference by the respondent, in making or refusing to revoke the deportation	HC	Asylum and Immigration Law

				order, with the exercise of the applicant's right to respect for her private life as protected by article 8.		
Leonard v Dublin City Council [2008] IEHC 79	Article 3 Article 6 Article 8 Article 13 Article 14	Section 5		The European Court of Human Rights had established that a wide margin of appreciate was afforded to a State in allocating housing resources and balancing conflicting interests in this regard.	HC	Housing Law

Kelly v Director of Equality Tribunal [2008] IEHC 112	Article 6	Section 3		S3 of the 2003 Act only brought the plaintiffs entitlement to damages into being as and from the 1st day of January, 2004. Court had regard to the events that preceded this time but not to award damages in respect thereof as the delay in hearing the case was not unreasonable.	HC	Equality Law
Dublin City Council v Liam Gallagher [2008] IEHC 354	Article 6 Article 8	Section 5		Granted a declaration pursuant to section 5 of the 2003 Act that s. 62 of the Housing Act 1966 was incompatible with the Convention. Breach of Articles 6 and 8 rights.	HC	Housing Law

A (P) and E (E) (minor) (applicants) . v. Minister for Justice, Equality & Law Reform & Others (respondents) and Human Rights Commission (notice party) [2008] IEHC 359	Article 8	Section 3		Relief refused as the unity of the family was never in danger therefore there was no potential interference with the applicant's rights under Article 8 of the European Convention on Human Rights.	HC	Asylum and Immigration Law
Minister for justice, Equality and Law Reform (applicant) v McCague (respondent) [2008] IEHC 154; [2010] 1 IR 456	Article 13	Section 4	None specified	Ordered surrender on the basis that the respondent was fully represented by both solicitor and counsel when he sought an adjournment and it had to be presumed that the procedures available in the issuing state met the minimum standards	HC	Criminal Law European Arrest Warrant

				guaranteed under the Convention		
Weston (applicant) v An Bord Pleanala (respondent) [2008] IEHC 71; [2008] 2 ILRM 542	Article 1 Protocol 1	Section 3		Granted order for judicial review as there was an obligation to state reasons for the condition clearly, cogently, in a manner to eliminate a reasonably held doubt as to whether there had been an error in law, a misunderstanding or other unlawful basis for the condition.	HC	Planning Law

O'C. (R) (applicant) v. Minister for Justice, Equality & Law Reform (respondent) [2008] IEHC 367	Article 8			There was no breach of the principle of family unity under the Article 8 rights of a failed asylum seeker who was the father of Irish citizen children.	HC	Asylum and Immigration Law Constitutional Law
O (OL) (Minor) (applicant) v. Refugee Applications Commissioner (respondent) [2008] IEHC 307	Article 8			The proposed deportation of the Irish citizen children's mother's cousin was not an interference with their private life so as to engage Article 8 of the European Convention on Human Rights.	HC	Asylum and Immigration Law

D(J) (applicant) v. Residential Institutions Review Committee (respondent) [2008] IEHC 350; [2009] 2 ILRM 65	Article 8 Article 13 Article 14	Section 2		Definition of “child” in Residential Institutions Redress Act 2002 struck down as the setting of an age limit was inherently discriminatory and the burden of proof had shifted to the State to justify the distinction. It had not been demonstrated that the decision to limit the scheme to those under eighteen years of age had a legitimate legislative purpose.	HC	Constitutional Law Equality Law

I (J) (applicant) v Refugee Appeals Tribunal and Others (respondents) [2008] IEHC 395		Section 3(1)		Refused the respondent's application for leave to appeal as the point of law arising in order to justify the granting of leave to appeal must be one of more than usual general importance.	HC	Asylum and Immigration Law
O'Sullivan v. Superintendent in Charge of Togher Garda Station [2008] IEHC 78; [2008] 4 IR 212	Article 7			Held the applicants' right to apply for restoration accrued after the repeal of the old s. 29 of the Act of 1961, they acquired the right to apply prior to its repeal and therefore maintained their entitlement to apply to the District Court for the restoration of their driving licences.	HC	Road Traffic Law

McFarlane v. Director of Public Prosecutions [2008] IESC 7; [2008] 4 IR 117	Article 6	None specified		Dismissed the appeal of the HC's decision that no consequences flowed from the delays in the proceedings which interfered with any interest which the applicant's right to an expeditious trial was intended to protect.	SC	Criminal Law
I. -v- Refugee Appeals Tribunal & ors [2008] IEHC 345	Article 13	Section 3(1) Section 5(1)		Application for leave to apply for judicial review was refused as the decision of the Tribunal member was rational and lawful.	HC	Asylum and Immigration Law

Gibbons -v- Governor of Wheatfield Prison [2008] IEHC 206		Section 3		Refused an order of certiorari quashing the order of the Governor made in disciplinary proceedings conducted by the respondent in respect of an allegation of misconduct against the applicant in Wheatfield Prison.	HC	Administrative Law
F.N. v. Minister for Justice [2008] IEHC 107; [2009] 1 IR 88	Article 3 Article 8	Section 3(1)		Nothing in Council Directive No. 2004/83/EC required that the decision making process as to whether a non-citizen was entitled to subsidiary protection should be the same as that for refugee status.	HC	Asylum and Immigration Law

Ayavoro (applicant) v. Health Service Executive and Minister for Social and Family Affairs (respondent) [2009] IEHC 66	Article 3 Article 13			The relief sought would be refused in both sets of proceedings as there was no negligence on the part of the officials as to the entitlement to the social welfare allowance and the reliance on article 3 was wholly misplaced.	HC	Social Welfare Law
M.N. v. R.N. (hearing a child) [2008] IEHC 382; [2009] 1 IR 388			Article 24	Granted an interlocutory order that the child be provided with an opportunity to be heard during the proceedings in accordance with article 11(2) of Council Regulation (EC) No. 2201/2003.	HC	Family and Child Law

N(M) (applicant) v. N(R) (respondent) [2008] IEHC 382			Article 24	An order was made to allow the child to be heard and the Court would obtain a professional assessment of the maturity of the child.	HC	Family and Child Law
R. -v- R. [2008] IEHC 162			Article 24	Held that the applicant is entitled to a declaration that the minor was wrongfully removed from the jurisdiction of the Republic of Latvia within the meaning of Article 3 of the Hague Convention and made an order for the return of the minor to the Republic of Latvia. However a stay was put on this order subject to conditions until the	HC	Family and Child Law Child Abduction Law

				matter comes before the Latvian Court.		
Dimbo -v- Minister for Justice Equality and Law Reform [2008] IESC 26	Article 8	Section 3(1)		It was held that the criteria of the IBC 05 Scheme included a requirement of continuous residence and the Minister was acting within the parameters of the Scheme in refusing residence on that basis and so the appeal of the Minister was allowed and the High Court decision reversed. Affirmed the decision of the	HC	Asylum and Immigration Law

				High Court as to the orders for deportation but for somewhat different reasons to the High Court judge.		
Mc D. -v- L. & Anor [2008] IEHC 96; [2010] 2 IR 199	Article 1 Article 8 Article 13 Article 35	Section 2 Section 5		The application by A for an order appointing him guardian of an infant, D, whom he had helped to conceive by way of a sperm donation was refused as the infant D was being brought up by a single sex couple forming a de facto family and it was held by the Court, taking account of the paramount welfare interests of the child, that it	HC	Family and Child Law

				was highly probable that the integrity of this family would be seriously and even possibly fatally broken by such guardianship orders in this case.		
Montemuino -v- Minister for Communications & Ors [2008] IEHC 157; [2009] 1 ILRM 218	Article 6 Article 13 Article 14	Section 5(1)		Held that the mandatory sanction is a proportionate penalty and that the applicant had failed to establish a breach of rights or an entitlement to any of the reliefs sought in these proceedings.	HC	Fisheries Law Administrative Law

E. & Anor -v- MJELR [2008] IEHC 68; [2008] 3 IR 760	Article 8	None specified		Held that this was precisely the type of case that merited the granting of an injunction given that the purpose of the proceedings is to seek to vindicate and protect the applicant's constitutional rights to the care and support of his natural father.	HC	Asylum and Immigration Law
Dooley & Ors -v- Killarney Town Council & Anor [2008] IEHC 242	Article 3 Article 8 Article 14			Held that there had not been a breach of Convention rights under Article 3 or Article 8 of the Convention as it had not been established that the respondents were simply permitting the applicants to needlessly languish, without	HC	Housing Law

				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.		
S. -v- Refugee Applications Commissioner & Anor [2008] IEHC 399	Article 6(1)			Held that the applicant not established substantial grounds for contending that the procedure at the ORAC stage was so flawed as to require intervention by way of judicial review and that no arguable grounds had been established for suggesting that the statute that so provides is unconstitutional, or incompatible with	HC	Asylum and Immigration Law

				the ECHR. Leave refused.		
Bula Ltd (in receivership) & Ors -v- Tara Mines Ltd & Ors [2008] IEHC 437	Article 6			Granted the relief sought by the Minister as it was held there was good reason for the delay on the part of the Minister in relation to the failure to execute before the period of six years had elapsed since the judgment or order was made and that there was no relevant prejudice suffered by Bula as a result of the delay.	HC	Court Practice and Procedure Administrative Law Receivership Law

MJELR -v- Gheorgie & Anor [2008] IEHC 115	Article 8			An order for surrender was made on the basis of several reasons including there could be no basis for the contention that persons, who have by absconding settled in another jurisdiction, could not be the subject of a surrender order pursuant to extradition or surrender arrangements entered into between states.	HC	European Arrest Warrant

I. & Ors -v- MJELR [2008] IEHC 23	Article 3			Held that the applicants had failed to establish any basis for judicial review and refused the relief sought.	HC	Asylum and Immigration Law
B. -v- Mental Health (Criminal Law) Review Board & Ors [2008] IEHC 303	Article 5	Section 2(1) Section 3(1)		Held that the applicant's current status did not offend against Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 and that s. 13 of the Criminal Law (Insanity) Act of 2006 was not incompatible with it.	HC	Criminal Law Mental Health Law

U. & Ors -v- MJELR & Ors [2008] IEHC 385	Article 8			Held that the applicants had not established substantial grounds and refused to grant leave.	HC	Asylum and Immigration Law
N. -v- MJELR & Ors [2008] IEHC 8	Article 2 Article 3 Article 5 Article 8 Article 13	Section 2		Refused relief as it was held that that there would be no interference by a public authority with the exercise of the applicant's right to respect for his private life in the absence of a positive obligation upon the State to provide medical treatment of the kind which the applicant was undergoing, and even if there was such interference	HC	Asylum and Immigration Law

				the consequences were not of such gravity as to engage the operation of article 8.		
Ahern -v- Judge Mahon & Ors [2008] IEHC 119; 2009] 1 ILRM 458; [2008] 4 IR 704	Article 6			Mr. Ahern was entitled to a declaration that he is entitled to claim Legal Professional Privilege, as protected by Article 6 ECHR, in respect of the documents set forth in the second part of the First Schedule to his affidavit of discovery.	HC	Constitutional Law Administrative Law

T. -v- MJELR [2008] IEHC 361	Article 8			The Court concluded that save for exceptional circumstances, a two year delay in arranging the reunification of the family of a person granted refugee status is an acceptable delay in the light of both Article 8 of the ECHR and the role of the family which is enshrined at the heart of the Irish Constitution. Held that the Minister has acted unlawfully and in breach of fair procedures and granted the reliefs sought.	HC	Asylum and Immigration Law

MJELR -v- Ollsen [2008] IEHC 37	None specified			Held that the respondent had not satisfied the Court that there was reason to believe that his constitutional or ECHR rights would be breached if he was surrendered.	HC	European Arrest Warrant
T. -v- MJELR & Ors [2008] IEHC 384	Article 8			Held that the analysing officer's consideration of the applicant's right to respect for his private life under Article 8 ECHR was wholly sufficient. Substantial grounds had not been established.	HC	Asylum and Immigration Law

O. & Ors -v- MJELR [2008] IEHC 80	Article 8			Granted leave to the applicant G.O. to argue that the refusal of the Minister to revoke the deportation order was in breach of the family rights of the Third to Seventh applicants guaranteed by Article 8 of the ECHR.	HC	Asylum and Immigration Law
Evans & Ors -v- Carlyle [2008] IEHC 143; [2008] 2 ILRM 359				The right to freedom of expression is protected both by article 10 of the ECHR and by Article 40.6.1. of the Irish Constitution. It was the opinion of the Court that it, therefore, should be very slow to restrict, either prior	HC	Constitutional Law Planning and Development Law

				to or after publication, the continuing exercise of this right.		
Lawlor -v- Planning Tribunal [2008] IEHC 282	None specified			Held that there was no claim in these proceedings for a declaration of incompatibility with the ECHR.	HC	Planning and Development Law
O. & Ors -v- MJELR & Ors [2008] IEHC 433	Article 8			Held that if there was any requirement to have regard to the applicants' right under Article 8 ECHR to respect for their private life, the analysing officers complied	HC	Asylum and Immigration Law

				with that requirement.		

2009

Case	Articles of ECHR Considered in Decision	Sections of the ECHR Act 2003 Considered in the Decision	Charter Article	Core Summary	Court	Core Legal Area
Byrne v Dublin City Council [2009] IEHC 122	Article 6 Article 8 Article 13 Article 14	Section 1 Section 3		Interlocutory injunction granted preventing removal of applicant from local authority accommodation	HC	Housing Law
Carmody v Minister		Section 5		The question of	SC	Criminal Law

for Justice, Equality and Law Reform [2009] IESC 71; [2010] 1 ILRM 157; [2010] 1 IR 635				the compatibility of s. 2 with s. 5 of the Act of 2003 did not accordingly arise in light of the conclusions of the Court.		Legal Aid
Pullen v. Dublin City Council (No. 3) [2009] IEHC 452	Article 6 Article 8 Article 13	Section 2 Section 3 Section 4 Section 5(2)(a)		Awarded damages to recompense them for all of the effects of the wrongful breach by the defendant of their Convention rights.	HC	Landlord and Tenant Law
D (J) v Residential Institutions Redress Committee [2009] IESC 59	Article 8 Article 14	Section 5		Pursuant to Section 5 of the Act of 2003 that the definition of a child in section 1 of the Residential Institutions Redress Act of 2002 was compatible with the obligations of the State pursuant to the European	SC	Constitutional Law Equality Law

				Convention on Human Rights. The alleged abuse had occurred before the entry into force of the Act of 2003, which did not apply retrospectively.		
F(S) (applicant) v. Her Honour Judge Yvonne Murphy, Director of Public Prosecutions, Ireland and the Attorney General (respondent) [2009] IEHC 497	Article 6	Section 2 Section 3 Section 4 **Section 5**		Held that the trial judge's decision did not violate he presumption of innocence. The trial judge acted fairly and correctly.	HC	Criminal Law Administrative Law
E.H. v. Clinical Director of St. Vincent's Hospital [2009] IESC 46; [2009] 3 IR 774; [2009] 2 ILRM 149	Article 5(1)	Section 2(1)		Appeal dismissed on grounds that the definition of voluntary patient was not framed in terms of a person who freely and voluntarily gave consent to an admission order	SC	Mental Health Law

				but rather someone who was not the subject of an admission or renewal order.		
A (M) (applicant) v Minister for Justice, Equality and Law Reform (respondent) [2009] IEHC 245	Article 8	Section 3		Relief granted as the respondent had failed to make a sufficiently considered assessment of whether the proposed deportation would breach Article 8 of the European Convention on Human Rights.	HC	Asylum and Immigration Law
Henry Ugbelase and Others applicants) v Minister for Justice, Equality and Law Reform (respondent) [2009] IEHC 598; [2010] 4 IR 233	Article 8			Respect for private life and family life under Article 8 of the ECHR did not, as such, preclude the exercise by the State of its sovereign right to control the entry and presence in	HC	Constitutional Law

				the State of foreign nationals including, in necessary cases, the expulsion from the State of a non-national parent of such a child.		
Elena Nkem Falvey, Nathan Eze Iwuoma and Steve Chidi Iwuoma (applicants) v Minister for Justice, Equality and Law Reform (respondents) [2009] IEHC 528	Article 8			The third-named applicant, having failed in an application for asylum, was not entitled to assert a choice of residence. The examination of the relevant file showed a careful and extensive examination of the rights of the applicants, their circumstances and the effect on them of a deportation order.	HC	Asylum and Immigration Law
V (P). (a minor) v	Article 6	None specified		The proceedings	HC	Family and

The Courts Service, Minister for Justice and Others [2009] IEHC 321				were moot as the applicant's mother had already obtained relief in the District Court in the form of an order for her to retain the applicant's passport to prevent the applicant's father from removing him from the jurisdiction.		Child Law
Murphy v. Director of Public Prosecutions [2009] IESC 53; [2009] 3 IR 821	Article 6(1)			Allowed the appeal as regards the membership of an unlawful organisation charge an granted an injunction prohibiting trial on that charge but dismissed the appeal on all other grounds as the the delay in the	SC	Criminal Law

				prosecution could not be described as inordinate, nor was it blameworthy.		
V. (I.) (Minor) (applicant) v Minister for Justice, Equality and Law Reform (respondents) [2009] IEHC 108	Article 8			Refused relief in the form of leave to seek judicial review of the decisions deporting them from the State and held that the rights of the applicants under article 8 of the Convention had been addressed.	HC	Asylum and Immigration Law
S.(W) (applicant) v Adoption Board (respondent) [2009] IEHC 429	Article 6 Article 8	Section 2 Section 3		Granted an order of certiorari of the decision of the respondent making an adoption order in respect of the applicant's daughter to her mother's new	HC	Adoption Law

				husband on the grounds that it had failed to notify him of the application for the said adoption order as an article 8 relationship existed between the natural father and his daughter.		
I (S) (applicant) v Refugee Appeals Tribunal (respondent) [2009] IEHC 8	Article 8	Section 3		Refused leave to seek judicial review of the decisions of to refuse their appeals against the recommendation of the Refugee Applications Commissioner that they be refused asylum and the decisions to refuse their applications for subsidiary protection and to	HC	Asylum and Immigration Law

				deport them.		
L (CL) (applicant) v. Refugee Appeals Tribunal and Minister for Justice Equality and Law Reform (respondents) [2009] IEHC 26	Article 8	Section 3		Refused leave to seek judicial review of the decisions of to refuse their appeals against the recommendation of the Refugee Applications Commissioner that they be refused asylum and the decisions to refuse their applications for subsidiary protection.	HC	Asylum and Immigration Law
E. F. I. v Refugee Appeals Tribunal and MJELR [2009] IEHC 94	Article 8	Section 3		Refused leave to seek judicial review of the decisions of to refuse their appeals against the recommendation of the Refugee Applications	HC	Asylum and Immigration Law

				Commissioner that they be refused asylum and the decisions to refuse their applications for subsidiary protection.		
O.F. v. Judge O'Donnell [2009] IEHC 142; [2012] 3 IR 483	Article 2 Article 3 Article 6 Article 13	Section 2 Section 5		Refused to make the costs orders sought as a judge should not be joined as a respondent in judicial review proceedings unless there was an allegation of mala fides or impropriety and an order for costs should not be made against a judge.	HC	Administrative Law Family Law
L. & Anor -v- MJELR & Anor [2009] IEHC 107	Article 8 Article 13	Section 5(1)		Application dismissed as there was no error of law on the part of the Minister and his	HC	Asylum and Immigration Law

				decision was a rational exercise of his discretion which the court cannot interfere.		
Carmody v Minister for Justice [2009] IESC 71; [2010] 1 IR 635		Section 5		Appeal allowed and in declaring that the plaintiff had a constitutional right to apply, prior to being tried, for legal aid to include solicitor and counsel in criminal proceedings brought against him in the District Court and to have that application heard and determined on its merits.	SC	Constitutional Law Legal Aid
J.D. v Residential Institutions Redress Review Committee [2009] IESC 59; [2010] 1 IR 262	Article 8 Article 14	Section 2		The provisions of the European Convention on Human Rights Act 2003 did not have	SC	Constitutional Law Equality Law

				the effect of retrospectively applying the provisions of the Convention to abuse that occurred prior to its entry into force.		
Ugbelase v. Minister for Justice [2009] IEHC 598; [2010] 4 IR 233	Article 8			Relief refused on the grounds that that the Constitution did not accord to the unborn child any of the unspecified personal rights enjoyed by the child when born a citizen.	HC	Asylum and Immigration Law Constitutional Law
O. & Ors -v- MJELR [2009] IEHC 448; [2010] 2 IR 144	Article 8	Section 3		Dismissed an application to quash the deportation order as the Minister, when considering making a deportation order, required a	HC	Asylum and Immigration Law

				substantial reason which had to be one associated with the common good and was proportionate to the end sought to be achieved.		
Mahon v. Keena and Kennedy [2009] IESC 64 and 78; [2010] 1 IR 336; [2009] 2 ILRM 373	Article 10	Section 2(1) Section 3(1) Section 4		Allowed the appeal by the journalist defendants holding that they were did not have to disclose their sources as they were protected by journalistic privilege.	SC	Media Law
Walsh v. Minister for Justice [2009] IEHC 102; [2010] 2 IR 463	Article 1 Article 6(3)(c) Article 13 Article 14	Section 2		Relief refused to a barrister who had not been paid for legal aid given under reg. 11(5), as his name had not been on the legal aid panel when the trial commenced and	HC	Criminal Law Legal Aid

				who submitted that the provision should be given be given a purposive interpretation.		
Alli (a minor) v. Minister for Justice [2009] IEHC 595; [2010] 4 IR 45	Article 8	None specified		Refused to make an order quashing the deportation of the father of an Irish citizen child and refused declaratory relief that there had been a breach of Constitutional or Convention family rights.	HC	Asylum and Immigration Law
The People (DPP) v. Norris [2009] IECCA 27; [2011] 2 IR 112	Article 6(1)			Refused leave to appeal against conviction as the test to be applied in considering objective bias of a juror had not been met.	CCA	Criminal Law Constitutional Law
N. -v- N. [2009] IEHC 213			Article 24(3)	Held in the light of the judgments referred to and the	HC	Family and Child Law

				court's finding in relation to the child's objection, that the Court should exercise its discretion in favour of the applicant in directing the return of the child to Lithuania. A stay was placed on the order to allow the matter to be heard by the Lithuanian Court.		
Roche -v- Roche & ors [2009] IESC 82			Article 3	It was held that the applicant did not succeed on any of the constitutional or contractual grounds in relation to the frozen embryos and so the appeal was dismissed.	SC	Constitutional Law
Li. -v- La. [2009] IEHC 585			Article 24(3)	Held that there was insufficient evidence to justify	HC	Family and Child Law

				not returning the children at this time.		
Redmond -v- Ireland & Anor [2009] IEHC 201; [2009] 2 ILRM 419	Article 6	None specified		Held that s. 3(2) of the Offences Against the State (Amendment) Act 1972 is not unconstitutional or, indeed, contrary to the Convention on Human Rights.	HC	Criminal Law
O. -v- MJELR [2009] IEHC 1236/ *[2009] IEHC 148*	Article 8			Refused leave for Judicial Review as it was held that that there were no substantial grounds for arguing that there was any entitlement to assert family life rights under Article 8 of the European Convention in the particular circumstances of this case and that	HC	Asylum and Immigration Law

				the analysis conducted on behalf of the respondent Minister was not incorrect.		
DPP -v- Don Bullman [2009] IECCA 84	Article 6	Section 2 Section 4		The applicant was refused leave to appeal on each of the grounds upon which he relied on the application for leave for various reasons including that the court was satisfied that the provisions of section 3 of the OAS (Amendment) Act 1972, properly applied, and having regard to the protections enumerated in the decision did not infringe Article 6 of the ECHR.	CCA	Criminal Law Administrative Law
S. -v- Refugee	Article 8	Section 1		The reliefs sought	HC	Asylum and

Appeals Tribunal [2009] IEHC 17		Section 3		were refused as it was held that the applicant's Article 8 rights arise for consideration at the pre-deportation order stage and not at the RAT stage and therefore the Tribunal Member acted in compliance with fair procedures and in accordance with natural and constitutional justice; she did not act in breach of her obligations under s.3 of the ECHR Act of 2003.		Immigration Law
O'Neill & Ors -v- An Taoiseach & Ors [2009] IEHC 119	Article 2			Allowed the defendants' appeal as it was held that the plaintiffs had failed to establish that discovery of		Constitutional Law Court Practice and Procedure

				the archive of the MacEntee Commission was either relevant or necessary in the context of the substantive proceedings. It was further held that the archive is subject to statutory privilege which prohibits its disclosure to the plaintiffs.		
Curtin & Ors -v- The Irish Coursing Club [2009] IEHC 175	Article 6	Schedule 1		Held that an Order for discovery in the terms sought would go far beyond what fair procedures would require, and what the case law considered proper.		Administrative Law Civil Procedure
Mc Cann -v- Judges of Monahan District Court & Ors [2009] IEHC 276;	Article 1, Protocol 4 Article 6	Section 2 Section 3(2) Section 5		Held that s. 6 of the Act of 1940 was invalid having regard to the	HC	Criminal Law Court Practice and Procedure

[2009] 4 IR 200				provisions of the Constitution and, in particular, the provisions of Article 34, Article 40.3 and Article 40.4.1. This finding of invalidity in relation to s. 6 means that the District Court had no jurisdiction to make the 2005 order. An order was thus made to quash the order.		
O'B. [a minor] -v- MJELR & Ors [2009] IEHC 423	Article 8			Reliefs sought were refused as it was held that the lack of a public register for guardianship agreements was not a breach of any of the applicant's Constitutional or Convention rights.	HC	Family and Child Law

C. (A. P. U. M.) -v- Mc. G. & Ors [2009] IEHC 438	Article 6(1)	Section 4		Held that the delay in this case was excusable, and even if it were not that this was a case where the balance of justice favoured permitting the plaintiff to proceed.	HC	Administrative Law Institutional Abuse
Pop & Ors -v- Judge Smyth & Ors [2009] IEHC 523	Article 6 Article 8			Held that the respondents acted at all relevant times within jurisdiction and that the applicants had failed to demonstrate that there were any reasonable, arguable or weighty grounds that would justify granting any of the reliefs claimed.		Criminal Law Administrative Law
I. & Ors -v- MJELR [2009] IEHC 61	Article 3			Refused the application for several reasons	HC	Asylum and Immigration Law

				which included that it was held that the respondent gave sufficient reasons for his decision, having regard to his limited role and that his decision was a correct application of the law.		
O. B. & Ors -v- MJELR [2007 IEHC 430]	None specified			Held that the applicants were not entitled to engage in forum shopping by seeking a new hearing in a new venue in the hope of getting a different result, they had not made out a case for judicial review and so the reliefs sought were declined.	HC	Asylum and Immigration Law

K. - M. & Anor -v- MJELR & Ors [2009] IEHC 125	Article 3			Refused to extend the time in favour of the second named applicant for the bringing of an application to seek leave to commence judicial review proceedings and held that there was insufficient persuasive weight in any of the points raised in the application for judicial review that were ably argued on behalf of the first and second named applicants.	HC	Asylum and Immigration Law
Fortune -v- The Revenue Commissioners [2009] IEHC 28	Article 6			Refused the reliefs sought for various reasons including that the applicant's arguments under Article 6 ECHR failed.	HC	Revenue Law

I. & Anor -v- MJELR [2009] IEHC 334	Article 3 Article 8	Section 3(1)		Held that none of the grounds had been made out and the application was therefore refused.	HC	Asylum and Immigration Law
Walsh Western Computer Services -v- Companies Acts [2009] IEHC 505	Article 6			Granted the relief sought and dismissed the proceedings on the basis of inordinate and inexcusable delay, pursuant to the inherent jurisdiction of the court to control its own procedure.	HC	Company Law
Greenstar Ltd -v- Dublin City Council & Ors [2009] IEHC 589	Article 6			Rejected the arguments made by Greenstar and came to various conclusions including that by failing to provide an oral hearing during the consultation	HC	Waste Management Law Administrative Law

				process, the respondents had not breached fair procedures or any constitutional or conventional rights of the applicant.		
H. -v- Clinical Director of St. Vincents Hospital & Ors [2009] IEHC 69	Article 5	Section 2		Held that the admission order made pursuant to s. 24[3] of the Mental Health Act of 2001, was in all respects valid and so there was no basis for suggesting that the detention of the applicant pursuant to the renewal order was illegal.	HC	Mental Health Law Constitutional Law
DPP -v- Feichín Hannon [2009] IECCA 43; [2009] 4 IR 147; [2009] 2 ILRM 235	Article 3, Protocol 7	Section 2 Section 2 Schedule 5		The court held, having considered Article 3 Protocol 7 ECHR, that the applicant was entitled to a certificate since a	CCA	Criminal Law

				fact which is both new and newly discovered - the complainant's confession of having fabricated the allegation - shows that his conviction was a miscarriage of justice.		
J. Harris Assemblers -v- D. P. P. [2009] IEHC 344	Article 6			The Court recognised the clear and unmistakable duty on the State under Article 6 ECHR, to conduct the administrative aspects of a criminal investigation efficiently and without undue delay but held that that the period of blameworthy delay which did occur in	HC	Health and Safety Law Criminal Law

				the present case was not of sufficient gravity to warrant the prohibition of the applicant's trial given the public interest in the matter.		
O'F. [otherwise F.] -v- MJELR & Ors [2009] IEHC 496	Article 6			Held that to allow a trial to proceed in such circumstances would be in clear violation of the constitutional requirements of fairness of procedures and the State's international obligations under Article 6 of the ECHR for a trial within a reasonable time.	HC	Criminal Law Administrative Law
Asibor (a minor) & Ors -v- MJELR	Article 8			It was clear to the Court from the	HC	Asylum and Immigration Law

[2009] IEHC 594				jurisprudence of the ECtHR on the Article 8 rights of persons who seek to resist deportation or expulsion demonstrate that the Minister acted in accordance with law when he assessed the proportionality of the decision to deport Mr Asibor by reference to those questions.		
Kudelska -v- An Bord Altranais [2009] IEHC 68	Article 6			The Court rejected the applicant's submission that she has been denied her rights of natural and constitutional justice, or indeed those under Article 6 of the ECHR as she was afforded	HC	Fitness to Practice Employment Law

				every possible opportunity to make her case throughout the proceedings.		
Minister for Justice Equality and Law Reform -v- Gheorghe & anor [2009] IESC 76	Article 8			With regard to Article 8 ECHR, it was held that no authority had been produced to support the proposition that surrender was to be refused where a person will, as a consequence, suffered disruption, even severe disruption of family relationships.	SC	European Arrest Warrant

2010

Case	Articles of ECHR Considered in Decision	Sections of the ECHR Act 2003 Considered in the Decision	Charter Article	Core Summary	Court	Core Legal Area
Quinn v Athlone Town Council & Others [2010] IEHC 270	Article 8	None specified		When the local authority reaches a decision to serve a notice to quit, this is the time at which a person's article 8 rights are engaged and is the point in time where an applicant should move to challenge the decision of the local authority but the applicant delayed here and so was out of time.	HC	Constitutional Law Administrative Law Housing Law
O(S) O(O) & Others O(O) v Minister for Justice, Equality and Law Reform [2010] IEHC 343	Article 8	None specified		No substantial grounds had been made out as to the illegality of the Contested Order.	HC	Asylum and Immigration Law

Khalimov (applicant) v. Minister for Justice, Equality & Law Reform, Ireland and the Attorney General (Respondents) [2010] IEHC 91;	Article 8	Section 3(1)		Relief refused as the applicant could not impugn the validity of the decision refusing him a long stay visa on the basis that the failure to consider his Article 8 family rights as such rights did not exist	HC	Asylum and Immigration Law
A (O) (applicant) v Minister for Justice, Equality and Law Reform (respondent) [2010] IEHC 268	Article 3 Article 8	Schedule 1		Refused the application as having considered the country of origin information it was rationally and reasonably open to the respondent to reach the conclusions he arrived at regarding Articles 3 and 8 of the Convention.	HC	Asylum and Immigration Law
J. McB. v. L.E.	Article 8		Article 7	An unmarried	HC	Family and

[2010] IEHC 123; [2010] 4 IR 433	Article 14		Article 21	father's right to respect for family life had not been breached by the removal of his children from the jurisdiction and his rights had been protected by the provision of a procedure under which he could have applied to the courts for guardianship.		Child Law
E.T. v. Clinical Director, Central Mental Hospital [2010] IEHC 378; [2010] 4 IR 403	Article 3 Article 8			It was held that the delay in admitting the psychiatrically ill applicant combined with the conditions of her confinement in an approved centre and the availability of better treatment in the Central Mental Hospital	HC	Mental Health

				did not constitute a breach of her rights.		
Minister for Justice v. Gorman [2010] IEHC 210; [2010] 3 IR 583	Article 8 Article 5(1)(f)	Section 2 Section 4		Refused to order the surrender of the respondent to the UK authorities as the surrender of the respondent would constitute an interference with his family rights.	HC	European Arrest Warrant
Moore and Moore v Dun Laoghaire - Rathdown County Council [2010] IEHC 466	Article 8	Section 2 Section 4		Refused to issue an order to quash a warrant as doing so would not be disproportionate and the court in its discretion would refuse the reliefs being sought by the applicants.	HC	Land Law Administrative Law Landlord and Tenant Law
S. (O.O.) (applicant) v Minister for Justice, Equality & Law Reform (respondent)	Article 8			Refused leave to seek judicial review of the decision of the respondent	HC	Asylum and Immigration Law

[2010] IEHC 173				refusing his application for leave to remain in the State as no information had been put before the respondent to support the view that the situation between the applicant and his purported father went beyond normal emotional ties.		
S (F. K.) (applicant) v The Refugee Appeals Tribunal and the Minister for Justice, Equality and Law Reform (respondent) [2010] IEHC 136	Not actually raised in the pleadings.			Application rejected as the issue raised was only a procedural one which did not affect rights generally or the validity of the asylum process as a whole.	HC	Asylum and Immigration Law Constitutional Law
L (Q) & Y (Y) (applicants) v. Minister for Justice,	Article 8	Section 3		Court order granting leave to seek the	HC	Asylum and Immigration Law

Equality & Law Reform (respondent) [2010] IEHC 223				declaratory relief sought but leave was refused by way of mandamus and no interlocutory inunction was granted.		
Neville v. South Dublin County Council [2010] IEHC 67; [2010] 4 IR 309	Article 8			Granted a declaration that the eviction of the applicant was unlawful and held that as the County Council had exercised its statutory function in doing so that it was amenable to judicial review.	HC	Housing Law Landlord and Tenant Law
Collins B. Oladapo and Ors (applicants) v Minister for Justice, Equality and Law Reform (respondents) [2010] IEHC 88	Article 8	Section 3		Application for leave to seek judicial review was refused as a detailed and meticulous consideration had been given to all	HC	Asylum and Immigration Law

				the matters that had been put before the Minister.		
Criminal Assets Bureau (applicant) v. MacAviation Limited and McG. & McG. (Respondents) [2010] IEHC 121	Article 6(1)	None specified		Held that there was no basis for contending that the hearing would imperil the right to a fair trial as publicity centred on the applicants in another jurisdiction would not prejudice the trial.	HC	Constitutional Law Civil Procedure
O'Sullivan v. Irish Prison Service [2010] IEHC 301; [2010] 4 IR 562	Article 6(1) Article 13 Article 14		Article 47	Dismissed the application alleging breaches of the applicant's rights and found that s. 16(12) of the European Arrest Warrant Act 2003, as amended, was not repugnant to the provisions of the	HC	Legal Practice and Procedure European Arrest Warrant

				Constitution.		
Minister for Justice, Equality & Law Reform (applicant) v. Pollak (respondent) [2010] IEHC 209; [2010] 3 IR 699	Article 2 Article 3 Article 15		Article 18 Article 19	Held that there could be no question but that the surrender of the respondent was prohibited by reason of his extant refugee status	HC	European Arrest Warrant Asylum and Immigration Law
Lynch (appellant) and Whelan (appellant) v. Minister for Justice, Equality & Law Reform, Ireland and the Attorney General (Respondents) [2010] IESC 34; [2012] 1 IR 1	Article 3	Section 5		A mandatory life sentence issued was ruled not to be incompatible with ECHR law.	SC	Constitutional Law Criminal Law
Foy v Governor of Cloverhill Prison [2010] IEHC 529; [2012] 1 IR 37	Article 8			Refused the application as there were weighty factors to justify the restriction on physical contact between prisoners	HC	Administrative Law

				and family members and those factors were not contradicted by the applicant by way of expert evidence or otherwise.		
J.E. v. Minister for Justice [2010] IEHC 372; [2011] 1 IR 574	Article 3 Article 8			Refused leave to seek an order of certiorari quashing the deportation order as the obligation on the respondent to give reasons for a decision did not involve the need for any detailed or narrative statement.	HC	Asylum and Immigration Law
Digital Rights Ireland Ltd. v. Minister for Communications [2010] IEHC 221; [2010] 3 IR 251	Article 6(1) Article 8 Article 10 Article 12		Article 7 Article 8 Article 11 Article 41	Granted the plaintiff locus standi to bring an actio popularis ;refused the defendants' motion for security	HC	Constitutional Law

				for costs; and granted the plaintiff's motion for a reference to the European Court of Justice.		
Kelly v. National University of Ireland (U.C.D.) [2010] IEHC 48; [2011] 4 IR 478	Article 6			Refused as application seeking an amendment on the basis that the order failed to reflect the court's ruling or intention the court had jurisdiction to alter or amend a perfected order where there had either been an accidental slip in the order as drawn up or, in exceptional circumstances, where the order did not accurately represent the	HC	Legal Practice and Procedure

				judgment and intention of the court.		
The People (DPP) v. Smyth Snr. [2010] IECCA 34; [2010] 3 IR 688	Article 6(2)			Allowing the appeal and ordering a retrial of both accused as s. 29(2) of the Misuse of Drugs Act 1977 cast a burden of proof on the accused which was discharged on the lowest standard of proof, namely that of proving a reasonable doubt that the accused did not know, and had no reasonable ground of suspecting that what he had in his possession was a controlled drug.	CCA	Criminal Law
Minister for Justice, Equality and Law	Article 3			Outlined the appropriate test to	CCA	European Arrest Warrant

Reform -v- Rettinger [2010] IESC 45				be used and remitted the matter to the trial judge to apply the test.		
Mannion -v- Legal Aid Board & anor [2010] IESC 9	Article 6 Article 13 Article 14	Section 3(1)		Dismissed the appeal and affirmed the decision of the High Court in relation to the applicant's legal aid.	HC	Legal Aid
Ugbo & Anor -v- MJELR & Ors [2010] IEHC 355	Article 8 Article 13			Application was refused as the Court is not satisfied that the point of law identified by the applicants warrants certification under s. 5(3) of the Illegal Immigrants (Trafficking) Act of 2000.	HC	Asylum and Immigration Law
Rodenhuis and Verloop B.V. v HDS	Article 6	None specified		The principles applicable to the	HC	Legal Practice and Procedure

Energy Ltd. [2010] IEHC 465; [2011] 1 IR 611				exercise by the court of its inherent jurisdiction to dismiss proceedings for delay were a rule of law in the sense given to that phrase by the European Convention on Human Rights Act 2003.		Contract Law
Doherty v Government of Ireland [2010] IEHC 369; [2011] 2 I.R. 222	Protocol 1, Article 3	Section 2		The applicant was entitled to seek judicial review in a limited declaratory form on the issue as to whether or not a lengthy delay in moving the writ for the by-election in question might be said to infringe his rights to representation and	HC	Constitutional Law

				equality of political representation.		
Byrne v. An Taoiseach [2010] IEHC 353; [2011] 1 IR 190	Article 2 Article 6 Article 13	Section 2 Section 3 Section 4 Section 5 Section 9		ECHR provisions were enforceable under domestic law in Irish courts only insofar as they were statutorily enforceable under the provisions of the European Convention on Human Rights Act 2003. the European Convention on Human Rights Act 2003 could not be seen as having retrospective effect or as affecting past events.	HC	Constitutional Law
The People (DPP) v. O'Brien [2010] IECCA 103; [2011] 1 IR 273	Article 6	Section 2 Section 4		Refused leave to appeal as there were no grounds upon which it	CCA	Constitutional Law Criminal Law Law of Evidence

				could be said that there was any infringement of any constitutional right arising from the alleged breach of the guarantee that a trial would be "in due course of law", since the right to cross-examine was fully vindicated.		
Dellway Investments Ltd. v. NAMA [2010] IEHC 364, [2011] IESC 4, [2011] IESC 13 & [2011] IESC 14; [2011] 4 IR 1	Article 6	Section 5	Article 47	Allowed the appeal on the grounds that no valid decision to acquire the loans had been made by NAMA.	HC SC	Constitutional Law Land Law
L. v. Kennedy [2010] IEHC 195; [2011] 2 IR 124	Article 5(1)			Upheld the legality of the applicant's detention as there was no absolute right to discharge where a person who was sentenced to	HC	Criminal Law

				detention pursuant to the Criminal Law (Insanity) Act 2006 then ceased to suffer from a mental disorder within the meaning of the Mental Health Act 2001.		
Lynch & Whelan v. Minister for Justice [2010] IESC 34; [2012] 1 IR 1	Article 3 Article 5 Article 6	Section 5(1)		A mandatory life sentence imposed in accordance with law as punishment for an offence was not in itself prohibited by or incompatible with any article of the European Convention on Human Rights and would not offend against article 3 of the Convention where the national law afforded the possibility of review of a life	SC	Constitutional Law

				sentence with a view to its commutation, remission, termination or the conditional release of the prisoner.		
Adeniron & Others (applicants) v. Minister for Justice, Equality & Law Reform, Attorney General and Ireland (respondents) [2010] IEHC 92	Article 8	Section 3(1)		The Court was satisfied that the applicants had not established substantial grounds for leave and the suspicion remained that the challenge was a delaying tactic.	HC	Asylum and Immigration Law
Minister for Justice v. Dillon [2010] IEHC 196; [2011] 3 IR 536			Article 50	Granted consent to proceedings being brought against the respondent in the United Kingdom as double jeopardy did not apply.	HC	European Arrest Warrant *(Appealed to the SC and heard on 17th November 2010; appeal dismissed and HC order affirmed).*
Tagni -v- MJELR	Article 6		Article 41	grant the applicant	HC	Asylum and

[2010] IEHC 85				a Declaration that the respondent was guilty of a failing to render his decision on the review commenced on the 27th of November 2008 within a reasonable time but dismissed all other aspects of the applicant's claim.		Immigration Law
An Taoiseach -v- Commissioner for Environmental Information [2010] IEHC 241	Articles 6-13		Article 47	Allowed the appeal, set aside the determination of the respondent and granted several declarations.	HC	Environmental Law
J. McB. -v- L.E. [2010] IESC 48	Article 8	Section 2 Section 4(1)(a)	Article 7 Article 52.3	Held that there was nothing in the text of Regulation No 2201/2003 or in Article 7 of the Charter of	SC	Family and Child Law

				Fundamental Rights to suggest that a natural father should be recognised as having custody rights for the purposes of decisions on wrongful removal in cases of child abduction in the absence of a judgment of a court made in the country of habitual residence of the children determining such rights.		
Mc Dermott -v- Governor of Cloverhill Prison & Ors [2010] IEHC 324	Article 13	Section 5(2)(a)	Article 47	Held that the applicant did not have locus standi to challenge the adequacy of the Attorney General's Scheme, such challenge being a	HC	European Arrest Warrant

				jus tertii, and in circumstances where s. 16(12) EAWA 2003 is not a prima facie breach of any of the applicant's rights, there was no need to enter into a consideration of its proportionality.		
A.Bu. -v- J.Be. [2010] IESC 38; [2010] 3 IR 737			Article 24	Affirmed the decision that it was inappropriate that the child be heard and refused the application to the Court.	HC	Child Abduction Law Family and Child Law
Murray -v- Newsgroup Newspapers Ltd & Ors [2010] IEHC 248	Article 8 Article 10	Section 1 Section 2(1) Section 3		Held that the plaintiff had not demonstrated by the necessary evidence that there was a real risk to his life or that he was likely to succeed at the		Constitutional Law Media Law

				trial of the action in further prohibiting the publication of information concerning him by the defendant newspapers and so the reliefs sought were refused as the applicant had not demonstrated that he was entitled to them.		
C. A. B. -v- O'Brien & Anor [2010] IEHC 12	Article 8(2)	Section 3(1)		It was held that the applicant's application for a s. 3 order in relation to the second named respondent's family home was not improper and in seeking such an order the applicant was performing its functions in a	HC	Criminal Assets Law

				manner compatible with this State's obligations under the ECHR Act 2003.		
Meadows -v- Minister for Justice Equality and Law Reform [2010] IESC 3; [2010] 2 IR 701; [2010] 2 IR 201	None specified			Held that the *O'Keeffe* standard is the correct standard to be applied in a case such as the present and refused leave to seek judicial review for various reasons.	SC	Asylum and Immigration Law
Mulligan -v- Governor of Portlaoise Prison & Anor [2010] IEHC 269	Article 3 Article 8	Section 3		Held that the case fails as there is no jurisprudence from the ECtHR, Northern Ireland, or Scots Courts which makes out the proposition that the absence of in-cell sanitation or "slopping-out"	HC	Constitutional Law

				per se constitutes a violation of Article 3 and that there is no breach of Article 8 by reference to any case law.		
Dowling & Ors -v- Judge Brennan & Anor [2010] IEHC 522	Article 6.3			Held that there had been no breach of Article 6.3 ECHR and the Court therefore reject the first named applicant's application. It was further held that the second, third and fourth named applicants had not established that they faced a real or serious risk of an unfair trial and their application was dismissed accordingly.	HC	Administrative Law Road Traffic Law
Dokie -v- D. P. P. [2010] IEHC 110	Article 6			Granted an injunction		Criminal Law

				restraining the respondent from taking any further steps in the prosecution proceedings and also a declaration that s.12 of the Immigration Act 2004 was inconsistent with the provisions of Bunreacht na hEireann and in particular Article 38.1 and Article 40.4.1.		
D.P.P.-v- Derek Wade [2010] IECCA 114	Article 8	Section 2 Section 4		Held that the learned trial judge had acted within the law as regards the handling of the evidence. Application dismissed.	CCA	Criminal Law
Criminal Assets Bureau -v- W. & Anor	Article 8	Section 2(1)		Held that all of the items identified in the schedule to	HC	Criminal Assets Law

[2010] IEHC 166				the originating notice of motion were purchased or obtained or funded either directly or indirectly from the criminal activities of the first named respondent and constituted proceeds of crime. It was held that a s. 3 order should be made in respect of each of the six items set forth to the originating notice of motion.		
F. & Ors -v- MJELR [2010] IEHC 457	Article 8 Article 13	None specified		Held that the points of law raised did not give rise to any issues which would meet the criteria for a certificate to be granted.	HC	Asylum and Immigration Law
H. -v- A.	None specified			Held that relief	HC	Family Law

[2010] IEHC 497				could not be granted for several reasons including that polygamous marriage is at odds with the institution of marriage as understood in this country and protected by the Constitution.		Matrimonial Law
X. & Anor -v- MJELR [2010] IEHC 446	Article 8	Section 5(1)		Quashed the decision of the Minister for various reasons including that it was held that so far as the dependency criterion was concerned, the Minister had applied the wrong legal test.	HC	Asylum and Immigration Law
N. & Ors -v- MJELR & Ors [2010] IEHC 250	Article 8			There was not a breach of Article 8 ECHR rights here	HC	Asylum and Immigration Law

				as the Court found that the memorandum analysis was clearly correct in concluding that, should they have wished to do so, the applicants as a family had an available choice of maintaining the family as a unit.		
B. (a minor) & Ors -v- MJELR [2010] IEHC 296	Article 8 Article 13			It was the opinion of the Court that the scope of the jurisdiction of the High Court in reviewing the legality of a decision made under s. 3 of the 1999 Act clearly fulfils the criteria established by the case law of the Strasbourg Court for the provision of	HC	Asylum and Immigration Law

				an effective remedy before a national authority in accordance with Article 13.		
A. (a minor) & Ors -v- MJELR & Ors [2010] IEHC 297	Article 8			Held no fair issue has been established under Article ECHR or otherwise for trial in this case.	HC	Asylum and Immigration Law
Kangethe -v- MJLR [2010] IEHC 351	Article 8			Held that no arguable case under Article 8 ECHR or otherwise had been made out here to demonstrate that the implementation of the deportation had become illegal by reason of the changed circumstances.	HC	Asylum and Immigration Law
S. & Ors -v-MJELR [2010] IEHC 433	Article 8			Held that even if it is accepted that in	HC	Asylum and Immigration Law

				appropriate circumstances a child in foster care can assert an entitlement to the protection of rights in the nature of "family life" for the purposes of Article 8 of the ECHR the Minister had not failed to consider fully and correctly the substance of the relationships which formed the subject of the representations made to him in the request for revocation.		
O. (a minor) & Ors -v- MJLR [2010] IEHC 521	Article 8	Section 5		Held that no arguable case had been made out as regards Article 8 of the ECHR and therefore there was no arguable	HC	Asylum and Immigration Law

				case for judicial review.		

2011

Case	Articles of ECHR Considered in Decision	Sections of the ECHR Act 2003 Considered in the Decision	EU Charter Article	Core Summary	Court	Core Legal Area
EFE v. The Minister for Justice, Equality and Law Reform [2011] IEHC 214, [2011] 2IR 798	Article 8 Article 13	Section 5		Judicial Review mechanisms for receipt of new evidence compatible under art 13 of ECHR therefore no basis for granting a declaration of incompatibility pursuant to s. 5(2) of the Act of 2003.	HC	Constitutional Law Immigration Law of Evidence
Wadria v. Minister for Justice [2011] IEHC 60; [2011] 3 IR 53	Article 3 Article 8	Section 3		The Minister had fulfilled his undertaking to reconsider the implementation of the transfer order of an asylum seeker and had acted lawfully in exercising such	HC	Asylum and Immigration Law

				function as required to be discharged under art. 20(1) of the Dublin II Regulation in a manner compatible with his duty under s. 3 of the European Convention on Human Rights Act 2003.		
O'Connor -v- Judge O'Neill & Ors [2011] IEHC 118; [2011] 4 IR 578	Article 5 Article 6			That under article 5(2) it was sufficient if a detainee was informed in general terms of the reasons for the arrest and any charge against him or her. Under art. 6(3)(a), he protection guaranteed did not extend to the provision of details	HC	Criminal Law (Road Traffic)

				of any possible defences to the charge. Article 6(3)(b) protected, inter alia , the right to adequate facilities for the preparation of a defence, which entailed that the accused should have the opportunity to organise his or her defence properly.		
E.D. (A MINOR) v. Refugee Appeals Tribunal [2011] IEHC 431; [2011] 3 IR 736	Article 2 Protocol 1		Article 14	The potential denial of a basic education to the applicant if returned to their country of origin constituted a sufficiently severe violation of basic human rights amounting to persecution within the meaning of s.	HC	Asylum and Immigration Law

				2 of the Refugee Act of 1996.		
Murphy v Ireland [2011] IEHC 536	Article 6 Article 13 Article 14	Section 1		The plaintiff had not established any locus standi to maintain the action which was that the certificate issued by the DDP and sending him forward for trial by the Special Criminal Court operated to deprive him of the constitutional right to a trial before a judge and jury.	HC	Criminal Law
Albion Properties Ltd. v. Moonblast Ltd [2011] IEHC 107; [2011] 3 IR 563	Article 13	Section 3(1)		Granted a mandatory interlocutory injunction to order a tenant to vacate a retail unit as in circumstances where the first defendant was in clear default in	HC	Landlord and Tenant Law

				respect of its obligation to pay rent, it was appropriate to grant mandatory interlocutory relief.		
The Minister for Justice, Equality and Law Reform (applicant) v Marcin Sawczuk (respondent) [2011] IEHC 41	Article 3			Granted the order of surrender to the Polish authorities as up to date information had been submitted to dispel any concerns raised by the respondent regarding his rights under the European Convention on Human Rights.	HC	European Arrest Warrant
Egan (applicant) v. An Bord Pleanala (respondent) and Athlone Town Council (Notice Party) [2011] IEHC 44	Article 6(1)	None specified		Leave for review was refused as decision of the Board consenting to the notice party's compulsory acquisition of a property pursuant	HC	Planning and Development Law

				to s. 16 Derelict Sites Act 1990 was well within its jurisdiction and the challenge brought was unsustainable.		
Health Service Executive (plaintiff) v J. O'B (A Person of Unsound Mind Not So Found) (respondent) [2011] IEHC 73	Article 5(1)			An order for detention at the Central Mental Hospital was made as where an adult lacked capacity and where there was a legislative lacuna the Court had jurisdiction to intervene.	HC	Mental Health Medical Law
Noel Brohoon (plaintiff) v Ireland, The Attorney General and The Director of Public Prosecutions (defendants) [2011] IEHC 74	Article 6 Article 14			It was held in dismissing the case that procedural disparities might be appropriate to take account of the quite different considerations	HC	Criminal Law Constitutional Law

				facing prosecution and defence and the absence of a right of appeal for a defendant would not necessarily offend the equality guarantee contained in Article 40.1 of the Constitution.		
E (O) (applicant) v Refugee Appeals Tribunal and Others (respondents) [2011] IEHC 149		None specified		Dismissed the application as the applicant had not shown good and sufficient reasons to allow the court to exercise its discretion to extend the time for the bringing of the application	HC	Asylum and Immigration Law
S (B) and others v The Minister for Justice, Equality and Law Reform [2011] IEHC 417	Article 8			Granted the relief sought in quashing the deportation order as the identification of the	HC	Asylum and Immigration Law

				constitutional rights involved and the significantly changed circumstances was not followed by a true examination of the case.		
Minister for Justice v. D.L. [2011] IEHC 248; [2011] 3 IR 145	Article 8		Article 24	Refused the application for postponement, of surrender to the Polish authorities as an applicant for postponement of surrender has to adduce evidence of humanitarian grounds warranting the postponement.	HC	European Arrest Warrant
In the Matter of Cathriona McAnaspie and Others [2011] IEHC 477	Article 2 Article 6(1)			It was held that a care order expired upon the death of the child concerned and that whether the in	HC	Family and Child Law

				camera rule applied mandatorily or by way of judicial discretion did not affect the authority of the court to permit disclosure of protected information where justice required it.		
A (T) and Others (applicants) v Minister for Justice, Equality and Law Reform (respondent) [2011] IEHC 9	Article 8			Leave for an order of certiorari to quash the deportation was given for the first applicant as the Minister did not pay due regard to the unusual features of the particular family. Relief was refused for the second applicant as his case was distinguishable from that of the	HC	Asylum and Immigration Law

				first named applicant.		
Health Services Executive v. M.X. [2011] IEHC 326; [2012] 1 IR 81	Article 3 Article 5 Article 6 Article 8 Article 13 Article 14	Section 2 Section 3 Section 4 Section 6		It was clear that the primary constitutional values engaged were the necessity for safeguarding the defendant's life and health. It was the duty of the court to apply an objective test as to best interests. The evidence coercively showed that the proposed medical regime was in the plaintiff's best interest. The vindication of those rights had to take precedence over autonomy and liberty.	HC	Mental Health Law
Markey v. Minister for	Article 6			Refused the declaration sought	HC	Constitutional Law

Justice [2011] IEHC 39; [2012] 1 IR 62				in holding that there was no rule of law or requirement in the Constitution that the procedures available to an accused person must be identical to those available to the prosecution.		Equality
Minister for Justice v. Adams [2011] IEHC 366; [2012] 1 IR 140	Article 6			Ordered the surrender of the respondent to the United Kingdom authorities.	HC	European Arrest Warrant
Arklow Holidays Ltd. v. An Bord Pleanala [2011] IESC 29; [2012] 2 IR 99	Article 6			Dismissed the applicant's appeal which had been based on the application of the rule in Henderson v. Henderson (1843) 3 Hare 100 to the planning process.	SC	Planning and Development Law Legal Practice and Procedure
Lofinmakin [a minor] & Ors -v-	Article 8 Article 13	Section 5(1)	Article 24	Leave was refused as it was		Asylum and Immigration Law

MJELR & Ors [2011] IEHC 38				held that no case of any substance could be made that the Minister's decision not to acquiesce, in effect, in Mr. Lofinmakin's abuse of the immigration rules could be considered contrary to common sense, unreasonable or disproportionate as encroaching upon private or family life to a degree that is unlawful.		
L. (a minor) & Ors -v- MJELR & Ors [2011] IEHC 282	Article 8 Article 13	Section 5	Article 24(3)	Held that the applicants were not entitled to an injunction for various reasons including that the applicants had not	HC	Asylum and Immigration Law

				satisfied the first limb of the *Campus Oil* test.		
MJELR -v- Adam [2011] IEHC 68	Article 5.3 Article 6 Article 8 Article 13		Article 7 Article 47	Held that the surrender of the respondent is not prohibited by Part 3 of the 2003 Act, or by the Framework Decision.		European Arrest Warrant
Lofinmakin [an infant] & Ors -v- MJELR & Ors [2011] IEHC 116			Article 24	The Court decided to grant a certificate but reformulated the terms of the certificate as compared with the draft put forward on behalf of the applicants. The Court also set out the points of law which would form the basis of the certificate.	HC	Family and Child Law
MJELR -v- Mc Guinness	Article 6		Article 47	Dismissed the objection raised by	HC	European Arrest Warrant

[2011] IEHC 289				the respondent to his surrender and ordered the surrender of the respondent to the issuing State under s.16 of the European Arrest Warrant Act of 2003.		
Mallak -v- MJELR [2011] IEHC 306	Article 13		Article 41(2) Article 47	Held that the grounds for which leave was granted had not been made out and the application for judicial review would therefore be refused.	HC	Asylum and Immigration Law
A. (a minor) -v- MJELR [2011] IEHC 323			Article 18 Article 24.2	Refused the application for a certificate, and held that the question of a reference did not arise.	HC	Asylum and Immigration Law
O. K. -v- K. [2011] IEHC 360			Article 24(3)	Held that the Mother and the	HC	Family and Child Law

				Father should have joint custody of the Child.		
O. (a minor) -v- Refugee Applications Commissioner & Ors [2011] IEHC 446	Article 13		None specified	The applications to amend the proceedings were dismissed as it was held that the applications to dismiss brought by the respondents were well founded and should be granted.	HC	Asylum and Immigration Law
S. (a minor) & Ors -v- MJELR & Ors [2011] IEHC 31	Article 13	Section 1 Section 5	Article 24 Article 52(1)	Allowed the amend insofar as the applicants sought to contend that the common law judicial rules were unconstitutional and disallowed the application insofar as it concerned reliance on the Charter.	HC	Asylum and Immigration Law
Salaja (a minor)	Article 8		Article 24	Refused the relief		Asylum and

& Anor -v- MJELR [2011] IEHC 51				sought by the Minister in the preliminary motion as it was held that that Mr. Salaja's circumstances were indistinguishable in principle from those of the respondent Board in *O'Brien* and that the case, accordingly, is not moot.		Immigration Law
Odia & Ors -v- MJELR Odia & Ors -v- MJELR [2011] IEHC 48	Article 8	None specified	None specified	The application for an interlocutory injunction restraining the Minister from exercising a deportation order was refused as it was held that no fair issue was raised to the effect that implementation of	HC	Asylum and Immigration Law

				the order in the circumstances would be unlawful and that the applicant's unlawful conduct constituted a compelling reason not to exercise jurisdiction in this matter.		
V. -v- U. [2011] IEHC 519	Article 8		Article 7 Article 24(3)	The application by the mother to relocate the children to Spain was refused as it was held that the consequence of making the order sought runs a substantial risk of very substantially reducing the contact which the boys have with one parent, in this case, the father and that this		Family and Child Law

				relationship outweighs the other apparent advantages of relocation.		
A. -v- MJE & Ors [2011] IEHC 381	Article 13		Article 47	Held that the test for the granting of an interlocutory injunction in this case had not been made out and the application must be refused.	HC	Asylum and Immigration Law
O. -v- MJE & Ors [2011] IEHC 472	None specified		None specified	It was held that the applicant had not made out grounds for leave in respect of either the decision refusing subsidiary protection or the decision issuing the deportation order.	HC	Asylum and Immigration Law
Aslam -v- MJE & Ors [2011] IEHC 512			Article 1	Granted the applicant an interlocutory injunction	HC	Asylum and Immigration Law

				restraining her transfer by either sea or by air to the United Kingdom. However the Court would not restrain the Minister from transferring her by road to Northern Ireland under Article 7 of the Dublin Regulation on the understanding that she would not be removed from the island of Ireland pending the delivery of the child.		
Gilligan & Anor -v- Murphy & Ors [2011] IEHC 465	Article 6 Article 7	Section 2 Section 3 Section 5		The claims of both plaintiffs relating to the ECHR were dismissed on the basis that neither plaintiff could rely on the provisions of the ECHR Act	HC	Criminal Law Criminal Assets Law

				of 2003.		
MJE -v- Siwy [2011] IEHC 252	Article 3 Article 5(3) Article 41 Article 46			Held that the respondent's surrender was not prohibited by Part 3 of the European Arrest Warrant Act of 2003, or by the Framework Decision (including the recitals thereto) and so the respondent should be surrendered to the issuing State.	HC	European Arrest Warrant
MJELR -v- Zych [2011] IEHC 161	Article 3 Article 6			Held that he respondent had not demonstrated that his surrender would be incompatible with the State's obligations under the ECHR in any respect and in the case of both warrants, the	HC	European Arrest Warrant

				Court directed his surrender to the issuing state.		
MJELR -v- Wlodarcyzk [2011] IEHC 209	Article 3			The Court ordered the surrender of the respondent to the issuing state on foot of both European Arrest Warrants for several reasons including that it was held that there was no real risk of a breach of Article 3 ECHR in making such an order.	HC	European Arrest Warrant
Tighe (a minor) -v- Judge Haughton & Anor [2011] IEHC 64	Article 6	Section 2(1)		Held that the Judge Haughton had acted within jurisdiction and has adhered to the principles of natural and constitutional justice. It was further held that	HC	Legal Aid

				the provisions of the Criminal Justice (Legal Aid) Act of 1962, as amended, and the ECHR Act 2003, had been properly applied and therefore the applicant had not been denied his right to be tried in due course of law in accordance with Article 38 of the Constitution.		
C. (a minor) & Anor -v- MJELR [2011] IEHC 112	Article 8 Article 13			Held that the applicants had established arguable grounds for leave to challenge by judicial review the decision of the respondent to affirm the deportation order.	HC	Asylum and Immigration Law
Murphy -v-	Article 8			Held that there	HC	Criminal Assets

Gilligan & Ors [2011] IEHC 62				was no basis for concluding that the existing s. 3 order caused an injustice or that in refusing to discharge or vary the s. 3 order that the Court would be acting in a disproportionate manner. The Court was satisfied that the relevant properties were purchased, funded and developed by funds which were generated by crime and represented proceeds of crime and the respondents, other than for the one exception, have failed to discharge		Law

				the onus on them in a s. 3(3) application to establish that such funds came from proceeds which were not the proceeds of crime.		
McGuinn v The Commissioner of an Garda Siochana & ors [2011] IESC 33	Article 6	Section 2 Section 4		Dismissed the appeal as it was held that the interests of justice require that a plaintiff be entitled to rely on a default judgment when no challenge is brought within a reasonable time to the entry of such judgment.	HC	Constitutional Law Administrative Law
Kennedy -v- D. P. P. [2011] IEHC 311	Article 6			Held that in the circumstances of the case, the delay was excusable. In relation to any prejudice the	HC	Criminal Law Administrative Law

				applicant may encounter, it was held that there was ample judicial authority for the proposition that such prejudice may be overcome or countered by means of appropriate directions or warnings from the trial judge.		
Dunnes Stores -v- Revenue Commissioners & Ors [2011] IEHC 469	Article 6			Reliefs refused as it was held that section 72 (5)(b) of the Waste Management Act provides quite specifically for the adaptation of the tax acts for the purpose of collecting the plastic bag levy and that regulation 15 does just		Revenue Law Waste Management Law

				exactly that.		
MJELR -v- Ciechanowicz [2011] IEHC 106	Article 8			Held that in the circumstances of the case, the surrender of the respondent is not prohibited by Part 3 of the European Arrest Warrant 2003 Act, or by the Framework Decision.	HC	European Arrest Warrant
Callan -v- Ireland & Anor [2011] IEHC 190		Section 1 Section 2 Section 5		The plaintiff's claim was dismissed for several reasons including that it was held that having been repealed by the Act of 1990, s. 1 of the Criminal Justice Act of 1861 Act was not in force immediately before the passing of the ECHR Act	HC	Criminal Law

				of 2003 and so could not be the subject of a declaration of incompatibility under s. 5 of the Act of 2003.		
W. -v- W. [2011] IEHC 201	Article 6			Granted the application to dismiss the claim on the grounds of both the Statute of Limitations and for want of prosecution.	HC	Criminal Law
MJELR -v- Sliwa [2011] IEHC 271	None specified			Held that the respondent had not made out the objections raised by him under s.37 of the European Arrest Warrant Act of 2003, either under the Convention, or under the Constitution, and that it was	HC	European Arrest Warrant

				appropriate to direct his surrender to the issuing state.		
Cosgrave -v- D. P. P. & Ors [2011] IEHC 312	Article 6			Held that the applicant's honest belief that this was the end of matters was not a reasonable belief for either him or his advisers to hold, nor was it nor could it be such that could constitute a representation. Relief refused.	HC	Criminal Law
MJELR -v- Puskas [2011] IEHC 80	None specified			Ordered the surrender of the applicant to the issuing State as it was held that any interference with his family life would be in accordance with the Convention	HC	European Arrest Warrant

				and its Protocols and that his surrender was being sought in pursuit of a legitimate aim or objective.		
DPP v David Timmons [2011] IECCA 13	Article 8			Refused an application for leave to add an additional appeal ground, that the "surveillance" in question was excessive, even oppressive, and that it thereby infringed rights of the applicant pursuant to Article 8 of the European Convention on Human Rights as the Court could not find on the evidence adduced, that the surveillance of the	CCA	Criminal Law

				applicant was oppressive.		
Oboh (a minor) & Ors -v- MJELR & Ors [2011] IEHC 102	Article 8			Held that the applicants had established substantial grounds for contending that the Minister did not conduct a full and fair assessment of their having regard to their rights under Article 8 ECHR.	HC	Asylum and Immigration Law
Fahy & Anor -v- Sanlon & Anor [2011] IEHC 293	Article 6			Held that the proceedings should be struck out on the grounds of inordinate and inexcusable delay in line with the provisions of Article 6 ECHR.	HC	Tort Law Contract Law

2012

Case	Articles of ECHR Considered in Decision	Sections of the ECHR Act 2003 Considered in the Decision	Charter Article	Core Summary	Court	Core Legal Area
O'Driscoll v Limerick City Council [2012] IEHC 594	Article 6 Article 8 Article 10 Article 13	Section 4 Section 5		Judicial review proceedings were determined to be an adequate remedy to satisfy Article 8 of the European Convention on Human Rights to deal with this case as to the proportionality of the Council's opinion.	HC	Administrative Law Housing Law
PL v Clinical Director of St. Patrick's University Hospital [2012] IEHC 547	Article 5 Article 13			Given the three criteria identified by reference to established ECHR Article 5 case-law for determining	HC	Mental Health/Mental Capacity

				whether a deprivation of liberty has occurred or not, it is necessary to establish, inter alia, “that the applicant has not validly consented to the confinement in question”. That is not established in this case.		
Minister for Justice v Staniak [2012] IEHC 508	Article 3 Article 8			Evidence is not sufficient to establish that the respondent’s surrender would represent a disproportionate interference with his right, and the rights of his partner and child, to respect for family life or that the respondent’s rights would not be	HC	European Arrest Warrant

				respected if imprisoned by the receiving state. Arrest warrant granted.		
M.E.O. v Minister for Justice [2012] IEHC 394	Article 3 Article 8			As a non-national, the State had no obligation to continue to treat the applicant under Article 3 unless it was shown that deportation would result in a critical deterioration in her condition.	HC	Asylum and Immigration Law Administrative Law
Sivsivadze v Minister for Justice & Others [2012] IEHC 137	Article 8	Section 5(2)		Granted leave to seek judicial review as the applicants had made out substantial grounds insofar as it was claimed that the application of a deportation order of (at least)	HC	Asylum and Immigration Law

				potentially indefinite duration would infringe Article 8 ECHR.		
Dowling & Ors -v- Minister for Finance & Ors [2012] IEHC 436			Article 17	Refused the present application to set aside the Direction Order made by the President of the High Court on the 28th March 2012.	HC	Financial Law Administrative Law
Dowling v Minister for Finance [2012] IESC 32		Section 1(1)		Dismissed the appeal. The timeline had been adjusted to the maximum extent possible in favour of the lay applicants.	SC	Legal Practice and Procedure
McArdle v DPP [2012] IEHC 286	Article 6			Relief refused as the applicant himself was responsible for much of the delay and had not pointed to any specific prejudice	HC	Criminal Law Constitutional Law

				that raised a real risk of an unfair trial.		
M.X. v. Health Service Executive [2012] IEHC 491; [2012] 3.I.R. 254	Article 8	Section 5		Refused relief as under the provisions of s. 60 of the Mental Health Act of 2001, the right to independent review and independent determination of capacity were already recognised statutory procedural rights, and the provisions gave effect to the duty of the State to vindicate the plaintiff's personal capacity rights.	HC	Constitutional Law
M.D. (a minor) v. Ireland [2012] IESC 10; [2012] 1 IR 697	Article 6 Article 6 Article 14	Section 2		Dismissed appeal on grounds that Article 40.1 of the Constitution recognised that	SC	Constitutional Law Criminal Law

				perfectly equal treatment was not always achievable and that applying the same treatment to all human persons was not always desirable because it could lead to indirect inequality due to inherent differences of capacity, physical and moral and of social function.		
Minister for Justice v Nolan [2012] IEHC 249	Article 3 Article 5 Article 14		Article 6	The respondent demonstrated that his surrender would be prohibited by the Constitution.	HC	European Arrest Warrant
Enright v DPP [2012] IESC 54	Article 6 Article 13			The appellant had accepted the agreed sum as a "final resolution" of his complaint to the European	SC	Constitutional Law Criminal Law

				Court of Human Rights and in so doing had waived any further claim against Ireland arising from the facts giving rise to his application.		
M.A. U-H. [Pakistan] v Minister for Justice [2012] IEHC 572	Article 8			Leave to seek judicial review granted on the basis that the subsidiary protection and deportation decisions insofar as they were based on the country reports relied upon were irrational and unreasonable.	HC	Asylum and Immigration Law
DPP v Donnelly [2012] IECCA 78; [2012] 7 JIC 3002	Article 6			Appeal arguing breach of rights dismissed as the appellants were correctly informed of the offences for	CCA	Criminal Law Constitutional Law

				which they were being arrested for. The court had been entitled to conclude that the failure to answer questions material to the investigation was capable of amounting to corroboration of the evidence of the belief of the chief superintendent.		
P. v Q. [2012] IEHC 593; [2012] 3 IR 805	Article 8			Interim order for discovery affirmed It was held that the respondent parent's questionable sexual activities of the respondent had the potential to have an effect on the child	HC	Family Law
Butcher v Minister for Justice [2012] IEHC 347;	Article 8			Held that whilst the power of the Minister in this	HC	Extradition of Prisoners

[2012] 4 IR 401				matter was discretionary, the applicant's art 8 rights were affected and should have been duly considered and balanced by the respondent. Final decision withheld until the conclusion of further hearing of the parties.		
Nash v DPP [2012] IEHC 598	Article 6 Article 13	Section 3		Refused relief for delay as it was not a case where nothing had happened for an unexplained extended period of time such as would give rise to a finding that the applicant’s rights under the Constitution and the ECHR had	HC	Criminal Law

				been breached.		
Walsh v. News Group Newspapers Ltd [2012] IEHC 353; [2012] 3 IR 136	Article 10	None specified.		Allowed Louis Walsh's application for discovery but excluding any documents that might lead to the identification of a source other than the complainant or members of An Garda Síochána.	HC	Media Law
I.P. v. T.P [2012] IEHC 31; [2012] 1 IR 666	Article 8			Refused the summary return of a child that had been removed to Ireland by her father to Poland for various reasons.	HC	Family and Child Law
T.M. v Refugee Appeals Tribunal [2012] IEHC 284	Article 13	Section 3(1)	None specified	Refused relief to the applicants judicially reviewing the tribunal's decision as the applicants had not established that	HC	Asylum and Immigration Law

				the tribunal member acted in a manner that was so unreasonable as to render his decision unfair or fundamentally flawed. The appropriate process and procedures were applied by the first named respondent in reaching the decision as to credibility.		
Lowry v. Smyth [2012] IEHC 22; [2012] 1 IR m	Article 6			Dismissed the appeal in relating to the refusal of relief for defamation as a high threshold was required to be met when seeking relief pursuant to s. 34 of the Defamation Act of 2009.	HC	Tort Law

A.M.S (Somalia) -v- MJE & A.K (Afghanistan) -v- MJE [2012] IEHC 72	Article 8 Article 13			Granted leave to seek certiorari by way of judicial review of the decisions refusing their applications for family reunification as there had been no indication of any proportionate analysis of the impact upon the rights of the applicants pursuant to Article 8 of the European Convention on Human Rights.	HC	Asylum and Immigration Law
Donegan v. Dublin City Council [2012] IESC 18; [2012] 3 IR 600	Article 6 Article 8 Article 13 Article 14	Section 2 Section 3 Section 4 Section 5		Dismissed the appeal *in Donegan v. Dublin City Council* [2008] IEHC 288 and allowed the appeal in *Dublin City Council v. Gallagher* [2008]	SC	Housing Law Landlord and Tenant Law

				IEHC 354 and dismissed the cross-appeal therein on various grounds.		
Health and Service Executive v L.N. [2012] IEHC 611	Article 6(1)			It was held that the District Court judge had been correct on the first 3 issues and on the forth issue that the sentence passed was lawful in the circumstances.	HC	Criminal Law Media Law
Kennedy v. DPP [2012] IESC 34; [2012] 3 IR 744	Article 3 Article 6	Section 3		Dismissed the appeal holding that the court should only prohibit criminal proceedings where prosecutorial delay infringed a person's constitutional right o an expeditious trial where the delay was	SC	Criminal Law Administrative Law

				inordinate, inexcusable and the balance of justice lay in favour of prohibition.		
Minister for Justice v. Bailey [2012] IESC 16; [2012] 4 IR 1	None specified			Allowed the appeal and refused to order surrender as a warrant issued for the purposes of investigation of an offence alone, in circumstances where that investigation might or might not result in a prosecution, was insufficient under s. 21A.	SC	European Arrest Warrant
Minister for Justice v. Tobin [2011] IEHC 72; [2012] IESC 37; [2012] 4 IR 147	Article 5 Article 6 Article 8			Allowed the appeal of the HC's order of surrender in holding that while the dismissal of an application for extradition on technical grounds	HC SC	European Arrest Warrant

				did not constitute a res judicata so as to prevent a second application, the second application might still be refused on the ground that it amounted to an abuse of process or an infringement of a right acquired under s. 27(1)(c) of the Interpretation Act 2005.		
Sister Mary Christian & Ors -v- Dublin City Council [2012] IEHC 163; [2012] 2 IR 506	None specified	None specified		Held in quashing the aspects of the development plan which dealt with the impugned zoning category Z15 that local authorities were entitled to have planning policies provided that such		Planning and Development Law

				policies were in conformity with planning legislation and their means of implementation were carried out in accordance with law.		
Caffrey v Minister for Justice [2012] IEHC 313	Article 3 Article 5	Section 1(1) Section 3(1)		The reliefs sought were refused as even if the proceedings were entitled to succeed, the reliefs sought would still be refused on the grounds of wavier and acquiescence.	HC	Criminal Law
Minister for Justice v Machaczka [2012] IEHC 434	Article 2 Article 3 Article 5 Article 8			Refused to order the surrender of the applicant to Polish authorities as it would be a disproportionate interference with the rights of the	HC	European Arrest Warrant

				respondent and his family.		
RP -v- SD [2012] IEHC 188			Article 24	It was held that it was inappropriate on the facts of this case, and having regard to the rights of the child, to directly involve the child who was on the cusp of 5 years in the Hague return application by giving her an opportunity to be heard.	HC	Family and Child Law
O.J (Nigeria) -v- Minister for Justice and Equality & Anor [2012] IEHC 71	Article 13	Section 3	Article 47	Refused all reliefs save granting leave for the judicial review on the grounds as the subsidiary protection order is invalid and so as a consequence the deportation order is also invalid.	HC	Asylum and Immigration Law
V.N (Cameroon) -			Article 47	The Court held	HC	Asylum and

v- Minister for Justice and Law Reform & Anor [2012] IEHC 62			Article 51	that the ground for leave had not been made and the application must be refused.		Immigration Law
Smith & Ors -v- The Minister for Justice and Equality & Ors [2012] IEHC 113	Article 8		Article 7 Article 21 Article 33	Held that no stateable case had been made out for the grant of leave and that even if there had been, the applicant's history of disregard for the law would be ample ground for refusing the application.	HC	Asylum and Immigration Law
Minister for Justice and Equality -v- Marjasz [2012] IEHC 233	Article 6		Article 47	In all the circumstances of the case including that the respondent was not represented by a lawyer, the Court was not satisfied to make an order pursuant to s.16(1)	HC	European Arrest Warrant

				of the Act of 2003 surrendering the respondent, and declined to do so.		
The Attorney General -v- O'Gara [2012] IEHC 179	Article 3 Article 13		Article 4 Article 47	Held that the evidence fell short of demonstrating that the particular respondent in this case would, if extradited, be exposed to a real risk that his fundamental rights would be breached.	HC	Extradition Law
Gilani & Anor -v- The Minister for Justice Adn Equality [2012] IEHC 193			Article 24	Held that no arguable case had been made for the grant of leave to apply for an order of mandamus upon the basis proposed.	HC	Asylum and Immigration Law
The Minister for Justice and Law Reform -v- Petrášek	Article 6			Held that the Court was disposed to make s.16 Orders and to surrender	HC	European Arrest Warrant

2012 IEHC 212				the respondent to the issuing state on foot of all three European arrest warrants.		
Afolabi & Ors -v- The Minister for Justice and Equality & Ors [2012] IEHC 192	Article 8 Article 13		Article 47	Held that the decisions sought to be challenged had been validly reached and were sound in substance. For those reasons leave was granted to apply for judicial review of the deportation orders only and upon the sole ground that they were invalid "by reason of the first named respondent not having personally considered whether the State's non-refoulement	HC	Asylum and Immigration Law

				obligations would be breached by the deportation of the applicants".		
A.A -v- Minister for Justice & Ors [2012] IEHC 222			Article 47 Article 51	Held that no substantial ground had been made out in the relevant case for the granting of leave to challenge the deportation order on the basis that the conclusions reached in the file note are either unintelligible or irrational.	HC	Asylum and Immigration Law
Minister for Justice & Equality -v- Rajki [2012] IEHC 270	Article 3 Article 8			Held that the evidence adduced by the respondent lacked the degree of cogency necessary to displace the presumption that the issuing state would respect the	HC	European Arrest Warrant

				respondent's fundamental rights including his rights under articles 3 and 8 of the Convention, respectively, and his rights under the Constitution. An order of surrender was made.		
EMI Records (Ireland) Ltd & Ors -v- The Data Protection Commissioner & Anor [2012] IEHC 264	Article 8 Article 10		Article 8 Article 11 Article 16 Article 17(2)	Held that in all the circumstances of the case that judicial review was properly and appropriately invoked. Held that the enforcement notice of 11 January 2012 was invalid in failing to give reasons and was therefore quashed.	HC	Data Protection Law Administrative Law
Pringle -v- The Government of			Article 47	Held that that the ESM Treaty was	HC	Constitutional Law

Ireland & Ors [2012] IEHC 296				not incompatible with the Constitution and that an amendment of the Constitution approved of by the people in a referendum was not necessary before it could be ratified. It was also held that the ESM Act of 2012 was not invalid having regard to the provisions of the Constitution.		European Union Law
O -v- Minister for Justice & Ors [2012] IEHC 457	Article 3 Article 8		Article 47	Refused the applicant's application seeking leave to apply for judicial review on all grounds and discharged the injunction made in this case as the	HC	Asylum and Immigration Law

				facts of the case did not support a stateable ground or provide the basis for an arguable one.		
M -v- L & Ors [2012] IEHC 485	Article 3 Article 13		Article 47	Leave was refused on the majority of the grounds canvassed in the judgment. However, the Court did grant leave to pursue arguments relating to the manner in which effect was given to the right to apply for subsidiary protection.	HC	Asylum and Immigration Law
Okunade v Minister for Justice Equality and Law Reform & the Attorney General [2012] IESC 49	Article 8		Article 47(1)	Allowed the appeal against the refusal of Cooke J. to grant an interlocutory injunction but made no order in		Law of Equity Asylum and Immigration Law

				substitution therefor by virtue of the fact that events had overtaken the necessity for any such order in substitution.		
O & Anor -v- Minister for Justice & Ors [2012] IEHC 458	Article 8(1)	Section 3(1)	Article 9 Article 47	Held that the application was refused in its entirety and the injunction was discharged for various reasons including that the application was made well outside the time limited by O. 84 of the Rules of the Superior Courts.	HC	Asylum and Immigration Law
The Minister for Justice and Equality -v- D.M [2012] IEHC 472	Article 8		Article 7 Article 24	Held that the respondent was not able to adduce evidence of sufficient cogency to satisfy the Court	HC	European Arrest Warrant

				that to surrender him would disrespect either his, or his child's, right to respect for family life under Article 8 E.C.H.R..		
Mallak v Minister for Justice Equality & Law Reform [2012] IESC 59	Article 13		Article 41(2) Article 51	Allowed the appeal and would grant an order of certiorari quashing the decision of the Minister refusing the application for a certificate of naturalisation as it was held that the Minister was under a duty to provide the appellant with the reasons for his decision to refuse his application for naturalisation.	HC	Asylum and Immigration Law Administrative Law
H.N. -v- MJELR & Ors [2012] IESC 58			Article 41	Referred to the Court of Justice of the European Union for	SC	Asylum and Immigration Law

				preliminary ruling on whether it is compatible with the Qualification Directive for Irish law to provide that an application for subsidiary protection will not be considered unless the applicant has already have applied for and been refused refugee status.		
Ervis Troci & Anor -v- The Minister for Justice & Equality and Ors [2012] IEHC 542	Article 8		Article 1 Article 7 Article 47 Article 49 Article 51(1)	An extension of time was granted in relation to the subsidiary protection decision and leave was granted on grounds 4, 5 and 11(a), (b) and (c) to seek reliefs 1, 5, 6, 7, 9, 14, 15, 19 and 20 with	HC	Asylum and Immigration Law

				reference only to the subsidiary protection decision. Leave was refused on ground 2.		
P. -v- MJE & Ors [2012] IEHC 18			Article 51	The application for leave by way of certiorari against the decisions refusing subsidiary protection and issuing a deportation order was refused for various reasons.	HC	Asylum and Immigration Law
A.O -v- Minister for Justice, Equality and Law Reform, Ireland and the Attorney General (No. 3) [2012] IEHC 104			Article 24 Article 51(1)	Granted the applicant leave to amend his pleadings to assert the relief discussed in the judgment insofar as it concerned the rights of Baby C under Article 41 and Article 42 of the Constitution	HC	Asylum and Immigration Law

				and, if necessary, Article 8 ECHR, granted leave to apply for judicial review and an interlocutory injunction restraining enforcement of the deportation order.		
NO2GM Ltd -v- Environmental Protection Agency & Anor [2012] IEHC 369	Article 6		Article 41(2)	Declined to grant the relief sought as to do so, without notice to other parties actually or potentially affected by such order would infringe fundamental principle of fair procedures as understood by the Constitution, the European Convention of Human Rights and the EU Charter of the Fundamental	HC	Environmental Law

				Rights.		
O'Connor -v- Environmental Protection Agency & Anor [2012] IEHC 370	Article 6		Article 41(2)	Declined to grant the relief sought as to do so, without notice to other parties actually or potentially affected by such order would infringe fundamental principle of fair procedures as understood by the Constitution, the European Convention of Human Rights and the EU Charter of the Fundamental Rights.	HC	Environmental Law
The Minister for Justice and Equality -v- Zbigniew Bednarczyk [2012] IEHC 154	Article 7		Article 49	Held that the Part 3 objections raised by the respondent with respect to correspondence were not made out, save in the case of the second	HC	European Arrest Warrant

				offence on the third warrant in time and so the surrender of the applicant ordered for all of the 4 warrants but the third one.		
W.A (DRC) -v- Minister for Justice & Anor [2012] IEHC 251	Article 8 Article 13		Article 47	Held that the applicant be granted leave to apply for orders of certiorari in respect of the refusal of the application for subsidiary protection and the deportation order by reference to 3 of the grounds outlined.	HC	Asylum and Immigration Law
Sivsivade & Ors -v- Minister for Justice & Ors [2012] IEHC 244	Article 8	Section 5		Relief refused as it was held that s.3(1) of the Immigration Act 1999 is not per se incompatible with	HC	Asylum and Immigration Law

				the Convention, particularly when that provision is assessed in association with the provisions contained in s.3(6) and s.3(11) of the Act.		
The Attorney General -v- Martin [2012] IEHC 442	Article 2 Article 3			In all the circumstances, the Court dismissed the objections to the respondent's extradition and made an order committing the respondent to a prison there to await the order of the Minister for his extradition to Florida.	HC	Extradition Law
The Minister for Justice and Equality [2012] IEHC 533	Article 8			Held that the respondent had not established a breach or a real risk of a breach of	HC	European Arrest Warrant

				any of his other fundamental rights, whether arising under the European Convention or under the Constitution and therefore his surrender to the issuing State was ordered.		
MEO -v- Minister for Justice, Equality and Law Reform [2012] IEHC 545	Article 3 Article 8			Held that s Ms. 0. had established substantial grounds in relation to the ECHR grounds as well as the constitutional grounds for contending that the Minister's decision was vitiated by material error of fact and that there may be a breach of her rights in deporting	HC	Asylum and Immigration Law

				her. Leave granted.		
DPP -v- Cormac Fitzpatrick and Terry McConnell [2012] IECCA 74	Article 6			Held that in all the particular circumstances of this case no miscarriage of justice had actually occurred and so the Court refused the appellant's application for leave to appeal against his conviction.	CCA	Criminal Law
E (A Minor) -v- The Minister for Justice and Equality [2012] IEHC 100	Article 3			Held that the applicant had not made out substantial grounds on the application for leave to challenge the deportation order, and therefore must fail.	HC	Asylum and Immigration Law
Quinn & Ors -v- Irish Bank Resolution	Article 6(1)			Held that Mr. Quinn had not demonstrated that	HC	Bankruptcy Law

Corporation Ltd & Ors [2012] IEHC 261				his rights under Article 6(1) of the Convention were infringed or likely to be infringed by answering the question posed at the outset of this judgment in the negative.		
Joel -v- DPP & Ors [2012] IEHC 295		Section 3		Held that on deciding if the test for judicial review is met, the court is also entitled to look at any answers that are given to any points that are made and to assess on that basis as to whether arguable grounds have been made out. It was decided having done this and having heard all sides, to refuse	HC	Criminal Law Administrative Law

				the application.		
O'Leary & Ors -v- The Minister for Justice, Equality and Law Reform [2012] IEHC 80	Article 8			Held that there had been an inadequate consideration given to a proportionate balancing of the interests of the State in maintaining the integrity of the Asylum and Immigration Laws as against the entitlement of the first and second named applicants to invoke the protection of their family interests under Article 41 of the Constitution.	HC	Asylum and Immigration Law
Mc Keogh -v- John Doe 1 & Ors [2012] IEHC 95	Article 13			Held that the plaintiff was not deprived of an effective remedy as guaranteed		Tort Law Media Law

				under the Constitution or under Article 13 of the ECHR and relief was refused.		
Ninga MBI -v- Minister for Justice and Equality & Ors [2012] IEHC 125	Article 8			The conclusion of the decision maker had been that refoulement was not found to be an issue and that no issue arose under s. 4 of the Act of 2000 or in relation to private and family rights under Article 8 ECHR and the Court found that no ground for judicial review of that decision had been made.	HC	Asylum and Immigration Law
McCarthy -v- Brandon Construction & Anor [2012] IEHC 413	Article 6			Held that the application should not be dismissed as 1. Although the proceedings were	HC	Tort Law

				instituted only days before the third anniversary of the plaintiff's fall, he was under age for most of the period, 2. There was an explanation for the delay that had some basis in fact, even though it was inadequate and 3. the defendant was itself responsible for substantial delay and default by its own conduct in taking more than two years to deliver its defence.		
Khaled Islam Khattak -v- Refugees Appeals Tribunal & Ors [2012] IEHC 569	Article 8 Article 13			Held that there was no evidential basis for concluding that he enjoys any form of private or family life in Ireland for	HC	Asylum and Immigration Law

				the purposes of Article 8 ECHR. Substantial grounds for judicial review had not been established.		

2013

Case	Articles of ECHR Considered in Decision	Sections of the ECHR Act 2003 Considered in the Decision	EU Charter Article	Core Summary	Court	Core Legal Area
Trevor Webster v The Commissioner of An Garda Síochána, Ireland and the Attorney General [2013] IEHC 449; [2014] 2 I.L.R.M. 144	Not specified	Section 3 Section 5		Case revolved around legality of Garda Vetting system. Proceedings struck out as an abuse of process.	HC	Administrative Law; Human Rights Law; Employment Law **[under appeal]**
Martin Corbally v The Medical	Article 6(1)	Section 5		Whether the findings made and	HC	Administrative Law

Council, Ireland and the Attorney General and the Irish Human Rights Commission (notice party) [2013] IEHC 500; [2014] 1 I.L.R.M. 272				sanction imposed by the Medical Council were proportionate to the facts of a case can be considered by the High Court.		
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) [2013] IEHC 490; [2014] 1 I.L.R.M. 170	Not specified	Section 5		Court refused to make an order that Section 25(6) of the Mental Health Act 2001 was repugnant to the Constitution and/or the ECHR	HC	Mental Health Law Administrative Justice Child Law
Minister for Justice and	Article 5 Article 8	Section 2 Section 4		Only in exceptional circumstances,	SC	European Arrest Warrant

Equality v Jaroslaw Ostrowski [2013] IESC 24; [2014] 1 I.L.R.M. 88		Section 8		would Article 8 ECHR prevent removal of an accused by virtue of a European Arrest Warrant. No exceptional circumstances existed in this case.		Extradition
Marie Fleming v Ireland, the Attorney General and the Director of Public Prosecutions and the Irish Human Rights Commission (Amicus Curiae) [2013] IEHC 2; [2013] 2 I.L.R.M. 9	Article 2 Article 3 Article 8 Article 14	Section 2 Section 3 Section 5		The absolute prohibition as regards assisting another individual to take her own life is neither unconstitutional nor in violation of the ECHR. It is for the State to regulate and determine issues relating to assisted suicide.	HC	Criminal Law Constitutional Law Health Law
Marie Fleming v Ireland, the Attorney General and the Director of Public Prosecutions and	Article 2 Article 3 Article 8 Article 14	Section 2 Section 3 Section 5		The absolute prohibition as regards assisting another individual to take her own life is neither	SC	Criminal Law Constitutional Law Health Law

the Irish Human Rights Commission (Amicus Curiae) [2013] IESC 19; [2013] 2 I.L.R.M. 73.				unconstitutional nor in violation of the ECHR. It is for the State to regulate and determine issues relating to assisted suicide.		
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] IEHC 12; [2013] 1 I.L.R.M. 305	Article 6 Article 8 Article 13	Section 2 Section 3 Section 4		Taking of a blood sample ordered by the High Court. Not in violation of XY's rights under the constitution or ECHR.	HC	Medical Law
Reid v Industrial Development Agency [2013] IEHC 433	Article 8	Section 3		Although the applicant's property rights and his rights under Article 8 of the Convention	HC	Administrative Law (land acquisition)

				carried undoubted weight, the test of proportionality favoured the compulsory acquisition decision was very much in the public interest and in keeping with the objectives of the Industrial Development Act 1986.		
Minister for Justice v Holden [2013] IEHC 62	Article 3		Chapter VI	The Court would not regard the theoretical possibility of a short term return to police detention as giving rise to substantial grounds for believing that the respondent would face a real risk of being subjected to inhuman or degrading	HC	European Arrest Warrant

				treatment, alternatively breach of his rights to bodily integrity and to be treated with human dignity, without evidence of particular vulnerability in his case. Arrest warrant granted.		
Minister v Justice v P.G. [2013] IEHC 54	Article 8			Arrest warrant granted as it had not been persuaded that surrendering the respondent would breach his right and/or the rights of his immediate family under article 8 ECHR to respect for private and family life.	HC	European Arrest Warrant
Minister for Justice v B.H. [2013] IEHC 443	Article 8			Where there is a risk of breach of article 8 rights, he Court must decide	HC	European Arrest Warrant

				whether the proposed interference to those rights was outweighed by the relevant public interest in having the individual extradited.		
J.A. v Refugee Appeals Tribunal [2013] IEHC 244	Article 3			Leave was given to allow the applicant to amend the statement of grounds to include a challenge to the deportation order but only on the ground that the deportation order had failed to address the applicant's rights under Article 3 the ECHR in relation to possible life imprisonment and prison conditions.	HC	Asylum and Immigration Law
Health Service	None specified			Appeal dismissed.	SC	Family Law

Executive v M.W. [2013] IESC 38				It could not therefore be argued that Council Regulation EC/2201/2003 was in conflict with the freedom of movement right.		
Teehan v Health Service Executive [2013] IEHC 383	Article 8			Relief refused as made it clear that there was no statutory right to a home birth and the applicant had been unable to sufficiently demonstrate that the HSE's policy on VBAC in a home setting was wholly unreasonable.	HC	Administrative Law Childbirth
Minister for Justice v Gordon [2013] IEHC 515	Article 6		Article 47	Whilst Article 6 of the European Convention on Human Rights entitled the respondent to "a fair and public	HC	European Arrest Warrant

				hearing within a reasonable time by an independent and impartial tribunal established by law", it did not necessarily follow that a delay in the trial process amounted to a breach of this right.		
I.D. v Minister for Justice [2013] IEHC 281	Article 8			The Tribunal's decision failed to answer the applicant's supplemental submission claiming that he had become a refugee "sur place" and so an order of certiorari was made quashing the decision.	HC	Asylum and Immigration Law
Quinn v Irish Bank Resolution Corp Ltd [2013] IEHC 116		Section 2(1)		Held that the stay on proceedings under s. 6(2)(a) of the Irish Bank	HC	Commercial Law Legal Practice and Procedure

				Resolution Corporation Act, 2013 was intended to be subject to being lifted on application to the courts.		
H.K. [Pakistan] v Minister for Justice [2013] IEHC 479	None specified			Decision of the Refugee Appeals Tribunal quashed as the applicant's claim had not been considered in full and a forward looking test had not been applied. Appeal remitted for fresh consideration.	HC	Asylum and Immigration Law
X.Y., A Minor v Health Service Executive [2013] IEHC 490	None specified	Section 5		Held that there was no need to make any of the declarations sought on behalf of the minor with bi polar disorder as many of them had already been catered for or were not	HC	Mental Health

				necessary.		
R.T.K. v Refugee Appeals Tribunal [2013] IEHC 108		Section 3(1)		Application for leave to seek judicial review was refused as a rational and well-reasoned decision had been given by the Tribunal and the court could find no flaws in the conclusions reached in the case.	HC	Asylum and Immigration Law
A.C. v Minister for Justice [2013] IEHC 105	Article 2 Article 8	Section 5	Article 4 Article 9 Article 10	As such, it was held that a substantial ground as regards her medical condition/disability had not been advanced by the applicant in this regard.	HC	Asylum and Immigration Law
Director of Public Prosecutions -v- McConnell *[2013] IECCA 45*	Article 6	None specified		The application for appeal to the Supreme Court was dismissed as it	CCA	Criminal Law201

				was held that the applicant in this case falls far short of the relevant test for certification of a point of appeal under s.29 of the Courts of Justice Act 1924.		
Smith & anor (minors) -v- Minister for Justice & Equality & ors [2013] IESC 4	Article 8	Section 3(1)	Article 7	Dismissed the appeal as the trial judge was correct in concluding that there were no arguable grounds established for challenging the Minister's second decision not to revoke the deportation order.	SC	Asylum and Immigration Law
N.J. -v- Minister for Justice Equality & Law Reform & ors [2013] IEHC 603		Section 3(1)		Made an order of certiorari quashing the deportation order as the applicant had successfully made out her complaint	HC	Asylum and Immigration Law

				that a failure to consider the Keane report breached the provisions of s. 3 (6) of the 1999 Act.		
Minister for Justice v McGuigan [2013] IEHC 216	Article 3			Surrender of the applicant was prohibited as the strength of the evidence created reasonable grounds for believing that the surrender would pose a real risk to the respondent of exposure to inhuman or degrading treatment.	HC	European Arrest Warrant
A.N. v Minister for Justice [2013] IEHC 480	Article 8		Article 7 Article 51	The applicants had not established an entitlement to the relief sought and the application would fail as there was no information was before the	HC	Asylum and Immigration Law

				Minister which would warrant the conclusion that it would be unreasonable to expect MS and her child to relocate to Albania.		
Minister for Justice v Kelly aka Nolan [2013] IESC 54	Article 5.1			Dismissed the appeal as it was held that the respondent should not be surrendered to serve a term of imprisonment which had been found to be contrary to the ECHR.	HC	European Arrest Warrant
D.F & anor -v- Garda Commissioner & Ors [2013] IEHC 5		Section 3(2)	Article 51(2)	Held that the plaintiff is entitled to jury trial in respect of the claims contained in the general endorsement of claim but that all issues touching on	HC	Legal Practice and Procedure Tort Law

				or concerning the legality of the arrest and detention of the plaintiff by members of An Garda Siochana are to be determined by the trial judge alone.		
The Minister for Justice and Equality -v- Jermolajevs [2013] IEHC 102	Article 3 Article 6 Article 8		Article 7 Article 47	An order was made directing the surrender of the respondent in respect of offences 1, 2, 4, 6, and 7 but not in in respect of offences 3 and 5.	HC	European Arrest Warrant
The Minister for Justice and Equality -v- Ciesielski [2013] IEHC 101	Article 8		Article 7 Article 14 Article 15 Article 24 Article 33 Article 45	Held that in circumstances where the Court has seen fit to uphold Point of Objection No 1 in the absence of an undertaking for the purposes of s. 45 of the Act of 2003, where such an	HC	European Arrest Warrant

				undertaking is required, the Court must regard the surrender of the respondent as being prohibited under Part 3 of the Act of 2003.		
E.B & Ors -v- The Minister for Justice & Anor [2013] IEHC 246	Article 8 Article 14		Article 7 Article 21 Article 24 Article 45 Article 52(3)	Held that the application for leave to apply for judicial review should be refused on several grounds.	HC	Asylum and Immigration Law
M.A.H -v- Minister for Justice & Ors [2013] IEHC 240	Article 6		Article 2 Article 47 Article 51	The application was refused as it was not for the High Court to make any observations in relation to the merits or otherwise of the Supreme Court appeal.	HC	Asylum and Immigration Law
Gilligan -v- Ireland & ors [2013] IESC 45			Article 49(3)	The appeal was dismissed for various reasons including that there was a rational	SC	Criminal Law

				connection between the nature of the penalty and the harm it sought to address.		
F.B.A. & ors -v- Minister for Justice and Equality & ors [2013] IEHC 554	Article 3 Article 8 Article 13		Article 24(2) Article 47	Held that it would not be fair or just to refuse an extension of time to enable the applicants to seek relief and that it was appropriate that the deportation orders in this case would not be acted upon pending the completion of these proceedings and that the then present position should be maintained.	HC	Asylum and Immigration Law Administrative Law
K.N. & anor -v- Minister for Justice and Equality [2013] IEHC 566	Article 8		None specified	Held that the balance of convenience lay against the granting of an injunction and refused leave to	HC	Asylum and Immigration Law

				apply for judicial review.		
Browne -v- Fingal County Council [2013] IEHC 630			Article 47	The application was refused for several reasons including that the Court was not satisfied that under Aarhus the applicant was entitled to the sort of blanket costs indemnity order he sought in advance of bringing his application for leave to seek judicial review.	HC	Planning and Development Law
M.H.A. -v- A.P. [2013] IEHC 611			Article 24(3)	The Court made several interlocutory orders pending further order or the determination of these proceedings in the High Court.	HC	Child Abduction Law Family and Child Law
Dos Santos & Ors -v- The	Article 2 Article 8		Article 4 Article 9	Held that if there was a deficiency in	HC	Asylum and Immigration Law

Minister for Justice & Ors [2013] IEHC 237			Article 10 Article 51	the deportation orders of the children it must be arguable that such defect tainted the decisions taken in the parent's cases and the balance of justice favoured restraining the deportation of the entire family in this instance.		
J.G & Anor -v- The Refugee Applications Commissioner & Ors [2013] IEHC 248	None specified		None specified	Held that even if granted leave to apply for judicial review, the applicants could not succeed in establishing the grounds relied upon and would not on the evidence have been able to establish that the respondents' decisions were unlawful and so	HC	Asylum and Immigration Law

				relief was refused.		
Applications by Coffey & others v Environmental Protection Agency & anor [2013] IESC 31	Article 6		Article 41(2)	Held that the learned trial judges of the High Court were acting within their jurisdiction, and were correct in law and under the Constitution in refusing to grant a costs order against parties without notice to those parties and in their absence from the Court. Affirmed the judgments and orders of the High Court and dismissed the appeals.	SC	Environmental Law Administrative Law
Maria Caldaras & Anor v An tArd Chlaraitheoir (Registrar General) [2013] IEHC 275		Section 2		Held that the applicant was entitled to the relief sought and to have the birth register amended accordingly.	HC	Civil Registration Law Administrative Law

A.J & Ors -v- The Minister for Justice and Equality [2013] IEHC 296	Article 13		Article 41	Held that as A.J. was granted leave to remain on humanitarian grounds referable to the submissions made on his mental health, it would be left to another day and another court to consider whether the blanket refusal of family reunification to those granted leave to remain can survive constitutional or Convention scrutiny.	HC	Asylum and Immigration Law
J.J -v- L Mc L [2013] IEHC 549	Article 8	Section 2		The application was refused as it was held that the respondent has not only established that it is in the best interests of the child that he not be		Family and Child Law Child Abduction Law

				returned to Belgium, but has also established that the child would be exposed to a grave risk of psychological harm if returned to Belgium at this stage of his development.		
Minister for Justice Equality & Law Reform -v- Strzelecki (No. 2) [2013] IEHC 477	Article 13		None specified	The Court held in favour of the applicant as it was held that even where our courts might potentially be entitled to intervene and refuse surrender they will not necessarily do so if the remedy being sought ought to be more appropriately pursued before the courts of the issuing state.	HC	European Arrest Warrant

Minister for Justice and Equality -v- Kasprowicz [2013] IEHC 531	Article 8		None specified	Held that the Court was not disposed to certify any of the three questions proposed in relation to the surrender of the applicant and the order sought by the respondent certifying that the Court's order or decision involved a point of law of exceptional public importance and that it was desirable in the public interest that an appeal be taken to the Supreme Court.	HC	European Arrest Warrant
Minister for Justice and Equality -v- T.E. [2013] IEHC 323	Article 8		Article 24	Held that the court was obliged by the terms of s. 21A of the Act of 2003 to refuse to surrender the respondent.	HC	European Arrest Warrant
Webster & Anor -	Article 8			Reliefs sought	HC	Housing Law

v- Dun Laoghaire Rathdown County Council & Ors [2013] IEHC 119				refused. It was held that in this case an eviction order could not give rise to a finding of incompatibility on the grounds of non-consideration of the proportionality of the eviction measure.		Landlord and Tenant Law
McNulty -v- Ireland & Ors [2013] IEHC 357	Article 6	Section 5		Refused the reliefs sought for various reasons including that the plaintiff had not satisfied the Court that s. 41 of the Criminal Justice Act 1999 was incompatible with Article 6 of the ECHR.	HC	Criminal Law
B.M. (Eritrea) -v- The Minister for Justice and Equality [2013] IEHC 324	Article 3 Article 13			Held that the applicant had established that the decision to refuse to revoke the deportation order		Asylum and Immigration Law

				was in all the circumstances fundamentally flawed on grounds 5, 6, 7, 8, 9, 10 and 11 of the amended statement of grounds. Therefore, an order of certiorari quashing the decision of the respondent was granted and the matter was remitted to be determined by the respondent in accordance with the applicable legal principles.		
A.S.M.A & anor -v- Minister for Justice & Equality & ors [2013] IEHC 381	Article 8	Section 3		Granted leave to apply for judicial review on several grounds including that the Minister in deciding to deport the second named applicant failed to have any or any	HC	Asylum and Immigration Law

				adequate regard for the best interests of the child and/or to consider the child's best interests as the primary consideration in the making of the decision contrary to Article 8 of the ECHR and Article 3.1 of the United Nations Convention on the Rights of the Child.		
F.E (A Minor) & Ors -v- The Minister for Justice and Law Reform [2013] IEHC 93	Article 8	Section 3		Held that the decision of the Minister and the examination of file complied fully with the terms, spirit and purpose of the *Oguekwe* guidelines and that the applicants had failed to establish for the reasons set out in the judgment	HC	Asylum and Immigration Law

				that the decision to deport M.E. was unreasonable, irrational or disproportionate.		
Akpekpe -v- The Medical Council & Ors [2013] IEHC 38	Article 6	Section 5		Refused to grant the reliefs sought for reasons including that it was held that no declaration of incompatibility had been sought pursuant to s. 5 of the ECHR Act of 2003 and the applicant is simply not entitled to seek declarations that statutory provisions themselves deny the applicant tights enshrined in the Convention in circumstances where that Convention has no direct effect in	HC	Medical Law Administrative Law

				national law.		
Minister for Justice and Equality -v- B.H. [2013] IEHC 443	Article 8			Held that the surrender of the applicant would not constitute a breach of his rights under Article 8 ECHR and that the private interests of a respondent and a dependent child do not outweigh public interest in extradition. Surrender to issuing state was ordered.	HC	European Arrest Warrant
The Minister for Justice and Equality -v- Eglitis [2013] IEHC 215	Article 6			The Court concluded that it had sufficient information to enable it to determine whether the respondent had put before it sufficiently cogent evidence to put the Court upon enquiry	HC	European Arrest Warrant

				as to whether or not the trial of the respondent leading to the conviction and sentence upon which the European arrest warrant is based was fair with reference to Article 6 ECHR but it was held that the Court lacked the necessary documentation to exercise its powers under the European Arrest Warrant Act 2003.		
Minister for Justice and Equality -v- Horváth [2013] IEHC 534	Article 2, Protocol 7			Held that as the Court was not in receipt of an undertaking from the Hungarian authorities in the form required by s. 45 of the European Arrest Warrant Act	HC	European Arrest Warrant

				of 2003, it had to refuse to make an order pursuant to s. 16(1) of the Act of 2003 and discharge the respondent from his bail.		
D.O.M. & ors -v- Minister for Justice and Law Reform [2013] IEHC 193	Article 8			Held that the Minister had considered extensively the facts and materials and that the applicants had failed to establish that the decision made was fundamentally flawed as contrary to reason or common sense or disproportionate in the sense indicated.	HC	Asylum and Immigration Law
The Minister for Justice, Equality and Law Reform -v- M.M.	Article 8			Held that the proposed surrender did not constitute a disproportionate	HC	European Arrest Warrant

[2013] IEHC 330				measure in the circumstances of this case and would not operate to disrespect the rights of the respondent, and his children, in breach of Article 8 of the E.C.H.R.		
In the Matter of Applications for Orders in Relation to Costs in Intended Proceedings by Coffey and others [2013] IESC 11	None specified			Held that there was no warrant for the claim that, in the application of EU law or the ECHR, specifically either by the Court of Justice or the ECtHR, there is any obligation on the court of a Member State to permit a litigant to be represented by a person other than a duly qualified lawyer.	SC	Legal Representation

2014

Case	Articles of ECHR Considered in Decision	Sections of the ECHR Act 2003 Considered in the Decision	EU Charter Article	Core Summary	Court	Core Legal Area
Gormley and Whyte v. DPP [2014] IESC 17 ; [2014] 1 I.L.R.M. 377	Article 6	Section 2		There is a constitutional (and implicitly a right under the ECHR) to access legal advice before questioning of a criminal suspect commences.	SC	Criminal Law
Thomas Murphy v Ireland, the Attorney General and the Director of Public Prosecutions [2014] IESC 19; [2014] 1 I.L.R.M. 457	Article 6	Section 2		The ECHR does not specify the manner in which criminal trials should be provided, and does not confer a right to trial by jury in all circumstances.	SC	Criminal Law
C.I. & Others v Minister for	Article 8			Interference with private life and	HC	Asylum and Immigration Law

Justice [2014] IEHC 447				family life is necessary in a democratic society therefore something other than the termination of the applicants private life in the deporting state was required if the proportionality analysis were to yield a positive result for the applicant. A similar sort of approach was appropriate in relation to family life.		
Minister for Justice v O'Donnell [2014] IEHC 138	Article 8 Article 4 of Protocol 2			Respondent's private interests do not outweigh the strong public interest in respondent's extradition, and his surrender would	HC	European Arrest Warrant

				not breach his rights under article 8 of the ECHR.		
Damache v DPP [2014] IEHC 114	Article 3 Article 5 Article 6 Article 8 Article 13	Section 3 Section 5		The Applicant's contention that the refusal to prosecute him within Ireland was unreasonable, disproportionate and made without proper regard to the impact that the extradition of the applicant would have on his constitutional and Convention rights, was unstateable.	HC	Criminal Law
Attorney General v Piotrowski [2014] IEHC 540	Article 1 Article 3 Article 6 Article 8			Extradition of the respondent to the Ukraine refused as where the Court had upheld the respondent's objection to his extradition based upon article 3	HC	Extradition

				ECHR, the Court was not disposed to make a committal order under the Extradition Act 1965.		
L.K. (infant) v Minister for Justice [2014] IEHC 521	Article 8			Held that the applicant had established a substantial ground upon which to grant leave to apply for judicial review of the deportation order not entitled to relief on any of the other grounds advanced so therefore the application was refused.	HC	Asylum and Immigration Law
Ryan v Clare County Council [2014] IESC 67	Article 6 Article 8 Article 1 Protocol 1	Section 2 Section 4 Section 5		Reversed the judgment of the High Court due to an error in the judge's discretion in refusing relief		Planning and Development Law

				via judicial review, and granted the declaration and mandatory orders sought.		
Minister for Justice v Balmer [2014] IEHC 459	Article 5			Held that it would be appropriate to surrender the respondent in respect of the offence to which the European arrest warrant related.	HC	European Arrest Warrant
Cerkovska v Minister for Justice [2014] IEHC 258	Article 8			The applicant's claim was dismissed in limine as she applicant could not establish that she had suffered, or would inevitably suffer any actual unfairness or breach of her rights in the circumstances.	HC	European Arrest Warrant
Tougher v	None specified			The judge	HC	Administrative

Tougher's Oil Distributors Limited (No 1) [2014] IEHC 254				indicated there was no reason at all to doubt the integrity of the former solicitor but that he was bound to follow the established rule which was that only a qualified barrister or solicitor has the right, if duly instructed, to represent a litigant before the courts.		Justice Constitutional Law
S.A.B. -v- Refugee Appeals Tribunal & ors [2014] IEHC 495		Section 3(1)		Issued an order quashing the decision of the RAT and referring it back for decision by another Tribunal member as the decision was deficient in several ways.	HC	Asylum and Immigration Law
C.B. -v- Refugee Appeals Tribunal & ors		Section 3(1)		Decision quashed and referred back to the RAT for	HC	Asylum and Immigration Law

[2014] IEHC 496				consideration by another Tribunal member as the decision did not refer explicitly to the COI in the form of the two internet articles.		
C.C. -v- Refugee Appeals Tribunal & ors [2014] IEHC 491		Section 3(1)		Held that the orders made by the Tribunal and the Minister should be quashed and the matter remitted for further hearing before a different tribunal member due to issues with the evidential basis.	HC	Asylum and Immigration Law
S.E. (a minor) -v- Refugee Appeals Tribunal & ors [2014] IEHC 240		Section 3(1)		Application for leave to seek judicial review was refused as the court was not satisfied that the applicant has established any	HC	Asylum and Immigration Law

				substantial grounds for allowing relief.		
Killeen -v- Governor of Portlaoise & ors [2014] IEHC 77	None specified			None of the reliefs were granted save for a declaration which could be made on consent that the detention of the applicants from 26th January, 2013 to 25th October, 2013 was not in accordance with rule 62 of the Prison Rules.	HC	Constitutional Law
Minister for Justice v Rostas [2014] IEHC 391	Article 6 Article 8 Article 14		Article 7 Article 20 Article 21 Article 47 Article 48 Article 49	The court refused to surrender the applicant as it determined that there was a real risk that the respondent suffered a flagrant denial of justice in respect of her trial resulting in the conviction and	HC	European Arrest Warrant

				sentence that led to the European Arrest Warrant being issued.		
S.L. v Minister for Justice & Equality & ors [2014] IEHC 16	Article 8 Article 14		Article 7	Application was dismissed as the applicants had failed to establish that the decision to affirm the deportation order was fundamentally flawed on the grounds advanced.	HC	Asylum and Immigration Law
F.E. (A Minor) v Minister for Justice [2014] IEHC 62	Article 8 Article 13	Section 5		Certification under section 5 (3) (a) of the 2000 Act was refused as the argument of the applicants regarding proportionality was incorrect, did not give rise to a point of law of exceptional public importance, and that an appeal was	HC	Asylum and Immigration Law

				not in the public interest.		
F.B. v Minister for Justice [2014] IEHC 427	Article 8			The court was satisfied that there was an error of law as regards the application of the test for dependency and the application of article 8 to the circumstances therefore the applicant was entitled to the relief claimed and the order was quashed.	HC	Asylum and Immigration Law
K.I. (a minor) & ors -v- Minister for Justice and Equality & ors [2014] IEHC 83	Article 8		Article 7 Article 24 Article 51 Article 52(3)	Held that the applicants had not established that the first named respondent's decision in refusing to revoke the deportation order pursuant to s. 3(11) was	HC	Asylum and Immigration Law

				vitiated on any of the grounds advanced and therefore the application was refused.		
J.S. & ors -v- Minister for Justice and Equality & anor [2014] IEHC 195	Article 3 Article 8		Article 7 Article 24 Article 51	Held that the refusal to revoke the deportation order challenged in this case was not fundamentally flawed on any of the three grounds advanced and that Minister in considering the additional material submitted on behalf of the applicants adopted a fair approach.	HC	Asylum and Immigration Law
T.D. -v- Minister for Justice Equality and Law Reform [2014] IESC 29			Article 18	Dismissed the appeal against the Order of the High Court for various reasons.	HC	Asylum and Immigration Law
D.F. -v- Garda	Article 3	Section 3(2)	Article 3	Held that the	HC	Tort Law

Commissioner & ors (No.3) [2014] IEHC 213	Article 5		Article 4 Article 6 Article 7 Article 51(2)	claims for declaratory relief in aid of these common law claims was inappropriate and potentially confusing given that that action was set down for trial before a jury and so struck them out. Several other conclusions were also made.		
K.A. (a minor) -v- Refugee Appeals Tribunal & ors [2014] IEHC 223	Article 8		Article 24.2	Refused the application but will list this matter for early hearing in the new term as Mr J McDermott was not satisfied to dismiss this case on the basis of the inherent jurisdiction of the court notwithstanding	HC	Asylum and Immigration Law

				the suggested infirmities of the grounds to be advanced by the applicant.		
A.P. -v- Minister for Justice and Equality (No. 2) [2014] IEHC 241			Article 41	An order of certiorari was made quashing the decision of the respondent refusing to grant a certificate of naturalisation to the applicant for various reasons including a lack of reasons being furnished to the applicant.	HC	Asylum and Immigration Law
Schrems -v- Data Protection Commissioner [2014] IEHC 310			Article 7 Article 8	Held that the present proceedings must stand adjourned pending the outcome of the Article 267 reference to the Court of Justice.	HC	Data Protection Law Intellectual Property Law

A.M & Anor -v- The Refugee Appeals Tribunal & Ors [2014] IEHC 388	Article 9		Article 10 Article 51(1) Article 52(3)	Held that the applications should be refused as A.M. is entitled to apply for an exemption on the same basis as her brother before the Military Committee and the error by the tribunal member in relying upon s. 39(c) does not affect that reality and is not such as to warrant the quashing of the decision.	HC	Asylum and Immigration Law
Dowling & Ors -v- The Minister for Finance [2014] IEHC 418	None specified	Section 3	Article 17	A preliminary ruling was sought from the Court of Justice on whether it would resile from, qualify or affirm the jurisprudence outlined on the Directive. Several	HC	Law of Finance

				findings of law and fact were also made.		
C.A. & anor -v- Minister for Justice and Equality & ors [2014] IEHC 532	Article 3 Article 8 Article 14 Article 2, Protocol 4		Article 1 Article 3 Article 4 Article 7 Article 15 Article 20 Article 21 Article 24 Article 41	Held that the applicants failed to establish that 'direct provision' because of cumulative effects, with or without a temporal element, breached their human rights whether arising under the Constitution or the European Convention on Human Rights. They succeeded in their claims that some of the RIA House Rules were unlawful and in their claim that the complaints handling procedure was	HC	Asylum and Immigration Law Social Welfare Law

				unlawful.		
D.A. (infant) (Nigeria) -v- Minister for Justice and Equality & ors [2014] IEHC 600			Article 24(2)	Held that the applicant had not established any substantial grounds upon which leave to apply for judicial review might be granted in this case and the application was therefore dismissed.	HC	Asylum and Immigration Law
J.M.O. -v- The Refugee Applications Commissioner & Ors [2014] IEHC 467	Article 3 Article 8		Article 1 Article 4 Article 52(3)	Held that the respondents properly considered all relevant matters in accordance with the Dublin II Regulation and the provisions of the ECHR and the Charter of Fundamental Freedoms, and the	HC	Asylum and Immigration Law

				decision to return the applicant to Slovakia under Article 3 was correct in law.		
Celtic Salmon Atlantic (Killary) Ltd -v- Aller Acqua (Ireland) Ltd & Anor [2014] IEHC 421			Article 41 Article 47 Article 48 Article 51	Held that it would not be contrary to the scheme of the Brussels Regulation to permit Celtic Atlantic to pursue its claim for breach of contract and negligence as against Aller Ireland in this jurisdiction and, where necessary, to sue Aller Denmark for negligence on the sole basis that the fish feed as so supplied was inherently unsuitable for fish of this nature,		European Union Law Contract Law Tort Law

				irrespective of contractual specifications.		
I.O. (Nigeria) -v- Minister for Justice and Law Reform & ors [2014] IEHC 598			Article 24(2)	Dismissed the application for judicial review as the applicant had not established substantial grounds for the contention that the decision ought to be quashed.	HC	Asylum and Immigration Law
S.K.T. (DRC) -v- Refugee Appeals Tribunal & ors [2014] IEHC 572			Article 41 Article 47	Held that the decision of the RAT must be quashed due to the inordinate delay in holding the hearings before the RAT and the lengthy delay in the delivery of its decision. It was also held that a number of the Tribunal's findings	HC	Asylum and Immigration Law

				were unsound and so were also struck down.		
M.O.I -v- The Refugee Appeals Tribunal & Ors [2014] IEHC 291	Article 6 Article 15(2)	Section 1 Section 2 Section 3 Section 4	None specified	Held that nothing the applicant had persuaded the Court that merely because of the existence of the Procedures and Qualification Directive as instruments of Community law, that this somehow triggered a requirement on a decision maker to consider the Articles of the Convention and whether the conduct sought thereby to be outlawed should be somehow assessed to see whether the	HC	Asylum and Immigration Law

				conduct complained of in the claim constituted such category of conduct. Leave to seek judicial review refused.		
F. -v- G. [2014] IEHC 152	Article 8			Held that the Court could not accede to the applicant's claim for an order appointing the respondent as the child's guardian under section 6A of the 1964 Act as no such application on the part of a mother, such as the applicant, could succeed because the section concerned only permits an application to be made by a father,	HC	Family and Child Law

				such as the respondent.		
Director of Public Prosecutions -v- Idah [2014] IECCA 3	Article 8			.As relevant and inadmissible evidence was been placed before the jury, it was held that the court had no alternative but to quash the conviction and order a retrial.	CCA	Criminal Law
Gorry & anor -v- Minister for Justice & Equality [2014] IEHC 29	Article 8			Held that the legal and constitutional rights of the applicants had been infringed by the failure to acknowledge, weigh and consider those rights. An order of certiorari was made quashing the decision of the respondent to affirm a	HC	Asylum and Immigration Law

				Deportation Order made against the first named applicant.		
Q.L. -v- Minister for Justice and Equality & ors [2014] IEHC 507	Article 8			Refused the reliefs sought as it was held that the scheme provided for in s. 3 of the Immigration Act 1999, safeguards the right for the applicant to make representations to the Minister prior to any Deportation Order being made, is a sufficient protection to the applicant to make representations under Article 41 of the Constitution and Article 8 of the ECHR meaning there was no breach of the applicant's rights.	HC	Asylum and Immigration Law

Javed -v- Minister for Justice and Equality & ors [2014] IEHC 508	Article 8 Article 13			Refused the reliefs sought as it was held that the absence of a gap between the considering of the representations and if unsuccessful, the making of the deportation order was not a breach of the applicant's constitutional rights or rights under Article 8 of the ECHR.	HC	Asylum and Immigration Law
Edward Lattimore v Dublin City Council [2014] IEHC 233	Article 8	Section 2		Held that the decision made was not in any sense disproportionate as appropriate alternate accommodation had been offered to the applicant and the correct application of the	HC	Housing Law

				proportionality principle in this case also means that there was no breach of the applicant's rights under Article 40.5 of Bunreacht na hÉireann.		
Jordan -v- Minister for Children and Youth Affairs & ors [2014] IEHC 327	Article 3 Article 6 Article 10 Article 13 Article 14	Section 1		The plaintiff's claim regarding the Referendum Act and public spending was dismissed for various reasons including that it was held that there was nothing in the terms of Article 6, 10, 13 or 14 of the European Convention or the Venice Code with which the McKenna principles or the remedies provided		Constitutional Law Referendum Law

				under the Referendum Act 1994, as interpreted by the Supreme Court, were incompatible.		
McCormack & Anor -v- Rouse *[2014] IEHC 396*	Article 6	Section 2		Held that the balance of justice favours the dismissal of the plaintiff's proceedings for various reasons including that there was a substantial risk that it was not possible to have a fair trial of the action and that there was likely to be serious prejudice to the defendant in the conduct of his defence.	HC	Administrative Law
Dos Santos & ors -v- Minister for Justice &	Article 8			It was held that the applicants had failed to establish	HC	Asylum and Immigration Law

Equality & ors [2014] IEHC 559				that the deportation orders were fundamentally flawed and so the applications were refused.		
A.M.S. -v- Minister for Justice and Equality [2014] IEHC 57	Article 8	None specified		Granted an order of certiorari in respect of the decision for several reasons including that it was held that no lawful proportionality assessment was conducted.	HC	Asylum and Immigration Law
A.L. -v- Minister for Justice and Equality & ors [2014] IEHC 503	Article 8			Refused the application for relief as it was held that the absence of a gap between the considering of the representations and if unsuccessful, the	HC	Asylum and Immigration Law

				making of the deportation order was not a breach of the applicant's constitutional rights or rights under Article 8 of the ECHR.		
Ryan -v- Danske Bank A/S t/a Danske Bank & anor [2014] IEHC 236		None specified		Held that the plaintiff had not made out an arguable prima facie case that he has rights under the ECHR which are capable of being protected and ought now to be preserved by way of interlocutory injunctive relief. Relief refused.		Commercial Law Receivership Law
M.C. -v- The Provincialate [2014] IEHC 101	Article 6			Held that the court would not dismiss the plaintiff's proceedings on the grounds of	HC	Institutional Abuse Administrative Law

				inordinate and inexcusable delay having regard to the balance of justice including prejudice to the defendant and the defendant's rights under natural and common law, the ECHR and Bunreacht na hÉireann.		
Sweeney -v- Governor of Loughlan House Open Centre & ors [2014] IEHC 150	Article 5			Relief refused as it was held that the continued detention of the applicant pursuant to the terms of the warrant issued by the Court in November 2008 was in accordance with law and would remain so after the 29th March 2014.		Penal Law Administrative Law
Morrissey & Anor -v- National		Section 3		Refused admission to the Commercial	HC	Commercial Law

Asset Management Agency & Ors [2014] IEHC 343				List as it was held that this litigation was fundamentally a constitutional action.		
Clarke -v- The Health Service Executive & Ors [2014] IEHC 419	None specified			Held that this was not an appropriate case for an intervention by the courts in refusing the relief sought.	HC	Penal Law Administrative Law
B.S. -v- Minister for Justice & Ors [2014] IEHC 502	Article 8			Refused to make an order quashing the deportation order for reasoning including that it was held it was open to the Minister to reach the conclusion that there was not a "real and substantial" risk of suicide and accordingly, the Minister was entitled to form the opinion that the	HC	Asylum and Immigration Law

				deportation order should not be revoked on this ground.		
R.B -v- Minister for Justice & Law Reform & anor [2014] IEHC 570	Article 8			Quashed the decision of the respondent for several reasons including that it was held that it was appropriate that when considering whether the applicant had established a private life in the State, the decision maker should have regard to the length of time that the applicant had been in the State when making the decision whether or not to revoke the deportation order.	HC	Asylum and Immigration Law

O'C & Anor -v- Udaras Uchtála na hÉireann [2014] IEHC 580	None specified			An order was made under s. 92 that the adoption in this case be entered in the Register of Inter Country Adoptions.	HC	Adoption Law
Cassidy -v- Martin Butterly and Company Ltd & ors [2014] IEHC 203	Article 6			Dismissed the application as the Judge felt that it should be left open to the defendant and the other defendants to prove at the hearing any express prejudice that arose and to revisit the question of dismissal of the action in evidence, argument and submissions at the trial.	HC	Employment Law
M.C.A. -v- Refugee Appeals Tribunal & Ors [2014] IEHC 504	Article 3			Held that the portion of the decision which impliedly required	HC	Asylum and Immigration Law

				the applicant to show a likelihood that he would suffer treatment in breach of Article 3 of the ECHR i.e. torture or inhuman or degrading treatment was an error of law as the applicant was only required to show a well-founded fear of persecution, not that he was likely to suffer torture, inhuman or degrading treatment.		
McClean -v- Sunday Newspapers Ltd [2014] IEHC 304	Article 6			Dismissed Mr. McClean's claim on the grounds of inordinate and inexcusable delay in the prosecution of his action as it was held that based on Article	HC	Tort Law Media Law

				6(1) ECHR, the defendant ought not to be subjected to the continuance of the proceedings.		
Minister for Justice and Equality -v- J.A.T. [2014] IEHC 320	Article 8			The Court was not disposed to uphold the s. 37 European Arrest Warrant Act 2003 objection based upon article 8 of the ECHR and an order for surrender to the issuing state was made.	HC	European Arrest Warrant
The Minister for Justice and Equality -v- Craig [2014] IEHC 460	Article 8			The Court was not disposed to uphold the respondent's s. 37(1)(a) European Arrest Warrant Act 2003 objection based upon his rights, and those of his wife, under article 8 of the ECHR.	HC	European Arrest Warrant
O'Brien v	Article 6			Dismissed the	HC	Constitutional

Director of Public Prosecutions [2014] IESC 39				application as it was held that very long period has elapsed since the public remarks were made and that this period was sufficient to allow public memory to fade. It was thus held that there was no real risk in the circumstances to a fair trial and so no breach of rights under Article 6 ECHR.		Law Media Law
Minister for Justice & Equality -v- Leskiewicz [2014] IEHC 584	Article 8			Held that the respondent had failed to adduce evidence of sufficient cogency to demonstrate that to surrender him would represent a disproportionate	HC	European Arrest Warrant

				interference with his rights to respect for family life in breach of article 8 of the ECHR.		
M.R. and D.R.(suing by their father and next friend O.R.) & ors -v- An t-Ard-Chláraitheoir & ors [2014] IESC 60	Article 8			In overturning the order of the HC that the biological parents were entitled to be listed on the children's birth certs as their parents after they had been delivered by a surrogate mother, the Court relied on an ECtHR ruling that subject to the terms of Article 8, there was no prohibition on a member state legislating against surrogacy insofar as such legislation was in accordance	SC	Surrogacy Law

				with the law, and necessary in a democratic society, in the circumstances outlined in Article 8.2 ECHR.		
Doyle -v- Dunne [2014] IESC 69	Article 6.1 Article 13	None specified		It was held that while the outcome which flowed from the decision of the Court may justify a sense of disappointment, even grievance, on the part of the beneficiaries of the appellant's estate and of her legal advisers, it did not contravene provisions of the ECHR including Article 6.1 or Article 13 or the ECHR Act 2003 as it was the outcome which ensued from	SC	Tort Law

				the decision the Court had to make, having regard to the relevant provisions, which were clear and unambiguous and had been in force for over fifty years.		
P.B. N. (DR Congo) -v- Minister for Justice and Equality [2014] IESC 9	Article 3			Held that there was failure on the part of the respondent to ensure the necessary protection for the rights of the appellant under Article 3 of the ECHR so as to expose her to a real risk of suffering serious harm on deportation.	HC	Asylum and Immigration Law
Khan & ors -v- Minister for Justice and	Article 8			Held that the Minister was entitled to come to	HC	Asylum and Immigration Law

Equality [2014] IEHC 533				the view that even where Article 41 and Article 8 rights arose and were engaged, the countervailing interest of the State in maintaining the integrity of the immigration process ought to prevail over those rights.		

Annex 3: References in judgments of the Irish District Court to European Convention on Human Rights, European Convention on Human Rights Act 2003 & Charter of Fundamental Rights of the European Union 2004-2014

Case	Articles of ECHR Considered in Decision	Sections of the ECHR Act 2003 Considered in the Decision	EU Charter Article	Core Summary	Court	Core Legal Area
DP v KS (Access Variation and Burden of Proof for Sexual Abuse) [2009] IEDC 3 (18 May 2009)	None specified	None Specified	None Specified	In a breach of an access order decision, the Court referred to Kilkelly, C*hildren's Rights in Ireland: Law, Policy and Practice* (Tottel Publishing, 2008). In considering the burden of proof as regards allegations of sexual abuse, the Court appeared to accept, albeit quoting from Kilkelly, that it must take into	DC	Child Care Law Evidence: Sexual Abuse

				account principles emerging from the case-law of the European Court of Human Rights. Specific mention was made of *TP and KM v. United Kingdom* [2001] 2 FLR 549. In this case, the DC found, as a matter of probability, the father had sexually abused Child 1.		
Health Service Executive v SK & anor (Costs) [2010] IEDC 2 (09 June 2010)				Emergency and Interim Care Orders are subject to the statutory welfare principle (Child Care Act 1991) and pursuant to constitutional and ECHR obligations. Legal assistance for a respondent	DC	Child Care Law Legal Aid

				parent may be necessary in order for the Court to carry out a proper inquiry. If a respondent parent cannot afford representation (outside the Scheme of the Legal Aid Board), the HSE may have to fund reasonable costs for this legal representation.		
Health Service Executive v M & anor (Children Request Solicitor) [2010] IEDC 4 (01 November 2010)	Article 8			Child 1 (16) and Child 2 (15) requested a solicitor to represent them in court proceedings and that they be joined as parties to the proceedings. The District Court judge was satisfied that through the guardian ad litem		Child Care Law Fair Procedures Rights of the Child Convention on the Rights of the Child Voice of the Child

				and the ability of the children to meet with the judge, satisfies the requirements of fair procedures under Article 8 ECHR and under Article 12 CRC.		
Health Service Executive v SM & anor (Change of Placement and Wishes of Child) [2010] IEDC 1 (13 May 2010)	Article 8 ECHR (incidentally)			In deciding on moving a child from a care placement, the Court must have significant regard to the wishes of the child (relying on *Bronda v Italy* & *Hokkanen v Finland)*. Significant planning is necessary as regards preparing a child for change. There was no evidence in this case that the HSE	DC	Child Care Law Rights of the Child Voice of the Child

				had engaged in such planning. Financial limitations do not justify (in this particular case) how the HSE sought to move a child to a different care placement.		
Health Service Executive v L & anor (Supervision Order - Corporal Punishment) [2012] IEDC 2 (13 January 2011)	Article 3			In interpreting Section 19 of the Child Care Act 1991, the Court made reference to the concept of ill-treatment under Article 3 ECHR and the case of *A v United Kingdom*. The Court appeared to accept that reasonable chastisement of children *might* be permitted under Irish law. However,	DC	Child Care Law Supervision Corporal Punishment Ill-Treatment

				ill-treatment for the purposes of Section 19 of the 1991 Act does not have to equate with a criminal act. In making a supervision order, the Court considered that ill-treatment must reach a minimum level of severity, and this depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical, its mental effects, and in some cases the sex, age, and state of health of the victim.		
Health Service	Article 8			In assessing	DC	Child Care Law

Executive v RB & anor (Care Order - CSA Allegations) [2011] IEDC 5 (30 September 2011)				whether the continuance of a care order should be permitted, the Court had regard to Article 8 ECHR and obligation for intervention within families to be provided for by law, legitimate, proportionate and necessary.		Proportionality
Health Service Executive v LL & ors *(Full Care Order - NAI)* [2011] IEDC 6 (11 October 2011)	Article 6 Article 8			Interventions into family life must be provided for by law, proportionate, and for the protection of children. While granting a full care order, the Judge directed the HSE to re-evaluate the need for restricted supervised access of the children with the mother.	DC	Child Care Law Proportionality

Health Service Executive v ON & anor (Care Order - Corporal Punishment) [2011] IEDC 8 (01 November 2011)	Article 8			In noting a difficult relationship between a mother and father, and two of their children who were in care, the Court had to consider Article 8 ECHR. The Court stated that where contact with a child would harm the interests of a child or interfere with the child's Article 8 rights, a proportionate balance must be struck. In this case, significant reports existed showing the dangers of reunification. Access of the two children to their parents and other	DC	Child Care Law Proportionality

				siblings, while at the discretion of the HSE, should be supported, flexible and phased, including overnight access.		
SB & anor v Health Service Executive (Direction to Prevent Change of Placement) [2011] IEDC 10 (08 December 2011)	Article 8	Section 2 Section 3 Section 4		Section 47 directions that a child remains in her current residential unit, after significant number of moves in a very short period of time. The Judge noted that the HSE was an 'organ of State' for the purposes of Section 3 of the ECHR Act 2003. There is a positive obligation on the State to ensure Convention rights are real, and not	DC	Child Care Law Socio-Economic Rights Care Placement

				illusory or theoretical. Courts, including the District Court, can take judicial notice of decisions of the ECtHR. While the HSE has to deal with financial difficulties, the Court noted that it had an obligation to maintain the mental and emotional integrity of the child.		
Health Service Executive v ED & anor (CO and SO - Neglect and Abuse) [2012] IEDC 1 (13 January 2012)	Article 8			Section 18 of the Child Care Act 1991, provides sufficient protection against interference with the family under the Constitution and under Article 8 ECHR. The Court stated that where contact with a child	DC	Child Care Law Care Order

				would harm the interests of a child or interfere with the child's Article 8 rights, a proportionate balance must be struck.		
Health Service Executive v CB & anor (Care Order - Neglect and Abuse) [2012] IEDC 5 (24 February 2012)	Article 8		Article 7 Article 24	Where a care order is granted, in general, a child will have a right to continued (if limited) access to birth parents, if it is in the best interests of the child to do so. In making orders, the District Court will be guided by principles relating to proportionality in interference with family life.	DC	Child Care Law Care Order

Health Service Executive -v- AM & anor (Care Order - Neo Natal Abstinence and ALTE) [2012] IEDC 9 (30 April 2012)	Article 8			Care orders, which are only granted once statutory grounds and evidentiary requirements are met, are a proportionate interference with families' rights under Article 8 ECHR.	DC	Child Care Law Care Order Proportionality
Health Service Executive -v- YG (Care Order - Physical Abuse and Neglect) [2012] IEDC 25 (10 December 2012)				The Judge stated, "Section 47 of the Child Care Act places the interests of the child above all other right". In this case, the Judge decided it was proportionate in the circumstances. To order the mother to produce an inappropriate video/recording of a child. This was	DC	Child Care Law

				stated in spite of counsel for the mother arguing that the matter of under Garda investigation, and the mother had a right against self-incrimination, right to silence and fair procedures.		
Health Service Executive v ME & anor (Moving Jurisdictions) [2013] IEDC 3 (30 January 2013)				Regard was had to the specified and unspecified rights of the child under the Constitution. Mention was also made of rights of the child under the ECHR and EUCFR. The Judge agreed with a care proposal for the grandmother to care for the children outside the jurisdiction.	DC	Child Care Law Care Order

Health Service Executive v SB (Care Order - Homelessness & Addictions) [2013] IEDC 6 (05 March 2013).				Domestic law, along with the ECHR and EUCFR require courts to carefully examine and be satisfied that a Care Order is a reasonable and proportionate interference in family life and is necessary in order to protect the best interests of the child.	DC	Child Care Law Care Order
Health Service Executive v M, X & ors (Joining of Party) [2013] IEDC 9 (25 March 2013)	Article 2 Article 3	Section 2 Section 3		X made an accusation of sexual abuse against M. A number of M's children are in care, some reside in a residential unit with X. X is a vulnerable young man, with significant mental	DC	Child Care Law: Section 47 Disclosure of Accusation (Sexual Abuse) Evidence Positive Obligations

				health challenges with on-going suicidal ideation as a response to stresses. After considering whether X could gain an order to block information on the sexual abuse allegation being made available to M, the Court took into account the obligations upon it under Section 2 of the ECHR Act 2003. In refusing to block disclosure, the Court noted that there was a positive duty to prevent a loss of life and preserve bodily integrity. This had to be		

				viewed in light of M's 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 to M.		
Health Service Executive v AM & anor (Care Order - Mental Illness) [2013] IEDC 10 (23 April 2013)	Article 8		Article 24 EUCFR	In deciding to grant a full care order, the Judge took cognisance of Article 8 ECHR obligations (and relevant domestic legislation), along with the obligation, so far as is possible, to take into account the views of the child	DC	Child Care Law Proportionality Voice of the Child

				under the Child Care Act 1991 and Article 24 EUCFR.		
Health Service Executive -v- B & anor (Lifting In Camera Rule) [2013] IEDC 13 (28 May 2013).	Article 6 Article 8			In determining whether a mother who participated in child care proceedings before the District Court is entitled to costs, the Court considered: (i) the Mother continues to benefit from a variety of rights	DC	Child Care Law Access to Justice Costs

				under the Constitution, ECHR and EUCFR, even when her children are in state care; (ii) Protection of an individual's right to access justice under Article 6(1) ECHR may be engaged. In this case, costs would not be granted for the Mother's participation in the review of the care order as the issues considered were not legally complex. However, costs were granted for the proceedings presently before the District Court.		

Health Service Executive v LC & ors (Child Care Proceedings – Costs) [2013] IEDC 22 (27 November 2013)	Article 6 Article 8			(Child 1 not being a child of a marital family; Child 2 being a child of the marital family, both children sharing a birth mother). In making a care order, Article 8 ECHR, affords a wide margin of appreciation in balancing the importance of child protection, with the aim of family reunification. The Care Order was granted, along with directions for supports to be provided to the Mother and Father of Child 2.	DC	Child Care Law Marital Family

Child and Family Agency (CFA) -v- H (Care Order - Psychological Assessment) [2014] IEDC 01 (17 January 2014)				Respondent submitted that the preparation of expert reports must be conducted in a rights (ECHR & constitutional) compliance manner that ensures procedural fairness. The Judge noted that the respondent must be permitted to object, deny or rebut matters in social work reports.		Child Care Law Assessments
Child and Family Agency -v- CG & anor (Care Order - Proportionality) [2014] IEDC 06 (29 May 2014)	Article 8 ECHR			In making a Care Order for a duration of two years, the District Court was directed by the requirements of the Constitution and Article 8	DC	Child Care Law Care Order Proportionality

				ECHR. The Judge noted, in line with ECtHR decisions, obligations to maintain family relationships (in so far as possible) and for restrictions (including issuance of the Care Order) to be subject to strict requirements of proportionality. Only in exceptional circumstances may a Court interfere with family life, and those circumstances are set down in legislation. The Judge also mentioned the protections under the EUCFR.		

Child and Family Agency and JO & Anor (Care Order - Proportionality) [2014] IEDC 11 (12 August 2014)	Article 8			There is a requirement under the Constitution, ECHR and EUCFR 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). In granting a Care Order until 18 for three children, Daly J. in the District Court engaged in an analysis of Article 8 ECHR and requirements of proportionality.	DC	Child Care Law Care Order Proportionality

				Best interests of the child may override rights of the parents.		
Child and Family Agency and KC & Anor (Care Order - Proportionality) [2014] IEDC 12	Article 8			Relying in part on *CFA v CG & anor* [2014] IEDC 06, Daly J. after considering Irish law, Article 8 ECHR and ECtHR jurisprudence decided that a three year care order was an appropriate, proportionate and necessary order to grant in this case.	DC	Child Care Law Care Order Proportionality

Child and Family Agency and CD & Anor (Care Order) [2014] IEDC 15 (17 October 2014)	Article 8			In granting a Care Order until the age of 18, Daly J. relying in part on *CFA v CG & anor* [2014] IEDC 06, found that this was a proportionate response in line with Article 8 ECHR and jurisprudence of ECtHR.	DC	Child Care Law Care Order Proportionality
Tusla: Child and Family Agency and COS & Anor [2014] IEDC 16 (31 October 2014)	Article 8			In granting a care order for one year, Daly J. noted that parents and children have significant rights under the Constitution and ECHR. “Immense care” is needed before granting a care order until children reach majority. In this case, the evidence	DC	Child Care Law Care Order Proportionality

				presented by the CFA fell short of the requirements of Section 18(1)(b) of the Child Care Act 1991.		
Tusla: Child and Family Agency and AC & Anor (Care Order - Proportionality) [2014] IEDC 17 (05 November 2014)	Article 8			The CFA is under a duty to protect the rights of the Child (by virtue of the Constitution, ECHR and EUCFR). However, there is a commensurate obligation on the CFA to consider family reunification and take steps to potentially enable this (subject to this not being detrimental to the child). Horgan P. also stated it was not in the best		Child Care Law Care Order Proportionality

				interests of the child to be told that his current foster family were his/her "forever family".		
Child and Family Agency and NC & Anor (Care Order - Proportionality) [2014] IEDC 18 (11 November 2014)	Article 8			Daly J granted a care order until a child reached the age of 18. In reaching this decision, Daly J. considered the obligations upon the District Court to engage in an assessment of Article 8 ECHR, balancing the rights of the child and the rights of the parents. In doing so, Daly J. stated that there were a number of distinguishing	DC	Child Care Law Care Order Proportionality

				factors, that merited the granting of the care order until 18 (referring to the proportionality assessment conducted in *CFA v CG & JB* [2014] IEDC 06)		
Child and Family Agency and GM & Anor (Care Order) [2014] IEDC 19 (12 November 2014)	Article 8			Family rights under the Constitution, ECHR and EUCFR were considered by Daly J. granting a Care Order in the case of three teenage children until they reached majority. Daly J. permitted the GAL to bring certain matters to the attention to the Ombudsman for Children as		Child Care Law Care Order

				regards alleged inaction of the HSE, National Education and Welfare Board and the Gardaí prior to the three children effecting their own escape from the family home in August 2013.		

Annex 4: References to the European Convention on Human Rights and European Convention on Human Rights Act 2003 and the European Charter of Fundamental Rights in decisions of other Irish Tribunals and Quasi-Judicial Bodies 2004-2014

Determinations of Appeal Commissioners under Section 994A of the Taxes Consolidation Act 1997

Four decisions post the introduction of the ECHR Act 2003, none that have raised Convention related issues.

Broadcasting Commission of Ireland

One complaint has mentioned the European Convention on Human Rights (*Mr. Seán Ascough Ref. No. 02/13*), however the decision was not based on a determination of any arguments forwarded as regards Convention compliance and broadcasting law and policy.

Work Place Relations & Equality Determination Mechanisms

Case/Date	Articles of ECHR Considered in Decision	Sections of the ECHR Act 2003 Considered in the Decision	Articles of EUCFR Considered	Core Summary	Tribunal	Core Legal Area
Determination No.EDA0417, *Italian Embassy v Damery* (December 2004)	None specified	None specified		The ECHR does not change pre-existing public international law as regards claims for diplomatic	Labour Court	Employment Law Sovereign Immunity

				immunity under the Vienna Convention on the Law of Treaties.		
Recommendation No. LCR18364, *Dunnes Stores Tralee and Mandate* (November 2005)	None specified.	The decision mentions the 2003 Act, and may be referring to Section 2 of the 2003 Act (rather than Article 2 ECHR)		No consideration of ECHR argument.	Labour Court	Employment Law
Decision No. REA 1120, *MDY Construction Limited and Building and Allied Trade Unions* (February 2011)	None specified	None specified		Dispute is between two companies neither of which are human persons. Therefore, parties cannot come within the scope of the Convention.	Labour Court	Employment Law
Determination No. EDA128, *Trailer Care Holdings v Healy*			Article 23 Article 33	The EUCFR is primary EU law, with the same constitutional	Labour Court	Employment Law Industrial Relations Acts,

(March 2012)				status as the EU Treaties. In interpreting EU law on dismissal on basis of pregnancy, the CJEU has interpreted exisiting legal obligations in light of the EUCFR. LC affirmed decision of Equality Authority.		1946 To 1990 Section 83, Employment Equality Acts, 1998 to 2011: Gender Pregnancy
Determination No. EDA1314, Ger Lally & Associates v Siniecka Rusek (July 2013)			Article 23 Article 33	The EUCFR is primary EU law, with the same constitutional status as the EU Treaties. In interpreting EU law on dismissal on basis of pregnancy, the CJEU has interpreted exisiting legal obligations in light	Labour Court	Employment Equality Acts, 1998 to 2011; Gender; Pregnancy

				of the EUCFR. LC overturned the decision of Equality Authority, and awarded Ms Rusek €20,000.		
Determination No., EDA1329, Gillick t/a Twist Foods v Rosploch (November 2013)			Article 23 Article 33	The EUCFR is primary EU law, with the same constitutional status as the EU Treaties. In interpreting EU law on dismissal on basis of pregnancy, the CJEU has interpreted exisiting legal obligations in light of the EUCFR. Decision of Equality Tribunal affirmed.	Labour Court	Employment Equality Acts, 1998 to 2011; Gender; Pregnancy
Determination No. EDA1416, Moonlite Cleaning			Article 23 Article 33	The EUCFR is primary EU law, with the same	Labour Court	Employment Equality Acts, 1998 to 2011;

Services Limited v Drabik (May 2014)				constitutional status as the EU Treaties. In interpreting EU law on dismissal on basis of pregnancy, the CJEU has interpreted exisiting legal obligations in light of the EUCFR. Decision of Equality Tribunal varied in part.		Gender; Pregnancy

Equality Tribunal

Case/Date	Articles of ECHR Considered in Decision	Sections of the ECHR Act 2003 Considered in the Decision	Articles of EUCFR Considered	Core Summary	Tribunal	Core Legal Area
DEC-S2005/200, Sharkey v Danny Minnie's Restaurant,	Article 6	Section 3		Equality Tribunal decision maker under a duty to consider Irish law	ET	Discrimination Law Equal Status Acts 2000-2004

Donegal, December 2005				in Convention compliant manner. Delay of 3 years in hearing of dispute did not adversely affect the respondents.		Equality Law: Race
DEC-S2006-077, 2 Named Complainants v Department of Education and Science, November 2006.	Article 8	Section 3		Complainant's right to privacy not violated as regards identifying a person as having a received certain exam supports, due to a disability, on the Leaving Certificate examination results form. However, the complainant succeeded on other grounds of complaint.	ET	Discrimination Law Equality Law Equal Status Act Disability
DEC-S2008-113, Mr Thomas O'Donnell v	Article 3	Section 2		The Equality Tribunal is not the appropriate forum	ET	Discrimination Law Equality Law

Roscommon County Council (2 December 2008)				in which to seek a determination as to whether a complainant suffered inhuman and degrading treatment under the ECHR. To make such a determination, the Equality Tribunal would be acting ultra vires.		Equal Status Act 2000 Membership of the Travelling Community
DEC-E2010-147, Laurentiu Eugen Iocob v The Central Hotel (3 August 2010)	Article 8			There was no finding of discrimination in this case against the respondents. Despite arguments of the respondents that covert voice recordings (taking by the complainant), violated the Constitution and/or the ECHR	ET	Discrimination Law Equality Law: Employment Equality Acts 1998-2008 Race

				and/or the Data Protection Act 1988, the Equality Officer listened to the recordings.		
DEC-S2010-053, A Patient v Health Service Provider and A Hospital (1 December 2010)	Article 8 Article 14	Section 3		The Equality Tribunal has no jusridiction under Section 3 of the ECHR Act 2003. Arguments that mental health services were provided in a gender discriminatory manner was not accepted.		Equality Law Equal Status Acts 2000 to 2008 Gender Mental Health Law
DEC-E2013-188, Mr L v A Medical Technology Enterprise , (20 December 2013)	None Specified	None Specified		The Equality Tribunal did not have jurisdiction to consider whether 'closed shop agreements' were contrary to the ECHR.		Equality Law Employment Equality Acts 1998 to 2011 Race Disability

DEC-E2014-045, John McAteer v South Tipperary County Council (24 June 2014)	Article 9 Article 14	None specified	Article 10 Article 52	The complainant was discriminated against on the basis of his religion. In coming to this decision, the Equality Officer had regard to the right to religious belief, including the right to communicate about religious beliefs. Significant reference was made to ECtHR jurisprudence. The Equality Officer stated that there was an obligation upon her to consider domestic law in light of Article 10 EUCFR and EU Framework Directive 2000/78 which prohibits	ET	Equality Law Employment Equality Acts 1998 to 2011 Religion

				inter alia discrimination both direct and indirect on the grounds of religion or religious belief		
DEC-E2014-050, Ms Z. v A Government Department (9 July 2014)			Article 21 Article 23 Article 26 Article 33 Article 34	The failure to provide the applicant with maternity leave or adoptive leave for her child born through a surrogacy arrangement (with the child being Ms Z's genetic child) did not violate domestic or EU law. This decision was made after a preliminary ruling by the CJEU in *C-363/12, Z. v. A Government*	Equality Tribunal	Equality Law Employment Equality Acts 1998 to 2011 Disability Gender

				Department and The Board of Management of a Community School.		

Irish Information Commissioners' Decisions

Case	Articles of ECHR Considered in Decision	Sections of the ECHR Act 2003 Considered in the Decision	Articles of EUCFR Considered	Core Summary	Court	Core Legal Area
Case No. 000478 & 000549, Mr X and the former Eastern Health Board (the Board), 17 November 2005	Article 8	Section 2 Section 3		Article 8 ECHR rights are not engaged when a person who is not a parent seeks access to a child's social work and other records relating to an allegation of sexual abuse. **N.B. The 2005 determination**		

				was set aside by Clarke J. in *F.P. v Information Commissioner*, 13 July 2009, but did not make comment on the Information Commissioner's interpretation of the ECHR/ECHR Act 2003.		

Irish Data Protection Commission Case Studies (until 2013)

Case	Articles of ECHR Considered in Decision	Sections of the ECHR Act 2003 Considered in the Decision	Articles of EUCFR Considered	Core Summary	Court	Core Legal Area
Case Study 13 of 2011: *Access to reports compiled by private investigators*	None specified	None specified	None specified	Engaging a private investigator to investigate a named individual "carries a very serious risk" of	IDPC	Data Protection Privacy

(2011)				breaching the Data Protection Acts, and rights to privacy under the ECHR, EUCFR and Bunreacht na hEireann.		
Case Study 6 of 2006 : *News of the World: Limits of the Media Exemption*	Article 8 Article 10	Section 3	None Specified	Data Protection Commissioner is obliged to interpret Irish Data Protection law in a manner compliant with the ECHR. With regard to ECtHR jurisprudence on privacy, there was a data protection breach by the News of World (Irish edition). This came about through the taking of pictures of a child of a well known Irish	**IDPC**	Data Protection, Privacy, Right to private life, Right to Family life

				celebrity, without permission.		

Competition Authority of Ireland (now Competition and Consumer Protection Commission)

The *Competition Authority* have not considered any arguments as regards the ECHR, ECHR Act 2003 or the EUCFR.