IMMIGRANTS IN THE CRIMINAL COURTS

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INTRODUCTION

At the outset I wish to point out that it is not the function of the judiciary to make policy in the area of immigration. That function is clearly the preserve of the legislative and executive arms of government.

In preparing this paper I have set out to avoid repeating a series of anecdotes which are, as we all know, the common currency of Judges whenever they get together. I accept that telling stories or relaying an anecdote of an experience can be a useful method of communicating important information relating to our work. However, anecdotes have a limited use in that they cannot adequately map out the issues or set a fuller context for the topic of this discussion, namely, immigrants in the criminal courts.

Further, in discussing the issue of immigrants in the criminal courts one needs to avoid the generalised complaint about the lack of resources which might be deemed necessary to deal with such an issue. Although sufficient resources are always an issue when it comes to providing competent interpreters and adequate court time to hear "immigrant" cases, such cases invariably take longer to determine when compared with what might be described as home-grown cases. I will return to this element of the topic in a moment.

I. REVERSAL OF FORTUNES

The issues and problems which may be encountered when dealing with immigrants in the criminal courts might best be recognised by Magistrates and Judges by reflecting upon the general Irish experience of emigration to Britain in the 1950s, and

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how the criminal justice system in Britain dealt with many of its Irish immigrants in that era.

Crime rates in the Republic of Ireland fell to an all time low in the late 1950s and the daily average prison and borstal population fell below 400 in 1958. As a result, the Government embarked upon a programme of closing prisons! The drop in the crime rate and the prison population was accompanied by massive outflows of emigrants from Ireland during the same period. In the main, such emigrants moved to England and Scotland as well as North America. The most significant number emigrated to Britain.[1]

Before the admission of Ireland to the European Economic Community on 1st January 1973, it was not uncommon for the courts in the Republic to impose a sentence of imprisonment which would then be suspended provided the convicted person left the jurisdiction immediately or within days of the court order. Such an approach to sentencing was tantamount to transferring Irish social problems on to neighbouring jurisdictions such as Britain.[2] Besides the severe economic and social factors which favoured significant emigration from Ireland to Britain in the 1950s, there is a strong suspicion that certain sentencing practices by the courts may have played some role in divesting the State of "undesirables" or persons convicted of criminal offences. Mr. Matt Russell asserts that Ireland was relatively crime-free (at least from serious offences) in the 1950s, suggesting as a possible reason, that:

> An Irishman with criminal aspirations almost invariably leaves this country and goes to England, sometimes voluntary, sometimes on the advice of the police, or even of a District Justice.[3]

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[1] R.O.I. net emigration: In the period 1946-1961 528,334 of 2,955,107 emigrated or 17.9% of the population (allowing for births and deaths). Note: Age profile: 18-30 years old. CSO Statistical Abstract 1993.

[2] See Russell, *The Irish Delinquent in England*, *Studies* Vol. 53 (Spring 1964) and Ryan, "Irish Emigration to Britain Since World War II" in Kearney (ed.) *Migration: The Irish at Home and Abroad*, (Dublin: Wolfhound Press, 1990).

[3] Russell, *The Irish Delinquent in England*, *Studies* Vol. 53 (Spring 1964) p.146.

Undoubtedly a significant number of offenders emigrated to Britain during this period, thus giving the impression that the use of incarceration was in decline, which in absolute terms in respect of imprisonment it was.[4] While the statistical abstract for 1956 shows historically low levels of imprisonment in Ireland at 373 prisoners,[5] Kilcommins *et al* have cautioned against being lulled into believing that the country's use of incarceration was particularly low when they demonstrate the use of numerous other concomitant carcerative procedures not directly linked with the criminal justice system, such as industrial schools and mental hospitals.[6] Meanwhile, across the Irish sea the newly arrived immigrants show a distinctive presence in the criminal justice system in Britain. In this regard O'Connor states:

> Between 1950 and 1961 the contribution of the Irish to violent crime in London rose from 9.7% to 12.2%, yet they formed only 2-3% of the population of the metropolis. In the same decade, Irish born from the Republic counted for 12% of the prison population in England and Wales and Scotland yet only 2% of the population were Irish born.[7]

Shane Kilcommins and colleagues have estimated that in 1960 nearly 3,000 Irish born males were imprisoned in English and Welsh prisons compared to 1,700 comparable committals to prisons in the Republic of Ireland.[8] By way of further illustration of the transference of Irish social problems to Britain, in a survey of adult males convicted of robberies in London in 1950 and 1957 it emerged that 7% were Irish-born in 1950 and this rose to 20% in 1957, notwithstanding the fact that the same category of adult

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[4] Kilcommins, O'Donnell, O'Sullivan and Vaughan, *Crime, Punishment and the Search for Order in Ireland*, (Dublin: Institute of Public Administration, 2004).

[5] CSO Statistical Abstract 1956.

[6] Kilcommins *et al*, *Crime, Punishment and the Search for Order in Ireland*, (Dublin: Institute of Public Administration, 2004), pp. 74-75

[7] O'Connor, *The Irish in Britain***,** (London: Sidgwick and Jackson, 1972) p.137.

[8] Kilcommins *et al*, *op. cit*., p.63 and Ryan, "Irish Emigration to Britain Since World War II" in Kearney (ed.) *Migration: The Irish at Home and Abroad*, (Dublin: Wolfhound Press, 1990).

males born in the Republic of Ireland amounted to only 2% of the population of the city of London for the same period.[9] While no reliable data are available to substantiate the claim that the courts pursued a policy of enforced migration, by obliging a convicted person on pain of incarceration to "take the boat" to England, the frequency of offending and the significant application of custodial sentences for Irish convicted offenders suggests either an upsurge in offending on the part of such immigrants once they had landed in Britain, or alternatively a continuation of offending behaviour by the same group who had avoided either prosecutions or penalties by leaving the jurisdiction of Ireland. The explanation might also be found in Russell's suggestion that serious offending commenced only upon arrival in Britain. In seeking an explanation of the significant increase in convictions of Irish emigrants to Britain one needs to have regard also to sentencing practices in the Magistrate's and County Courts specifically towards Irish immigrants who fell foul of the law during this period.

If one accepts the view put forward by Matt Russell in 1964 that the upsurge in criminal offending by Irish immigrants only commenced when such persons landed in Britain, one needs to look at the possible reasons why this may have come about. No doubt the reasons are complex but the following may be identified as major contributing factors:

1. Young Irish immigrants to Britain for the first time experienced being away from home and freed from the constraining influence of family and neighbours.
2. The influence of religious or clerical control in Ireland no doubt was significantly stronger, particularly during this period.
3. The use of alcohol seems to be a particularly strong feature in criminal offending by Irish immigrants as identified by senior English police officers to Russell during this period.

[9] McClintock and Gibson, *Robbery in London*, (Home Office Research Unit, London: MacMillan, 1961).

4. Housing conditions were very poor for the entire population and particularly so in respect of immigrants.
5. Irish migration to Britain during this period was essentially driven by higher wages and this brought a new found wealth and increasing disposable income.

One other factor which may have contributed to the high level of Irish persons running foul of the law in Britain during this period may have been a tendency for the police to target these recent immigrant groups for special attention. This may have drawn them into the criminal justice system more rapidly than would otherwise be the case. At present one hears similar criticisms of the policing and the targeting of black communities. Clearly, if a certain group is consistently targeted by the police for special attention, one would expect to see such groups come before the courts more frequently. However, the results of the selectivity of policing must be distinguished from the results of criminal trials where guilt is actually proven. Consequently, the number of Irish immigrants ending up in prison during this period is a positive proof of the increase in criminal behaviour of Irish immigrants in Britain at that time.

It must be emphasised however that during this period the vast majority of Irish immigrants benefited materially as a result of their emigration to Britain and the British economy no doubt also benefited. However, the experience of those Irish immigrants who fell foul of the law in varying degrees is a useful reminder to us administering justice in Northern Ireland and the Republic of what it might mean to be an immigrant in our respective jurisdictions today.

II. THE BRIDGE TO THE PRESENT

Consider now and compare the recent Polish crime figures which show a significant drop in the crime rate in that jurisdiction. While crime rates in Ireland, Britain and Europe in general have fallen recently, the crime rates in Poland have dropped much more precipitously. How could this possibly have come about you might ask?

In Krakow, where the trend of falling crime rates is most prevalent, Mr. Piotr Kosmaty, Chief Prosecutor, said it is not the falling population (in part caused by emigration) that is causing the slide but the *type* of people who are emigrating.[10]

In Lithuania, which acceded to the EU on 1st May, 2004, the Centre for Crime Prevention reported that the first year of membership revealed a 2.5% drop in the crime rate, while in the preceding year there was an 8.8% increase in crime.[11]

Are we perhaps experiencing the results of the same migration pattern as the Irish experience in the 1950s only this time in reverse? There can be little doubt that crime rates among the immigrant communities, and in some communities more than others, has gone up significantly. This observation is based upon the proportion of foreign offenders appearing before the criminal courts in the Republic each day which, at a personal estimate, must be on average in the 15-20% range. The fall in crime figures in Poland may not be equally compensated by a corresponding increase in crime by the same offenders in these two jurisdictions. Remember the Irish pattern to Britain in the 1950s. Irish emigrants to Britain showed an accelerated propensity to commit offences once they migrated to that jurisdiction. I have already speculated as to the complex factors which may have given rise to this increased criminal behaviour. Are these factors any different for foreigners migrating at present into the two jurisdictions of Northern Ireland and the Republic of Ireland? While the Orthodox Church has seen a significant resurgence in the countries of the former Soviet Bloc since the end of Soviet rule and many African immigrants hail from countries with strong religious communities (*e.g.* Nigeria, from which almost 50% of African immigrants to Ireland originate[12]), the traditional hold of religion can hardly be seen to apply to these countries to the same extent as that pertaining in Ireland during the 1950s. Nor can the

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[10] See "Crime falls in Poland as criminals emigrating", the *Irish Examiner*, 19 August, 2006, which reported comments made by Mr. Kosmaty to the leading Polish newpaper *Gazeta Wyborcza*.

[11] Centre for Crime Prevention in Lithuania (CCPL) – Report (2006).

[12] CSO Principal Statistics: Persons usually resident and present in the State on Census Night classified by nationality and age group 2006. Available at www.cso.ie.

provision of housing be identified as a contributing factor. Housing today is far superior than it was for Irish migrants to Scotland and England in the decade after the Second World War. Patterns of heavy drinking are reasonably well established in the home countries prior to migration to Ireland. Are these factors not common to the previous Irish experience of emigration?:

1. The immigrant has a certain anonymity and detachment from the host community – a factor not unconnected with the profile of offenders.
2. The immigrant is regarded as "other than us" at first instance by the community and sometimes by the organs of State themselves. It is easier for Irish communities to define the immigrant as "deviating" from our norms and as a result he or she becomes "a deviant".
3. The break from family and the restraining community at home liberates the immigrant offender from the constraints that held him in check before he came to these shores.
4. The perception of wealth, when compared to the home country and the abundance of goods, present temptation which some simply cannot resist and shoplifting in some cases provides a source of revenue.

Why does the poor Moldovan asylum seeker steal a suit in Brown Thomas and not Penneys? It cannot simply be an issue of necessity.

III. ENGAGING THE IMMIGRANT IN THE CRIMINAL JUSTICE SYSTEM

A. Language and Communication

Quite recently the Courts Service in the Republic of Ireland entered into a contract with Lionbridge International to provide a single service of interpreters to the courts in the Republic. This contract provides for a minimum standard of interpretation skills to be provided and this is to be monitored by on-going quality control and review of the service provided. Heretofore, the

provision of interpreters had been an *ad hoc* arrangement organised by the local court offices. In general, the experience in the Cork area has been satisfactory but, on occasion, the service provided has fallen far short of the standard required to administer justice openly and fairly.

A persistent dilemma arises when the court cannot be sure if the accused has sufficient grasp of English to adequately understand the proceedings. In a simple matter such as driving without insurance, one can get by without too much difficulty. However in a case concerning theft, reasonably complex issues arise, such as the right of election and the disclosure of prosecution evidence prior to election. In such cases it is essential that an interpreter is provided, if there is any doubt at all about the ability of the accused to understand the proceedings in English. In presiding over such cases, one has the duty to conduct such trial fairly. Essentially the test must be – was the trial conducted fairly from the point of view of the particular accused? To proceed otherwise is to breach fundamental principles of constitutional and natural justice and also Article 6 of the European Convention on Human Rights. Moreover, even if the accused gives the impression of having a working knowledge of English – and one clearly cannot be sure of this by conducting a cursory examination – if a trial proceeds without an interpreter and it is established that the accused did not have sufficient knowledge of English, the proceedings are open to challenge by way of Judicial Review.

But make no mistake about it – a criminal trial or remand hearing where an interpreter is engaged is conducted in a different gear and related speed. Magistrates and Judges of the District Court who exercise a jurisdiction of a summary nature are by definition busy and are engaged in a high output of work. Proceedings which normally go through on fifth gear are suddenly conducted in second gear, if I might continue with the motoring analogy. A certain spontaneity which is a feature of the common law courts is lost as result of the necessity to conduct the proceedings in this stilted and disjunctive manner. The same difficulty presents when a complainant is a foreigner and does not have sufficient English. Cross-examination of the complainant must again be conducted at this slower pace.

B. Swearing in the Witness

Seven or eight years ago most of us saw no problem with requiring a Muslim to take the Koran in his hand as part of the oath-taking process. Little did we know. At this stage, hopefully we have taken on board the sensibilities of the Muslim communities by presenting the Koran in the designated box or container. As a result the witness is no longer actually obliged to handle the text itself.

C. Remands, Arraignments and Pleas

Courts of summary jurisdiction, in order to operate efficiently, require a significantly high level of pleas of guilty on the part of accused persons, as a matter of course,.

We are all familiar with occasional changes in the law, such as the introduction of the intoxilyser in drunk-driving cases in the Republic of Ireland, where a shift in pleas of not guilty may occur from time to time. If one ignores the issue of immigrants in the criminal justice system entirely – and simply reflects upon the effect of these shifts from pleas of guilty to pleas of not guilty – a court's system can be thrown out of equilibrium for a period of six months to a year, before matters settle down to a new level or revert back to the old level of activity, once the new provision has bedded down and the court's views on such matters become known. However, when dealing with accused persons from immigrant communities there appears to be a marked reluctance to plead guilty to offences which in the event are very easily proven and conclusively so.

Moreover, at the initial stages of charge and remand it is not at all uncommon for foreign accused persons to give false or misleading names and addresses even with the benefit of interpreters. This results in unnecessary and costly remands in custody to determine the true identity and addresses of the accused. Usually on the second remand such issues are sorted out and bail is granted. In the meantime the accused quite often loses his liberty and valuable prison places come under pressure.

Similarly, when asked to plead to a charge, even with the benefit of an interpreter and a legal aid solicitor, far fewer pleas of guilty seem to be forthcoming relative to the number of such pleas from Irish offenders. As a result, the immigrant offender

loses a significant discount on penalty when convicted on a plea of not guilty, as the prosecution is put on full proof of guilt and must present all the witnesses in court.

One can only speculate, at this stage, about this tendency not to engage with the criminal justice process at the remand stage, which frequently leads to unnecessary remands in custody. Can it be explained as an attempt by the immigrant offender to maintain anonymity and detach him or herself from the criminal justice process even though physically detained in court on a charge? Moreover, is the tendency not to co-operate or, if you like, "play the game" by engaging with the criminal justice process by offering an early plea of guilty, a result of a basic distrust of all authority whether here or in the home country of origin? These reasons offered are admittedly speculation on my part, but from where I am sitting I can definitely see a difference in the way some immigrant offenders engage, or rather refuse to engage, with the criminal justice process when compared with local offenders who may be more familiar with the system. Perhaps these differences can be explained by lack of familiarity with the criminal justice process itself, with the habits and practices, especially the sentencing practices, of the local Magistrate or District Court Judge and perhaps that indefinable matter, namely, the relationship between a solicitor and his client. It should be noted that most immigrant offenders receive independent legal advice from a legal aid solicitor (depending upon the seriousness of the offence and having regard to his means) who is usually forearmed with a disclosure of evidence order before the client is actually put on his election and plea. Of course, an accused person has every right to plead not guilty to a charge. But a system which requires a large number of pleas of guilty to operate in any way efficiently will find itself heading into difficulties if a certain level of guilty pleas are not forthcoming. The opportunity to plead to a lesser charge is also defeated if the accused maintains a steadfast denial of guilt to a charge which may be relatively easily proven. These practices tend to lengthen the case load of the courts.

The additional number of foreign persons accused of offences coming before the courts (which I estimate to be 10-20%) combined with the manner in which they choose to engage

or more likely not to engage with the criminal process, such as remands and pleading, heralds a permanent shift in the manner in which the court must now conduct its business. Court sittings are now longer as a result of this change and additional resources–yes indeed resources–are required to service this change of circumstances. It is useful also to note that other sectors in the society are equally challenged by cultural and language difficulties associated with immigration. In the educational sphere a significant number of supply teachers have been diverted to deal with children who have no English and must be educated in Ireland. In the medical field the diagnosis of illness and the provision of services is also significantly hampered by language and cultural differences. An immigrant charged with an offence who has little or no English is at a particular disadvantage when it comes to dealing with him within the criminal justice system. There is no element of choice involved when the accused is charged with an offence. He does not choose to be charged with the offence, but in order for justice to be done and seen to be done the court must go to extra lengths to ensure that he gets a fair trial, and that the trial is fair to him, by an objective standard.

IV. DISPOSAL OF CASES INVOLVING FOREIGN OFFENDERS

It is probable that the range of sentences involving foreign offenders may differ from the range of sentences available and used daily when dealing with local offenders. In particular, courts may be reluctant to put a non-English speaking offender on probation having regard to the difficulties experienced in court in seeking to engage and communicate with the offender through an interpreter. The courts in our two jurisdictions regularly place offenders on probation with the condition that the offender seeks treatment for addiction to alcohol or drugs. Anecdotally, the Garda in Cork tell me that certain Eastern European immigrants consume enormous quantities of spirits which may indicate a certain amount of problem drinking among these groups. That is not to conclude that generally the same communities are not very good or hard working men and women.

The Probation Service in the Republic is a scheme under constant pressure. It is not unknown for the Probation Service to

inform a court that there is a queue or waiting list for a number of months before a client can be seen. These difficulties inhibit the enthusiasm of the courts to refer offenders, except in the most obvious cases, to the Probation Service for assistance. As a result, the possibility of sending non-English speaking offenders to the Probation Service becomes even more remote.

Another area which may be even less viable a penalty to consider for non-English speaking offenders, as opposed to immigrant offenders as a whole, is the Community Service Order. Community Service Schemes involving five or six offenders may not be capable of accommodating a non-English speaking offender unless by specific arrangement with the Probation Service in advance. I suspect courts are reluctant to use this form of non-custodial sentence for non-English speaking offenders.

As a result of these difficulties or perceived difficulties, the range of penalties for the immigrant offender, particularly the non-English speaking offender, narrows significantly to either the traditional fine or imprisonment.

The suspended sentence is used quite widely in the Republic of Ireland. Surveys show 13.3% of all indictable offences disposed of summarily attract a suspended sentence[13] – 2% of all cases including summary cases in the District Court.[14] In Northern Ireland the total of offenders given a suspended sentence in 2004 was 7% and 26% in the Magistrates Court and the Crown Court respectively.[15] The suspended sentence has been used in the courts in the Republic of Ireland to allow an offender to return to his home country without serving an actual custodial sentence. In the case of *People (D.P.P.) v. Alexiou*[16] the defendant was a South African who had no connection with the Republic of

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[13] Needham, "The District Court – An Empirical Study of Criminal Jurisdiction", thesis submitted for LL.M degree, University College Galway, 1983. Quoted in Bacik, "The Practice of Sentencing in the Irish Courts", in O'Mahoney (ed.) *Criminal Justice in Ireland* (Institute of Public Administration, 2002) p.355.

[14] Rottman and Tormey (1985), "Criminal Justice System: An Overview" in Whitaker, *Report of the Committee of Enquiry into the Penal System*, (Dublin: Stationary Office, 1985).

[15] Reply by Mr. David Hanson to Lady Hermon, *Hansard*, H.C. 21 November 2006 col. 71W.

[16] [2003] 3 I.R. 513.

Ireland nor had he any right of residency or establishment under EU law. He was found in possession of in excess of €70,000 worth of drugs at Dublin Airport, which amount pursuant to Section 15(a) of the Misuse of Drugs Act 1977-1984 warranted a presumptive sentence of 10 years imprisonment minimum.

As I have already indicated, there is a very strong suspicion that this type of suspended sentence with the proviso that the accused leave the jurisdiction within days of the sentence was widely used in the 1950s by the District Court in the Republic of Ireland. The rise in criminal behaviour of Irish emigrants to Britain must be connected to this practice in some way and to some extent. As a result, section 7 of the Commonwealth Immigration Act 1962 in England and Wales provided for the deportation to the country of origin of offenders in excess of 17 years who were convicted of an offence punishable with imprisonment. Up to May 1963, of the total number of deportations recommended by the courts under the Act (624), over half were born in the Republic of Ireland (357). This is just an historical footnote but the reversal of migration into as opposed to from the jurisdiction of the Republic of Ireland and Northern Ireland may rekindle an interest in this type of court order – to oblige the offender under pain of a conditional custodial sentence to leave the jurisdiction.

The law has moved on and developed since the 1950s and 1960s regarding the freedom of the courts to make such orders today. The provisions of the European Convention on Human Rights, the obligations upon States to protect refugees given or seeking asylum, and the right of establishment under EU Treaties may limit the powers of the courts to suspend a custodial sentence in this manner. However, within the Republic of Ireland at least, there does seem to be a residual category of offenders whose cases may be disposed of in this way. One does need to caution against the use of the sanction which would offend against the protected categories outlined above. Otherwise such suspended sentence might be open to Judicial Review.

Thus we may observe a differential in sentencing when it comes to dealing with certain immigrant offenders.

CONCLUSION

It is a pious hope that the work of the criminal courts might revert to the slow-paced and familiar settings of practice and procedure which most of us remember either from our time as practitioners or from our earlier experiences on the Bench. Not only is immigration a major feature of change in our society at present but the continual flow of immigration into our jurisdictions is regarded as one of the most significant determining factors in the continued growth of our economies.[17] As Jim O'Leary of the Economics Department at NUI Maynooth put it:

> Now medium and long-term forecasts for the economy are predicated on the assumption that large-scale net immigration will continue for many years into the future.[18]

When any of these immigrants fall into criminal behaviour or convey their criminality to these jurisdictions, perhaps that is one of the costs which society must bear, and we as Magistrates and Judges are tasked and will continue to be tasked to deal with such offenders with all the attendant difficulties which I have outlined in this paper.

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[17] Beatty, Fegan and Marshall, "Long Term International Migration Estimates for Northern Ireland" 2004-2005,.Northern Ireland Statistics and Research Agency, 2006. Net annual immigration to Northern Ireland 2001 – 7,000 p.a., 2005 – 14,000 p.a. Age group – mainly 25-34 years.

[18] See "Take economic forecasts with a pich of salt", *Irish Times*, 5 January 2007.