In what follows, I provide an update to the second edition of my book, **Social Inclusion and the Legal System: Public Interest Law in Ireland**, covering available Irish material up to 22 May 2020.

Gerry Whyte,
22 May 2020

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Introduction

Page 1, insert in line 18:

It must be conceded that these terms are not particularly helpful in defining this type of law, given that the concept of the public interest is so indeterminate and, in some contexts, contentious. Other attempts at identifying key characteristics of this type of law have focused on the type of client involved – that public interest lawyers work for clients who are not adequately represented by the private profession or in democratic politics; the criteria used by public interest lawyers for selecting clients – that clients are selected primarily because of the potential social impact of their case rather than primarily because of the fee to be earned; the motivation of the lawyer – that public interest lawyers are motivated, at least in part, by altruism, by a moral or political commitment to a particular cause, or by a desire to change the status quo; and the setting in which the lawyer works – that public interest lawyers generally work for NGOs, rather than in private firms.[1]

Page 2, add to footnote 6:

Cp. *NN v Minister for Justice and Equality* [2016] IEHC 470, where Humphreys J held that in light of ss.192 and 246(7)(f) of the Social Welfare (Consolidation) Act 2005, a person subject to a deportation order did not have any right to social provision, commenting, at para.43, that "[t]hose who fall outside [the limits of social provision] simply do not benefit. Their fate must therefore be left to private initiative or indeed to their own efforts…"

Ch.1 – The Legitimacy of Judicial Activism on behalf of the disadvantaged

Page 11, insert new material:

In discussing the legitimacy of judicial activism on behalf of disadvantaged individuals, I propose to consider initially whether the

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[1] **For a more detailed examination of the various attempts at defining "public interest law' and their attendant difficulties, see Chen and Cummings, Public Interest Lawyering: A Contemporary Perspective, (Wolters Kluwer Law and Business, 2013), ch.1, on which this brief summary has drawn heavily.**

State may be restrained by the courts from taking action that would result in a person being directly at risk of poverty. I will then consider whether the courts could require the State to take positive steps to assist those who are unable, through their own efforts, to avoid being at risk of poverty as a result of economic or social disadvantage. This structure is based in part on the tripartite classification of the State's duties in respect of human rights, inspired by the work of Henry Shue, G.J.H. Van Hoof and Asbjorn Eide – the duty to respect, the duty to protect and the duty to promote or fulfill. The duty to respect obliges the State to refrain from interfering with human rights; the duty to protect requires the State to safeguard human rights from violations by third parties (and so human rights, including ESC rights, may be relevant to horizontal relationships between private parties in addition to the vertical relationship between the State and the individual)[2]; and the duty to promote or fulfill obliges the State to take positive steps to assist those who are unable, through their own efforts, to enjoy human rights.[3]

DUTY TO RESPECT RIGHT NOT TO BE DISADVANTAGED[4]

With regard to the duty to respect the right not to be disadvantaged, there are some indications that the Irish courts recognise, at least in some contexts, the State's duty to refrain from taking action that would directly place a person at a serious disadvantage or, at least, to refrain from relying on the consequences of such action in a way that would further disadvantage that person. While both the European Convention on Human Rights and the Constitution have been invoked in this regard, only some claims based on the Constitution have proved successful.[5]

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[2] In relation to the Irish State's duty to protect socio-economic rights, it is worth noting that Hogan J held, in *Irish Life and Permanent v Duff* [2013] IEHC 43, that, by virtue of Art.40.5, there must be a judicial procedure in place to determine whether a mortgagee is entitled to recover possession of a home where the mortgagor has defaulted on the mortgage. In addition, by virtue of ss.6(1)(c) and 3(3B) of the Equal Status Act 2000 (as inserted by s.13 of the Equality (Miscellaneous Provisions) Act 2015), a person providing accommodation or related services and amenities cannot discriminate on the ground that one person is in receipt of rent supplement, housing assistance or a social welfare payment and the other is not.

[3] See Shue, **Basic Rights, Subsistence, Affluence and US Foreign Policy,** (2nd ed., Princeton University Press, 1996); Van Hoof, "The Legal Nature of Economic, Social and Cultural Rights" in P. Alston and K. Tomasevski (eds.), **The Right to Food** (International Studies in Human Rights, Utrecht, 1984) and **Report on the Right to Adequate Food as a Human Right**, submitted to the UN Committee on Economic, Social and Cultural Rights, by A. Eide, UN Special Rapporteur, (1987). See further, J. Connolly, ***Unfinished Business: The Case for Housing, Health and other Social Rights in the Irish Constitution*** (Dublin, 2014), pp.72–5.

[4] Much of the material in this section (and some material in a later section on dignity) first appeared in an article I published in The Irish Jurist – "Lord Ellenborough's Law of Humanity and the legal duty to relieve destitution" [2018] 60 Ir. Jur. (n.s.) 1 – and I am very grateful to the publishers of The Irish Jurist for permission to reproduce it here.

[5] In one case, *Ayavoro v. HSE* [2009] IEHC 66, O'Neill J., though without indicating the legal basis for the proposition, appears to have accepted that the authorities may not deliberately deny a person access to a basic level of income already provided for under the social welfare code when he stated, obiter, that the welfare authorities were not entitled:

Duty to respect and the European Convention on Human Rights

The few attempts to rely on Art.3 of the European Convention on Human Rights to enforce the State's duty to respect the right of the individual not to be subjected to inhuman or degrading treatment as a result of material disadvantage have invariably been unsuccessful on the facts of the individual cases.[6] *C.A. v Minister for Justice and Equality*[7] involved a challenge to the legality of the Direct Provision scheme, a largely cashless scheme of support, through the provision of accommodation and meals, for persons seeking asylum or subsidiary protection. This scheme has attracted particular criticism because of the length of time such persons remain in direct provision as they await decisions on their applications for asylum or subsidiary protection, with more than half of the almost 8,000 people in the system in early 2015 having been dependent on direct provision for more than five years.[8] However MacEochaidh J. rejected the argument that the Direct Provision Scheme violated Art.3 of the Convention. He distinguished the decision of the European Court of Human Rights in *M.S.S. v Belgium,*[9] which concerned the treatment of asylum seekers in Greece, on the ground that the circumstances said by the applicants in *C.A.* to constitute inhuman and degrading treatment were not "startling or alarming examples of physical or mental abuse."[10] Moreover, the Court held that the applicants had also failed to establish the negative effects they claimed constituted inhuman and degrading treatment.[11]

> "[T]o make onerous demands [for information] which kept an impecunious person out of benefit for an unconscionable period of time which, in the case of impecuniosity, would … be a very short time indeed."

However this does not mean that there is a substantive right to a basic income as these remarks speak to administrative delay only and simply deal with effective processing of a claim to a statutory entitlement.

[6] At European level, Art.3 appears to have had limited impact in protecting persons other than prisoners or asylum seekers—see L. Thornton, "The European Convention on Human Rights: A Socio-Economic Rights Charter?" in S. Egan, L. Thornton and J. Walsh, *Ireland and the European Convention on Human Rights" 60 Years and Beyond* (Bloomsbury, 2014) and A. O'Reilly "The European Convention on Human Rights and Socioeconomic Rights Claims: a Case for the Protection of Basic Socioeconomic Rights through Article 3" [2016] 15 *Hibernian Law Journal* 1.

[7] [2014] IEHC 532.

[8] See *Final Report of Working Group to Report to Government on Improvements to the Protection Process, including Direct Provision and Supports to Asylum Seekers* (June 2015, Department of Justice and Equality) at p.16.

[9] Application No. 30696/09, 21 January 2011.

[10] At para.7.2.1 of the judgment.

[11] For the same reason, MacEochaidh J. also held that the applicants had failed to establish that the Direct Provision Scheme unlawfully interfered with their family life as protected by Art.8 of the Convention, though he did hold that certain rules applied by the accommodation centres under the Scheme infringed privacy rights under the Convention and the Constitution.

In *Ayavoro v. HSE*[12] which raised the question of what information welfare authorities are entitled to require claimants to provide, O'Neill J dismissed the applicant's reliance on Art.3, distinguishing *R (Limbuela) v Secretary of State for the Home Department*[13] on its facts, there being no evidence of destitution before the Court nor a total prohibition on welfare being provided.

In *Dooley v Killarney Town Council,*[14] Peart J. held that the fact that the applicants had to live in a wooden chalet on a halting site while waiting almost four years to be provided with permanent housing did not result in a breach of the applicants' rights under Arts.3 or 8 of the Convention. According to the judge, to establish a breach of either Arts.3 or 8, it would have to be shown that the council was permitting the applicants to languish, without justification, in conditions that amount to inhuman or degrading treatment or that lack respect for private and family life.

In *PC v Minister for Social Protection*,[15] Binchy J. in the High Court held that the fact that a prisoner had been disqualified for receipt of his State Pension (Contributory) while in prison did not adversely affect his living conditions to such an extent as to violate Art.3.[16]

In *O'Donnell v South Dublin Co. Co.,*[17] Laffoy J. held that the plaintiffs who were living in a caravan that was grossly over-crowded, potentially unsafe and wholly unsuitable to the needs of three of the plaintiffs, each of whom had a severe physical disability, had not made out a case that their rights under Art.3 had been violated.

Thus, attempts to date to invoke the Convention to enforce the State's duty to respect the right of the individual not to be subject to inhuman or degrading treatment as a result of economic or social disadvantage have invariably been unsuccessful.[18] Nor does it seem likely that there will be any change in this situation in the near future. In *McD v L*,[19] Fennelly J., with whom Hardiman and Geoghegan JJ. agreed, indicated, albeit *obiter*, that in applying s.2 of the European Convention on Human Rights Act 2003, which requires Irish courts to interpret any statutory provision or rule of law in a manner compatible with the State's obligations under the Convention, insofar as is possible, Irish courts could only have regard to, inter alia, the existing

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[12] [2009] IEHC 66.
[13] [2006] 1 A.C. 396; [2005] 3 W.L.R. 1014.
[14] [2008] IEHC 242.
[15] [2016] IEHC 315.
[16] On appeal, the Supreme Court held that this statutory disqualification was unconstitutional and so did not have to consider whether it was also incompatible with Art.3 of the Convention - [2017] IESC 63, [2017] 2 I.L.R.M. 369.
[17] [2007] IEHC 204, [2011] 3 I.R. 417.
[18] It should be noted, however, that Art.8 of the Convention offers some procedural protection to occupants of public housing facing eviction – see *Donegan v Dublin City Council* [2012] 3 IR 600, [2012] 2 ILRM 233.
[19] [2009] IESC 81, [2010] 2 I.R. 199, [2010] 2 I.L.R.M. 461.

jurisprudence of the European Court of Human Rights, observing that "(t)he Act of 2003 does not provide an open ended mechanism for our courts to outpace Strasbourg."[20] Thus, Irish courts will have to await developments at European level before being able to rely on the Convention in support of a State duty not to push people into poverty as a direct result of State policies. However, the prospects of the European Court of Human Rights using the Convention to protect socio-economic rights are poor. Thornton concludes that there is:

> **"[A] general reluctance by the European Court of Human Rights to enter into a substantive discourse on the ability of the [Convention] to protect socio-economic rights"[21]**

and that successful invocations of the Convention to protect such rights are limited to cases where states failed to comply with existing domestic legal obligations. In her comprehensive analysis of attempts to protect socio-economic rights through reliance on Art.3 of the Convention, O'Reilly also comments that:

> **"[T]he ECtHR's focus on factual extremities, without attempting to derive any general principles, has resulted in a dearth of guidance on when exactly positive obligations to remedy destitution arise. This leaves poverty-stricken litigants in a position of great uncertainty and creates issues for national courts facing similar domestic claims."[22]**

Duty to respect and the Constitution

In contrast to the experience of Irish litigants invoking the Convention as protection against poverty caused directly and immediately by the State, the Constitution arguably affords some protection to persons experiencing, or facing the risk of, poverty directly induced by the State itself. However, to date there is no general, overarching principle and instead specific constitutional provisions have provided protection in specific situations. In *Fajujonu v Minister for Justice*,[23] a majority of the Supreme Court,[24] per Walsh J., agreed that it would be ultra vires the Aliens Act 1935 for the Minister to deport the non-national parents of citizen children solely on the ground of poverty, particularly when that poverty had effectively been induced by the authorities through the policy of refusing to grant unauthorised aliens

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[20] At para.328. See also the Supreme Court decision in *O'Donnell v South Dublin Co Co* [2015] IESC 28 wherein the Court, per MacMenamin J., held that, in the context of a failure by the respondent council to provide a caravan to the applicants, a claim that this amounted to a breach of Art.8 of the Convention could only succeed if, *inter alia*, there was a clear statement of principle to that effect discernible from the ECtHR jurisprudence—see para.82 of the judgment.

[21] Thornton (2014), at para.14.35.

[22] O'Reilly (2016), p.9.

[23] [1990] 2 I.R. 151.

[24] Walsh, Griffin, Hederman and McCarthy JJ. The fifth member of the Court, Finlay C.J., did not express any opinion on the specific point under consideration here.

the right to work in the State. The protection would appear to have been derived from the constitutional guarantee of the integrity of the marital family contained in Art.41.1.2. This protection was, admittedly, limited. The State was not precluded from denying aliens the right to work, only from relying on the consequences of that policy to justify deportation.[25]

A number of different constitutional provisions featured in *Dillon v DPP*,[26] where de Valera J. indicated that laws criminalizing the act of begging had to be read in light of the Constitution and, in particular, the constitutional guarantee of freedom of expression and the right to communicate. In *Dillon,* the issue was the constitutionality of s.3 of the Vagrancy (Ireland) Act 1847 which criminalized begging by, inter alia, "every person wandering abroad and begging". De Valera J. noted that this element of "wandering abroad" was not defined in the 1847 Act but that it had been judicially interpreted in the context of the Vagrancy Act 1824 to refer to persons who had given up work and adopted begging as a habit or mode of life or who were committed to begging as a means of livelihood.[27] He concluded that this element must be related to "rumour or ill-repute or past conduct", a feature of the offence of loitering contrary to s.4 of the Vagrancy Act 1824 that led the Supreme Court, in *King v Attorney General*,[28] to condemn that offence as unconstitutional on the ground that it was incompatible with the constitutional guarantees in Arts.38.1, 40.1, 40.3 and 40.4.1. Accordingly, de Valera J. held that s.3 of the 1847 also violated Arts.34.1, 40.4.1, 40.1 and 40.3 of the Constitution.[29] He further held that s.3 infringed the applicant's right to express freely convictions and opinions under Art.40.3 and Art.40.6.1.i.[30] He was at pains to point out, however, that the rights to communicate and to freedom of expression can be limited in the interests of the common good and

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[25] Though see now *N.V.H. v Minister for Justice and Equality* [2017] IESC 35; [2017] 2 I.L.R.M. 105, discussed further below, 000.

[26] [2007] IEHC 480, [2008] 1 I.R. 383.

[27] See *Mathers v Penfold* [1915] 1 K.B. 514.

[28] [1981] I.R. 233.

[29] See [2008] 1 I.R. 383, 389. It is probable, however, that the reference to Art.34.1 is a typing error and that de Valera J. meant to refer to Art.38.1 as earlier in his judgment, he had dismissed an argument that s.3 of the 1847 Act was inconsistent with Art.34 on the grounds that it denied a trial judge any discretion in relation to the imposition of a sentence for this offence.

[30] However de Valera J. did not allude to the distinction between public and private speech implicitly drawn by the Supreme Court, *per* Barrington J. in *Murphy v Independent Radio and Television Commission* [1999] 1 I.R. 12, [1998] 2 I.L.R.M. 360 when he said, at pp.24 and 372 respectively:

> "Article 40.6.1º.i … is concerned with the public activities of the citizen in a democratic society. That is why…the framers of the Constitution grouped the right to freedom of expression, the right to free assembly and the right to form associations and unions in the one subsection. All three rights relate to the practical running of a democratic society."

Consequently the better view may be that s.3 infringed the implied right to communicate protected by Art.40.3 rather than freedom of expression protected by Art.40.6.1.i.

that:

> **"Nothing in the judgment should be construed as preventing the legislature from making laws controlling the location, time, date, duration and manner in which begging or the seeking of alms might take place and the age of any person involved in such activity."[31]**

In *Re Art.26 and the Health (Amendment) (No.2) Bill 2004,*[32] the Supreme Court held that a Bill that, inter alia, purported to abolish the right of in-patients in publicly funded nursing homes to recover monies that they had been unlawfully required to pay for certain services infringed the guarantee of private property in Arts.40.3 and 43. According to the Court, legislation that sought to expropriate property solely in the financial interests of the State could not be regarded as regulating the exercise of property rights. The Court also commented:

> **"[The Constitution] protects [property] rights even when they are of modest value and in particular, as in this case, where the persons affected are among the more vulnerable sections of society and might more readily be exposed to the risk of unjust attack."[33]**

The guarantee of equality in Art.40.1 may also offer some, albeit limited, protection to impoverished individuals insofar as that guarantee prohibits unjustified State discrimination against individuals or groups based on their social class.[34] In *Quinn's Supermarket v Attorney General*,[35] Walsh J. said that the guarantee of equality under Article 40.1 was not a:

> **"[G]uarantee of absolute equality for all citizens and all circumstances but it is a guarantee of equality as human persons and … is a guarantee related to their dignity as human beings and a guarantee against any inequalities grounded on an assumption, or indeed a belief, that some individual or individuals or classes of individuals, by reason of their human attributes whether ethnic or**

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[31] [2008] 1 I.R. 383, 390. **See now the Criminal Justice (Public Order) Act 2011 which regulates begging.**

[32] [**2005] 1 IR 105; [2005] 1 ILRM 401.**

[33] [**2005] 1 IR 105 at p.208; [2005] 1 ILRM 401 at p.455. The Court had earlier noted, at pp.000 and 452, that the property rights affected by the Bill belonged to the most vulnerable members of society and that that would be relevant to a consideration of the grounds upon which the State sought to justify the legislation.**

[34] Note, however, that Doyle argues that the "vast majority of the case law interpreting Art.40.1 is wholly inconsistent with a substantive interpretation of Art.40.1"—O. Doyle, *Constitutional Equality Law* (Dublin: Thomson Round Hall, 2004) at p.230. Moreover, even if the guarantee of equality can be deployed to review legislative or executive policies on the grounds that they discriminate unlawfully on grounds of social class, there is always the risk that in some cases, such discrimination might be removed by "levelling down", i.e., by depriving the privileged group of the benefit of the policy and leaving the position of the marginalised group unchanged.

[35] [1972] I.R. 1.

racial, *social* or religious background, are to be treated as the inferior or superior of other individuals in the community".[36]

To date, however, there has been relatively little consideration of the impact of Art.40.1 on discrimination based on social class or wealth and the cases concerning such discrimination have arisen mainly in the two contexts of the administration of justice and of accessing rights or privileges, though two cases fall outside this classification.

With regard to the administration of justice, Ó Dálaigh C.J. suggested, in *The State (McIlhagga) v Governor of Portlaoise Prison*,[37] that a court would be acting unconstitutionally if it punished two defendants of equal obloquy by sending the poorer one to prison but letting the richer one go free on payment of a fine well within his means, though in the instant case the Supreme Court held that a condition that a sentence of imprisonment would be lifted if money obtained through false pretences was repaid did not discriminate between persons with means and those without, as it aimed merely at the restoration of what had been wrongfully got.[38] In *De Burca v A.G.*,[39] O'Higgins C.J. and Walsh J in the Supreme Court held that a property qualification restricting eligibility to serve as a juror was contrary to Art.40.1[40] while in *Framus Ltd. v Amantiss Enterprises Ltd.,*[41] Herbert J said that to make an order for security for costs on the grounds of a litigant's lack of means would amount to invidious and unjust discrimination. In *Health Service Executive v OA,*[42] O'Malley J, held that to deny costs to a litigant in child care proceedings who could have availed of civil legal aid but chose not to do so would amount to unconstitutional discrimination. According to the judge, the consequence of denying costs would be that:

"[P]ersons of limited means would have to justify their choice of advocate in a way that wealthier individuals would not, despite the fact (or because of the fact) that they are not seeking State assistance."[43]

O'Malley J. had earlier categorised the case as being

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[36] At pp.12–13. (Emphasis added.)
[37] Unreported, Supreme Court, 29 July 1971.
[38] See also *Osmanovic v DPP* [2006] IESC 50, [2006] 3 I.R. 504, where the Supreme Court, per Murray C,J,, held that statutory provision for the imposition of a fine as an alternative to imprisonment did not amount to unconstitutional discrimination based on wealth. The Court also rejected the contention that provision for smaller fines where the accused pleaded guilty before the District Court instead of opting for trial on indictment was unconstitutional. According to the Court, given the various safeguards in the particular provision in question, this was not a situation in which an impecunious defendant was being forced to plead guilty rather than opt for trial by jury.
[39] [1976] I.R. 38,
[40] Henchy and Griffin JJ, held that it was contrary to Art.38.5 and Budd J. held that it was inconsistent with the Constitution, though without giving precise reasons for his conclusion.
[41] [2003] 1 I.L.R.M. 462.
[42] [2013] IEHC 172.
[43] At para.66.

"about the right of an individual litigant who is not on legal aid and has not applied for legal aid to be treated in the same way as any other litigant who is not on legal aid - without arbitrary, capricious or invidious discrimination that, on the arguments mounted by the HSE and the Attorney General, could be based only on her supposed lack of means."[44]

Two other cases considered wealth discrimination in the context of access to certain rights or privileges. In *Redmond v Minister for the Environment*[45] Herbert J. held that the statutory requirement that candidates for election to Dáil Éireann or the European Parliament must pay a deposit amounted to invidious discrimination against persons who wished to run for election but who could not afford the deposit. In coming to this conclusion, he identified classifications that adversely affect the dignity of the individual as falling within the remit of the constitutional guarantee of equality. He said:

"[A] law which has the effect, even if totally unintended, of discriminating between human persons on the basis of money is an attack upon the dignity of those persons as human beings who do not have money. This is far removed, for instance, from issues such as alleged rights to wage parity or increases or issues of the uneven impact of taxation upon citizens in various marital or non-marital relationships or on farmers or householders or occupiers. The history of poverty and of social deprivation in Ireland, but by no means exclusively in Ireland, demonstrates overwhelmingly the extent to which the essential dignity of persons as human beings is involved. In my judgment, this is exactly the type of discrimination for which the framers of the first sentence of Article 40, section 1 of the Constitution were providing." [46]

***Redmond* was, admittedly, later overruled in *King v Minister for the Environment*[47] with the Supreme Court (per Murray C.J.), saying, *obiter*, with reference to the requirement that a candidate for election to the Dáil had to pay a deposit, that it did not constitute invidious discrimination. However the Supreme Court did not comment on Herbert J.'s view that a distinction based on wealth that adversely affects the dignity of an individual would fall foul of Art.40.1.**

The second case to note in this context is *In re Xnet Information Services Ltd.*[48] where the applicant sought relaxation of the statutory

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[44] At para.65. The Supreme Court subsequently held in this matter that costs should not normally be awarded to parent respondents in District Court care proceedings—*Child and Family Agency (formerly HSE) v OA* [2015] IESC 52, [2015] 2 I.R. 718, [2015] 2 I.L.R.M. 145. However the case did not come before the Supreme Court by way of an appeal against O'Malley J.'s decision and there is no discussion of her application of the guarantee of equality.

[45] [2001] 4 I.R. 61.

[46] [2001] 4 I.R. 61, 80.

[47] [2006] IESC 6, [2007] 1 I.R. 296.

[48] [2006] IEHC 289.

conditions in the former s.150(3) of the Companies Act 1990 restricting him from acting as a company director or secretary, or being involved in the promotion or formation of a company. One of these conditions stipulated that any private company limited by shares established by a restricted director had to have share capital of at least €40,000. O'Neill J. held that, in order to ensure equality of treatment under Article 40.1, this statutory provision could not be applied in such a way as to work an invidious discrimination against impecunious individuals.

The impact of Art.40.1 on socio-economic differences was also referred to by Barron J. in *In re SW, K v W*[49] where, in the course of determining a custody dispute, he held that he could not take account of socio-economic differences between the two competing homes as to do so:

> **"[W]ould be to favour the affluent as against the less well-off which does not accord with the constitutional obligation to hold all citizens as human persons equal before the law."[50]**

Thus it would seem that distinctions in State policy based on lack of means would prima facie engage Art.40.1. However one should not overestimate the potential in Art.40.1 for tacking social inequality given that a strong presumption of constitutionality applies to legislation dealing with controversial economic or social matters. See, for example, *Webster v Rathdown County Council,*[51] where Hedigan J. rejected an argument that s.62 of the Housing Act 1966 was contrary to Art.40.1 because it offered public sector tenants less legal protection against eviction than that available to private sector tenants.[52]

The constitutional right to person, dignity and the law of humanity

While to date, the courts have only recognised the State's constitutional duty to respect the individual's right not to be put at risk of poverty in a number of specific situations, one constitutional right arguably has the potential to provide the basis for a more overarching principle in this regard. I refer to the constitutional guarantee in Art.40.3.2 of the right of the person, read in light of the

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[49] [1990] 2 I.R. 437.
[50] [1990] 2 I.R. 437, 459.
[51] [2013] IEHC 119.
[52] The justification for the difference in treatment in the instant case arose from the duty imposed on the housing authority to provide housing free or at very low cost to those in need. Section 62 was constitutional because of the need of housing authorities to manage and control housing stock. Note, however, that the Supreme Court had previously held s.62 to be incompatible with Art.8 of the European Convention on Human Rights—see *Donegan v Dublin City Council* [2012] IESC 18, [2012] 3 I.R. 600, [2012] 2 I.L.R.M. 233 while in *Kelly v Dublin City Council* [2019] IEHC 56, the Supreme Court invoked, *inter alia*, Art.40.3 of the Constitution in holding that the council had to afford the plaintiff an opportunity of being heard before moving to evict him from a local authority house.

constitutional objective, stated in the Preamble, of promoting the common good so as, inter alia, to assure the dignity and freedom of the individual. In a number of High Court decisions, Hogan J indicated that the right of the person encompasses the physical, mental and emotional wellbeing of the individual.[53]

Reading these decisions in light of the constitutional objective of assuring the dignity of the individual arguably provides support for a general constitutional principle that the State should refrain from pursuing policies, the direct effect of which would be to push people into poverty.[54] We have already seen how Walsh J. in *Quinn's Supermarket v Attorney General*[55] linked the guarantee of equality to the protection of human dignity and the constitutional reference to the dignity of the individual has come under increasing judicial scrutiny in recent times.[56] In a small number of cases, the concept of dignity was alluded to in the context of claims brought by

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[53] See cases discussed in Hogan, Whyte, Kenny and Walsh (eds.), Kelly, The Irish Constitution (5th ed., 2018), at paras.7.3.45-49. In *Simpson v Governor of Mountjoy Prison* [2019] IESC 81, MacMenamin J said, at para.89 of his judgment: "The right to privacy and the value of dignity find their focus point in the right of the appellant to be protected as a "person" as defined under Article 40.3 of the Constitution. The words "person" or "personal" not only carry with them the ideas of individual privacy and dignity, but additionally the respect due to each individual by virtue of his or her status as a human being … By virtue of personhood, each individual has an intrinsic worth which is to be respected and protected by others and by the State."

[54] Note that in *Simpson v Governor of Mountjoy Prison* [2019] IESC 81, O'Donnell J stated, at para.11 of his judgment, that the fundamental rights protected by the Constitution must be interpreted in light of the objective stated in the Preamble that "the dignity and freedom of the individual [must] be assured."

[55] [1972] I.R. 1, 13, quoted above at 000. See also the remarks of Herbert J. in *Redmond v Minister for the Environment* [2001] 4 I.R. 61, 80, quoted above at 000. Commenting on Walsh J.'s comments in *Quinn's Supermarket*, William Binchy contends that they require judges:

> "[T]o open their eyes fully to social and economic reality. Every society is the accretion of values and power relationships over time. Anyone who looks at recent Irish social history will be seriously disturbed at the way the less powerful members of our society have been treated: children, in schools and institutions; women, in the home and the workplace; the physically and mentally disabled; the elderly. They have been the victims, not merely of individual injustice but of the passive acquiescence in the *status quo* by those in power. They seem to fit precisely within the language of Walsh J: people subjected to inequalities grounded on the assumption that, by reason of their human attributes or their background they are to be treated as inferiors of others. In all of these cases, human dignity was not assured, contrary to the constitutional mandate. That the assumption was tacit and not driven by specific malice does not subtract from the violation of dignity."

"Dignity as a Constitutional Concept" in O. Doyle and E. Carolan (eds), *The Irish Constitution: Governance and Values* (Dublin: Thomson Round Hall, 2008), at pp.317–8.

[56] For an insightful analysis of the case law in this area, see C. O'Mahony, "The Dignity of the Individual in Irish Constitutional Law" in D. Grimm, A. Kemmerer and C. Mollers (eds), *Human Dignity in Context* (Hart Publications, 2017). For earlier academic commentary on the concept of dignity in the Irish Constitution, see T. Iglesias, "The Dignity of the Individual in the Irish Constitution" (2000) 89 *Studies* 19; J. O'Dowd, "Dignity and Personhood in Irish Constitutional Law" in G. Quinn, A. Ingram and S. Livingstone, (eds), *Justice and Legal Theory in Ireland* (Oak Tree Press, 1995), p.163; and W. Binchy (2008).

impoverished litigants. In *The State (Healy) v Donoghue,*[57] the Supreme Court held that indigent defendants in criminal cases were entitled to legal aid by virtue of Art.38.1 of the Constitution, O'Higgins C.J. commented:

> **"[T]he concept of justice, which is specifically referred to in the preamble in relation to the freedom and dignity of the individual, appears again in the provisions of Art.34 which deal with the Courts. It is justice which is to be administered in the Courts and this concept of justice must import not only fairness, and fair procedures, but also regard to the dignity of the individual."**[58]

In *M.E.O. v Minister for Justice, Equality and Law Reform*,[59] Hogan J. alluded to the dignity of the applicant in granting her leave to challenge a decision to deport her in circumstances in which, because of her own ill-health and poverty and the risk that she would be unable to access appropriate health care in her home country, she would be "condemned to face decline and death over months in circumstances where her human dignity cannot be maintained."[60] In *O'Donnell v South Dublin Co. Co.*,[61] the Supreme Court, *per* MacMenamin J., cited[62] the reference in the Preamble to the dignity of the individual when holding that the respondent council had failed to discharge its statutory duty under the Housing Act 1988 to one of the appellants, a young girl with cerebral palsy living in very poor and overcrowded accommodation. [63]

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[57] [1976] I.R. 325.

[58] At p.347 (footnote omitted). In another case, *G v An Bord Uchtála* [1980] I.R. 32, the same judge said, at p.56, "Having been born, the child has the right to be fed and to live, to be reared and educated, to have the opportunity of working and realizing his or her full personality and dignity as a human being. These rights of the child … must equally be protected and vindicated by the State." Though this case was not directly concerned with issues of deprivation, O'Higgins C.J.'s remarks clearly support the argument that the State has a constitutional duty not merely to avoid pushing a child into penury but also to support the child in its efforts to realize its human dignity.

[59] [2011] IEHC 545.

[60] At para.31. However at the subsequent hearing of this challenge, *M.E.O. v. Minister for Justice, Equality and Law Reform* [2012] IEHC 394, Cooke J. dismissed the application, though without reference to the concept of dignity.

[61] [2015] IESC 28.

[62] **He said, at para.68: "[B]ecause of the exceptional overcrowding, and the destruction of the sanitation facilities, her capacity to live to an acceptable human standard of dignity was gravely compromised. Her integrity as a person was undermined."**

[63] **In *C.A. v Minister for Justice and Equality* [2014] IEHC 532 an apparent attempt to challenge the legality of the Direct Provision system for asylum seekers on the ground that it showed a lack of respect for the applicant's dignity may not have been properly pleaded but, in any event, failed on evidential grounds - see para.7.25 of the judgment. One further aspect of *C.A.* worth noting in the present context is the statement of MacEochaidh J. to the effect that while the doctrine of separation of powers precludes Irish courts from trespassing on the role of the executive or legislature when deciding how a problem should be addressed, where the State takes action that infringes human rights and the only remedy is the expenditure of additional money, the courts may make such an order—see para.12.6 of his judgment. One might infer from this that if state action driving a person into destitution is unconstitutional because it**

Moving away from claims brought by impoverished litigants, in *G v An Bord Uchtála*,[64] O'Higgins CJ included among the natural rights of the child, the right "to have the opportunity … of realizing his or her full potential and dignity as a human being."[65] More recently, in *N.H.V. v Minister for Justice and Equality,*[66] the Supreme Court, *per* O'Donnell J., adverted to the constitutional goal of assuring the dignity of the individual in the context of deciding whether non-citizens could rely on the implied constitutional right to work. According to O'Donnell J, non-citizens may, by virtue of the guarantee of equality in Art.40.1, rely on those constitutional rights that protect something "that goes to the essence of human personality so that to deny [such rights] to persons would be to fail to recognize their essential equality as human persons mandated by Article 40.1."[67] Referring specifically to what he categorized as the freedom to work, he acknowledged that work was connected to the dignity and freedom of the individual that the Preamble states the Constitution seeks to promote.[68] Accordingly, he concluded that the freedom to work or seek employment was a part of the human personality and therefore could not be withheld absolutely from non-citizens. While a policy of restricting the ability of asylum seekers to obtain employment could be justified, the relevant statutory provision, s.9(4) of the Refugee Act 1996,[69] removed the right to seek employment from asylum seekers for as long as their application for refugee status was being considered. In the instant case, the applicant had waited more than eight years for a decision on his application for asylum and according to O'Donnell J:

> **"[T]he point has been reached when it cannot be said that the legitimate differences between an asylum seeker and a citizen can continue to justify the exclusion of an asylum seeker from the possibility of employment. The damage to the individual's self worth, and sense of themselves, is exactly the damage which the constitutional right seeks to guard against. The affidavit evidence of depression, frustration and lack of self-belief bears that out."[70]**

He therefore concluded that in circumstances where there was no temporal limit on the asylum process, the absolute prohibition on

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undermines that person's dignity, the courts could grant mandatory injunctions to remedy the situation.

[64] [1980] IR 32.

[65] At p.55.

[66] [2017] IESC 35; [2017] 2 I.L.R.M. 105.

[67] Para.13; [2017] 2 I.L.R.M. 105, 114.

[68] In fact, the constitutional objective, according to the Preamble, is that the dignity and freedom of the individual may be "assured" which, as Binchy points out, is a "stern task" that imposes on courts "the obligation to adopt an interpretation of the entire text … that will seek to give practical assurance to the dignity and freedom of the individual."—Binchy, fn.88, p.310.

[69] See now s.16(3)(b) of the International Protection Act 2015.

[70] Paragraph 20; [2017] 2 I.L.R.M. 105, 117.

seeking employment was unconstitutional, though the Court adjourned consideration of the order it might make, thereby affording the legislature and executive an opportunity to consider amending some of the applicable statutory provisions.[71]

These various judgments link dignity to equality of treatment, to protection of self-worth and to the realization of each individual's potential. To the extent to which State policies directly driving individuals into poverty undermine these goals, it is arguable that the State has failed to protect the right of the person as guaranteed by Art.40.3.2.

DUTY TO PROMOTE RIGHT NOT TO BE DISADVANTAGED

In contrast to the duty to respect the right not to be put at risk of poverty, whether Irish constitutional law[72] should recognise a duty on the State to promote such a right, i.e., to take active steps to protect socio-economic rights, has been the subject of more detailed judicial discussion and, indeed, opposition.

[TOPIC] ***(a) Doctrine of separation of powers***

Page 16, insert new footnote in line 6, after "jurisdiction to entertain":

In *PC v Minister for Social Protection* [2016] IEHC 315, (29 April 2016), Binchy J indicated, at para.85, that to accede to the plaintiff's claim that his statutory right to the State (Contributory) Pension was a constitutionally protected property right would amount to determining an issue of distributive justice contrary to the decision in *O'Reilly*. He also stated, at para.97, that a prisoner's right to personal autonomy is not a socio-economic right "to have the judicial branch ensure a minimum level of economic provision by the other branches of government". (The issue of whether judicial acceptance of the plaintiff's claim would amount to the exercise of distributive justice was not addressed in the subsequent Supreme Court decisions in this case – [2017] IESC 315 and [2018] IESC 57.) See also *O'Donoghue v AIB Mortgage Bank plc* [2017] IEHC 344 where Gilligan J also relied on, *inter alia*, the argument that issues of distributive justice are non-justiciable when dismissing the plaintiff's attempt to prevent the Government selling its shareholding in the defendant bank.

Page 27, add to n.59

See also, to similar effect, the decision of Faherty J in *PT v Wicklow Co Co* [2017] IEHC 623 in relation to an application for an interlocutory order directing the respondent council to provide

[71] The order that the statutory ban on asylum seekers seeking work was unconstitutional was made on 9 February 2018.

[72] In ch.2, I consider to what extent, if at all, such a duty is imposed on Irish courts by the European Convention on Human Rights and EU law.

financial assistance to the applicants to help them secure accommodation.

Page 27, add to n.60

But see the comments of Clarke J (as he then was) in *Persona Digital Telephony v Minister for Public Enterprise* [2017] IESC 27, and *SPV Osus Ltd v HSBC Institutional Trust Services (Ireland) Ltd.* [2018] IESC 44, discussed below, 000.

Page 29, insert after line 15:

That said, it is important not to overstate the impact of these two cases on the role of the Irish courts in relation to the protection of socio-economic rights. First of all, as just mentioned, the comments by various members of the Supreme Court in both cases endorsing the view that the judiciary could not adjudicate on matters of distributive justice are clearly obiter. The issue in Sinnott, decided against the plaintiff, was whether the constitutional right to free primary education provided for in Art.42.4 was lifelong in the case of persons with severe or profound learning difficulties.[73] Similarly the specific issue decided in T.D. was whether the High Court could grant a mandatory injunction directing the executive as to how it should carry out its functions so as to remedy a breach of constitutional rights.[74] While not wishing to underestimate the force of the dicta in both cases suggesting that the Constitution does not protect implied

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[73] Thus Murray J. said, [2001] 2 I.R. 545, 677–8:

> **"The primary issue in this appeal is whether Article 42.4 in requiring the State to "provide for free primary education" should be interpreted as creating a constitutional obligation on the State to provide such education to all persons, that is to say children and adults, at any stage of their life should an individual be in need of such education.**
>
> **In their appeal the defendants have also put in issue certain parts of the order made by the learned High Court Judge which are consequent upon his declaration that the first plaintiff is entitled to be provided with free primary education into the future so long as he is in need of it, in particular, that part of the order which is mandatory as against the State and which involves the High Court in a supervisory role on the post trial implementation of its order by the State. These latter issues only arise if the defendants are unsuccessful on the primary issue."**

[74] Thus Keane CJ, while expressing the gravest doubts as to whether the courts should assume the function of declaring socio-economic rights to be implied rights protected by Art.40.3, stated, [2001] 4 IR 259 at p.282, that "the resolution of that question must await a case in which it is fully argued." In similar fashion, Hardiman J, while sharing Murphy J's reservations in the same case about whether the Constitution protected implied socio-economic rights, expressly reserved his position until the matter arose in an appropriate case – see p.345. Finally Murray J said, at p.322, "In these proceedings the State has not contested the constitutional obligations which it is bound to fulfil with regard to children of minor age in need of special care and facilities, according to the judgment of *FN v Minister for Education* [1995] 1 IR 409 …The issue is not the obligation but whether the courts may incorporate a policy or programme of this nature in a mandatory order."

socio-economic rights, the fact remains that that particular question has not yet been authoritatively decided by the Supreme Court.

Second, the remarks in both cases have no bearing on the duty of the State to respect human rights. Thus in *C.A. v Minister for Justice and Equality,*[75] MacEochaidh J, having cited some of Murphy J's remarks in *T.D.*, said:

> **"It seems to me that the high point of the jurisprudence in the area confirms that courts should not trespass on the role of the executive or the legislature when deciding how a particular problem might be addressed. How public money is used is a matter exclusively for the Oireachtas working in co-operation with the executive. Nonetheless, where State action results in a breach of human rights and where the only remedy is the expenditure of additional money, the Court, in my opinion, must be entitled to make an appropriate order, even if the consequence is that the State must spend money to meet the terms of the order."[76]**

MacEochaidh J differentiates here between a situation in which the executive or legislature has yet to decide how to address a problem (where the courts should not intervene)[77] and a situation in which the State has taken some action that affects human rights adversely, i.e., where the State has failed to respect human rights. In that latter situation, the judge envisages that a judicial order could be made requiring the State to spend public monies to remedy the situation. More recently, in *Persona Digital Telephony v Minister for Public Enterprise,*[78] Clarke J (as he then was) said: at para.4.1 of his judgment:

It has long been said that the courts must act to find a remedy in any case where there is a breach of constitutional rights. While the choice, as a matter of policy, between a range of possible ways in which a potential breach of constitutional rights might be removed is fundamentally a matter for either the Oireachtas or the Executive, it may be that circumstances could arise where, after a definitive finding that there had been a breach of constitutional rights but no action having been taken by either the legislature or the government to

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[75] [2014] IEHC 532.
[76] At para.12.6 of his decision. This echoes Geoghegan J's obiter dictum in *Sinnott v Minister for Education* [2001] 2 IR 545 at 724 that "In very exceptional circumstances, it may be open to a court to order allocation of funds where a constitutional right has been flouted without justification or reasonable excuse of any kind."
[77] In relation to the question of whether the amount of the allowance given to asylum seekers in direct provision was adequate, MacEochaidh J said, at para.13.26: "For many of the years since the introduction of this payment Ireland experienced a buoyant economy and it is not unreasonable to say that the State has been less generous about the amount of this 'pocket money', but the proper place to make this complaint and to agitate for an increase is in the political arena and not in the High Court."
[78] [2017] IESC 27.

alleviate the situation, the courts, as guardians of the Constitution, might have no option but to take measures which would not otherwise be justified."[79]

Third, the interaction of constitutional rights and statutory law can enhance the statutory protection provided to socio-economic rights. Thus in *O'Donnell v South Dublin Co. Co.,*[80] the Supreme Court (*per* MacMenamin J.), citing *O'Brien v Wicklow UDC,*[81] indicated that the Constitution could affect socio-economic rights protected by legislation when it stated that statutory powers vindicating constitutional rights or values could, in exceptional cases, give rise to a statutory duty if there were no reasons why the powers could not be exercised.[82] In the instant case the Supreme Court held, *inter alia*, that the defendant council had a statutory duty under s.10 of the Housing Act 1988 to provide one of the plaintiffs with such assistance as the council considered appropriate or to rent accommodation, arrange lodgings or contribute to the cost of lodgings for her.

Finally, and perhaps surprisingly, the Supreme Court itself appears to suggest, in a decision handed down in the aftermath of *Sinnott* and *T.D.*, that the courts may retain some role, albeit very limited, in relation to the identification and protection of socio-economic rights.

Page 40, line 11, replace sentence beginning "One High Court judge.." with:

In two cases, legislative provisions were invalidated because of a constitutional lacuna.

Page 40, end of first paragraph, insert:

The second case in this context concerned detention under the Mental Health Act 2001. In *A.B. v Clinical Director of St. Loman's Hospital*,[83] the Court of Appeal held that the failure of that Act to make provision for independent review of the continued detention of a patient pursuant to renewal orders provided for by s.15(3) of the Act rendered that subsection unconstitutional. On this occasion, the Court suspended the effect of its finding of unconstitutionality for a period of six months following the date of the judgment in order to enable the Oireachtas to enact remedial legislation. This use of a suspended declaration of invalidity provides one solution to the problem posed by the invalidation of a provision underpinning the

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[79] See para.4.1 of his judgment. He repeated this point at para.2.9 of his judgment in *SPV Osus Ltd v HSBC Institutional Trust Services (Ireland) Ltd.* [2018] IESC 44.
[80] [2015] IESC 28.
[81] *Ex tempore*, High Court, 10 June 1994.
[82] See para.65 of the decision.
[83] **[2018] IECA 123.**

grant of a benefit or privilege and may embolden Irish courts to review more closely lacunae in such provisions.[84]

Page 40, insert new footnote at the end of the first sentence in para.2:

In *Minister for Justice and Equality v O'Connor* [2015] IECA 227, (23 October 2015) CA, Hogan J was prepared to grant a declaration that the European Arrest Warrant Act 2003 was unconstitutional insofar as it failed to provide for a statutory right to legal aid for persons facing surrender under the Act. On this point, though, Hogan J was in a minority on the Court of Appeal. On appeal – [2017] IESC 21 - the Supreme Court, *per* O'Donnell J, indicated, obiter, at para.14, that where a constitutional challenge was based on the absence of a provision from legislation, it was conceivable that "in such circumstances a court might stop short of invalidating the Act, and instead make a declaration that insofar as the legal regime did not make available some feature required by the Constitution, it could not be operated."

Page 41, add to n.114:

On appeal, the Court of Appeal that an appeal did, in fact, lie against a decision of the Circuit Court in these circumstances – *McCabe v Ireland* [2015] IECA 156 (22 July 2015).

Page 55, (d) Impact of Article 45, add to n.175

and in *N.H.V. v Minister for Justice and Equality* [2016] IECA 86, Hogan J queried, at para.56, the legitimacy of reliance on Art.45 in identifying implied rights for the purpose of Art.40.3.1, a position shared by O'Donnell J in the Supreme Court on appeal – [2017] IESC 35 at para.35 of his judgment.

Page 63, add to n.206:

More recently, Niamh Hourigan has argued that, largely as a result of experience of being colonized, Irish society tends to place more value on relationships than on the equal application of rules. She further argues that, beginning in the 1960s, the strong relationship between business and political elites led to the latter rewriting the "rules" to the benefit of the former – see Rule-Breakers: Why 'Being There' Trumps 'Being Fair' in Ireland (Gill and Macmillan, 2015).

Page 64, line 4, add:

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84 For consideration of a suspended declaration of invalidity as a way of modifying the blunt effect of a declaration of unconstitutionality, see Carolan, "The Relationship between Judicial Remedies and the Separation of Powers: Collaborative Constitutionalism and the Suspended Declaration of Invalidity" (2011) 46 Ir Jur (ns) 180.

Moreover, it must also be acknowledged that the GINI coefficient measuring income inequality in Ireland moved from 32 in 2014 to 30.8 in 2015 (the lowest figure since 2010), indicating a reduction in inequality,[85] and that, according to Professor James Wickham, the Irish welfare system transforms the country from being among the most unequal in the European Union to being more equal than the European average.[86]

Page 66, line 6, add:

and the Thirty-fourth Amendment to the Constitution in 2015, providing for same sex marriage, was prompted, at least in part, by the High Court decision in *Zappone v Revenue Commissioners*.[87]

Page 66, insert into beginning of n.221:

A point first made by Walker in "Must Constitutional Rights be Specified? Reflections on the Proposal to Amend Article 40.3.1" (1997) 32 Ir Jur 102 at 117.

Page 85, line 9, insert after "executive":

Jerome Connolly similarly argues that "Without some standard of minimum core, express or implied, it would seem difficult to decide in many cases if a right has been violated or not…. Without minimum core content, the compelling nature of the right is liable to be dissolved in face of arguments by the state that other calls on resources justify only a token discharge of its obligations in respect of a given right."[88] According to Connolly, minimum core content is definable in three ways. The first is in absolute quantitiative terms such as, e.g., a right to food being defined in terms of entitlement to a minimum number of calories. The second approach is qualitative where the elements of a right are defined without specifying an appropriate quantitative level of provision, such as, e.g., deciding that access to justice should include criminal and civil legal aid. Finally minimum core may be defined indirectly, through what he calls a "legal via negativa" "by determining that a given situation does not comply with the constitutionally required minimum, but leaving it to the State to determine what the minimum should be."[89]

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85 **Dan Griffin, "Disposable incomes rise but 8.7% remain in 'consistent poverty'", The Irish Times, (Dublin, 1 February 2017).**

86 **See Wickham, Cherishing All Equally 2017 (TASC, 2017), p.9. In 2018, the CSO reported that net wealth was more equitably distributed in Ireland in 2018 than in 2013 – see https://www.cso.ie/en/releasesandpublications/ep/p-hfcs/householdfinanceandconsumptionsurvey2018/incomeandwealthinequality/ (last accessed on 30 April 2020.)**

87 **[2006] IEHC 404, [2008] 2 IR 417.**

88 **Connolly, (2014), p.295. Ch.17 of this book is devoted to a defence of minimum core analysis in the context of any future amendment to the Irish Constitution extending constitutional protection to socio-economic rights.**

89 *Ibid.,* p.297.

In defining minimum core, Connolly accepts that context is important and, in particular, that account must be taken of the resources available to the State. Moreover, "minimum core should identify the basic human interests at play in a right, and embrace all factors reasonably relevant to these interests. The needs of the most vulnerable group to be protected by the right are particularly important in assessing minimum core obligations. The margin of appreciation to be accorded to the State will vary depending on the degree of help an individual needs to ensure his or her autonomy."[90] He also contends that courts could use a reasonableness standard when determining whether the State had complied with the minimum core requirement.[91]

Page 87, line 20, insert this footnote after "counterparts":

Though Irish judges do not always differentiate between the "rationality" and "reasonableness" standards of review - see, e.g., the comments of Hogan J in *Efe v Minister for Justice, Equality and Law Reform* [2011] IEHC 214, [2011] 2 IR 798, [2011] 2 ILRM 411, paras.8-11.

Page 87, add to n.297:

- see the comment of Geoghegan J in *Clinton v An Bord Pleanála (No.2)* [2007] IESC 58, [2007] 4 IR 701, at p.723, that "It would insufficiently protect constitutional rights if the court … merely had to be satisfied that the decision [affecting such rights] was not irrational or was not contrary to fundamental reason and common sense." **In *Lowry v Mr. Justice Moriarty* [2016] IEHC 29, (27 January 2016) HC, Hedigan J stated, at para.7.4, that the rationality standard applied to challenges to a decision "made with special competence in an area of special knowledge". See also the comments of Hogan J in *Efe v Minister for Justice, Equality and Law Reform* [2011] IEHC 214, [2011] 2 IR 798, [2011] 2 ILRM 411, paras.14-17.**

Page 88, replace n.304 with:

[2010] 2 IR 701. **See discussion of *Meadows* in *A.A.A. v Minister for Justice* [2017] IESC 80, at paras.17-26.** In *Efe v. Minister for Justice, Equality and Law Reform* **[2011] IEHC 214, [2011] 2 IR 798, [2011] 2 ILRM 411**, Hogan J indicated, obiter, at **para.** 21, that a standard of review permitting judicial intervention only where there was no evidence to justify an administrator's factual conclusion would be unconstitutional where the decision in question engaged constitutional rights, having regard to the obligation imposed on the State by Art.40.3 to vindicate such rights. **See also, to similar effect, *N.M. (DRC) v Minister for Justice, Equality and Law Reform* [2016] IECA 217, [2016] 2 ILRM 369, paras. 35-57, and**

[90] *Ibid.*, p.307.
[91] *Ibid.*, p.311.

***Dowling v Minister for Finance* [2018] IECA 300, paras.137-140.** In *Lattimore v. Dublin City Council* [2014] IEHC 233 (10 May 2014), O'Neill J applied the principle of proportionality in deciding to uphold the council's decision to refuse to allow the plaintiff to remain in a council-owned house occupied by his family since the 1950s. **See also the comments of Hedigan J in *Lowry v Mr. Justice Moriarty* [2016] IEHC 29, (27 January 2016) HC where, at para.7.4 of his decision, he indicates that where an administrative decision affects rights, the standard of judicial review shifts from rationality review to proportionality review. In *Kivlehan v RTÉ* [2016] IEHC 88, (15 February 2016), Baker J applied the test of proportionality when reviewing a decision of the respondent relating to a televised political debate in the context of a general election, commenting, at para.35, that "broad and central constitutional issues are at play in the present case and that RTÉ is placed in a unique position of obligation to protect freedom of expression in the context of the democratic process." However in some cases it may be that there is no practical difference between the reasonableness/rationality standard and the approach indicated in *Meadows* – see, e.g., the comment of McGrath J in *C.K. v Child and Family Agency* [2019] IEHC 635, at para.59.**

Page 98, line 9, insert new footnote after "socio-economic rights":

While versions of the republican tradition see a role for the State in tacking inequalities that exist between citizens - see E. Daly and T. Hickey, *The political theory of the Irish Constitution: Republicanism and the basic law* (MUP, 2015), pp.12-3 - there appears to be no consensus among republicans in relation to the role of the courts in protecting fundamental rights, with at least some republicans seeing a judicial role in this context as simply another source of domination and arbitrary rule - see discussion in Daly and Hickey (2015), ch.2 (though the authors themselves defend a system of restrained judicial review of legislation in a situation where the courts do not have the final say as to the constitutionality of legislation – see ch.4 of their book and also Hickey, "Revisiting Ryan v Lennon to make the case against judicial supremacy (and for a new model of constitutionalism in Ireland)" (2015) 53 Ir Jur (ns) 125. However the authors do not appear to address the question of what role, if any, the courts may have in protecting constitutional rights threatened by State inaction.)

Page 99, insert after line 13:

The goal stated in the Preamble to assuring the dignity of the individual is also of relevance in this context. We have already noted how various judgments link dignity to equality of treatment, to protection of self-worth and to the realization of each individual's potential.[92] One of these cases, *The State (Healy) v Donoghue*,[93] concerned the *failure* of the State to make appropriate provision for

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92 **See above, 000.**

93 **[1976] IR 325, (1976) 110 ILTR 9.**

protecting the dignity of the individual and so it is arguable that this decision is based on the State's duty to promote the dignity of the individual, a position consistent with the literal text of the Preamble which sets as one of the objectives of the Constitution that the dignity and freedom of the individual would be "assured".[94] According to Samuel Moyn, constitutional references to dignity first emerged from what he calls "religious constitutionalism":

> **"[A] new form of constitutionalism navigating between the vehement rejection of the secular liberal state long associated with the French Revolution and the widespread demand for an integrally social order."[95]**

He further contends:

> **"The Irish were the true pioneers both in the development of religious constitutionalism and in symbolizing its project through appeals to human dignity. In their 1937 constiution, they gave it foundational placement, as a religiously inspired root concept connected (as in the later West German case) to the subordination of the otherwise sovereign democratic polity to God – and, for many, to the moral constraints of His natural law."[96]**

Moyn argues that the inspiration for the reference to dignity in the Preamble was the papal encyclical, *Divini Redemptoris*, which was published on 19th March 1937 while the Constitution was still being drafted. However Chris McCrudden points out, inter alia, that references to dignity are to be found in drafts of the Preamble probably dating from February 1937, a proposal on private property, dated 22 February 1937, from then Dr John Charles McQuaid, and a draft of the English text of the Constitution dated 28 February 1937, from which McCrudden infers that the earlier papal encyclicals, *Quadragesimo Anno* and *Rerum Novarum*, rather than *Divini Redemptoris*, were the primary influences leading to the inclusion of a reference to dignity in the Preamble.[97] McCrudden further contends that Catholicism was not the only inspiration for this reference to dignity and that:

> **"[T]he formative influences in including "dignity" in the Preamble were likely to have been quite diverse: comparative (the Polish Preamble), social democratic ("the idea of the "dignity of labour", and Weimar), nationalist (the association of dignity with the nation), and conservative (behaving in a way appropriate to one's social**

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[94] Of course, *State (Healy)* concerned the liberty of the individual, the pre-eminent concern of liberal democracy, and so this case might not prove to be a reliable indicator as to how Irish courts would respond to claims requiring the State to promote socio-economic rights.

[95] **Christian Human Rights** (University of Pennsylvania Press, 2015) at p.27.

[96] At p.31.

[97] See *"Translating Dignity"*, draft paper (and, as such, subject to possible revision) delivered at Trinity College Dublin on 13 December 2017, pp.45-6 (on file with the author).

role), as well as specifically Catholic. To claim that the religious influence was the sole influence on de Valera is questionable."[98]

Though he argues that a significant shift in the meaning of dignity occurred during the drafting process from a "communitarian, national understanding of the appropriate relationship between the state and the individual to a more liberal, universalist understanding"[99] that stripped dignity of its overtly Christian roots, his ultimate conclusion is that very different conceptions of dignity[100] featured at different times during the drafting process, none of which was a "clear winner". The specific change on which McCrudden bases his contention that there was a shift in the meaning of dignity during the drafting process is the change in language from "the dignity and freedom of the citizens" in earlier drafts of the Preamble to "the dignity and freedom of the individual" in the final draft. However it is interesting to note that in *Rerum Novarum*, the three references to "dignity" also concern the individual as distinct from the general citizenry[101] while in *Quadragesimo Anno*, six of the seven references to "dignity" are to the dignity of workers (not confined to employees), either as individuals or as a class.[102] Thus it is arguable that the language of the final draft continues to reflect a Catholic heritage.

For present purposes, it suffices to note the connection between the reference to dignity in the Preamble and the papal encyclicals, *Rerum Novarum* and *Quadragesimo Anno*. This arguably links the constitutional goal of assuring human dignity to Catholic social teaching and a distinctive way of understanding rights that potentially has implications for the judicial protection of socio-economic rights, in particular, for judicial recognition of the State's duty to alleviate destitution.[103] While the Catholic Church, prior to Vatican II,

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[98] Footnote 113, p.33.
[99] Footnote 113, p.37.
[100] These were:

> "[D]ignity as the ultimate and inherent value of the human person; dignity as the value we have as persons created in the image of God; dignity as not using individuals merely as means not ends in themselves; dignity as nobility in the face of adversity; dignity as being treated appropriately according to one's inherent nature; dignity as the freedom to exercise autonomy and self-determination (whether as a person or as a nation); dignity as the respect accorded to those performing their appropriate role in life, such as the dignity of labour; dignity as a resistance to viewing the individual simply as a factor of production, a cog in the economic machine; and dignity as the source of rights against the state and against each other."

Footnote 113 at p.48.
[101] See http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum.html (last accessed 1 March 2018), paras 20, 36 and 40.
[102] See http://w2.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno.html (last accessed 1 March 2018), paras 23, 28, 83, 101, 119, 136.
[103] While McCrudden notes that Mr de Valera would have regarded the Preamble as non-justiciable, it has, nonetheless, been relied on by the courts in interpreting provisions of the

notoriously had great difficulty with the civil and political rights promoted by the Enlightenment, this was not the case in relation to what we now call socio-economic rights. Thus Curran comments:

> **"[E]ighteenth- and nineteenth-century Catholicism strongly opposed liberalism and the rights movement associated with the Enlightenment, but Catholics were more open to social and economic rights. Pope Leo XIII, in his 1891 encyclical *Rerum Novarum*… explicitly recognized such social and economic rights. The purpose of the encyclical in the light of the misery and wretchedness affecting the majority of the poor is to 'define the relative right and mutual duties of the wealthy and of the poor.'"[104]**

This openness to socio-economic rights was doubtless influenced by the concern for the poor going back to antiquity within the Judeo-Christian tradition and reflected the major difference between the Catholic and liberal understanding of rights. Hehir states the difference between these two views as follows:

> **"Liberal theory's focus – rooted in Locke and modern philosophy – stressed rights as immunities. Rights were protectors against interference by the State or other actors in society. In contemporary terms, the liberal tradition was the source of political-civil rights. The social encyclicals, focused primarily as they were prior to Pius XII on the social and moral consequences of the Industrial Revolution, stressed rights as empowerments, as social and economic claims made in the name of workers and their families. Again, in modern terms the church was concerned with social justice and rights claims as a way to achieve justice in a new economic era."[105]**

Discussing the question of who are the addressees of rights, McCrudden says:

> **"There are two strongly different legal traditions that can be identified on each side of this debate: one, let us call it the US legal tradition, sees constitutional rights as rights against the state and views skeptically any attempt to empower the state to restrict the freedom of others in order to protect the right-holder. The other, let us call it the European legal tradition, sees the state as subject to positive obligations to protect the right-holder against others, whether they be state actors or not. The Roman Catholic tradition is aligned with the European legal tradition on this issue. There**

Constitution—see Kelly, *The Irish Constitution*, 4th edn (LexisNexis Butterworths, 2003), paras.2.1.14–42.

[104] C. Curran, "Churches and Human Rights: From Hostility/Reluctance to Acceptability" in C. Curran (ed.), *Change in Official Catholic Moral Teachings* (Paulist Press, 2003), 38, 51. The words quoted by Curran are taken from para.2 of *Rerum Novarum.*

[105] B. Hehir, "The modern Catholic Church and human rights: the impact of the Second Vatican Council" in J. Witte, Jr. and F. Alexander (eds), *Christianity and Human Rights: An Introduction* (CUP, 2010), 113, 116.

appears to be a strong preference for a state whose duty it is to actively bring about the conditions under which rights are protected. In the terms we have just identified, there is a preference for positive obligations."[106]

He subsequently notes that the Catholic Church strongly favours an approach to human rights incorporating socio-economic rights.[107] Reliance on Catholic social teaching to interpret the Constitution is no longer as fashionable as it once was but until such time as the People explicitly disavow by referendum the Catholic influence on the Preamble, it would seem quite legitimate for the judiciary to have regard to that teaching as a pre-interpretive value when attempting to construe indeterminate provisions of the Constitution such as Art.6 which confers constitutional status on the doctrine of separation of powers but which does not comprehensively prescribe the jurisdictional limits of the three branches of government.

Ch.2 – European Law and Domestic Litigation on Socio-Economic Rights

Page 108, insert into line 4:

The question then arises as to whether Irish litigants could look to other legal sources for protection of such rights.

Ireland has ratified a number of international agreements that protect socio-economic rights, most notably the UN International Covenant on Economic, Social and Cultural Rights and the revised European

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[106] C. McCrudden, "Legal and Roman Catholic Conceptions of Human Rights: Convergence, Divergence and Dialogue?" (2012) 1(1) *Oxford Journal of Law and Religion* 185, 188–9.

[107] Footnote 122,189. While the Church's teaching on subsidiarity meant that it was distrustful of the welfare state until the pontificate of Pope John XXII—see his acceptance of a growing role for the State in regulating the economy in the 1961 papal encyclical, *Mater et Magistra*, at para.54—see http://w2.vatican.va/content/john-xxiii/en/encyclicals/documents/hf_j-xxiii_enc_15051961_mater.html (last accessed on 23 February 2018)—still even in *Rerum Novarum*, Pope Leo XIII accepted that in extreme cases, the State had a role to play in alleviating poverty. Thus *Rerum Novarum* states, at para.14:

> "True, if a family finds itself in exceeding distress, utterly deprived of the counsel of friends, and without any prospect of extricating itself, it is right that extreme necessity be met by public aid, since each family is a part of the commonwealth."

In Ireland, Church opposition, based on the principle of subsidiarity, to the Mother and Child scheme controversially led to the resignation of the then Minister for Health, Noel Browne, in April 1951. That opposition, however, appears to have been based on the facts that the proposed scheme was a universal (i.e., not means-tested) scheme and on a fear that it might result in the State providing education on the issues of contraception and abortion that would not respect Church teaching on both issues—see J. Whyte, *Church and State in Modern Ireland, 1923–1979*, 2nd edn (1980), pp.213–4. In contrast, there appears to have been no opposition from the Catholic hierarchy to the extension of social insurance to all employees earning below a certain income and to an increase in the range of welfare payments effected by the Social Welfare Act 1952 (Whyte, pp.273–4).

Social Charter.[108] However while ratification makes such agreements binding on Ireland in international law, they are not enforceable by the Irish courts unless they are incorporated into domestic law by the Oireachtas.[109] Article 29.6 of the Constitution provides: "No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas." In the absence of such a decision by the Oireachtas, only four possibilities exist for invoking such agreements before the Irish courts.

- **It may be possible to argue that an unincorporated agreement has indirect legal effect in Irish law if it gives rise to a legitimate expectation by virtue of a pattern of executive action complying with the agreement. However this doctrine of legitimate expectation does not entitle a litigant to rely on the provisions of a ratified but unincorporated treaty where those provisions are contrary to domestic legislation or a judicial decision.[110]**

- **Unincorporated international agreements may also have indirect legal effect through the operation of a presumption of compatibility of domestic legislation with international obligations. Thus if domestic legislation was ambiguous on some point, this presumption could operate to support one interpretation of the provision that was consistent with the provisions of an international agreement ratified by Ireland. However this presumption cannot apply if domestic legislation is clearly at variance with the State's international obligations. [111]**

- **There is some judicial authority for the proposition that in interpreting the Constitution, the courts should have regard to relevant international conventions as guiding principles where the values of such conventions are not contrary to any provisions of the Constitution. [112]**

- **Where the European Union is a party to an international agreement, the agreement is binding on, *inter alia*, member states provided it**

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[108] **The State has also ratified the UN International Convention on the Elimination of All Forms of Racial Discrimination, the UN Covenant on the Elimination of All Forms of Discrimination against Women, the UN Convention on the Rights of the Child and the UN Convention relating to the Status of Refugees, all of which contain provisions concerning economic, social and cultural rights. At the time of writing, the State had not yet ratified the UN Convention on the Right of People with Disabilities.**

[109] These agreements may, however, be used by NGOs to put political pressure on the State through, e.g., filing 'shadow' reports with, or bringing individual or collective complaints before, the relevant international oversight body detailing instances of the State's non-compliance with the relevant convention. This use of 'soft law' is, however, beyond the scope of this book.

[110] **See Kelly The Irish Constitution (5th ed., 2018), para.5.3.125-6.**

[111] ***Ibid.,* para.5.3.127.**

[112] ***Ibid.,* para.5.3.128. Though note that in *Simpson v Governor of Mountjoy Prison* [2019] IESC 81, both MacMenamin and O'Donnell JJ in the Supreme Court indicated that it is not appropriate to incorporate legal principles enunciated by the European Court of Human Rights in relation to Art.3 of the Convention into a claim for damages for infringement of constitutional rights.**

relates to an area of EU competence – see Art.216(2) of the Treaty on the Functioning of the European Union. The Union is a party to the UN Convention on the Rights of People with Disabilities and the status of this Convention in domestic Irish law has been considered in two cases. In *MX v HSE* [2012] 3 IR 254, [2013] 1 ILRM 322, MacMenamin J held that art.12 of the Convention dealing with mental capacity did not come within the competence of the EU with the result that it did not have the force of law in domestic Irish law, (though he also opined that the Convention could operate as a guiding principle in the identification of standards of care and review of persons with disability) while in *D.F. v Garda Commissioner (No.3)* [2014] IEHC 213, Hogan J indicated that the Convention could only be justiciable in an Irish court where the matter raised was within the scope of application of EU law. See also, to similar effect, the decision of Hogan J in relation to the Aarhus Convention 1998 in *NO2GM Ltd v Environmental Protection Agency* [2012] IEHC 369.

Even where the State may be willing to incorporate an international convention protecting ESC rights into domestic law, this is not necessarily going to be straightforward. Thus O'Connell states:

> **"[W]hile the principles developed at the international level are of value, they cannot simply be transposed into a given domestic context without significant modification. They are, in a sense, normative ideals which set out in broad outline the overarching principles which should govern the way in which human rights are implemented. However, due to the relative institutional autonomy of treat-monitoring bodies, much of what is established as the aspirational ideals at the international level is not easily translated into the domestic arena of constitutional adjudication."[113]**

However there may be more potential for using two European legal orders in domestic litigation concerning socio-economic rights and I turn to consider these now.

Page 108, add to n.3:

For a comprehensive review of the application of the European Convention on Human Rights Act 2003 and of the Charter of Fundamental Rights of the European Union by the Irish courts up to the end of 2014, see Suzanne Kingston and Liam Thornton, A Report on the Application of the European Convention on Human Rights Act 2003 and the European Charter of Fundamental Rights: Evaluation and Review (Dublin, July 2015), accessible here - https://researchrepository.ucd.ie/handle/10197/7044

[113] O'Connell, **Vindicating Socio-Economic Rights: International Standards and Comparative Experiences** (Routledge, 2012) at p.47.

[TOPIC] **1. European Convention on Human Rights Act 2003**

Page 108-9, replace first fifteen lines of the section on the ECHR Act 2003 with:

First, litigation in the domestic courts **asserting socio-economic rights as against the State** might be taken pursuant to the European Convention on Human Rights Act 2003[114] and, indeed, some public interest litigants have relied on this Act, though with mixed results.[115] The main aspect of public interest law in which the courts have been asked to consider the 2003 Act relates to public housing rights but the Act has also featured in cases addressing the State's obligations to children at risk who have been placed in protective detention, its obligations to aliens facing deportation who are in need of medical treatment, **its obligations to persons seeking asylum or subsidiary protection, its obligations under the social welfare code and its obligations to convicted prisoners**. In relation to public housing rights, six cases taken by Travellers raised arguments under the Act.[116] **Five** of these were unsuccessful - *Doherty v. South Dublin Co. Co.,*[117] *Dooley v. Killarney Town Council,*[118] *O'Driscoll v Limerick City Council,*[119] *McDonagh v Kilkenny Co. Co.*[120] **and *O'Donnell v South Dublin Co. Co.*[121] In a sixth case, also** called *O'Donnell v. South Dublin Co. Co.,*[122] Laffoy held that the failure of the State to provide appropriate caravan accommodation to Travellers with severe physical disabilities amounted to an infringement of Art.8 of the Convention giving rise to an entitlement to damages. **However the decisions of the Supreme Court in *McD v L*[123] and in the other *O'Donnell* case[124] now seem to preclude the Irish judiciary from reaching a similar conclusion in any future case in the**

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[114] For a comprehensive account of the 2003 Act, see de Londras and Kelly, **European Convention on Human Rights Act: Operation, Impact and Analysis** (Round Hall, 2010). See also Egan, "The European Convention on Human Rights Act 2003: A Missed Opportunity for Domestic Human Rights Litigation" (2003) 25 DULJ (ns) 230 and Doyle and Ryan "Judicial Interpretation of the European Convention on Human Rights Act 2003: Reflections and Analysis" (2011) 33 DULJ (ns) 369. Once a litigant has exhausted all domestic remedies, s/he may take a case directly to the European Court of Human Rights. However in this chapter, I am solely concerned with litigation before the Irish courts.

[115] For a more detailed examination of this topic, see, by the present author, "Public Interest Litigation in Ireland and the European Convention on Human Rights Act 2003" in Egan, Thornton and Walsh (eds.) **Ireland and the European Convention on Human Rights: 60 Years and Beyond** (Bloomsbury, 2014) at p.257.

[116] These cases are examined in more detail at 000. **See also Kenna, Housing Law, Rights and Policy (Clarus Press, 2011), paras.11.89-115.**

[117] [2007] 2 IR 696.

[118] [2008] IEHC 242, (15 July 2008) HC.

[119] [2012] IEHC 594, (9 November 2012) HC.

[120] [2011] 3 IR 455.

[121] **[2015] IESC 28, (13 March 2015) SC. One of the plaintiffs did succeed on other grounds in this case.**

[122] [2011] 3 IR 417.

[123] [2010] 2 IR 199, see p.316; [2010] 1 ILRM 461, see p.530.

[124] **[2015] IESC 28, (13 March 2015) SC.**

absence of a decision of the European Court of Human Rights on the point.[125]

Page 109, add to n.12:

In *Moore v Dun Laoghaire Rathdown Co. Co.* [2016] IESC 70, the Supreme Court held that where a warrant of possession of a family home had been obtained despite non-compliance with O.47, r.15 of the District Court Rules, (and which non-compliance resulted in a fundamental denial of fair process) the execution of such warrant was inconsistent with Art.8.2 of the European Convention on Human Rights.

Page 109, replace text in n.13 with:

Part 2 of the 2014 Act was commenced by S.I. No.121 of 2015.

Page 110, insert at end of first paragraph:

Cooke J reached a similar conclusion in relation to both Arts.3 and 8 of the Convention in *M.E.O. (Nigeria) v Minister for Justice, Equality and Law Reform.*[126] He pointed out that the medical condition of the applicant, who was HIV+, was not critical and that she was not at imminent risk of significant deterioration in health by reason only of deportation to her native country. In *DE (an infant) v Minister for Justice and Equality,*[127] an attempt to invoke Art.3 of the Convention to prevent the deportation of a child with sickle cell disease was also unsuccessful on the ground, *inter alia*, that the medical evidence presented did not reach the threshold identified by the European Court of Human Rights in *Paposhvili v Belgium*[128] for the application of Art.3 to cases where the alleged breach of Art.3 emanated from a naturally occurring illness.[129] Two unsuccessful cases were taken seeking to clarify the State's obligations to asylum seekers under the Convention. In *C.A. v Minister for Justice and Equality* [2014] IEHC 532, (14 November 2014) HC, MacEochaidh J rejected the argument that the Direct Provision Scheme for asylum seekers and persons seeking subsidiary protection violated Art.3 of the Convention. This Scheme is a largely cashless scheme of support, through the provision of accommodation and meals, for persons seeking asylum or subsidiary protection. People covered by the Direct Provision

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[125] **Moreover Thornton comments that in subsequent case law, the European Court now takes the view that whether housing is provided or not is essentially a political matter -** "The European Convention on Human Rights: A Socio-Economic Rights Charter?" in Egan, Thornton and Walsh, **Ireland and the European Convention on Human Rights" 60 Years and Beyond** (Bloomsbury, 2014) at para.14.34**.**

[126] **[2012] IEHC 394.**

[127] **[2018] 2 ILRM 324.**

[128] [2016] ECHR 1113.

[129] **The Supreme Court did indicate, however, at para.8.14, that fresh evidence could be presented to the Minister in support of the claim that the criteria set out in *Paposhvili* were satisfied.**

Scheme cannot seek employment and must comply with detailed rules in the accommodation centres in which they live. They cannot claim any mainstream social welfare payments (other than discretionary payments made pursuant to ss.201 or 202 of the Social Welfare (Consolidation) Act 2005) by virtue of the operation of the habitual residence requirement in relation to social assistance payments and by virtue of the fact that they cannot establish a social insurance record that would enable them to claim social insurance payments. He distinguished the decision of the European Court of Human Rights in *M.S.S. v Belgium,* Application No. 30696/09, 21 January 2011, which concerned the treatment of asylum seekers in Greece on the ground that the circumstances said by the applicants to constitute inhuman and degrading treatment were not "startling or alarming examples of physical or mental abuse." (Para.7.2.1). Moreover in the instant case the applicants had also failed to establish the negative effects they claimed constituted inhuman and degrading treatment. For the same reason, the judge held that the applicants had failed to establish that the Direct Provision Scheme unlawfully interfered with their family life as protected by Art.8 of the Convention, though he did hold that certain rules applied by the accommodation centres under the Scheme did infringe privacy rights under the Convention and the Constitution. While this case was largely unsuccessful, it does raise the possibility that if State treatment of vulnerable groups is particularly severe, this may amount to a breach of Art.3 of the Convention. In the second case concerning asylum seekers, *A v Minister for Social Protection*,[130] White J held, *inter alia*, that the denial of child benefit to asylum seekers in respect of the period when they did not have a right to reside in Ireland did not infringe Art.8 of the Convention having regard to the margin of appreciation afforded to contracting States in respect of measures of economic or social strategy, the fact that the applicants were entitled to direct provision during this time and also the fact that there was no culpable delay in processing the applications for family reunification or *Zambrano* rights.[131] Penultimately, Art.14 of the Convention was unsuccessfully invoked by the applicant in *Donnelly v Minister for Social Protection*[132] who argued that the denial of Domiciliary Care Allowance in respect of a child who was hospitalised amounted to unlawful discrimination. However Binchy J held that where the Oireachtas attempted to strike a balance between the parent of a child with a disability resident in hospital and the parent of a similar child resident at home and did so in a reasonable, objective and proportionate manner, the measures

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[130] [2017] IEHC 6.

[131] **In *Zambrano v Office National de l'Emploi,* Case C-34/09, [2011] 2 CMLR 1197, the European Court of Justice held that a non-EEA parent of EU citizen children could not be denied residency rights and the right to work in an EU country where such denial would result in the children having to leave the E.U. and therefore being unable to exercise the substance of the rights conferred on them as EU citizens. The Supreme Court subsequently upheld White J's decision, though without reference to the Convention – see *Michael (a minor) v Minister for Social Protection* [2019] IESC 82.**

[132] [2018] IEHC 27.

adopted would not infringe Art.14.Finally, two cases concerned the application of the 2003 Act to prison conditions. In both *PC v Minister for Social Welfare*[133] and *Simpson v Governor of Mountjoy Prison,*[134] Binchy and White JJ rejected the claim that the respective plaintiffs had been subject to inhuman or degrading treatment contrary to Art.3 of the Convention because of the conditions of their detention in Irish prisons.[135]

P.110, insert at end of page:

Note, however, that in *Stec v U.K.*[136] the European Court of Human Rights indicated that the national authorities were in principle better placed than the Court to appreciate what was in the public interest on social or economic grounds and that the Court would generally respect the legislature's policy choice unless it was "manifestly without reasonable foundation",[137] a very deferential standard of review.

P.111, insert new footnote at end of line 8:

Note, however, that in her comprehensive analysis of attempts to protect socio-economic rights through reliance on Art.3 of the Convention, O'Reilly comments that "the ECtHR's focus on factual extremities, without attempting to derive any general principles, has resulted in a dearth of guidance on when exactly positive obligations to remedy destitution arise. This leaves poverty-stricken litigants in a position of great uncertainty and creates issues for national courts facing similar domestic claims." - "The European Convention on Human Rights and Socioeconomic Rights Claims: a Case for the Protection of Basic Socioeconomic Rights through Article 3" [2016] 15 *Hibernian Law Journal* 1 at p.9.

Page 112, replace lines 17 to 19 with:

An additional factor limiting the potential of the 2003 Act in litigation targeting social exclusion are the remarks of Fennelly J (with whom

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[133] **[2016] IEHC 315. The Supreme Court subsequently allowed an appeal against this decision but not in relation to this particular issue – [2017] IESC 63, [2017] 2 ILRM 369.**
[134] **[2017] IEHC 561.**
[135] **On appeal in the Simpson case, the Supreme Court upheld White J's decision that the plaintiff's constitutional right to privacy had been infringed and also held that the plaintiff could not rely on concepts and principles derived from caselaw under Art.3 of the Convention in a claim for damages for infringement of constitutional rights – [2019] IESC 81.**
[136] **(2006) 43 EHRR 47.**
[137] **At para.52. *Stec* was cited by White J in *A v Minister for Social Protection* [2017] IEHC 6 in dismissing a challenge based on Art.8 of the Convention to the direct provision system of catering for asylum seekers and the habitual residence requirement applicable to social assistance payments and Child Benefit. This point did not feature in the subsequent Supreme Court decision on appeal – *Michael (a minor) v Minister for Social Protection* [2019] IESC 82**

Hardiman and Geoghegan JJ agreed) in *McD v. L*[138] **indicating that in discharging their statutory duty under s.2 of the Act to interpret, insofar as is possible, any statutory provision or rule of law in a manner compatible with the State's obligations under the Convention, Irish courts can only have regard to, *inter alia*, the existing jurisprudence of the European Court of Human Rights**.[139]

[TOPIC] **2. Charter of Fundamental Rights of the European Union**

Page 113, add to n.34:

In *Minister for Justice and Equality v O'Connor* [2014] IEHC 640, (4 December 2014) HC, Edwards J indicated that the requirement in Art.47 to provide effective access to justice did not necessarily mean that such access had to be by means of a statutory scheme of legal aid in European Arrest Warrant cases. On appeal – [2017] IESC 21 - the Supreme Court decided, inter alia, not to refer a question to the European Court of Justice as under the administrative scheme of legal aid, the applicant still had an entitlement to legal aid.

Page 114, replace n.36 with:

In a series of cases, *S v. Minister for Justice, Equality and Law Reform* [2011] IEHC 31, (21 January 2011) HC, *Lofinmakin v. Minister for Justice, Equality and Law Reform* [2011] IEHC 38, (1 February 2011) HC, *Mallak v. Minister for Justice* [2011] IEHC 306, (22 July 2011) HC, (the Supreme Court on appeal in *Mallak* did not consider it necessary to decide this point – [2012] 3 IR 297) and *Smith v. Minister for Justice and Equality* [2012] IEHC 113, (5 March 2012) HC, Cooke J took the view that the making of deportation orders in each case did not involve the implementation of Union law. See also, to the same effect, the decisions in *J.S. v. Minister for Justice and Equality* [2014] IEHC 195, (28 March 2014) HC, ***Dos Santos v Minister for Justice* [2015] IECA 210, [2015] 3 IR 411, [2015] 2 ILRM 483, *N.N. v Minister for Justice and Equality* [2016] IEHC 470, (29 July 2016) and *E.B. (a minor) v Minister for Justice and Equality* [2016] IEHC 531. In *Bakare v Minister for Justice and Equality* [2016] IECA 292, the Court of Appeal held that the Charter did not apply to an application for residency rights, a decision followed in *Doyle (a minor) v Minister for Justice and Equality* [2017] IEHC 374, while in *P v Minister for Justice and Equality* [2019] IESC 47, a majority of the Supreme Court, per Clarke J, indicated, *obiter*, that the Charter did not apply to applications for naturalisation.** In his decisions in *D.F. v. Garda*

[138] [2010] 2 IR 199 at p.316; [2010] 1 ILRM 461 at p.530. **See Cahill, "McD v L and the Incorporation of the European Convention on Human Rights" (2010) 45(1) Ir.Jur. (n.s.) 221. See also *O'Donnell v South Dublin Co. Co.* [2015] IESC 28, (13 March 2015) SC.**

[139] **Indeed in *R.C. (Afghanistan) v Minister for Justice and Equality* [2019] IEHC 65, Humphreys J even questions whether Irish courts are bound to follow every decision of the European Court of Human Rights – see para.21 of his judgment. See also his decision in *I.H. (Afghanistan) v Minister for Justice and Equality* [2019] IEHC 698, at paras.28-33.**

Commissioner [2013] IEHC 5, (14 January 2013) and *D.F. v. Garda Commissioner* [2014] IEHC 213, (11 April 2014), Hogan J similarly held that the Charter could not be invoked in an action for false imprisonment and trespass to the person where the plaintiff had been arrested under a purely domestic statute. **(This issue was not addressed in the subsequent Supreme Court decision on appeal – [2015] IESC 44)**. **In *AIB Ltd. v Aqua Fresh Fish Ltd.* [2017] IECA 77, the Court of Appeal held that the rule that a company can only be represented in court proceedings by a solicitor or counsel did not involve the application of EU law and therefore did not have to be read in light of the Charter. (This issue was not considered by the Supreme Court on appeal – [2018] IESC 49.) In *DN v Chief Appeals Officer* [2017] IEHC 52 (16 February 2017), White J held that s.246(7)(b) and s.246(8)(c) of the Social Welfare (Consolidation) Act 2005 dealing with the habitual residence requirement for claimants of social assistance and child benefit were not contrary to the Charter. In *Morrissey v IRBC Ltd* [2017] IECA 162, the Court of Appeal held that the Charter did not apply to s.12 of the Irish Bank Resolution Corporation Act 2013.** In *Minister for Justice, Equality and Law Reform v. Adam* [2011] IEHC (3 March 2011) HC, Edwards J indicated that Charter rights were applicable to an application made under s.16 of the European Arrest Warrant Act 2003, a point he re-iterated in *Minister for Justice and Equality v. L* [2011] 3 IR 145. **The Charter might also apply to actions for home repossessions given that mortgage contracts are subject to Council Directive 93/13/EEC – see *Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Menresa,* Case C-415/11, 14 March 2013, *AIB v Counihan* [2016] IEHC 752, *Ulster Bank Ireland Ltd v Costelloe* [2018] IEHC 289 and *Permanent TSB plc v Fox* [2018] IEHC 292 and *Grant v County Registrar from Co. Laois* [2019] IEHC 185.**

Page 116, replace n.45 with:

See also his decision in *Minister for Justice and Equality v O'Connor* [2014] IEHC 640, (4 December 2014) HC. On appeal in this case – [2017] IESC 21 – the Supreme Court held that the absence of a statutory scheme of legal aid for persons arrested under a European Arrest Warrant did not infringe Art.40.1 of the Constitution. The Court refused to refer a question to the European Court of Justice in relation to the fact that legal aid was provided pursuant to an administrative scheme rather than pursuant to a statutory scheme on the ground that, under the administrative scheme, the applicant still had an entitlement to legal aid. See also *Minister for Justice and Equality v O'Connor, Re Brexit* [2017] IESC 48. For discussion of the former Attorney General's Scheme, see pp.427-9.

Ch. 3 – The Implications of Public Interest Litigation for Civil Procedures and Remedies

[TOPIC] **Locus standi of association acting in defence of the interests of its membership**

Page 126, add to n.33:

Cp National Maternity Hospital v Information Commissioner **[2007] IEHC 113 in which Quirke J, relying on *Construction Industry Federation*, suggested, *obiter*, that an unincorporated association representing individual members who were financially incapable of mounting a legal challenge might be afforded *locus standi*. In *M28 Steering Group v An Bord Pleanála* [2019] IEHC 929, an environmental case, McGrath J said, obiter, at para.124, that the applicant, an unincorporated NGO, enjoyed, as a matter of law, a general right of standing.**

Page 128, add to n.44:

On standing in environmental cases, see *Grace v An Bord Pleanála* [2017] IESC 10, (24 February 2017) SC.

Line 9, replace ***"section 390 of the Companies Act 1963" with "section 52 of the Companies Act 2014".***

Page 129, line 3, replace ***"section 150 of the Companies Act 1963" with "section 819 of the Companies Act 2014."***

[TOPIC] **Locus standi of private party acting in defence of the public interest**

Page 131, n.64, insert in line 9:

(though in *Mohan v Ireland* [2019] IESC 18, the Supreme Court, *per* O'Donnell J, indicated, *obiter*, that there is no *actio popularis* in Irish constitutional law that would entitle a citizen to challenge the constitutionality of legislation without having to show some adverse effect on the plaintiff, either actual or anticipated – see para.11).

Page 142, add to n.115:

though this was later amended by s.20 of the Environment (Miscellaneous Provisions) Act 2011 to afford standing to applicants with a "sufficient interest" in the matter.

Page 143, add to n.117:

In *Grace v An Bord Pleanála* [2017] IESC 10, (24 February 2017) SC, the Supreme Court (per Clarke and O'Malley JJ) stated, at para.6.7,

> **"While it has been noted from time to time that a mere interest in ensuring that the law is upheld is not, in itself, sufficient to confer standing (for if it were then there would, in all cases, be the potential for a so-called *actio popularis* and standing rules might**

be of very little relevance save for excluding abuse of process and the like), nonetheless *Mulcreevy* seems to suggest that the nature of the measure under challenge may be such as to confer a right to challenge on a very wide range of persons (and possibly, in some cases, on all persons not motivated by bad faith or the like).”

[TOPIC] ***Locus standi* to act on behalf of third parties**

Page 151, insert following footnote in line 18:

Note, however, that in *Mohan v Ireland* [2019] IESC 18, the Supreme Court, *per* O’Donnell J, indicated, *obiter*, that there is no *actio popularis* in Irish constitutional law entitling a citizen to challenge the constitutionality of legislation without having to show some adverse effect on the plaintiff, either actual or anticipated – see para.11.

Page 151, add to n.156:

In *Merriman v Fingal Co Co* [2017] IEHC 695, Barrett J, applying *Digital Rights Ireland,* held that Friends of the Irish Environment CLG had standing to assert the existence of an implied constitutional right to an environment consistent with the human dignity and well-being of the general citizenry while in *Friends of the Irish Environment CLG v Government of Ireland* [2019] IEHC 747, McGrath J similarly held that the same organisation had standing to contend that the National Mitigation Plan was in breach of its constitutional or Convention rights.

[TOPIC] **Taking account of the interests of those affected by iitigation**

Page 157, add to n.183:

and by Reynolds J in *Charles Kelly Ltd. v Ulster Bank (Ireland) Ltd.* [2019] 711. See also *Dowling v Minister for Finance* [2013] IESC 58.

Page 159, add to n.193:

In *Attorney General v Damache* [2015] IEHC 339, (21 May 2015) HC, where submissions were heard during the proceedings at first instance from the Irish Human Rights and Equality Commission acting as an *amicus curiae*, the State complained that the Commission had overstepped its role by commenting on the evidence. However in Part 5 of her judgment, Donnelly J rejected criticism about the Commission’s commentary on facts that were either agreed between the parties or that might be so found. She also commented that it was necessary for all parties, including an *amicus*, when dealing with a contentious issue, to focus their points of law on the facts of the case and that it was unrealistic to suggest that submissions of law could take place in a factual vacuum. Finally, she

indicated that objections to submissions made by an *amicus* should be made in open court during the course of the proceedings rather than, as here, by way of written submissions filed with the leave of the court towards the end of the hearing. In *LC v Director of Oberstown* [2016] IEHC 740, Eagar J refused to give the Commission permission to appear as an amicus curiae in the instant case, suggesting that such an intervention by the Commission would be more appropriate role in relation to any appeal to the Court of Appeal.

Page 162, add to n.218:

This decision of Hogan J led Keane J to comment, in *Data Protection Commissioner v Facebook Ireland Ltd.* [2016] IEHC 414 (19 July 2016), at para.13, that "the reluctance of a court to admit a party as an *amicus curiae* if they have a strong view or vested interest seems to have diminished somewhat in recent times." Note, however, that in *M v Minister for Justice and Equality* [2018] IESC 7 (7 February 2018), the Supreme Court observed that if it acceded to an application by the Pro-Life Campaign to be permitted to participate as an *amicus curiae* in legal proceedings concerning the constitutional rights of unborn life, this might give rise to applications by other partisan groups to be afforded the same facility, creating clear logistical problems.

Page 162, second last line, insert new footnote after "before the court":

This ground was relied upon by Keane J in *Data Protection Commissioner v Facebook Ireland Ltd.* [2016] IEHC 414 (19 July 2016) to refuse permission to a number of parties to act as *amici curiae* in that litigation. See also the decision of the Supreme Court to similar effect in *M v Minister for Justice and Equality* [2018] IESC 7 (7 February 2018) in relation to the application by the Pro-Life Campaign to be permitted to act as an *amicus curiae* in that case. The Supreme Court, per O'Donnell J, also expressed concern, at para.15 of his judgment, that arguments advanced by the Pro-Life Campaign might tend towards "general arguments, unmoored from the specific contentions in this case." See also *Minister for Justice and Equality v Celmer* [2018] IEHC 154.

Page 163, add to n.220

But note the views of Donnelly J in *Attorney General v Damache* [2015] IEHC 339, (21 May 2015) HC relation to the right of the Irish Human Rights and Equality Commission to comment on the facts of a case when acting as an *amicus curiae*. In *Data Protection Commissioner v Facebook Ireland Ltd.* [2016] IEHC 414 (19 July 2016) HC, Keane J was influenced by the fact that there was no factual dispute between the parties and also by the fact that parties wishing to be heard by the CJEU in the context of a reference to that court must have participated in the relevant proceedings before the national court in holding that certain parties could act as *amici curiae* at trial

stage. In a follow-up ruling to this decision, *Data Protection Commissioner v Facebook Ireland Ltd.* [2017] IEHC 105, (20 February 2017), Costello J stated, at para.7 of her judgment, that there was no absolute rule that an *amicus curiae* can never give evidence but that, as a general rule, an *amicus curiae* is not permitted to give evidence. She also stated, at para.10, that an *amicus curiae* cannot contest the undisputed facts in a case.

[TOPIC] 4. COSTS

Page166, add to n.230

and *North East Pylon Pressure Campaign Ltd. -v- An Bord Pleanála (No.5)* [2018] IEHC 622.

Page 166, add to n.233

Note, however, that in *WL Construction Ltd. v Chawke* [2018] IECA 113, the Court of Appeal questioned whether *Moorview* was correctly decided.

Page 167, replace lines 2-4 with:

The general rule in relation to the award of costs is that, by virtue of s.169 of the Legal Services Regulation Act 2015, a party who is entirely successful in civil proceedings is entitled to an award of costs against the unsuccessful party unless the court orders otherwise, having regard to the particular nature and circumstances of the case and the conduct of the proceedings by the parties.

Page 169, add to n.246:

In *Ryanair Ltd v Revenue Commissioners* [2017] IEHC 272, (5 May 2017), Barrett J followed *Shackleton* in declining to award costs to the successful defendants on the ground that the case was a test case that clarified a question of law.

[TOPIC] ***(a) Exercise of judicial discretion to award costs to unsuccessful litigant***

Page 170, add to n.248:

See also *A.Q. v Minister for Health* [2016] IEHC 556, (13 October 2016).

Page 171, add to n.250:

***Collins* was subsequently cited with approval by the Divisional High Court in *Kerins v McGuinness* [2017] IEHC 217.**

Page 171, add to n.253:

See also *P.C. v Minister for Social Protection* [2016] IEHC 343, (14 June 2016), where Binchy J awarded the unsuccessful plaintiff two thirds of his costs where a number of other parties would have had an interest in the outcome of the litigation, and *M.C. v Clinical Director, Central Mental Hospital* [2016] IEHC 467, (25 July 2016). In *W v Geraldine Gleeson (Appeals Officer)* [2019] IEHC 579, Simons J stated that, in order to justify a departure from the normal rule on costs, it is not enough to show that the case is capable of being determinative of other cases and that the court is entitled to have regard to, *inter alia*, the strength of the case, whether the relevant area of the law is in need of clarification, the conduct of the proceedings and whether the litigant has a financial or proprietary interest in the outcome of the proceedings.

Page 171, add to n.254:

See also *North East Pylon Pressure Campaign Ltd. -v- An Bord Pleanála (No.5)* [2018] IEHC 622 at para.43.

Page 171, add to n.255:

In *W v Geraldine Gleeson (Appeals Officer)* [2019] IEHC 579, Simons J commented, at para.29, that, in some instances, a public interest may coincide with a private interest in the outcome of proceedings. He also noted that it would be a "Catch-22" situation if complying with the *locus standi* requirement for judicial review proceedings of having a sufficient interest in the matter would automatically shut out a litigant from protection against the risk of an adverse costs order.

Page 171, add to n.252:

See more recently *Collins v Minister for Finance* [2014] IEHC 79, *Kerins v Mcguinness* [2017] IEHC 217 and *Zalewski v The Workplace Relations Commission* [2020] IEHC 226.

Page 171, insert new footnote at end of line 20:

In *R.A. v Refugee Appeals Tribunal* [2015] IEHC 830, (21 December 2015) HC, Humphreys J exercised his discretion to depart from the rule that costs follow the event in a case that, *inter alia*, raised a point of law of exceptional public importance, where there was a need to resolve a conflict between two High Court decisions and where the issues raised were of great practical significance. See also his decision in *B.W. v Refugee Appeals Tribunal* [2015] IEHC 833, (21 December 2015) HC where he also departed from the general rule that costs follow the event because, *inter alia*, a resolution of the case would bring clarity and certainty for both the State and all applicants for asylum under the Refugee Act 1996 and the legal issues raised in

the case could have been addressed more explicitly by the Oireachtas. In a third case, *K.R.A. v Minister for Justice and Equality (No.2)* [2016] IEHC 421, (24 June 2016), Humphrey J took account of, *inter alia*, the opacity of the legislation at issue in the case and the conduct of the respondent in attempting unilaterally to resile from representations made to the court at the hearing in departing from the general rule.

Page 171, insert before last para:

In *Zalewski v The Workplace Relations Commission*,[140] Simons J said that in exercising its discretion to depart from the general rule that costs follow the event,

> **"it will be necessary for the court to consider factors such as (i) the general importance of the legal issues raised in the proceedings; (ii) whether the legal principles are novel, or, alternatively, are well established; (iii) the strength of the applicant's case: proceedings might touch upon issues of general importance but she grounds of challenge pursued might be weak; (iv) whether the subject-matter of the litigation is such that costs are likely to have a significant deterrent effect on the category of persons affected by the legal issues; and 9v) whether the issues touch on sensitive personal issues."[141]**

Specifically in relation to the fourth factor listed above, Simons J said that if the general rule was to be followed in cases concerning relatively modest claims, this might skew constitutional litigation towards cases with significant financial implications for the litigants and might deter people with more modest claims from litigating important constitutional issues.

Of particular interest to public interest lawyers, in *C.A. v Minister for Justice and Equality* [2015] IEHC 432, (10 June 2015) HC, MacEochaidh J refused to award costs against an unsuccessful litigant who had challenged the system of direct provision for asylum seekers and whose lawyers had acted on a *pro bono* basis, on the ground that to do so would cause significant injury to the interests of justice generally as it would mean her lawyers would not be paid for the work that they had done. He continued:

> **"If this were ordinary private litigation the court would have no reason to be concerned by the possibility of the applicant's lawyers not being paid. However, the court acknowledges that the only manner in which a person in the circumstances of the applicant can exercise a right of access to court is if her lawyers are willing to act on a conditional fee basis. That a vulnerable group of people have been living in the challenging circumstances of direct**

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140 **[2020] IEHC 226.**

141 **At para.22 of his judgment.**

provision for extremely lengthy periods of time, well beyond the six months for which the scheme was intended, is exclusively attributable to inefficiencies on the State side. The sorry saga of direct provision cannot be described as the State's finest hour. A legal challenge of some sort was surely inevitable - as inevitable as the public campaign addressed to the Government. To award the respondent the costs of the issues which it won would have a chilling effect on litigation of this sort and might have the effect of denying vulnerable and marginalised people their constitutional right of access to the courts. Therefore, I refuse to make an order in favour of the respondents."[142]

This approach, if adopted by other judges, may offer some protection to unsuccessful public interest litigants against the risk of having to pay the costs of their successful opponents.[143] However whether a judge is willing to take this approach will only become clear after the conclusion of the litigation and so an unsuccessful plaintiff in *pro bono* litigation remains at some risk that she will have to pay her opponent's costs.

[TOPIC] ***(b) Protective costs order***

Page 172, add to n,258:

See also *Heather Hill Management Company CLG v An Bord Pleanála* [2019] IEHC 186.

Page 175, insert at end of line 1:

However it is worth noting that in *Austin v Miller Argent (South Wales) Ltd.,*[144] the Court of Appeal for England and Wales, per Elias LJ, said that "the mere fact that the claimant has a personal interest in the litigation does not of itself bar her from obtaining a PCO."[145]

Page 176, add to n.274:

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[142] **At para.26 of his judgment. However he also indicated, at para.29, that special care is required to ensure that *pro bono* litigation is conducted efficiently and in a manner that does not unreasonably inflate expense for the defendant. In *B.A. v Minister for Justice and Equality* [2015] IEHC 861, (16 November 2015) HC, MacEochaidh J, in an *ex tempore* decision, refused to follow his own decision in *C.A.* on the ground that the instant case did not share sufficient qualities of public interest to warrant applying that approach. He noted, *inter alia*, that the plaintiff did not represent a class of persons making the same complaint.**

[143] **Note that in *Gill v Kildare Co. Co.* [2017] IEHC 51, where the applicant had successfully sought leave to bring judicial review proceedings against the council challenging its refusal to offer her emergency homeless accommodation and where the subsequent proceedings were resolved amicably, Eagar J awarded her the costs of her *ex parte* application. In doing so, he had regard to, *inter alia*, the difficult situation of persons facing homelessness.**

[144] [2015] 1 WLR 62

[145] [2015] 1 WLR 62, 77 (para.44).

In *Callaghan v An Bord Pleanála* [2015] IEHC 235, (20 February 2015) HC, McGovern J held that s.50B did not apply to a decision of the Board that a proposed development was a strategic infrastructure development. In *Heather Hill Management Co CLG v An Bord Pleanála* [2019] IEHC 186, Simons J held that the qualifying criteria for costs protection under s.50B related to the type of decision which is the subject of judicial review proceedings rather than to the grounds of challenge.

[TOPIC] **Doctrine of mootness**

Page 181, line 5, insert the following footnote after "the future":

In *N.V.H. v Minister for Justice and Equality* [2017] IESC 35, the Supreme Court, *per* O'Donnell J, held that a person affected by the operation of a statute which s/he contends is unconstitutional may be entitled to maintain the claim even if the statute is no longer being applied to him/her. (In the instant case, the applicant was granted refugee status and so was no longer subject to the statutory prohibition on gaining employment that was imposed on asylum-seekers. Nonetheless, he was allowed to maintain his constitutional challenge to the relevant legislation.)

Page 181, insert following footnote at end of sentence on sixth last line:

In *Hussein v Minister for Justice, Equality and Law Reform* [2015] IESC 104, (10 November 2015) SC, the Supreme Court entertained an appeal concerning the powers of the Minister under the Immigration Act 2004 notwithstanding its mootness – the applicant had been granted citizenship prior to the Supreme Court hearing – presumably on the basis that there was concern that the law in this area should be clarified. See also *Okunade v Minister for Justice, Equality and Law Reform* [2012] IESC 49, (16 October 2012) SC. In *Crayden Fishing Company Ltd v Sea Fisheries Protection Authority* [2017] IESC 74, O'Donnell J indicated, *obiter*, at para.11 of his judgment, that a case that was technically moot because the legal relationship between the litigants could not be altered by any decision made on appeal could nonetheless be heard and determined if it raised an issue of general public importance. See also *O'Sullivan v Sea Fisheries Protection Authority* [2017] IESC 75, at paras.26-8 and *N.V.H. v Minister for Justice and Equality* [2017] IESC 35 at para.6.

Page 182, n.298, line 9, insert after (10 February 2011) HC:

and by the Court of Appeal in *Gorry v Minister for Justice and Equality* [2017] IECA 282

Page 183, replace last 5 lines in n.302 with:

On appeal, this was one of the factors that led the Supreme Court to hear the appeal, though the matter was moot – see [2014] 2 ILMR 341 at pp.348-9. See also *Dundon v. Governor of Cloverhill Prison* [2013] IEHC 608, (3 December 2013) HC, *Whelan v Governor of Mountjoy Prison* [2015] IEHC 273, (1 May 2015) HC, *McDonagh v Governor of Mountjoy Prison* [2015] IECA 71, (20 March 2015) CA, *IRM v Minister for Justice and Equality* [2016] IEHC 478 and *N.V.H. v Minister for Justice and Equality* [2017] IESC 35 for further applications of this principle. In *McDonagh*, the Court of Appeal, *per* Hogan J, noted, at para.12, that the doctrine of mootness is "simply a rule of practice which may be relaxed as the occasion appropriately presents itself."

Page 183, add to footnote 304:

***Kovacs v Governor of Mountjoy Women's Prison* [2016] IECA 108 and *Freeman v Governor of Wheatfield Place of Detention* [2016] IECA 177.**

Page 183, line 9, insert new footnote after "permit":

See also the decisions of Humphreys J in *O'Connell v Solas* [2017] IEHC 242 and *Bedford Borough Council v M* [2017] IEHC 583.

P.183, add to n.306

See also the comments of Charleton J at paras.36-9 of his judgment in *Child and Family Agency v McG* [2017] IESC 9.

Page 183, add to line 13:

or where a case raises an issue of exceptional public importance of systemic relevance to particular applications.[146] In *Lofinmakin v Minister for Justice,*[147] McKechnie J suggested that a decision could be given on a matter that was moot where this was required by the overriding interests of justice.[148] Finally, in *N.V.H. v Minister for Justice and Equality,*[149] the Supreme Court, *per* O'Donnell J, decided not to apply the doctrine of mootness given that the instant case was a test case raising a point of law of general public importance that would gain nothing from being raised in the context of new facts in a different case.

Page 183, replace last sentence with:

Thus the offer of a settlement, in many cases, may frustrate an attempt to set a precedent that would benefit other individuals facing the same difficulties as the plaintiff. One possible way to counteract

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146 **See *Kovacs v Governor of Mountjoy Women's Prison* [2016] IECA 108 and *C.G. v K.Q.* [2019] IEHC 283.**

147 **[2013] IESC 49, [2013] 4 IR 274.**

148 **See para.67 of his judgment; [2013] 4 IR 274 at p.000.**

149 **[2017] IESC 35.**

this tactic might be to organize a group action so that the settlement would benefit as many people as possible and where it might be more difficult to prevent news of the settlement becoming public knowledge. However the difficulty of organizing such an action should not be underestimated and I turn to address the issue of group actions in Irish law now.

[TOPIC] 6. Enhancing the impact of public interest litigation

Page 187, add to n.320:

Note that in *Tate v Minister for Social Welfare* [1995] 1 IR 481; [1995] 1 ILRM 507, Carroll J held, *inter alia*, that the plaintiffs were entitled to damages equivalent to the amount of social welfare that the State should have paid to them pursuant to Directive 79/7/EEC. Approximately 70 women were named as plaintiffs in one of the two joined actions decided by Carroll J but the law report does not explicitly state whether it was a representative action taken pursuant to Ord.15, r.9.

[TOPIC] 7. Remedies

Page 195, add to n.357:

In *McD v. Minister for Education and Skills* [2013] IEHC 175, O'Malley J applied this test when refusing to order the State to provide the applicant with an appropriate educational placement, that there was no evidence of bad faith on the part of the respondents or of any conscious or deliberate disregard of the applicant's rights.

Ch.4 – Practical issues relating to the use of litigation strategy

Page 201-2, add to n.19

Section 18(2) of the Legal Services Regulation Act 2015 authorises the Legal Services Regulatory Authority to make regulations in relation to the advertising of legal services but this section has not yet been commenced. It is worth noting that in *N.V.H. v Minister for Justice and Equality* [2017] IESC 35, O'Donnell J commented that in other jurisdictions, it is entirely permissible to seek out persons with particular characteristics and experience to act as a nominal plaintiff in constitutional litigation, and he raised the possibility that this issue might need to be considered in this jurisdiction.

Page 202, Insert following footnote in line 10 after the word "offence":

See s.3 of the Maintenance and Embracery Act 1634, retained by the Statute Law Revision Act 2007. In *Persona Digital Telephony Ltd v Minister for Public Enterprise* [2017] IESC 27, a majority of the Supreme

Court, per Dunne J., declined to decide whether champerty and maintenance continued to be offences under Irish law given that their status as offences had not been challenged in the instant case.

Page 202, add to n.20:

See *Persona Digital Telephony Ltd v Minister for Public Enterprise* [2016] IEHC 187, (20 April 2016) HC and [2017] IESC 27 and the Law Reform Commission's Issues Paper on Contempt of Court and other Offences and Torts involving the Administration of Justice (2016), pp.66-76.

[TOPIC] ***(a) Doctrines of champerty and maintenance***

Page 202, add to n.23:

In *SPV Osus Ltd v HBSC Institutional Trust Services (Ireland) Ltd.* [2018] IESC 44, the Supreme Court, per O'Donnell J, held that the assignment of a right to litigate was void as savouring of champerty or maintenance unless it was justified by a genuine commercial interest. See also *McCool v Honeywell Control Systems Ltd.* [2018] IEHC 167. For a case in which a third party had a legitimate interest in taking over litigation, see *Waldron v Herring* [2013] IEHC 294, (28 June 2013) HC.

Page 203, replace last sentence in n.24 with:

Section 149(1)(a) of the Legal Services Regulation Act 2015 extends this prohibition to counsel. In *Persona Digital Telephony Ltd v Minister for Public Enterprise* [2017] IESC 27, (23 May 2017) SC, a majority of the Court held that professional third party funding of litigation in return for a share of the proceeds contravened the rules on maintenance and champerty and the fact that the case was of immense public importance was of no relevance. See further Biehler, "Maintenance and Champerty and Access to Justice – The Saga Continues" (2018) 59 Ir. Jur. 130. However *Persona* would not appear to be applicable to lawyers who offer their services gratuitously or perhaps even on a "no foal, no fee" basis where they are motivated by the desire to ensure that an indigent litigant has access to justice.

Page 204, insert in line 7 after "members"

That said, in *Persona Digital Telephony Ltd v Minister for Public Enterprise,*[150] the Supreme Court, by a majority, held that an agreement to fund litigation where there was no connection between the plaintiffs and the funder other than the agreement itself was

150 **[2017] IESC 27.**

champertous[151] and the fact that the case was of immense public importance was of no relevance.[152] However this case concerned professional third party funding of litigation in return for a share of the proceeds and would not appear to be applicable to lawyers who offer their services gratuitously or perhaps even on a "no foal, no fee" basis where they are motivated by the desire to ensure that an indigent litigant has access to justice.

Page 204, add to n.33:

On appeal, the Court of Appeal held that in the absence of the no-win no-fee agreement and its compliance with s.68 of the Solicitors (Amendment) Act 1994, there was not sufficient evidence before the High Court to demonstrate the existence of an effective After the Event (ATE) insurance policy. In addition the policy here was so conditional that it did not provide a sufficient security to the defendant to warrant refusal of an order for security for costs and so the appeal against the High Court decision was allowed. However the Court did not address the question of whether such policies might amount to either maintenance or champerty – see *Greenclean Waste Management Ltd. v Leahy* [2015] IECA 97, (8 May 2015) CA.

Page 204, add to para.2 after n.36

In contrast, such judicial references as exist in Irish case law to the "no foal, no fee" system are, at worst, tolerant and, at best, approving, though none constitute binding authority for the legality of the practice. Thus in *C.A. (Costs) v Minister for Justice*[153] MacEochaidh J, viewing a conditional fee arrangement as a means of enabling vulnerable and marginalized people to exercise their constitutional right of access to the courts, refused to award costs against an unsuccessful litigant whose lawyers had acted on a *pro bono* basis while in both *McHugh v. Keane*[154] and *Synnott v. Adekoya*[155] the Irish High Court entertained actions in which it was accepted, albeit *sub silentio*, that a 'no foal, no fee' arrangement was a valid contract.[156] **In *Persona Digital***

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151 **The same majority, per Dunne J., declined to decide whether champerty and maintenance continued to be offences under Irish law as this issue had not been raised in the instant case.**

152 ***Persona Digital Telephony v Minister for Public Enterprise* [2017] IESC 27. The majority also indicated that development of the common law on champerty in light of modern policy was more suited to legislation (though in his judgment, Clarke J speculated, at para.4.3 of his judgment, that if it was ever held that the existing law amounted to a breach of the constitutional right of access to the courts and if no corrective action was taken by the Oireachtas and/or executive, the court's jurisdiction would necessarily have to extend to taking whatever measures were necessary. (Note that in this case the Court was not asked to consider how, if at all, the law on maintenance and champerty might be affected by the Constitution.)**

153 **[2015] IEHC 432, (10 June 2015) HC.**

154 High Court, 16 December 1994.

155 [2010] IEHC 26, (29 January 2010) HC.

156 Though solicitors are generally prohibited from advertising their services on this basis - see art.9 of the Solicitors (Advertising) Regulations 2002 [S.I. No.518 of 2002].

***Telephony v Minister for Public Enterprise*[157] Denham CJ commented, at para.54, that there was "a long history at the Bar, and amongst solicitors, of taking cases on a "no foal, no fee" basis" and in his judgment Clarke J referred, without disapproval, to this practice.[158] More recently, in *O'Leary v Mercy University Hospital Cork Ltd.,*[159] MacMenamin J commented that a rigid, unthinking application in "no foal, no fee" cases of a universal rule against contingency agreements might restrict or prevent access to a court by meritorious persons.[160]**

Page 204, 4th last line, insert footnote after "arrangement":

S.68(2) will be repealed once s.5 of the Legal Services Regulation Act 2015, insofar as it relates to the repeal of s.68, is commenced. Section 149(1) of the 2015 Act similarly prohibits contingency fees in most cases but again makes no reference to "no foal, no fee" agreements.

[TOPIC] ***b) Liability for costs***

Page 207, add to n.54:

Note that in the particular circumstances of *Brebenek v Minister for Justice and Equality* [2018] IEHC 323, Keane J rejected the contention that the solicitor's reliance on the advice of a barrister in his devilling year was a defence to the making of a wasted costs order.

Page 208, add to n.58:

Cooke J's decision was subsequently cited with approval by Laffoy J in the Supreme Court decision of *PO v Minister for Justice and Equality* [2015] IESC 64, [2015] 3 IR 164.

Page 208, insert new footnote at end of line 9:

In *He v Governor of Castlerea Prison* [2015] IEHC 854, (20 October 2015) HC, McDermott J held that a wasted costs order was appropriate in circumstances in which two solicitors failed to take the minimal steps to inform themselves of the facts of their clients' cases. However he refrained from making such an order in light of the full apology made to the court by each of the solicitors and in light of the fact that the proceedings were discontinued at an early stage. In *Brebenek v Minister for Justice and Equality* [2018] IEHC 323, (30 May

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157 **[2017] IESC 17.**

158 **See para.2.8(g) of his judgment where he also points out, however, that *pro bono* litigation may not be feasible in cases requiring extensive discovery or the procurement of expert evidence as the cost of such activities would, in practice in such cases, have to be funded in advance by the lawyers who might not be willing to take on the risk of not being remunerated if the case was lost.**

159 **[2019] IESC 48.**

160 **See para.23 of his judgment.**

2018), Keane J made a wasted costs order in circumstances in which application for leave to seek judicial review was brought in breach of statute with the judge hearing the *ex parte* application being misled by omission on the applicable law. Keane J was also of the view that the proceedings ought not to have been brought as they could never have succeeded.

Page 209, add to second para:

In *C.A. (Costs) v Minister for Justice* [2015] IEHC 432, (10 June 2015) HC MacEochaidh J explicitly rejected the suggestion that a "no foal, no fee" arrangement disentitles a litigant from securing costs from his or her opponent because the litigant has no liability to his or her own lawyers, saying that such a view was not consonant with modern reality. and he awarded the applicant 20% of the total costs of the proceedings reflecting the extent of her success in the case.[161] However insofar as the respondents had conceded that the applicant was entitled to this level of costs, this decision is not authority for the proposition that lawyers taking a case on a "no foal, no fee" basis are entitled to costs when the action is successful. Specifically in relation to independent law centres regulated by The Solicitors Acts, 1954 to 2002 (Independent Law Centres) Regulations 2006 [S.I. No.103 of 2006], it is worth noting that among the conditions that must be satisified by an organization wishing to be treated as an independent law centre are that the organization must not "and does not intend to charge legal costs and outlays to a client over and above those legal costs and outlays that are recoverable by the client from another source" - reg.4(3)(c) – and that the organization "applies all legal costs and outlays recovered by an employed solicitor on behalf of a client solely for furthering the charitable purposes of the organization and in particular the provision to clients of legal services" – reg.4(3)(d). These provisions clearly imply that independent law centres may recover costs in pro bono cases.

Ch.5 – Judicial Treatment of Social Welfare Issues

[TOPIC] ***(a) Independence of appeals system***

Page 216, add to note 14:

However, Barrett J's decision was overturned by the Court of Appeal which held that s.186C(3) of the 2005 Act required the deciding officer

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161 **Though he reduced this sum by 25% to reflect inefficiencies in the applicant's approach to the litigation. He also refused to award costs against the unsuccessful plaintiff in this *pro bono* litigation on the ground that this would cause significant injury to the interests of justice as it would mean that her lawyers would not be paid for the work they had done and that to award costs against an unsuccessful plaintiff in such a case "would have a chilling effect on litigation of this sort and might have the effect of denying vulnerable and marginalized people their constitutional right of access to the courts." (Para.26).**

to "have regard" to the opinion of the medical assessor in such cases – *CSB v Minister for Social Protection* [2016] IECA 116, (20 April 2016) CA. This did not mean that the deciding officer was bound by the opinion of the medical assessor but she was required to inform herself in respect of the matter to which she was obliged by statute to have regard and to give reasonable consideration as to whether this should inform her decision-making. Hogan J said, at para.30, that if the deciding officer regarded himself or herself as *bound* by the medical assessor's decision, this would be an unlawful fettering of discretion. He also said at para.32, that if the deciding officer discounted the medical assessment provided by an applicant and "simply unthinkingly endorsed the contrary views expressed by the medical assessor", the applicant could appeal the decision or seek a statutory review pursuant to s.301 of the 2005 Act. If the original decision was upheld, its reasonableness could ultimately be challenged by way of judicial review. In the instant case, there was no evidence that the deciding officer had adopted a "fixed policy" position as statistics alone did not prove the existence of such a position (though the outcome might be different if statistics showed that a deciding officer had always or almost always decided in favour of the Minister).

[TOPIC] ***(b) Appellant's right to be heard***

Page 217, add to note 20:

In contrast, in *National Museum of Ireland v Minister for Social Protection* [2016] IEHC 135, (7 March 2016) HC, the failure of an Appeals Officer to give the applicant an opportunity to comment on an e-mail on which the Appeals Officer subsequently placed some reliance rendered the hearing and subsequent decision unsatisfactory.

Page 217, insert new section at the end of the page:

- and duty to give reasons

The duty on deciding officers (and appeals officers) to give reasons for a decision has been considered on three occasions, with conflicting outcomes. In *A.M. v. Minister for Social Protection*,[162] Hanna J dismissed an application seeking to quash a refusal to grant the applicant Domiciliary Care Allowance in respect of the applicant's son who suffered from autism. The ground for the refusal, reflecting the language of s.186C of the Social Welfare (Consolidation) Act 2005 as amended, was that the extra care and attention required by the child was not substantially in excess of that required by a child of the same age who did not have the particular disability in question. Hanna J held that, contrary to the applicant's submissions, adequate reasons had been given by the deciding officer for his decision to

162 [2013] IEHC 524, (25 October 2013) HC.

refuse payment. The deciding officer's decision reflected the language of the legislation setting out the criteria for qualifying for the payment and did not prejudice the applicant's right to seek a revision of the decision or to appeal against it to an appeals officer. According to the judge, the Department did not have to give detailed reasons for its decision but was only obliged to notify claimants of the grounds for the decision so that the right of appeal was not impaired. Hanna J also accepted the Department's contention that, as there was no conflict of medical evidence as between the applicant's GP and the Department's medical assessors, the deciding officer did not have to give a detailed explanation of his decision in this regard and neither was the Department obliged to have the applicant's son medically examined. He also indicated that the applicant should have taken an appeal under the 2005 Act against the decision to refuse payment rather than seeking to have it quashed by way of judicial review.[163]

***A.M.* was subsequently followed by Baker J in *M.D. v Minister for Social Protection* [2016] IEHC 70, (9 February 2016) HC, which also concerned an application for Domiciliary Care Allowance, in relation to the applicant's duty to pursue a statutory appeal in preference to seeking judicial review where the appeal is capable of remedying the identified defect in the decision being challenged. However in relation to the duty to give reasons, she said that this duty was based on more than the proposition that the giving of reasons was necessary to enable an applicant to make an informed decision on whether to appeal, or seek judicial review of, the decision. Citing remarks of Kelly J in *Mulholland v. An Bord Pleanála* [2006] 1 IR 153, she indicated that the duty to give reasons is also necessary in order to enable an applicant to know whether the decision maker had directed its mind adequately to the issues before it, a point not addressed by Hanna J in *A.M.* In the instant case, she characterised the reports from the Departmental medical assessors as devoid of factual content or analysis and following almost exactly the statutory formula when expressing the view that the legislative test was not met. These reports did not provide the deciding officer with a factual basis on which the officer "could engage the full decision making process, and compare or weigh the factors supportive of each position." (Para.54). Accordingly the applicant had made out an argument that the deciding officer had failed properly to consider all of the evidence furnished by her and therefore the officer had erred in law and was in breach of fair procedures.**

In a third case, *National Museum of Ireland v Minister for Social Protection* [2016] IEHC 135, (7 March 2016) HC, Murphy J also took a more demanding approach than that of Hanna J to the duty to give reasons when she held that deciding and appeals officers must set

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163 In fact, the applicant subsequently pursued a successful appeal against the decision to refuse payment – see *Malone v. Minister for Social Protection* [2014] IECA 4, (12 October 2014) CA, at para.8. ***A.M.* was followed on this point of failure to exhaust remedies by Baker J in *M.D. v Minister for Social Protection* [2016] IEHC 70, (9 February 2016) HC.**

out the facts upon which the decision is based. She went on to cite with approval the comments of Kelly J. in *Mulholland v. An Bord Pleanála* [2006] 1 IR 153, that a decision making body:

> ***"…must give its reasons and considerations in a way which not only explains why it has taken a different course but must do so in a cogent way so that an interested party can assess in a meaningful fashion whether or not the respondent's decision is reasonably capable of challenge".***

In the instant case, Murphy J said that the failure of the appeals officer to set out clearly the facts on which his decision was based meant that it appeared, on the face of his determination, that he had, to some extent, engaged in the cherry picking of evidence.

[TOPIC] ***(e) Procedures: Miscellaneous***

Page 223, line 4, insert new footnote:

While s.10 of the Social Welfare (Miscellaneous Provisions) Act 2015 allows a deciding officer to seek the opinion of a medical assessor in relation to a claimant's entitlement to social welfare, this provision does not appear to apply to social welfare appeals, thereby leaving unaffected the ruling of the Supreme Court in *Kiely* on the more limited role of medical assessors in that context.

Page 224, insert after line 2:

In *Hoey v Chief Appeals Officer*,[164] Barrett J quashed a decision of the Chief Appeals Officer to refer a social welfare appeal to the Circuit Court rather than to an appeals officer pursuant to s.307 of the 2005 Act on the ground that the Chief Appeals Officer had not considered whether the ordinary appeals system was inadequate as regards the applicant or whether any threat might arise for any appeals officer hearing her case. Instead her decision to refer appeared to be based on a general policy of protecting the anonymity of Criminal Assets Bureau officers who made the initial decision now under appeal and because any appeals officer asked to adjudicate on such an appeal did not enjoy a right to anonymity. Earlier in his judgment, Barrett J had accepted that where a social welfare appeal is referred to the Circuit Court, the appellant is deprived of the opportunity of having the decision on appeal revised by another appeals officer or by the Chief Appeals Officer, an opportunity that does exist where an appeal goes to an appeals officer.

Page 224, fourth last line, insert following footnote after "social welfare code"

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164 **High Court, 21 December 2016.**

See also, to the same effect, *Petecel v Minister for Social Protection* [2019] IECA 25.

Page 225, insert before last paragraph:

In *M.D. v Minister for Social Protection* [2016] IEHC 70, (9 February 2016) HC, the same judge held that, having regard to the terms of s.186G of the Social Welfare (Consolidation) Act 2005, an applicant for domiciliary care allowance could not insist on a medical examination of her child as a deciding officer had no statutory power to call for a medical assessment of a child in respect of whom an application for domiciliary care allowance had been made (as distinct from a child in respect of whom the allowance was already payable).[165]

Finally in this context, in *McDonagh v Chief Appeals Officer* [2020] IECA 5, the Court of Appeal held that a refusal on the part of a deciding officer to revise an earlier decision of another deciding officer was itself neither a decision within the meaning of s.311(1) of the 2005 Act nor a revised decision within the meaning of s.301 of that Act and that, therefore, no appeal could be taken against such refusal.

Page 227, insert before last paragraph:

In *Kozinceva v Minister for Social Protection*,[166] the Court of Appeal, *per* Haughton J, held that requiring a homeless person to provide evidence that she was currently residing in a particular catchment area for the purpose of claiming Jobseeker's Allowance was *ultra vires* the Minister as this was not provided for by legislation and had the effect of unlawfully denying the applicant access to the administrative process for determining her claim for this allowance.[167]

[TOPIC] ***(a) Cases improving access to welfare payments***

Page 249, insert after line 23

(vii) Disqualification of prisoners for receipt of State Pension Contributory

In *PC v Minister for Social Protection*[168] a successful challenge was made to s.249(1)(b) of the 2005 Act which disqualifies, *inter alia*, persons imprisoned or detained in legal custody for receipt of, *inter*

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165 **The applicant did, however, success on other grounds in challenging the deciding officer's decision to refuse to pay this allowance.**

166 **[2020] IECA 7.**

167 **The Court did accept that in normal circumstances it might be reasonable to require an applicant to provide a current residential address but it also stated that this could not justify the imposition of a further residential requirement in respect of an applicant known to be homeless and who could not comply with the requirement.**

168 **[2017] IESC 63, [2017] 2 ILRM 369.**

alia, the State Pension (Contributory). The Supreme Court mistakenly took the view that by virtue of art.218 of the Social Welfare (Consolidated Claims, Payments and Control) Regulations 2007 [S.I. No.142 of 2007], this disqualification, in its application to the State Pension (Contributory),[169] applied only to persons detained pursuant to a conviction by a court of law. In fact, it also applied to claimants of this pension who were detained pursuant to a verdict of not guilty by reason of insanity under the Criminal Law (Insanity) Act 2006. Acting on this mistaken understanding of the law, the Supreme Court, _per_ MacMenamin J, held that s.249(1)(b) imposed an additional penalty on the plaintiff which, because it was not imposed by a court of law, constituted a breach of Arts.34 and 38 of the Constitution. However the Court did not make any order at that time and instead adjourned the matter to allow the parties to make submissions on the question of remedy. This was the focus of the second decision in this litigation, _C v Minister for Social Protection,_[170] the leading judgment in which was delivered by O'Donnell J. This is an important constitutional decision addressing the consequences that might follow from a declaration that a statutory provision is unconstitutional. For present purposes, it is sufficient to note that the Court made a declaration of invalidity in respect of, in the words of O'Donnell J at para.23 of his judgment,

> **that portion of s.249(1)(b) of the 2005 Act which disqualifies the appellant and persons in the same position from benefits while serving a lawful term of imprisonment in respect of a sentence imposed upon them…**

This formula implicitly addresses the mistaken assumption made by MacMenamin J about the scope of s.149(1)(b) as it clearly assumes that this sub-section applies to claimants other than convicted prisoners. Though O'Donnell J does not explicitly identify the portion of s.249(1)(b) that disqualifies convicted prisoners for receipt of benefits, it is arguable that this consequence flows from the use of the word "imprisonment" which carries with it connotations of punishment and that s.249(1)(b) should now simply read "is undergoing detention in legal custody".

(viii) Right to reside and habitual residence condition

The last issue in respect of which some welfare claimants have pursued successful litigation concerns the right of non-nationals to reside in the State. This issue arises in relation to social welfare entitlements in the context of the operation of the habitual residence condition restricting access to social assistance payments and child benefit. The background to these cases is that in 2004, in order to deter welfare tourism, a new pre-condition for claiming certain social

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169 The application of this disqualification to other welfare payments varies in scope depending on the payment in question and is not always confined to convicted prisoners.

170 **[2018] IESC 57.**

assistance payments and child benefit was introduced – now a claimant for such payments must show, among other things, that s/he has been 'habitually resident' in the State at the date of making the application and while s/he continues to claim the particular welfare payment. In deciding whether this condition is satisfied, the authorities must take into account: (a) the length and continuity of residence in the State or in any other particular country; (b) the length and purpose of any absence from the State; (c) the nature and pattern of the person's employment; (d) the person's main centre of interest; and (e) the future intentions of the person concerned as they appear from all the circumstances.[171] In 2009, it was further provided that a person with no right to reside in the State cannot claim that s/he was habitually resident here.[172] This requirement clearly prevents people in the process of seeking refugee status or subsidiary protection pursuant to the International Protection Act 2015 from claiming social welfare here prior to a determination in their favour. However this requirement has to be read in the light of EU law which confers a right to reside in other member States on Union citizens, subject to various conditions.[173] A number of cases have come before the courts concerning the operation of the habitual residence test, three of which cases led eventually to positive decisions for the claimant.

The first of these successful cases is *Gusa v Minister for Social Protection*[174] in which the Court of Justice of the EU ruled on a question referred by the Court of Appeal asking whether a self-employed EU national who had worked in Ireland but subsequently ceased economic activity because of an absence of work retained the status of self-employed person pursuant to Art.7(1)(a) of Directive 2004/38. Mr. Gusa had worked here for four years as a self-employed plasterer until October 2012 when he ceased to work because of the economic downturn. His application for Jobseeker's Allowance was turned down on the ground that he no longer had a right to reside in Ireland and therefore did not satisfy the habitual residence condition. In three earlier cases, *Solovastru v. Minister for Social Protection,*[175] *Hrisca v. Minister for Social Protection*[176] and *Genov v Minister for Social Protection,*[177] Dunne, White and Hedigan JJ had respectively held, *inter alia*, that self-employed EU nationals did not retain a right

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171 **Section 246(4) of the Social Welfare (Consolidation) Act 2005, as inserted by s.30 of the Social Welfare and Pensions Act 2007.**

172 **Section 246(5) of the Social Welfare (Consolidation) Act 2005, as inserted by s.15 of the Social Welfare and Pensions (No.2) Act 2009.**

173 **See Art.21 of the Treaty on the Functioning of the European Union and Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. This Directive is now transposed into Irish law by the European Communities (Free Movement of Persons) Regulations 2015 {S.I. No.548 of 2015]. For a very clear account of how EU law protects the social welfare entitlements of EU citizens in Ireland, see Shortall, "Social Welfare Rights of EU Citizens in Ireland" (2017) 20(1) IJEL 80.**

174 **Case C-442/16, decision dated 20 December 2017.**

175 **[2011] IEHC 532.**

176 ***Ex tempore*, 16 February 2016.**

177 **[2013] IEHC 340.**

to reside pursuant to Directive 2004/38 where they ceased to engage in economic activity in this jurisdiction because of a lack of work. However in *Gusa*, the CJEU ruled that Art.7(3)(b) of Directive 2004/38 did not distinguish between employed and self-employed person so that an EU national retained the status of self-employed person for the purposes of Art.7(1)(a) of Directive 2004/38 where, having lawfully resided in and worked as a self-employed person in another Member State for more than one year, he ceased that activity because of an absence of work and where he had registered as a jobseeker with the relevant employment office of the latter Member State.

In the second of these cases, *Tarola v Minister for Social Protection,*[178] White J held that an applicant who had a work record in the State of less than a year had not established a right of residence under Directive 2004/38/EC. However in April 2019, the CJEU held that a person who had worked for less than one year before becoming voluntarily unemployed did retain his status as worker for six months provided he had registered as a jobseeker – *Tarola v Minister for Social Protection*.[179]

[TOPIC] ***(b) Cases unsuccessful in court***

Page 253, replace the second paragraph with the following:

The Supreme Court decision in *Meagher v. Minister for Social Protection* [2015] IESC 4, (29 January 2015) SC, like Kingham, turned on whether the claimant had satisfied one element of the contribution conditions relating to the Old Age (Contributory) Pension (now called the State Contributory Pension). In this case, the plaintiff had to show that he had paid at least 260 social insurance contributions in order to be eligible for a half rate of the SCP. The background to the case was that on 6 April 1988, compulsory social insurance was extended to the self-employed. However those self-employed persons over the age of 56 and entering insurance for the first time on 6 April 1988 were ineligible to claim the SPC as a condition of eligibility was that a claimant had to have entered insurance before attaining the age of 56. In 1999, the law was amended for this group to enable them to claim a half-rate of SPC if they entered insurance before the age of 62 provided they paid 260 weekly social insurance contributions. The applicant was under 62 on 6 April 1988 and paid PRSI as a self-employed person from that date until 4 July 1992 and as an employed person from 1991 until 4 July 1992 when he reached pensionable age. A social welfare Appeals Officer held that in the applicant's retirement tax year, 6 April 1992 to 5 April 1993, the applicant had made 13 self-employment contributions and 13 contributions as an employee in respect of the 13 contribution weeks from 6 April to 4 July, when the applicant reached pensionable age. Critically, however, this left him short of having paid 260 social insurance contributions since entry

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178 [2016] IEHC 206

179 **Case C-483/17, decision dated 11 April 2019.**

into insurance in April 1988. The claimant argued that for self-employed persons aged 61 before 6 April 1988 who were concurrently employed contributors, the effect of s.21(1)(d) of the Social Welfare (Consolidation) Act 2005 and art.23 of the Social Welfare (Consolidated Contributions and Insurability) Regulations 1996 [S.I. No.321 of 1996] was that they were deemed to have paid self-employed contributions for the number of weeks in the contribution year 6 April 1992 to 5 April 1993 in respect of which employment contributions were not paid. This section provided, in relevant part, and with emphasis added:

> **Subject to regulations under section 22, where a self-employment contribution has been paid by a self-employed contributor of not less than the amount that he or she is liable to pay under paragraph (a) or the amount specified in paragraph (b), whichever is appropriate, the self-employed contributor *shall be regarded as having paid contributions for each contribution week in that contribution year.***

This would have enabled the applicant to claim that he had paid 52 contributions for the contribution year 1992/1993 and, therefore, that he had paid 260 contributions since entry into insurance in April 1998, thereby qualifying for the half-rate of SPC.

This argument was opposed by the Minister who contended, inter alia, that s.21(1)(d) could not apply to any person who ceased to be a self-employed contributor on reaching pensionable age which, in the applicant's case, was 4 July 1992.

Categorising the case as a question of statutory interpretation, the Supreme Court, per McKechnie J, said, at para.34 that principles of justice or fairness do not enter the exercise. As both parties agreed that s.21(1)(d) had to be given a literal interpretation, that was the approach taken by the Supreme Court, though McKechnie J noted that this was without deciding that such an approach was necessarily correct. Reading the provision in the context of other provisions of the Social Welfare Acts, the Supreme Court noted, at para.42, that once pensionable age was reached, a person ceased to be within the social insurance scheme and that any provision of the legislation that would have the effect of continuing beyond pensionable age the accrual of rights that otherwise can only occur before that date would have to be clear, precise and definite to that end. The Court indicated that s.21(1)(d) was designed as a conversion mechanism whereby the once off yearly payments made by self-employed contributors could be adapted to fit within a scheme of weekly insurance contributions and that it was not intended to confer substantive benefits. The Court also held that art.23 of the 1996 Regulations applied only to those persons who, at the date of its operation, remained under pensionable age with the result that it could not apply to the applicant after 4 July 1992 and therefore he could not rely on the formula contained therein

for calculating the number of self-employed contributions payable in a contribution year by a person who was concurrently a self-employed and employed contributor. Neither did Art.22 of the 1996 Regulations apply to the applicant as that provision dealt with self-employed contributors ceasing to be self-employed but who might at some future time become PRSI contributors, something that was not possible in the applicant's case given that he had reached pensionable age.

The Supreme Court considered that this outcome was very unsatisfactory, inasmuch as any self-employed person entering insurance for the first time and attaining the age of 61 before 5 April 1988 could not qualify for the SCP even though they had to pay self-employed contributions and yet no understandable reason had been given by the Minister for this state of affairs. However the applicant's contention would equally have involved some measure of anomaly or inconvenience in that it would mean giving a substantive meaning to s.21(1)(d) of the 2005 Act when this was not, in fact, intended by the Oireachtas. Balancing the competing interpretations of the law, McKechnie J said that the balance rested in upholding the submission fo the Minister so as to keep intact the integrity of the underlying scheme. He added, at para.56, that he could not find a "legally valid justification for judicially compounding a statutory mishap by adopting the alternative interpretive version which, when the Act is considered as a whole, is not open." McKechnie J concluded, however, by regretting that the Minister had not acted on a recommendation on this matter made by the Human Rights Commission.180

Both *Kingham* and *Meagher* involved very specific, technical provisions and although in both cases the provisions gave rise to issues of unfairness, neither court could resolve these issues, arguably because of the very determinate nature of the statutory provisions.

Page 254, insert after line 2:

Five judicial decisions dealing with the habitual residence requirement that appear unexceptional are *Douglas v. Minister for Social Protection,*[181] where Charleton J upheld a decision of the welfare authorities that the applicant, who had resided in the UK for most of her life and in Ireland for little more than ten weeks before she was refused Jobseeker's Allowance and Supplementary Welfare Allowance, was not

180 **In *The Self-Employed and the Old Age Contributory Pension: Report of an Enquiry into the Impact of Certain Provisions of Social Welfare Legislation on the Self-Employed* (2006), the former Human Rights Commission had recommended that persons in this situation be provided with a reduced pension.**

181 [2012] IEHC 27, (6 February 2012) HC.

habitually resident in Ireland;[182] ***Macovei v Minister for Social Protection,[183]*** **in which McDermott J upheld a decision refusing Jobseeker's Allowance to a Romanian national who applied for the allowance 26 days after entering the State in search of work;** ***Munteanu v Minister for Social Protection*****,[184] in which the Court of Appeal held that restricting entitlement to social assistance payments and Child Benefit to claimants with a legal right to reside in Ireland was compatible with EU law;[185]** ***Griga v Chief Appeals Officer,[186]*** **in which Noonan J upheld a decision of the CAO that the plaintiff did not have a right to reside in Ireland on the ground that he did not have sufficient resources to avoid becoming an unreasonable burden on social assistance for the purpose of Reg.6 of the European Communities (Free Movement of Persons) Regulations 2015 [S.I. No.548 of 2015] and** ***DN v Chief Appeals Officer,[187]*** **in which White J upheld the constitutionality of s.246(7)(b) and s.246(8)(c) of the Social Welfare (Consolidation) Act 2005 which, respectively, deny certain welfare payments to persons seeking subsidiary protection pursuant to the European Communities (Eligibility for Protection) Regulations 2006 and prevent the backdating of such payments to persons granted subsidiary protection in respect of the period prior to the granting of such protection. He also held that they were not contrary to EU Law.**

In a sixth case dealing with the habitual residence requirement, ***Michael v Minister for Social Protection*****,[188] the Supreme Court allowed an appeal from the decision of the Court of Appeal that s.246 of the 2005 Act was unconstitutional having regard to Art.40.1 insofar as it precluded the payment of child benefit in respect of an Irish citizen child resident in the State solely because the qualifying parent, the child's mother, did not have an unconditional entitlement to reside in the State as she was an asylum seeker. The Court of Appeal had held that depriving a citizen child of the benefit of Child Benefit in circumstances where her mother had not yet been afforded the right to reside in Ireland amounted to unconstitutional discrimination contrary to Art.40.1 against that citizen child when compared to other citizen children whose parents did enjoy**

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182 He also upheld a deciding officer's decision that the applicant was not available for work in circumstances where she had indicated to the authorities that she was only available for work that was compatible with her ability to pursue a third level diploma course entailing up to eleven hours of lectures a week.

183 **[2017] IEHC 593.**

184 **[2019] IECA 236.**

185 **Whyte and Cousins consider that the refusal of social assistance in this case was clearly required in light of the fact that the applicant was economically inactive since August 2013 (and therefore could not assert a right to reside under EU law) but they are critical of the court's view that a social assistance payment such as Jobseeker's Allowance cannot be regarded as a payment facilitating access to the labour market in respect of which EU jobseekers would have a right to equal treatment with Irish nationals – see "Social Welfare Law" in Annual Review of Irish Law 2019 (Round Hall, 2020) at p.000.**

186 **[2017] IEHC 602**

187 **[2017] IEHC 52, (16 February 2017) HC.**

188 [2019] IESC 82

such a right of residency. On appeal, the State contended that the Court of Appeal had erred in treating Child Benefit as a benefit to which the child is entitled whereas it is a benefit to which an adult is entitled in respect of a child in their care. In her judgment, with whom the other members of the Court agreed, Dunne J took the view that the Court of Appeal had proceeded on the basis that Child Benefit was an entitlement of the child rather than of its parent or guardian. She went on to state that this view was misconceived and that the person entitled to Child Benefit is the parent or guardian with whom the child normally resides. She then noted that all qualified persons habitually resident in the State are entitled to Child Benefit and that no differentiation is made in this regard between citizens, refugees or other persons granted permission to reside in the State or EU citizens entitled to reside in the country by virtue of EU law. Moreover the status of the child as a citizen was irrelevant in this context. For the purpose of determining whether a breach of Art.40.1 had occurred, a comparison had to be drawn among those entitled to Child Benefit and not among the children in respect of whom the payment was made, as the requirement of habitual residence applied to the claimants only. Consequently Dunne J rejected the conclusion of the Court of Appeal that the habitual residence test was intended to deter the making of opportunistic asylum claims. She also took the view that there were legitimate reasons for differentiating between persons who did not have a right to reside in Ireland and claimants of Child Benefit who did enjoy such a right as the State was entitled to impose restrictions on inward migration. In light of this, she held that there was no breach of Art.40.1.

In his judgment, O'Donnell J characterised the claim as one of indirect discrimination. However he clarified that he was not using the term "indirect discrimination" in its usual sense of "a claim that an apparently neutral provision bears disproportionately upon a particular protected group. Here, it is used in the sense that the rights holder is not the direct or proximate object of the legislative provision challenged, but rather is affected, if at all, indirectly."[189] He also ruled that the provisions of the 2005 Act, in differentiating between persons who are habitually resident in the State and those who are not, and further, between persons with a right to reside in the State and those who do not enjoy such a right, did not directly discriminate contrary to Art.40.1 as the distinctions were rational and "directed towards both the purpose for which benefit is made available to those habitually resident, and limitations upon it, which are clearly within the decision-making power of the Oireachtas."[190] He went on to indicate, *obiter*, that in the absence of evidence that the indirect effect of the legislation was intended or that the legislation was motivated by prejudice or stereotyping, a plaintiff might have to show something substantial, either in terms of the impact of the provision or the class of person affected, before the court would find the provision invalid by reason of indirect effect where the direct

189 **See para.17 of his judgment. O'Donnell J subsequently characterised this type of claim as one of "secondary discrimination" – para.19.**

190 ***Ibid*., para.18.**

object of the provision was both permissible and non-discriminatory. O'Donnell J accepted that legislative distinctions between citizens and non-citizens that bore more heavily on the latter would require careful scrutiny under Art.40.1. However the distinction complained of in the instant case was a distinction *between* citizens and such a distinction did not require *a priori* careful scrutiny. The basis for the distinction was the different immigration status of the respective parents of the citizen child in this case and the comparator citizen child. O'Donnell J held that this distinction was a permissible distinction based on rational grounds and was a legitimate State objective. The difference in treatment between the two citizen children was rationally related to, and consequent upon, that distinction and therefore was not contrary to Art.40.1.

The appellant also advanced arguments based on Art.28 of Council Directive 2004/83/EC which provides:

> **Member States shall ensure that beneficiaries of refugee or subsidiary protections receive in the Member State that has granted such status, the necessary social assistance, as provided to nationals of that Member State.**

The Court of Appeal had taken the view that this meant that a child was entitled to Child Benefit once she was granted refugee status. However Dunne J held that the benefit could only have become payable when the claimant, the mother, was given permission to reside in the State.[191] Finally, the appellant had relied on the decision of the CJEU in Case-34/09 *Zambrano v Office National de l'Emploi*[192] wherein the Court held that a member state could not refuse a right of residence to a third country national with dependent EU citizen children who are nationals of the member state and residing therein if such refusal would result in the children having to move out of the EU. However Dunne J held that as the appellant had not been forced to leave the State, she could not rely on *Zambrano* in order to claim the child benefit.

With the possible exception of the Supreme Court's interpretation of Art.28 of Council Directive 2004/83/EC, it is difficult to find fault with the Court's reasoning on any other aspect of this case. It is certainly the case that the person entitled to Child Benefit is the adult with whom the child resides and not the child. Moreover the Court's reasoning in relation to Art.40.1 has some echoes of that taken by the Supreme Court in *Fleming v Ireland*[193] which concerned an unsuccessful challenge to s.2 of the Criminal Law (Suicide) Act 1993. That provision made it an offence for a person, inter alia, to assist another in committing suicide. The plaintiff in this case argued that the section was unconstitutional

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191 **Though Cousins and Whyte argue thatArt.28 does not specify that the refugee must be the claimant of the relevant social assistance and that the CJEU might adopt a broader interpretation of Art.28 than that taken by the Supreme Court - Cousins and Whyte (2019), p.000.**

192 **C-34/09, [2011] 2 CMLR 1197.**

193 **[2013] IESC 19, [2013] 2 IR 417, [2013] 2 ILRM 73.**

because it discriminated against those persons with a disability who, because of their disability, needed assistance to implement a decision to end their lives. Classifying the claim as one of indirect discrimination, the Supreme Court accepted that such discrimination, motivated by a discriminatory intent or revealing a prejudice, would be unconstitutional. In the instant case, the Court upheld the validity of s.2 of the 1993 Act. In light of the *Michael* case, *Fleming* should perhaps be regarded as another instance of secondary discrimination rather than of indirect discrimination as that term is normally understood as s.2 applied directly to the person seeking to assist a suicide and only indirectly, or secondarily, to the person seeking to end his/her life. Both cases suggest that successful claims of unconstitutional secondary discrimination may be very difficult to sustain. Finally, it seems clear that *Zambrano* was not applicable on the facts of this case.

EU law also featured in another case, *Mannion v Chief Appeals Officer,*[194] in which Baker J held that EU Reg.883 of 2004 had no application to welfare entitlements derived exclusively from domestic law and, therefore, did not displace s.247 of the Social Welfare (Consolidation) Act 2005 which prohibits overlapping benefits in certain situations.

In *G v Department of Social Protection* [2015] IEHC 419, (7 July 2015) HC, O'Malley J held that a commissioning mother in a surrogacy situation could not rely on the Equal Status Acts to argue that the social welfare code discriminated unlawfully against her by not providing her with maternity benefit when such benefit is provided to birth and adoptive mothers. The judge reasoned that it was not open to her to make a finding of unlawfulness in relation to one corpus of legislation, the Social Welfare Acts, on the basis of the policy set out in another piece of legislation, the Equal Status Acts and that the contrary view would have the effect of elevating the Equal Status Acts to all-but constitutional level. An alternative argument leading to the same conclusion would be to say that s.14(a)(i) of the Equal Status Act 2000, which provides that the Equal Status Act does not prohibit the taking of any action required by or under, inter alia, any enactment, protects decisions on welfare entitlements made in accordance with the provisions of the statutory social welfare code. In the instant case, it could be argued that the Social Welfare Acts required the welfare authorities to pay maternity benefit to birth and adoptive mothers only and therefore to discriminate against a commissioning mother in a surrogacy situation. O'Malley J considered that s.14 was irrelevant to the Department's contention that it would be ultra vires the Minister to provide for an non-statutory payment to the commissioning mother as the Social Welfare Acts do not prohibit the payment of non-statutory payments. It is respectfully submitted, however, that this aspect of s.14 requires the focus to be

194 ***Ex tempore*, High Court, 20 January 2014.**

on what is *required* under a piece of legislation, not on what might be *prohibited* by such legislation. The current provisions of the Social Welfare Acts require the authorities to exclude commissioning mothers in surrogacy situations from the payment of statutory maternity benefit and therefore that would appear to be protected by s.14 against any challenge taken under the Equal Status Acts.

***Donnelly v Minister for Social Protection*[195] concerned a challenge to the refusal of the Minister to pay Domiciliary Care Allowance (DCA) to the first applicant in respect of his son, the second applicant, who was hospitalized for most of the first two years of his life. The ground for this decision was that, during this time, the second applicant was not resident with the first applicant at home. The first applicant had left employment in order to assist with the care for his son while the latter was in hospital, normally spending 8 to 12 hours per day for five days a week providing such care. The applicants argued that ss.186D(1) and 186E(1) of the Social Welfare (Consolidation) Act 2005, respectively requiring that the child in respect of whom DCA is claimed be resident at home with the applicant and prohibiting the payment of DCA to a child resident in an institution (subject to exceptions not applicable in the instant case), were unconstitutional because they infringed the guarantee of equality in Art.40.1 and were also incompatible with the European Convention on Human Rights Act 2003. Both arguments were dismissed by Binchy J. With regard to the constitutional argument, the judge noted that the statutory provisions enjoyed a particularly strong presumption of constitutionality, given that they concerned financial matters and that decisions on how to distribute the resources of the State were within the exclusive preserve of the Oireachtas. Binchy J accepted that any decision by the Oireachtas discriminating between different categories of person for the purpose of determining eligibility for social welfare (though not for the purpose of determining the extent of any welfare payment) would have to be proportionate as such a decision affected the constitutional right to equality. However in the instant case, he held that the denial of DCA to the first applicant was justified by the need to avoid potential duplication by the State of maintenance of the second applicant. Counsel for the applicants had also argued that the exclusion of the first applicant from the DCA scheme amounted to an unconstitutional legislative omission on the part of the Oireachtas. However Binchy J held that this argument could not be advanced as it was not a ground upon which leave to seek judicial review had been granted but that even if the argument could be advanced, this was not an accidental omission but, rather, a deliberate decision on the part of the Oireachtas with which the judiciary could not interfere.[196]**

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195 ***Donnelly v Minister for Social Protection* [2018] IEHC 421.**

196 **Binchy J went on to hold that the statutory provisions did not infringe the guarantee of equality in Art.14 of the European Convention on Human Rights, holding that where the Oireachtas endeavoured to strike a balance between the parent of a child with a disability resident in hospital and the parent of a similar child resident at**

Finally in this category is *Michael v Minister for Social Protection*,[197] where the Supreme Court allowed an appeal from the decision of the Court of Appeal that s.246 of the 2005 Act was unconstitutional having regard to Art.40.1 insofar as it precluded the payment of child benefit in respect of an Irish citizen child resident in the State solely because the qualifying parent, the child's mother, did not have an unconditional entitlement to reside in the State as she was an asylum seeker. The Court of Appeal had held that depriving a citizen child of the benefit of Child Benefit in circumstances where her mother had not yet been afforded the right to reside in Ireland amounted to unconstitutional discrimination contrary to Art.40.1 against that citizen child when compared to other citizen children whose parents did enjoy such a right of residency. On appeal, the State contended that the Court of Appeal had erred in treating Child Benefit as a benefit to which the child is entitled whereas it is a benefit to which an adult is entitled in respect of a child in their care. In her judgment, with whom the other members of the Court agreed, Dunne J took the view that the Court of Appeal had proceeded on the basis that Child Benefit was an entitlement of the child rather than of its parent or guardian. She went on to state that this view was misconceived and that the person entitled to Child Benefit is the parent or guardian with whom the child normally resides. She then noted that all qualified persons habitually resident in the State are entitled to Child Benefit and that no differentiation is made in this regard between citizens, refugees or other persons granted permission to reside in the State or EU citizens entitled to reside in the country by virtue of EU law. Moreover the status of the child as a citizen was irrelevant in this context. For the purpose of determining whether a breach of Art.40.1 had occurred, a comparison had to be drawn among those entitled to Child Benefit and not among the children in respect of whom the payment was made, as the requirement of habitual residence applied to the claimants only. Consequently Dunne J rejected the conclusion of the Court of Appeal that the habitual residence test was intended to deter the making of opportunistic asylum claims. She also took the view that there were legitimate reasons for differentiating between persons who did not have a right to reside in Ireland and claimants of Child Benefit who did enjoy such a right as the State was entitled to impose restrictions on inward migration. In light of this, she held that there was no breach of Art.40.1.

In his judgment, O'Donnell J characterised the claim as one of indirect discrimination. However he clarified that he was not using the term "indirect discrimination" in its usual sense of "a claim that an apparently neutral provision bears disproportionately upon a particular protected group. Here, it is used in the sense that the rights holder is not the direct or proximate object of the legislative provision

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home and did so in a reasonable, objective and proportionate manner, the measures adopted would not contravene the Convention.

197 [2019] IESC 82

challenged, but rather is affected, if at all, indirectly."[198] He also ruled that the provisions of the 2005 Act, in differentiating between persons who are habitually resident in the State and those who are not, and further, between persons with a right to reside in the State and those who do not enjoy such a right, did not directly discriminate contrary to Art.40.1 as the distinctions were rational and "directed towards both the purpose for which benefit is made available to those habitually resident, and limitations upon it, which are clearly within the decision-making power of the Oireachtas."[199] He went on to indicate, *obiter*, that in the absence of evidence that the indirect effect of the legislation was intended or that the legislation was motivated by prejudice or stereotyping, a plaintiff might have to show something substantial, either in terms of the impact of the provision or the class of person affected, before the court would find the provision invalid by reason of indirect effect where the direct object of the provision was both permissible and non-discriminatory. O'Donnell J accepted that legislative distinctions between citizens and non-citizens that bore more heavily on the latter would require careful scrutiny under Art.40.1. However the distinction complained of in the instant case was a distinction *between* citizens and such a distinction did not require *a priori* careful scrutiny. The basis for the distinction was the different immigration status of the respective parents of the citizen child in this case and the comparator citizen child. O'Donnell J held that this distinction was a permissible distinction based on rational grounds and was a legitimate State objective. The difference in treatment between the two citizen children was rationally related to, and consequent upon, that distinction and therefore was not contrary to Art.40.1.

The appellant also advanced arguments based on Art.28 of Council Directive 2004/83/EC which provides:

Member States shall ensure that beneficiaries of refugee or subsidiary protections receive in the Member State that has granted such status, the necessary social assistance, as provided to nationals of that Member State.

The Court of Appeal had taken the view that this meant that a child was entitled to Child Benefit once she was granted refugee status. However Dunne J held that the benefit could only have become payable when the claimant, the mother, was given permission to reside in the State.[200] Finally, the appellant had relied on the decision of the CJEU in Case-34/09 *Zambrano v Office National de l'Emploi*[201]

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198 **See para.17 of his judgment. O'Donnell J subsequently characterised this type of claim as one of "secondary discrimination" – para.19.**

199 ***Ibid*., para.18.**

200 **Though Cousins and Whyte argue thatArt.28 does not specify that the refugee must be the claimant of the relevant social assistance and that the CJEU might adopt a broader interpretation of Art.28 than that taken by the Supreme Court - Cousins and Whyte (2019), p.000.**

201 **Case C-34/09, [2011] 2 CMLR 1197.**

wherein the Court held that a member state could not refuse a right of residence to a third country national with dependent EU citizen children who are nationals of the member state and residing therein if such refusal would result in the children having to move out of the EU. However Dunne J held that as the appellant had not been forced to leave the State, she could not rely on *Zambrano* in order to claim the child benefit.

Page 260-2, replace material beginning with "Finally, there are three cases.." on bottom of p.260 and ending with "…its social welfare system" on fifth last line on p.262, with:

Finally, there are **three** cases concerning the application of a right to reside test and/or an habitual residence test to non-nationals claiming social assistance payments. **As already noted above,[202] in *Solovastru v. Minister for Social Protection,*[203] *Hrisca v. Minister for Social Protection*[204] and *Genov v Minister for Social Protection,*[205] Dunne, White and Hedigan JJ had respectively held, *inter alia*, that self-employed EU nationals who ceased to engage in economic activity in this jurisdiction because of a lack of work could not claim social assistance payments as they did not have a right to reside here and so could not satisfy the habitual residence condition applicable to such payments. That these decisions were questionable seems to be borne out by the fact that in another Irish case, referred to the CJEU by the Court of Appeal, *Gusa v Minister for Social Protection,*[206] the CJEU ruled that a self-employed person did, in fact, enjoy a right to reside under Art.7(1)(a) of Directive 2004/38 where, having lawfully resided in and worked as a self-employed person in another Member State for more than one year, he ceased that activity because of an absence of work and had registered as a jobseeker with the relevant employment office of the latter Member State.**

Page 277, insert after heading "5. Conclusion":

Before attempting to evaluate the impact of litigation on the protection of the interests of social welfare claimants, it is worth noting that, in this context, welfare claimants usually enjoy one advantage over other public interest claimants, namely, in relation to remedies. In the majority of cases, social welfare claimants seek to be provided with a social welfare payment. Where this is ordered by the courts, this does not usually impose any great administrative burden on the welfare authorities as they simply have to add the litigant to the roll of welfare claimants and do not have to devise a new welfare payment to meet his or her particular circumstances. This is in contrast to, e.g., litigation taken on behalf of children in care where the authorities had to put in

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202 **000.**
203 **[2011] IEHC 532.**
204 ***Ex tempore*, 16 February 2016.**
205 **[2013] IEHC 340.**
206 **Case C-442/16, decision dated 20 December 2017.**

place new facilities with provision for oversight in order to address the severe shortage of appropriate secure places for such children.

Ch.6 – Litigation and Children's Rights

Page 303, insert new footnote in third last line after "duration"

In *Child and Family Agency v Q* [2016] IEHC 335 (16 June 2016), O'Hanlon J emphasised the importance of detention having an educational and therapeutic rationale and stating that detention for protective purposes alone is not permitted – see para.119.

Page 304, add to n.102:

In *Child and Family Agency v Q* [2016] IEHC 335 (16 June 2016) HC, O'Hanlon J accepted, at para.99 of her judgment, the legal submissions of a guardian *ad litem* that the greater the level of deprivation of constitutional rights of a child in care, the more rigorous must be the application of the relevant procedures put in place by the authorities. She also held that the protective detention of a child must be subject to the safeguards of fair procedures and regular intensive welfare review – para.115.

Page 305, insert after quotation:

More recently, two conflicting High Court decisions have been handed down relating to the continued existence of the inherent jurisdiction of the High Court to make special care orders. In *Child and Family Agency v Q*,[207] the continued existence of this jurisdiction after the enactment of Art.42A was not called into question, O'Hanlon J noting that the High Court could not exercise this jurisdiction to order the protective detention of a minor if the therapeutic purpose of the detention is undermined by a lack of resources. She also indicated that in any *ex parte* application seeking the exercise of this inherent jurisdiction, the Court would have to be provided with documentation detailing, *inter alia*, an education plan, a therapeutic plan and a psychiatric treatment/intervention plan for the child. In *Child and Family Agency v O'L*,[208] however, O'Faherty J held that this inherent jurisdiction had been replaced by the provisions of Part IVA of the Child Care Act 1991, which Part was inserted by the Child Care (Amendment) Act 2011 and was commenced on 31 December 2017. However she also held that the High Court retained an inherent jurisdiction to review the circumstances of any child the subject of a statutory special care order after the expiry of such order and, if necessary, to retain the services of a guardian ad litem appointed under the special care order. Neither judgment, however, considered the possible impact of Art.42A.2.1 on the continued existence of the High Court's inherent jurisdiction to intervene on behalf

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207 **[2016] IEHC 335 (16 June 2016) HC, at para.130.**

208 [2019] IEHC 781.

of children in cases of failure of parental duty. As noted above, this jurisdiction was first asserted by Geoghegan J in *F.N. v. Minister for Education*[209] in the context of enforcing the State's constitutional duty towards children under the former Art.42.5 in exceptional cases of failure of parental duty. However Art.42.5 has since been replaced by Art.42A.2.1 and whereas Art.42.5 was self-executing, this is not the case with Art.42A.2.1 which clearly requires the State to act "by proportionate means as provided by law". *Quaere,* therefore, whether the High Court retains an inherent jurisdiction to defend the constitutional rights of children in cases of failure of parental duty or whether its jurisdiction in such cases must now be derived from legislation.

Page 305, line 14, insert new footnote after "children":

Though for an account of ongoing difficulties in relation to the provision of psychiatric services to young persons in care, see *Child and Family Agency v Q* [2016] IEHC 335 (16 June 2015) HC.

Page 333, add to n.191:

Note also that in *KRA v Minister for Justice and Equality* [2016] IEHC 289 (12 May 2016), Humphreys J suggested, obiter, at para.69, that there might be medical conditions such that meaningful or full education is not a practical possibility or that the cost of providing "full bespoke education to a particular child in particular circumstances imposes an extraordinary financial or operational burden on the State, well above that involved in the Sinnott case".

Page 333, add to n.192:

See, to the same effect, the comments of Rose *et al*., "Special and inclusive Education in the Republic of Ireland: Reviewing the literature from 2000 to 2009" (2010) 25 *European Journal of Special Needs Education* 359 at 363.

Page 334, add to n.193:

In June 2016, however, the Minister for Education announced a 7% increase in the number of SNAs followed by an allocation, in October 2016, of an additional 430 resource teachers to support children with special educational needs.

Ch.7 – Litigation and Travellers' Rights

Page 342, amend line 16 to read:

209 [1995] 1 IR 409; [1995] 2 ILRM 297.

The very strong case for Traveller ethnicity,[210] **eventually accepted by the State in 2017[211] was based on the fact that** Travellers have a distinct culture, characterised by a distinct spoken language…

Page 345, at to end of page:

However subsequent years witnessed a small but steady increase in the number of families on unauthorized sites to 459 families in 2017.[212]

Page 347, eighth last line, insert new footnote after "yards":

Worth noting in this context is a recent decision of the Court of Appeal of England and Wales in *London Borough of Bromley v Persons Unknown* [2020] EWCA Civ 12 upholding a High Court decision refusing to grant a *quia timet* injunction that would have amounted to a *de facto* boroughwide prohibition on unauthorised encampments on the ground that such an order would have been disproportionate.

Page 351, add to n.50:

In its Report to the Committee of Ministers on Complaint No.100/2013, European Roma Rights Centre (ERRC) v Ireland, 1 December 2015, the European Committee on Social Rights indicated, at paras.145-7, that the failure of s.10 of the 1992 Act to provide for prior consultation and the absence of legal aid resulted in a violation of Art.16 of the European Social Charter.

Page 352, add to n.52:

In December 2015, the European Committee of Social Rights found that the failure of this legislation to provide for prior consultation, adequate or any prior notice, limits on when evictions may take place and proposals for alternative accommodfation meant that Ireland was

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[210] See generally, Barnes, "Irish Travelling People" in Rehfisch (ed.) **Gypsies, Tinkers and other Travellers** (Academic Press, 1975) at p.231; McCann, Ó Síocháin and Ruane (eds.), **Irish Travellers, Culture and Ethnicity** (Belfast, 1994); MacLaughlin, **Travellers and Ireland: Whose Country, Whose History?** (Cork University Press, 1995); **Irish Human Rights Commission**, **Discussion Paper on Travellers as an Ethnic Minority under the Convention on the Elimination of Racial Discrimination** (2004); Keane, *"International Law and the Ethnicity of Irish Travellers",* 11 Washington & Lee Race & Ethnic Anc. L. J. 43 (2005); Hayes, **Irish Travellers: Representation and Realities** (Liffey Press, 2006), ch.4; Equality Authority, **Traveller Ethnicity: An Equality Authority Report** (2006).

[211] **See the statement made by An Taoiseach in Dáil Éireann on 1 March 2017 – Vol.941 Dáil Debates, col. 000. Though note that in *Mongans v Clare Co. Co.* [2017] IEHC 709, Eagar J held that this statement had no legal effect for the purpose of the proceedings before him.**

[212] **See Annual Estimate of Accommodation of Traveller Families 2017, available here - https://www.housing.gov.ie/sites/default/files/publications/files/2017_traveller_families_in_all_categories_of_accomodation.pdf (last consulted 12 April 2019).**

in breach of Art.16 of the European Social Charter - Report to the Committee of Ministers on Complaint No.100/2013, European Roma Rights Centre (ERRC) v Ireland, 1 December 2015 at paras.140-144. The Committee also indicated, in para.141, that the absence of legal aid for those threatened with eviction was a further problem here.

Page 360, add after first sentence in n.84:

by Baker J in *Mulhare v Cork Co. Co.* [2017] IEHC 288, by Meenan J in *Middleton v Carlow Co. Co.* [2017] IEHC 528 and by Allen J in *Clare Co. Co. v McDonagh* [2019] IEHC 662. See also *C v Galway Co. Co.* [2017] IEHC 784. The Court of Appeal in *Mulhare* – [2018] IECA 206 – also stated, at para.34, that the allocation of housing stock is not a matter for the courts unless there is a clear error in the decision-making process.

Page 366, add to n.114:

However in December 2015, the European Committee of Social Rights found that there was a violation of Art.16 of the European Social Charter as "not an insignificant number" of sites for Travellers were in an inadequate condition - Report to the Committee of Ministers on Complaint No.100/2013, European Roma Rights Centre (ERRC) v Ireland, 1 December 2015 at para.92.

Page 376, insert after first paragraph

In *Clare Co. Co. v McDonagh*,[213] Allen J held that determining the balance between Traveller specific accommodation and other accommodation provided by the plaintiff council under the Housing Acts was a matter that had been left by the Oireachtas to the discretion of housing authorities.[214] He also held that issues as to the quality or effectiveness of the consultation process under the 1998 Act were not justiciable.

Page 378, line 6, insert new footnote after "objection":

According to a report commissioned by the Housing Agency, Review of Funding for Traveller-Specific Accommodation and the Implementation of Traveller Accommodation Programmes (RSM, June 2017), those consulted for the research identified the planning process as "the most significant issue limiting the delivery of capital output under [Traveller Accommodation Programmes]." – see para.1.4.4. The Traveller Accommodation Expert Review (July 2019) recommended, *inter alia*, that local authority chief executives should be encouraged to use emergency powers to bypass problems with decision-making by elected members of local authorities relating to

213 **[2019] IEHC 662.**

214 **He also held that allegations of breaches of statutory duty on the part of the council were hopelessly vague, as were the reliefs claimed.**

Traveller accommodation, that the reserved functions of elected members in relation to proposals for Traveller accommodation be suspended and that provision should be made to enable proposals for Traveller-specific accommodation to go directly to An Bord Pleanála – see pp.36-7.

Ch.8 - Litigation and access to legal services

Page 409, insert footnote at end of first paragraph:

In *Conway v Ireland* [2009] IEHC 472, (21 October 2009) HC, Laffoy J also held, *inter alia*, that there was no constitutional right to professional assistance, both technical and legal, equivalent to that used by the National Roads Authority when planning and operating major road infrastructure. (At a subsequent stage in these proceedings, the Supreme Court considered whether there was a right to legal aid under the Aarhus Convention and the Public Participation Directives before holding that neither the Convention nor the Directives were applicable – [2017] IESC 13.)

Page 410, insert footnote at end of first paragraph

In *MM v The Relevant Circuit Court Judge* [2016] IEHC 756, Baker J noted, at para.18, that there was no rule or authority to support the proposition that all litigation concerning rights arising from the constitutional protection of the family, of children or of the bond between mother and child had to be funded by the State. Note, however, that in *Persona Digital Telephony v Minister for Public Enterprise* [2017] IESC 27, Clarke J, at para.2.6 of his judgment, tentatively raised the possibility that "in modern circumstances, it may be necessary to consider whether the right of access to the Court needs to be looked at on a broader basis which may, at least in some cases, require consideration of whether that right is, in practice, effective even though there may be no formal barrier to its exercise." Later in his judgment, at para.2.8.(e), he suggested that "it may well be the case that there has been a very material increase in the number and type of case where the undoubted right to run the case as a litigant in person might be argued not to present effective access to the Court in any meaningful sense." The language used here echoes that of the ECtHR in *Airey v Ireland* (1979-80) 1 EHRR 524 when it ruled that Ireland was in breach of Art.6 of the European Convention on Human Rights because Mrs. Airey did not enjoy an effective right of access to the courts in relation to her matrimonial case. The judge also indicated, at para.2.8.(g) that the "no foal, no fee" system may increasingly prove to be less effective in providing access to justice in practice and on this point he concluded, at para.2.9, that "there is at least an arguable case that the constitutional right of access to the court may include an entitlement that that right be effective, not just as a matter of law and form, but also in practice." In the earlier case of *Conway v Ireland* [2017] IESC 13, the Supreme Court, per Clarke J,

raised the possibility, at para.2.25, that the State might be obliged to provide legal aid in some cases taken falling within the scope of the Aarhus Convention 1998 and/or the Public Participation Directives (Directive 2011/92/EU), (though it cautioned that this did not necessarily give rise to directly effective rights – see para.2.29). More recently, in *A.C. v Cork University Hospital* [2019] IESC 73, O'Malley J in the Supreme Court suggested that the absence of legal aid in wardship matters might, in some circumstances, render the wardship process unfair though she was careful to say that this did not necessarily mean there was a constitutional right to legal aid in wardship cases – see paras.367-8 of her judgment.

Page 411, add to n.48

More recently, in *M.C. v Legal Aid Board* [2018] IECA 398, the Court of Appeal, *per* McGovern J, held that a prosecution taken pursuant to s.5 of the Courts (No.2) Act 1986, arising out of failure to comply with a District Court order dealing with the right of access to a child, could not be regarded as a civil case in respect of which legal aid could be provided under the 1995 Act and that the failure to provide civil legal aid in this case did not breach the applicant's constitutional or Convention rights. In *Child and Family Agency v A* [2020] IECA 52, the Court of Appeal held that the refusal of a High Court judge to award costs in favour of a legally aided party to High Court proceedings concerning the welfare of that party's child amounted to a clear disregard of s.33(2) of the 1995 Act.

Page 415, add to n.64:

Judicial oversight of decisions of District Judges on applications for criminal legal aid is restricted to applications for judicial review as s.2(2) of the 1962 Act provides that a decision of the District Court on such an application is final and not appealable.

Page 416, add to end of line 11"

and they have established that the right to legal aid in District Court proceedings encompasses the right to counsel.

Page 418, amend n.77 to read :

Followed in *Costigan v. Brady* [2004] IEHC 16, where Quirke J. upheld a decision to refuse criminal legal aid in circumstances in which the applicant was legally represented when applying to the District Judge for legal aid. **Quirke J also held that in judicial review proceedings, it was not the function of the High Court to consider the merits of the application made to the District Judge.** See also the similar decisions of Hanna J in *Tighe v. Haughton* [2011] IEHC 64, ***King v Coughlan*** **[2015] IEHC 300 and of Meenan J in *Karadag v D.P.P.* [2019] IEHC 422.**

Page 421, line 14, insert new footnote after "constitutional right":

In *Ward v Judge Reynolds* [2015] IEHC 783, (11 December 2015) HC, O'Malley J inferred from the reasoning in *Carmody* that a Circuit Court judge had the jurisdiction to grant a legal aid certificate for counsel in the case of an appeal from the District Court where this was, in the judge's view, essential in the interests of justice (though in the instant case, she held that the applicant had not sufficient standing to maintain his action).

Page 424, eighth last line, insert new footnote after "such right":

In 2009, a non-statutory scheme was introduced enabling the District Court to assign counsel to a defendant in certain cases.

Page 426, line 5, add:

while in a third, an article in the Criminal Justice (Legal Aid) (Amendment) Regulations was declared *ultra vires* because of its impact on the defendant's right to choose his solicitor.

Page 427, line 5, insert new footnote at end of sentence:

In *Fogarty v Governor of Portlaoise Prison* [020] IEHC 154, Gearty J cited *State (Royle) v Kelly* [1974] IR 259 in support of the proposition that the right to legal representation is not the right to a particular lawyer but as neither *The State (Freeman)* nor *Mulhall* are referred to, this comment may be regarded as having been made *per incuriam*. Gearty J also said that the right to legal representation cannot be vindicated unless there is a minimal level of cooperation by the defendant.

Page 427, line 5, add new paragraph:

In *Ward v Minister for Justice and Equality*,[215] Baker J held that art.3(1)(g) of the Criminal Justice (Legal Aid) (Amendment) Regulations denied the applicant his choice of solicitor and was therefore *ultra vires*. The article essentially provided that where a solicitor represented a number of co-accused at a trial on indictment in the Circuit Court, he would be paid in respect of his representation of one accused only. According to Baker J, the practical and legal effect of the provision was to deny the accused the right to legal aid in respect of a solicitor of his choice when that solicitor represented a co-accused. She further held that while s.10 of the 1962 Act empowered the Minster to prescribe the rate of fees to be paid under the scheme, it did not authorize him to remove entirely the right to a fee by fixing the rate at zero.

Page 427, add to line 14:

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215 [2017] IEHC 656.

However this decision now has to be read in light of the Supreme Court decision in *Magee v Farrell*[216] in which the Supreme Court, *per* Finnegan J, appeared to accept the correctness of Lardner J's decision in *Kirwan v Minister for Justice*[217] that a person seeking a review of his detention in the Central Mental Hospital pursuant to an order of the Central Criminal Court had a constitutional right to legal aid.[218]

Page 427, insert at end of section (c):

At the other end of the spectrum to *Felloni*, in *McEntaggart v D.P.P.*,[219] Binchy J held that a District Judge only has jurisdiction to entertain an application for legal aid when the defendant has been charged with an offence before the court. In the instant case, the proceedings against the applicant were struck out at the request of the prosecution before the accused was charged and so Binchy J held that the District Judge had no jurisdiction to grant legal aid.

(d) Miscellaneous decisions

Finally, the superior courts have handed down a number of miscellaneous decisions on other aspects of the criminal legal aid scheme. In *Horvath v District Judge Bryan Smyth* [2015] IEHC 16, (16 January 2015) HC, Kearns P. held that where a defendant was charged with two different offences arising from two different sets of circumstances, a District Judge did not have the authority to extend a legal aid certificate granted in respect of the first offence to cover the second offence. Instead, two certificates would have to be granted, though the State could then ask the court, pursuant to regulations 7(4) of the Criminal Justice (Legal Aid) Regulations 1965, to deem that only one certificate was granted to the defendant. This decision enables a defending solicitor in such a situation to make the case to court that she should be paid for both cases whereas if the original certificate was simply extended to cover the second offence this would have the result, as Kearns P. put it, "that the solicitor on record remains unpaid for the additional work done in respect of the second case, which can be quite substantial, even in the context of a seemingly uncomplicated set of proceedings."

In *O'Brien v District Judge Coughlan* [2015] IECA 245 (10 November 2015) CA, the Court of Appeal, *per* Ryan P, indicated, *inter alia*, that a District Judge may rule on an application for criminal legal aid at the conclusion of the case while in *King v Coghlan* [2015] IEHC 300 (14 May 2015) HC Hanna J held, on the facts, that a District Judge had properly dealt with an application for legal aid on the basis of the evidence before

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216 [2009] 4 IR 703, [2009] 2 ILRM 453.

217 [1994] 2 IR 417, [1994] 1 ILRM 444.

218 **As was also noted above, at p.000, in *McCann v Judges of Monaghan District Court* [2009] 4 IR 200; [2010] 1 ILRM 17, Laffoy J held that a debtor facing imprisonment for non-payment of a debt was entitled to legal aid.**

219 [2018] IEHC 230.

him. In *MW v Director of Public Prosecutions*,[220] Ní Raifeartaigh J held that a Circuit Court judge, in refusing to assign a second counsel pursuant to Reg.7(2) of the Criminal Justice (Legal Aid) Regulations 1965, as amended, which empowers a court to assign two counsel where, *inter alia*, the case against the accused presents exceptional difficulty, had focused too restrictively on the issue of complexity and had not sufficiently taken into account the wording of Reg.7 or the general principles governing the constitutional right to legal aid outlined by the Supreme Court in the cases of *State (Healy) v Donoghue,*[221] *Carmody v Minister for Justice, Equality and Law Reform*[222] and *Joyce v Brady*.[223]

Page 429, add to n.124:

In *Minister for Justice and Equality v O'Connor* [2017] IESC 21, (30 March 2017), the Supreme Court held that the absence of a statutory scheme of legal aid for persons arrested under a European Arrest Warrant did not infringe Art.40.1 of the Constitution.

Page 429, add new paragraph after line 2:

in *McDonagh v Legal Aid Board*,[224] Burns J rejected the Board's contention that the Legal Aid (Custody) Scheme applied only to cases where the applicant's liberty was at stake. Instead, she read s.4(iii) of the Scheme as also covering, *inter alia*, criminal matters where the relief of certiorari, mandamus or prohibition is sought. Finally, in *O'Shea v Legal Aid Board*,[225] Simon J held that, having regard to s.9 of the Scheme, it falls to the High Court to determine eligibility under the Scheme and that the role of the Legal Aid Board is confined to determining the amount of legal costs to be paid. He also held that, if he was incorrect on this point, the Board had, in any event, erred in holding that the applicant was not entitled to assistance under the Scheme as the proceedings brought by the applicant were judicial review proceedings concerning criminal matters or matters concerning concerning the applicant's liberty which are covered by s.4(iii) of the Scheme.

Ch. 10 – Access to Legal Services

[TOPIC] **1. Introduction**

Page 447, replace n.1 with:

220 [2017] IEHC 831.
221 [1976] IR 325.
222 [2010] 1 IR 635.
223 [2011] 3 IR 376.
224 [2018] IEHC 558.
225 [2019] IEHC 385.

The general rule is that the only persons enjoying a right of audience before the courts are the litigant when not legally represented or the litigant's legal team, though in rare and exceptional cases, the High Court may exercise its inherent jurisdiction to permit an unqualified advocate to represent a litigant - see *Coffey v. Tara Mines Ltd.* [2008] 1 IR 436, *In the Matter of Applications for Orders in Relation to Costs in Intended Proceedings by Coffey and others* [2013] IESC 11, (26 February 2013) SC, *Tougher v. Tougher's Oil Distributors Ltd.* [2014] IEHC 254, (15 May 2014) HC, *Pablo Star Media Ltd v EW Scripps Co*. [2015] IEHC 828, (21 December 2015) HC, *Knowles v Governor of Limerick Prison* [2016] IEHC 33, (25 January 2016) HC, *Walsh v Minister for Justice and Equality* [2016] IEHC 323, (13 June 2016) HC, *AIB Ltd. v Aqua Fresh Fish Ltd.* [2018] IESC 49, (18 October 2018) and *Munster Wireless Ltd v A Judge of the District Court* [2019] IECA 286. In *Kelly v McNicholas* [2018] IECA 319, the defendant who, due to illness, was physically incapable of presenting his own appeal, was given permission to have his son-in-law speak on his behalf while in *A.C. v Cork University Hospital* [2019] IESC 73, O'Malley J suggested, obiter, that in particular circumstances, the vindication of the constitutional right to liberty of a person unable to present their own case might justify permitting a lay person to speak on behalf of the detained person in *habeas corpus* proceedings, particularly if the lay person is a close relative of the detained person. (For an example of such a case, see *Fogarty v Governor of Portlaoise Prison* [2020] IEHC 154.) The courts may also permit a lay person, known as a "McKenzie friend", to assist a litigant by taking notes or making quiet suggestions during the hearing but not acting as an advocate - see *K v K* [2010] IEHC 417 (20 October 2010) HC, *Butler v Nelson & Co Solicitors* [2017] IECA 149 (10 May 2017), *Byrne v Ó Conbhuí* [2018] IECA 57 (9 March 2018) and *AIB Ltd. v Aqua Fresh Fish Ltd.* [2018] IESC 49, (18 October 2018. In *Swords v AIB plc* [2017] IEHC 496, (27 July 2017) HC, Eagar J expressed the view that neither EU law nor the European Convention on Human Rights obliged the court of a member or signatory State to permit a litigant to be represented by a person other than a duly qualified lawyer. Practice Direction HC72 issued by the Presidents of the Court of Appeal and of the High Court on 31 July 2017 stipulates that McKenzie Friends may provide moral support for litigants, take notes, help with case papers and quietly give advice on any aspect of the conduct of the case but that they may not address the court (unless the court, in exceptional circumstances, gives permission), receive any payment for their services, act as the litigant's agent in relation to the proceedings or manage the litigant's case outside court. In the course of his judgment in *O'Shea v Butler* [2017] IESC 65, MacMenamin J commented, at para.86-7, that a McKenzie friend cannot be permitted to act in a manner that defeats the interests of justice or that results in litigation being conducted in a vexatious manner or in breach of the rules of procedure governing the manner in which advocates may act in court. He added that a judge may take such measures as are necessary in the interests of fair procedures and justice, including

disqualifying a person from acting as a McKenzie friend or removing them from court altogether. The High Court has an inherent jurisdiction to order that a person may only act as a McKenzie Friend with the consent of the President of the High Court – see *Smith v Ireland* [2017] IEHC 642 – or to prohibit a person from ever acting as a McKenzie Friend – see *AIB Ltd v McQuaid* [2018] IEHC 516. In *Bond v Dunne* [2017] IEHC 646, Gilligan J held that the Rules of the Superior Courts did not permit a party to defend an action by counsel alone, acting without an instructing solicitor, and that this was also precluded by the Code of Conduct of the Bar of Ireland.

[TOPIC] **1. Free Legal Advice Centres Ltd. (FLAC) – *(f) Late 1980s to the present:***

Page 474, add to n.98:

In 2014, the organization produced a major research report highlighting flaws and gaps in the legal protection available to borrowers and users of financial services – Joyce and Stamp, Redressing the Imbalance: A study of legal protections available for consumers of credit and other financial services in Ireland (2014). That same year, FLAC made presentations to two different Joint Oireachtas Committees on different aspects of consumer protection.

Page 474, add to n.99:

while in 2014, it co-ordinated the preparation of a shadow report on Ireland's implementation of the International Covenant on Economic, Social and Cultural Rights – *Our Voice, Our Rights: A parallel report in response to Ireland's Third Report under the International Covenant on Economic, Social and Cultural Rights* (2014).

[TOPIC] **2. The law centre movement – *(c) Characteristics of law centres***

Page 484, add to n.132:

See also the following description of client-centred lawyering by Binder, Bergman and Price, cited by Chen and Cummings (2013) at p.290: "A client-centered conception assumes that most clients are capable of thinking through the complexities of their problems. In particular, it posits that clients are usually more expert than lawyers when it comes to the economic, social and psychological dimensions of problems. The client-centered conception also assumes that, because any solution to a problem involves a balancing of legal and nonlegal concerns, clients are usually better able than lawyers to choose satisfactory solutions. Moreover, the approach recognizes that clients' emotions are an inevitable and natural part of problems

and must be factored into the counseling process. Finally, the approach begins with the assumption that most clients seek to attain legally legitimate ends through lawful means."

Page 484, insert after line 27:

Binder, Bergman and Price have identified six attributes of client-centred lawyering,[226] summarized by Chen and Cummings as follows:

> **"The lawyer helps identify problems from a client's perspective; actively involves a client in the process of exploring potential solutions; encourages a client to make those decisions that are likely to have a substantial legal or nonlegal impact; provides advice based on a client's values; acknowledges a client's feelings and recognizes their importance; and repeatedly conveys a desire to help."[227]**

Chen and Cummings point out, however, that a client-centred approach may carry with it some risks, such as "a tension between promoting client interests and advancing a broader cause – as, for instance, when the client desires a negotiated outcome that does not create strong precedent for the movement."[228] They also highlight the difficulty of trying to avoid lawyer domination of the client and the resource implications of a client-centred approach which may be more time consuming than simply identifying the client's legal problem and presenting the client with a solution. In addition, some clients may prefer their lawyers to make decisions on their behalf and a further problem may arise if the lawyer considers, based on her professional expertise, that the client's decision is not in the client's best interests.[229]

Page 485, line 4, insert new footnote after "ways":

Chen and Cummings note that, in addition to using litigation, public interest lawyers in the US engage in mediation, community education, political lobbying and transactional work relating to economic development to promote community empowerment – Chen and Cummings (2013), p.307.

Page 485, insert at end of page:

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226 **Binder, Bergman and Price, Lawyers as Counselers: A Client-Centered Approach (1991) at pp.19-22.**

227 **Chen and Cummings (2013), p.291.**

228 ***Ibid.*, pp.293-4. See also their discussion of this problem at pp.279 et seq., and, in particular, pp.286-90.**

229 **For discussion of these points, see Chen and Cummings (2013), pp.321-5.**

However in addition to the challenges posed by client-centred lawyering,[230] this community lawyering raises further difficulties such as how to define the relevant community and identify its spokespersons and how to deal with a situation where the community does not speak with one voice.[231]

[TOPIC] **3. The Civil Legal Aid Act 1995**

Page 508, add to n.239:

It is also worth noting that legal aid before Mental Health Tribunals is provided by the Mental Health Commission pursuant to the Mental Health Act 2001.

Page 509, add to n.240:

In *EE v Child and Family Agency* [2016] IEHC 777 (14 November 2016), Humphreys J acknowledged, at para.107, that the absence of legal aid for a person accused of child sexual abuse who brings an appeal before an appeals panel established by the Child and Family Agency leaves that person in grave jeopardy but then stated that whether this amounted to a breach of the Constitution or the European Convention on Human Rights had to await a future case.

Page 510, add to n.247:

On 22 January 2016, the government introduced a new extra-statutory scheme of financial advice and legal aid and advice, called "Abhaile", for insolvent borrowers and for people with home mortgage arrears.

[TOPIC] **4. Evaluation of State provision of civil legal aid**

Page 513, add to n.268

In Conway v Ireland [2017] IESC 13, the Supreme Court, per Clarke J, questioned whether the statutory scheme of civil legal aid could meet Ireland's possible obligations under EU law to provide legal aid in at least some environmental cases.

Page 513, insert new footnote at end of line 11:

For an evaluation of the impact of the recession on the statutory scheme of civil legal aid and advice, see FLAC, Accessing Justice in Hard Times (February 2016). This report notes, inter alia, a growing demand since the start of the recession for FLAC's services in relation to housing, debt, employment and social welfare issues,

230 **See above, p.000.**

231 **See further discussion of these issues in Chen and Cummings (2013), pp.325-8.**

areas of the law that generally fall outside the scope of the State scheme. It also points out that though there was an increase of more than 70% in the demand for the services of the Legal Aid Board between 2006 and 2012, the Board's funding was reduced between 2008 and 2011 and as of 2013 was still below 2008 levels. It is also critical of the low level of allowable deductions in respect of accommodation costs and spousal maintenance used in calculating an applicant's disposable income for the purpose of the statutory scheme's means test and concludes that the Board's triage system for dealing with waiting lists cannot be implemented effectively because of a lack of resources.

Page 513, add to n.266:

In its review of the impact of the recession on the civil legal aid scheme, FLAC noted a growing demand for its own legal services in such areas as debt, housing, social welfare and employment but also noted that many of these issues fell outside the scope of the statutory scheme – see Accessing Justice in Hard Times (FLAC, 2016), ch.2. (As previously noted, however, on 22 January 2016, the government introduced "Abhaile", a new extra-statutory scheme of financial advice and legal aid and advice for insolvent borrowers and for people with home mortgage arrears.)

Page 513, add to n.267:

FLAC has also criticized the low level of allowable deductions in respect of accommodation costs and spousal maintenance used in calculating an applicant's disposable income for the purpose of the statutory scheme's means test – see Accessing Justice in Hard Times (FLAC, 2016), at p.16.

[TOPIC] SOCIAL HOUSING REGENERATION AND LEGAL AID

Page 514, line 20, insert new footnote after "funding":

See Nestor, "Public Interest Law and Regeneration: The Case of Ballymun Community Law Centre – Connecting the Dots through Community Economic Development" in Kenna (ed.), Contemporary Housing Issues in a Globalized World (Ashgate, 2014), at p.210. Nestor links the creation of Ballymun Community Law Centre to the emergence of Community Economic Development (CED) Law in the US, especially in the 1980s following the election of President Reagan and the increasing reliance on the market to address the issue of poverty. CED lawyers engage in transactional lawyering such as advising community groups, negotiating on their behalf and drafting documents in order to promote economic development in disadvantaged communities – see discussion in Chen and Cummings (2013), pp.233-48. While it is true that Ballymun

Community Law Centre and Limerick Community Law and Mediation, on the one hand, and CED Law, on the other, share common origins in urban regeneration schemes in their respective countries, neither of the Irish centres engage in this type of transactional lawyering.