THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE CRIMINAL JUSTICE SYSTEM

ÚNA NÍ RAIFEARTAIGH*

I. HOW IS THE CONVENTION MAKING ITS PRESENCE FELT TO A PRACTITIONER?

It is, of course, still very early days in terms of assessing the impact on barristers of the entry into force of the European Convention on Human Rights Act 2003 (hereinafter "the ECHR Act, 2003"). In most criminal trials, little appears to have changed and the arguments that arise are usually the familiar procedural and evidential arguments based on constitutional law. This is perhaps not surprising when one considers that Article 38.1 had resulted over the years in a considerable degree of 'constitutionalisation' of criminal justice procedures, the content of which is frequently equal to, and arguably sometimes greater than, the Convention procedural requirements. To the extent that Convention-based arguments have arisen in criminal trials, it seems to have been primarily in the Special Criminal Court, where 'membership' trials take place. Again, this is perhaps not surprising, because such trials feature special evidential provisions such the those permitting the drawing of inferences from silence or from failure to mention a fact in one's defence, and for the admissibility of the 'belief' evidence of the Chief Superintendent. Indeed, there has been a series of appeals to the Court of Criminal Appeal from the Special Criminal Court concerning such 'belief' evidence, grounded upon Convention arguments. One of these, albeit a pre-ECHR Act case, reached the Supreme Court and is discussed by Michael Farrell in his paper.[1]

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* B.C.L., B.L. Edited version of a paper delivered at the Annual Criminal Law Conference, *Rebalancing Criminal Justice in Ireland: a question of Rights*, University College Cork, 29 June 2007.

[1] See Farrell's treatment of *D.P.P. v. Martin Kelly* [2006] 3 I.R. 115 in "The Challenge of the ECHR" (2007) 2 *Judicial Studies Institute Journal* 76.

A second way in which the Convention is making its presence felt is through judicial review proceedings and plenary proceedings concerning statutory provisions and administrative or Executive decisions. Where formerly the Constitution was the primary or sole basis for the legislative challenge, legislation now tends to be challenged on a twin-track basis *i.e*. on both constitutional and Convention grounds. The cases involving challenges to the mandatory life sentence, discussed below, are an example of this type of twin-track approach. One of the challenges for practitioners in such cases is to master the nuances of the authorities in each system of law, together with the relationship between the two streams of authority. Further, the practitioner has to relate the substantive arguments to the precise, and limited, procedures and reliefs available in domestic law pursuant to the ECHR Act, as this is the only mechanism through which Convention concepts are filtered into domestic law.

Thirdly, the impact of the Convention can be seen when one considers the provisions of particular pieces of legislation, clearly enacted to forestall or respond to existing challenges based on Convention jurisprudence. The Criminal Law (Insanity) Act, 2006 and the Defence (Amendment) Act, 2007 are examples of this type of legislation.

The three topics chosen in this paper were chosen not only because I have had direct experience of them in my practice, but also because they are, perhaps, slightly less well recognised areas of Convention impact than other more well-known areas, such as the right to silence, equality of arms, disclosure of prosecution material, Article 2 'right to life' investigative inquiries, and so on. An examination of the impact of the Convention in the three chosen areas poses intriguing questions for practitioners and courts alike as to why it took the Convention to effect serious change in these areas, and why the Constitution was either less protective of certain rights, or was not tested to see how much protection was already available under the Constitution. They give the lie to the idea that the Convention has nothing to offer the Irish criminal justice system by way of additional human rights protection.

II. THE CRIMINAL LAW (INSANITY) ACT, 2006 AND ARTICLE 5(4) OF THE CONVENTION

The Criminal Law (Insanity) Act, 2006 subjected to a major overhaul the law relating to the criminal justice system and the mentally ill offender. Although reform of the criminal law of insanity and fitness to plead had been on the legislative backburner for many decades, it appears that it was the Convention that turned up the heat sufficiently to propel the Government and the Oireachtas into action.

Prior to the 2006 Act, the 'guilty but insane' verdict in a criminal trial was provided for by the Trial of Lunatics Act, 1883. This provided not only for the form of verdict in the event that an accused was found insane ('guilty but insane'), but also provided that any such person would be subject–*automatically*–to indefinite detention ("detention…until the pleasure of the Lord Lieutenant is known"). Following the new Executive arrangements following Irish independence, the decision concerning the release of such a detainee fell upon the Minister for Justice (although it was not confirmed until the Supreme Court decision in *Application of Gallagher*[2] that it was indeed the Executive who held this particular power). It is one of the astonishing features of the Irish criminal justice system that there was no legislative amendment of the 19th century law on insanity at all during the 20th century. More particularly, no statutory provision was made for a structured statutory system for the review of the detention of persons detained in mental hospitals, either following a verdict of 'guilty but insane', or as a result of a determination of 'unfitness to plead' in criminal proceedings. Further, the automatic nature of the order of indefinite hospitalisation following a verdict of 'guilty but insane' was left untouched; this, despite that the fact that even the most cursory examination of the law of insanity would have revealed a potential mismatch between, on the one hand, the breadth of the definition of insanity for the purpose of the insanity verdict (including the fact that it is only concerned with the accused's mental state at the precise time of the offence and not the time of the verdict), and, on the other, the automatic nature of the hospital

[2] [1991] 1 I.R. 31 (S.C.).

order that followed upon the special verdict. There were, of course, some developments in the courts (particularly relating to the concept of 'irresistible impulse'), and some developments, late in the century, in terms of review of detention. Nonetheless, the Oireachtas remained silent on the numerous issues that arose in such cases.

A. The Convention and the Mentally Ill Offender

The relevant Convention provisions are Article 5(1)(e), which permits deprivation of liberty in respect of "persons of unsound mind", and Article 5(4) which provides for procedures whereby the lawfulness of detention may be regularly reviewed. The seminal case in respect of Article 5(1)(e) is the *Winterwerp case*.[3] The applicant had been brought to a police station on suspicion of having stolen documents and was found naked in a police cell some time later. This triggered a committal to a mental hospital which lasted six weeks under an 'emergency' provision before his detention was formally examined. Against this backdrop, the Court established three simple but fundamental principles:

1. The presence of 'unsound mind' must be determined by objective medical evidence;
2. The mental illness must result in a condition making detention necessary for the protection of the patient or others; and
3. The mental condition must persist throughout the period of confinement.

The Court did, however, also say "emergency situations" could justify confinement without medical evidence, and that situation has been further addressed in cases such as *X. v. United Kingdom*[4] and *Varbanov v. Bulgaria*.[5]

In addition to the three *Winterwerp* criteria generated by Article 5(1)(e), the Court's interpretation of Article 5(4) has had a

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[3] *Winterwerp v. The Netherlands* (1979) 2 E.H.R.R. 387.
[4] (1981) 4 E.H.R.R. 188.
[5] European Court of Human Rights, unreported, 5 October 2000.

significant impact on the detention of the mentally ill within the criminal justice system. In *E v. Norway*,[6] it was held that the review body must be legally empowered to conduct a review of a sufficient scope to bear on all of the conditions which are essential to the lawfulness of the detention. In *X. v. United Kingdom*, a mental health review tribunal was held not to qualify as a 'court' for Article 5(4) purposes because it was limited to making advisory recommendations to the Home Secretary, and had no actual power of release. Further, it was held that *habeas corpus* proceedings were not sufficient to fulfil Article 5(4) requirements.

B. The Constitution and the Mentally Ill Offender

One might have expected the Constitution to have important things to say about the detention of the criminally insane, given the importance attached in the Irish jurisprudence to the value of liberty in other contexts, for example, arrest and detention for investigation. Yet it would appear that the automatic nature of the indefinite hospitalisation following from the insanity verdict was never challenged on constitutional grounds by any Irish detainee. Accordingly, there does not appear to have been any explicit analysis of the precise conditions that might be required under the constitutional liberty guarantee before a person might be detained in a secure mental hospital, that is to say, there was no analysis of the constitutional preconditions to the *commencement* of such detention.

Nonetheless, during the 1990s, there were a number of challenges by mental hospital detainees to the *continuance* of their detention. As regards the 'guilty but insane' verdict specifically, John Gallagher's attempts to be released from the Central Mental Hospital led to some clarification of the constitutional standards surrounding the review of such detention. By this stage, the Minister for Justice had put in place various non-statutory advisory committees to assist her with an analysis of the available medical and other information concerning a 'guilty but insane' detainee, of whom John Gallagher was one. In

[6] (1990) 17 E.H.R.R. 30.

Application of Gallagher (No. 2),[7] the applicant brought proceedings pursuant to Article 40.4.2 of the Constitution in respect of his continuing detention in the Central Mental Hospital. It may be noted that his primary ground of challenge to his detention was that his detention was unlawful as the Minister had failed to address and decide the central issue in relation to his application for release, namely whether he was suffering from any mental disorder warranting his continued detention in the public or private interest. It was further submitted on his behalf that the procedures adopted by the Minister were flawed and unfair insofar as she had regard to documentation and advice which were not disclosed to the applicant and on which the applicant was not given the opportunity to comment. In the particular circumstances of the case, the applicant's case failed; it was held that Minister's decision to implement a programme of supervised outings rather than outright release was consistent with the evidence before her and not unreasonable. Further, it was held that there was no evidence that the Minister had acted other than in accordance with fair procedures. The one criticism made by the Court related to the delay in reaching a decision on the applicant's application for review, although this did not result in his release from detention.

Interestingly, the appropriate principles identified by the Court are similar to, although not identical to, Convention principles. A divisional High Court (Geoghegan, Laffoy and Kelly JJ.) held, *inter alia*, that:

1. The function of the Minister in adjudicating on an application for release such as arose in this case must be performed in a quasi-judicial manner having regard to fair procedures and due regard to principles of natural and constitutional justice;

2. In considering an application for release by a person in the position of the applicant, the task was to determine whether by reason of mental ill-health the person currently constituted such a risk to the public or to a section of the public or to himself that he should be detained;

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[7] [1996] 3 I.R. 10 (H.C.).

3. The foundation of such a determination was the evidence of experts such as psychiatrists and psychologists as to the current clinical condition of the person;

4. That the detention pursuant to section 2(2) of the 1883 Act was permitted only for so long as was necessary to achieve the objective of the provision; therefore if on consideration of an application for release from such detention, a relaxation of total deprivation of liberty was indicated for a limited purpose, the relaxation put in train must be proportionate to that purpose.

5. The Minister was obliged to keep the applicant's position under review and any failure to do so would be susceptible to judicial review.

Although the Gallagher decision concerned the justification for the *continuance* of detention rather than its *commencement*, it would seem to follow logically that the same principles would apply to initial hospitalisation; therefore, that the *automatic* nature of the detention following a verdict of 'guilty but insane' might have been suspect under Irish constitutional principles. However, to my knowledge, this was never put to the test and, certainly, no separate inquiry as to the necessity for detention appears to have been conducted by any trial court following a guilty but insane verdict.

A decision on the civil rather than criminal side of detention on ground of mental illness ultimately took the European route. Sean Croke brought an application pursuant to Article 40.4.2 of the Constitution as to the lawfulness of his detention in the Central Mental Hospital, he having originally been detained under the civil commitment procedures.[8] The High Court (Budd J.) was of the view that section 172 of the Mental Treatment Act 1945 was invalid having regard to the provisions of the Constitution and stated a case to the Supreme Court. The Supreme Court upheld the constitutionality of the relevant statutory provisions. Again, many of the basic principles articulated by the Court were not dissimilar to Convention principles. However, the Supreme

[8] See *Croke v. Smith* [1998] 1 I.R. 101 (S.C.).

Court also held that the detention of a patient did not require automatic review by an independent tribunal. It was this aspect of matters that led the State to settle the proceedings brought by Mr. Croke to the European Court of Human Rights pursuant to Article 5(4) of the Convention,[9] relying on the Convention right to independent and automatic review prior to or immediately after his detention and to periodic, independent and automatic review of his detention thereafter, pursuant to Article 5(4). The Court's judgment striking out the action records that it was a term of the friendly settlement reached that the State acknowledged the applicant's "legitimate concerns in relation to the absence of an independent formal review of his detention under the Mental Health Acts".

C. The key features of the Criminal Law Insanity Act, 2006

1. Ensuring there is a demonstrable necessity for detention before detention is imposed

An important theme in the Criminal Law (Insanity) Act, 2006 is that only those persons who *require* detention should actually be subjected to detention. Thus, for example, where a person is found 'not guilty by reason of insanity', he is no longer automatically *assumed* to require hospitalisation. Rather, he must fulfil certain criteria before the hospital order is made. Unfortunately, however, the manner in which this is dealt with in the Act is quite cumbersome and far from transparent. The Act employs two definitions of 'mental disorder'. This is supposed to distinguish between those suffering mental illness who *do not* require detention and those suffering mental illness who *do* require detention. The mechanism by which the two categories are distinguished from each other is as follows. The first category of persons is captured in the concept of 'mental disorder' *simpliciter* as provided for in the definition section of the Act, section 1, which defines 'mental disorder' as "mental illness, mental disability, dementia or any disease of the mind but does

[9] *Croke v. Ireland* European Court of Human Rights, unreported, 21 December 2000.

not include intoxication". The second category of persons (*i.e.* those requiring detention) is captured by the Act's use of the phrase "mental disorder within the meaning of the Act of 2001". The Mental Health Act 2001 defines 'mental disorder' as:

> mental illness, severe dementia or significant intellectual disability where—
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> *(a)* because of the illness, disability or dementia, there is a serious likelihood of the person concerned causing immediate and serious harm to himself or herself or to other persons, or
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> *(b)* (i) because of the severity of the illness, disability or dementia, the judgment of the person concerned is so impaired that failure to admit the person to an approved centre would be likely to lead to a serious deterioration in his or her condition or would prevent the administration of appropriate treatment that could be given only by such admission, and
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> (ii) the reception, detention and treatment of the person concerned in an approved centre would be likely to benefit or alleviate the condition of that person to a material extent.

The differences between 'mental disorder' *simpliciter* and 'mental disorder within the meaning of the 2001 Act' should therefore be noted. The latter category refers to those who, in addition to suffering from a mental disorder, may cause 'immediate and serious harm' to themselves or to other persons; *or* for whom (condensing the longer description) treatment in an approved would be 'useful'. It may be noted that the 'serious harm' and 'treatment' criteria are alternative, and not cumulative.

(i) Not guilty by reason of insanity and detention

The consequences of this distinction between categories of 'mental disorder' used in the Act can be seen in relation to the 'not guilty by reason of insanity' verdict pursuant to section 5 of

the Act. This special verdict should be returned where the accused falls within the criteria of insanity set out in section 5(1). However, only if the person satisfies the additional criteria may the court commit the person to a mental hospital pursuant to section 5(2); these criteria being that the person is suffering from a mental disorder within the meaning of the Act of 2001 *and* is in need of in-patient care or treatment in a designated centre. Because of the alternative criteria of the 2001 definition, noted above ('serious harm' or 'treatment'), this means that a person may be committed to a designated centre after a verdict of not guilty by reason of insanity even if he or she poses no risk of serious harm. A question which may be posed, therefore, is whether this complies with the *Winterwerp*/Convention requirement that the mental illness must result in a condition 'making detention necessary for the protection of the patient or others'.

(ii) Unfitness to plead and detention

The distinction between the two categories of person suffering from mental disorder is similarly reflected in the fitness to plead provisions. Accordingly, when a decision has been reached that an accused is unfit to plead, whether by the District Court or a higher court, the accused may only be committed to a designated centre for *in-patient treatment* if he is suffering from a "mental disorder within the meaning of the 2001 Act". There is also an intermediate position, which is that the court may make an order for *out-patient* treatment if he is suffering from a "mental disorder within the meaning of the 2001 Act". However, if he is merely suffering from a 'mental disorder' *simpliciter*, no order may be made other than the *adjournment* of the proceedings. This, unfortunately, is not explicitly stated but emerges from an examination of the totality of the provisions, which are as follows:

- There is a District Court power to adjourn proceedings and commit to hospital for in-patient treatment upon a finding of unfitness to plead and that the person has a mental disorder within the meaning of the 2001 Act and

that he is in need of in-patient care or treatment in a designated centre: Section 4(3)(b)(i).

- There is a District Court power to adjourn proceedings and make an order for out-patient treatment upon a finding of unfitness to plead, that the person has a mental disorder within the meaning of the 2001 Act and that he is in need of out-patient care in a designated centre: Section 4(3)(b).

- As regards the District Court and other cases of unfitness to plead: there is no specific provision, and so apparently only Section 4(3)(b) applies *i.e*. the Court may adjourn the proceedings but make no other order.

- The court of trial has the power to adjourn proceedings and commit to hospital for in-patient treatment upon a finding of unfitness to plead, that the person has a mental disorder within the meaning of the 2001 Act and that he is in need of in-patient care or treatment in a designated centre: Section 4(5)(c)(i).

- The court of trial has the power to adjourn proceedings and make an order for out-patient treatment upon a finding of unfitness to plead, that the person has mental disorder within meaning of 2001 Act and that he is in need of out-patient care of treatment: Section 4(5)(c)(ii).

- As regards the court of trial and other cases of unfitness to plead; there is no specific provision and so apparently only section 4(5)(c) applies *i.e*. the Court may adjourn the proceedings but make no other order.

It is clear, therefore, that, as with the guilty but insane verdict, the intention was to ensure that no person would be committed on a long-term basis to a mental hospital unless such detention was necessary; and, under the scheme of the Act, such detention can only be necessary when the person requires in-patient treatment would be useful. Again, given that a person may be detained without there being a risk of 'serious harm', one

wonders whether this is compatible with the *Winterwerp* criteria. Also, the provisions are, perhaps, somewhat open-ended as to what should happen in a case where the person does not require treatment of any kind but has been found unfit to plead; there does not appear to be any provision for bringing proceedings to an end at any stage.

2. The 2006 Act and the principle of periodic review

Perhaps the key area where the Act showed the imprint of the Convention was in the establishment of a new body known as the Mental Health (Criminal Law) Review Board.[10] This is an independent body with the power to review the detention of a person detained in a 'designated centre'. Key to the operation of this body are the following features;

(a) its independence;

(b) that it has the power to make an order "whether for [a person's] further detention, care or treatment in a designated centre or for his or her discharge whether unconditionally or subject to conditions for out-patient treatment or supervision or both"; and

(c) that detention is at fixed intervals of not less than 6 months, and there are additional mechanisms whereby the person's detention may come under review of the Board.

These features all reflect Convention requirements concerning the nature of a review body within the meaning of 'court' for Article 5(4) purposes, as well as the frequency of the review required.

3. Section 4(6) 2006 Act and short-term detention for assessment

A point that may arise in the future is the compatibility of Section 4(6) of the Act with the Convention. Section 4(6) concerns short-term remands to a mental hospital for the purposes of assessment. Without going into unnecessary detail in this

[10] Sections 11, 12, and 13 in particular, together with Schedule 1.

paper, it may be said that because section 4(6) does not explicitly incorporate Convention-compliant principles, there is arguably a danger that a court, interpreting the section literally, might violate those principles. However, it is submitted that it is possible to interpret the sub-section in a manner compatible with the Convention principles; and, of course, such an approach is required under section 2 of the European Convention on Human Rights Act, 2003.

4. Facilities on the ground

Other difficulties of a practical nature remain. A number of cases pending before the High Court raise the questions concerning persons who originally required secure detention, but have become suitable for 'step-down' accommodation. Problems in locating suitable alternative accommodation for a person in such a situation featured in the case of *Johnson v. United Kingdom*.[11] The Court made it clear that, while the national authorities must be given a certain latitude in assessing the risk posed by such a person, once a decision had been reached that conditional release (to reside in a hostel) was the appropriate form of accommodation for the person, the onus was on the authorities to ensure that such a hostel place was available. In that case, it was held that there was a breach of Article 5(1) where there had been a delay of four years in releasing the applicant, primarily because of the non-availability of any accommodation alternative to a closed detention facility. It is interesting to note that while section 13 enables the Review Board to impose conditions upon a patient who is discharged, there is no mechanism for enforcing any such conditions. In contrast, section 14, which permits the Minister to consent to Temporary Release of a patient by the clinical director of a designated centre subject to conditions, provides clear mechanisms for the steps to be taken if there is breach of conditions by the patient. If section 14 is used, however, the person seems to pass out of the review jurisdiction of the Review Board as he is no longer in 'detention'. Questions also remain as to the relationship between sections 13 and 14:

[11] (1999) 27 E.H.R.R. 296.

can the Minister by-pass the Review Board's views by using the Temporary Release power? And can the Temporary Release power be used for long-term discharge to a high support hostel?

III. THE CONVENTION AND LIFE SENTENCES

There is a considerable volume of jurisprudence from the European Court concerning the phenomenon of life sentences as they operate in the UK. This resulted in substantial changes to the system at a domestic level in that jurisdiction. As a result, it is probably not surprising that a number of Irish prisoners have brought challenges to the mandatory life sentences imposed upon them. Indeed, a report of the (Irish) Human Rights Commission came to the conclusion that the system under which mandatory life sentences are currently administered in this jurisdiction might well violate the Convention requirements. However, two recent decisions of the High Court, discussed below, have upheld the current regime of imposition and administration of the mandatory life sentence for murder. Before examining these decisions, it may be helpful to consider the Convention jurisprudence that was raised in those cases.

As we have seen above regarding the detention of persons of 'unsound mind', Article 5(4) of the Convention imposes exacting standards in relation to the review of certain types of detention. The Court has interpreted Article 5(4) as requiring these standards in respect of *any detention that is based upon a rationale that is susceptible to change and therefore in need of review*. Article 5(4) does not usually apply to sentences of imprisonment imposed in respect of criminal offences, because detention in those cases is connected with the conviction and has a fixed punitive rationale. However, Article 5(4) can impact upon a sentence of imprisonment if the sentence is wholly or partly based on a preventive detention rationale. The reason for this is that the ground for detention – the continued risk posed by the offender – is susceptible to change and therefore must be kept under review.

This explains the result in a number of important Convention cases in which domestic UK arrangements concerning various kinds of life sentence were held to be

incompatible with Article 5(4) of the Convention. The European Court has, in addition, interpreted Article 6 to strike down the power previously held by the UK Executive of setting the tariff in life sentence cases. This is essentially on a 'separation of powers' type approach, namely that the setting of the tariff is an aspect of the sentencing exercise which can only be carried out by the judicial power.

The application of Article 5(4) ECHR to preventive detention commenced with the case of *De Wilde Ooms and Versyp v. Belgium*.[12] In this case, the Court held that certain sentences of 'preventive detention', imposed by magistrates in cases of vagrancy and begging, were in violation of Article 5(4). The Court clarified the meaning of the term 'court' in Article 5(4) as being a concept more flexible than a judicial body in the full sense, but nonetheless requiring certain minimum characteristics of independence and decision-making. Importantly, the Court also made it clear that Article 5(4) would not normally apply to deprivation of liberty arising under a sentence of imprisonment for a criminal offence, as the 'review' required under Article 5(4) here would 'incorporated' into the original sentencing decision.

What Article 5(4) is therefore primarily concerned with is the review of deprivations of liberty imposed by an administrative body and in situations other than those involving a sentence of imprisonment following conviction. In *Van Droogenbroeck v. Belgium*,[13] the applicant received a sentence which incorporated, in part, a preventive detention element after the expiration of two years. The Court held that Article 5(4) may render an initially lawful detention unlawful, if the detention ceases to be based on reasons that are plausible and consistent with the objectives of the relevant domestic legislation; and held, further, that he must be entitled at reasonable intervals to apply to a court within the meaning of Article 5(4) to determine whether or not the detention remains lawful. These two cases show Article 5(4) in its application to sentences overtly based on a preventive detention rationale.

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[12] (1979-80) 1 E.H.R.R. 373.
[13] (1991) 13 E.H.R.R. 546.

Certain life sentences in the UK contained obvious elements of preventive detention and cases began to make their way to Strasbourg invoking the protection of Article 5(4). First, there were cases involving the 'discretionary' life sentences based explicitly on 'preventive detention' for offenders considered to a danger to the public.[14] The Court held that the 'dangerousness' of an offender was a matter 'susceptible to change', and therefore a matter that fell within the 'review' ambit of Article 5(4). Second, there were cases involving young offenders who were detained at Her Majesty's pleasure.[15] It was held that because a youth might undergo change as a result of the maturation process, the necessity for his continued detention would have to be kept under periodic review, again requiring the protection of Article 5(4).

The position regarding the mandatory life sentence for murder in respect of adults had a different history in Strasbourg. In the first case, *Wynne v. United Kingdom*,[16] the Court held that the administration of the mandatory life sentence for murder did not fall within Article 5(4). In the second case, *Stafford v. United Kingdom*,[17] in an apparent U-turn, but in reality anchored in changes at domestic level within the UK legal system since the decision in *Wynne*, the Court decided that the mandatory life sentence, as then administered in the UK, did attract the protection of Article 5(4).

In addition to the 'review' requirements of Article 5(4), the tariff-fixing aspects of the UK system attracted the condemnation of the European Court. Since 1983, a tariff system had been introduced at administrative level, under which the Secretary of State set a formal tariff in respect of each life sentence. The prisoner was required to serve the tariff as a minimum period of imprisonment, and only became eligible for release after the tariff had expired. As a result of decisions of the European Court, the power to set the tariff has been transferred from the Executive to the Judiciary.

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[14] *Weeks v. United Kingdom* (1987) 10 E.H.R.R. 293; *Thynne and others v. United Kingdom* (1991) 13 E.H.R.R. 666.
[15] *Hussain v. United Kingdom* (1996) 22 E.H.R.R. 1; *T. and V. v. United Kingdom* (2000) 30 E.H.R.R. 121.
[16] (1995) 19 E.H.R.R. 333.
[17] (2002) 35 E.H.R.R. 1121.

The principles from the ECHR cases on the UK life sentences may be summarised as follows. In a system where a life sentence is divided into the tariff period (representing the penal or punitive element in respect of the offence for which the person was sentenced) and the post-tariff period (representing a period of detention based upon the rationale of preventive detention):

1. The fixing of a tariff as to the minimum period to be served as the penal or punitive element of a sentence of life imprisonment is a sentencing exercise and must be done by a Court. This is the case whether the life sentence is (i) mandatory;[18] (ii) discretionary;[19] or (iii) juvenile detention at Her Majesty's pleasure.[20]

2. The deprivation of liberty in the post-tariff stage of the life sentence is no longer justified automatically under Article 5(1) and must be justified periodically to ensure that the reason for continued detention (dangerousness) continues to persist (Article 5(4) requirement). This is the case whether the life sentence is (i) mandatory;[21] (ii) discretionary;[22] or (iii) juvenile detention at HM pleasure.[23]

3. The review carried out to satisfy Article 5(4) requirements in respect of the post-tariff preventive detention period must be carried out reasonably promptly by a body with the following characteristics (in order to satisfy the definition of a 'court' within the meaning of Article 5(4)):

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[18] *Stafford v. United Kingdom* (2002) 35 E.H.R.R. 1121.
[19] *Easterbrook v. United Kingdom* (2003) 37 E.H.R.R. 48.
[20] *T. and V. v. United Kingdom* (2000) 30 E.H.R.R. 121.
[21] *Stafford v. U.K.* (2002) 35 E.H.R.R. 1121.
[22] *Weeks v. United Kingdom* (1987) 10 E.H.R.R. 293*; Thynne and others v. United Kingdom* (1991) 13 E.H.R.R. 666.
[23] *Hussain v. United Kingdom* (1996) 22 E.H.R.R.

(a) the body must have the power to release the prisoner if it is satisfied that he no longer poses a risk to the public.[24]

(b) there must be adversarial proceedings including the right to oral hearing, notice of evidence, and examination/cross-examination of witnesses etc.[25]

(c) the scope of its examination must be sufficiently broad that the connection between the detention and the reason for detention can be scrutinised.[26]

IV. APPLICATION TO IRELAND

Irish law does not permit the sentencing of offenders on the basis of 'preventive detention'. Nor does the Minister engage in a 'tariff-fixing' exercise at the outset of the sentence, determining a minimum period that has to be served in prison before the 'lifer' can be considered for release. Further, the respective roles of the judiciary in sentencing, and the Executive in giving effect to the sentence, are constitutionally embedded and have frequently been discussed and approved in a number of judicial decisions. To what extent do these differences surrounding the mandatory life sentence in Ireland prevent our system from conflicting with Convention norms?

In *Whelan v. Ireland and Lynch v. Ireland*,[27] the applicants, each serving a life sentence for murder, challenged their sentences on both constitutional and Convention grounds. The constitutional arguments were divided, in essence, between arguments relating to: (a) proportionality; and (b) separation of powers. The Convention arguments were grounded on the UK authorities referred to, and the applicant also relied heavily on the opinion of the Human Rights Commission Report to the effect that Ireland was in breach of Convention law. The arguments grounded on the Convention were to the effect that the Minister's decision as to when to release a life sentence prisoner amounted

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[24] *Weeks v. United Kingdom*, *supra*; *Hussain v. U.K.*, *supra*.
[25] Hussain v. U.K., *supra*.
[26] *Thynne and others v. United Kingdom*, *supra*.
[27] High Court, Irvine J., 2007, judgment not yet approved.

to an unlawful determination of sentence in breach of the separation of powers, and that Article 5(4) required any review of detention for the purpose of relief to be carried out by a 'court' within the meaning of that sub-Article. The respondents relied upon the essential differences between the UK system and the Irish system referred to above, and argued that the mandatory life sentence in Ireland was entirely punitive in rationale, and therefore lacked any preventive detention component that would attract the review requirements of Article 5(4). Further, it was pointed out that no ECHR decision had held that the imposition of the mandatory life sentence *per se* was contrary to the Convention. Arguments were also made about the precise reliefs sought under the ECHR Act, 2003. There is, of course, a distinction between the *imposition* of a life sentence by a court, and the *release from* a life sentence by a Minister. The declaratory relief provided for by section 5 of the Act is limited to declarations of incompatibility with a "statutory provision or rule of law". The High Court (Irvine J.) refused all the reliefs sought.

In *Nascimento v. Minister for Justice, Equality and Law Reform, Ireland and the Attorney General*[28] the applicant also relied upon the above-mentioned Convention authorities in the course of a challenge to a Ministerial decision refusing to transfer him to Portugal to serve the balance of his life sentence for murder. The applicant had set out to rob the hotel in which he worked and in the course of the robbery shot a young woman who worked there. He pleaded guilty to murder, and in the course of imposing sentence, the trial judge described the killing as "one of the most vicious and brutal, callous killings that I have ever encountered". Following the applicant's application for transfer, information was obtained from the Portuguese authorities as to the length of time the applicant would serve if transferred there. The Irish authorities were informed that the sentence would be considered equivalent to a fixed 25-year sentence; with the applicant being eligible for conditional release after two-thirds of sentence, and entitled to conditional release after five-sixths of sentence. After 25 years, his release would be unconditional. The Minister refused to transfer the applicant, referring to the balance

[28] High Court, Dunne J., judgment not yet approved.

of the sentence in Portugal as being "not appropriate given the gravity of this crime". Much of the case concerned the issue of whether the Minister's decision was *ultra vires* the discretion conferred on him by the relevant legislation, namely the Transfer of Sentenced Persons Acts 1995-2006. This issue was decided in favour of the respondent Minister. However, the applicant had also sought a declaration that section 2 of the Criminal Justice Act, 1990 was unconstitutional and contrary to the Convention, relying on the above-mentioned Convention jurisprudence. The High Court refused the declaration sought, on the ground that the Minister's function in determining when a life sentence prisoner should be released constituted the 'giving effect' to a sentence of a court in accordance with the separation of powers, rather than a trespass into the sentencing area. The Court took the view that the Convention authorities were of little relevance, given the differences between the UK system of life sentences and the Irish system, and particularly the absence of any 'preventive detention' component in the Irish life sentence. The Court also observed that the regime involving Executive release of life sentence prisoners was not a "statutory provision or rule of law" within the meaning of section 5 of the ECHR Act, 2003, and therefore that the Declaration of Incompatibility was not available under the Act.

On a slightly different note, another point of interest in the *Nascimento* decision is the Court's view that the selection of a mandatory sentence for murder by the Oireachtas does not violate the proportionality requirement of sentences required by the Constitution. A discussion of the compatibility with the Convention of mandatory sentences for offences other than murder took place in the House of Lords decision in *R . v. Offen and others*.[29] In this case, the House of Lords used Convention principles in its interpretation of a statutory provision which provided for the automatic imposition of a life sentence following conviction for a second 'serious offence' (there being a list of specific offences falling within the definition of 'serious offence'). The Court employed Convention principles to interpret the opt-out clause, referring to 'exceptional circumstances', in such a way as to avoid an arbitrary deprivation of liberty based on

[29] [2001] 1 W.L.R. 253.

'assumed dangerousness' that had not been demonstrated in the particular case. Given the new phenomenon of mandatory minimum sentences for serious offences in Irish law, it may be that a twin-track approach to challenging that form of sentence will shortly feature in our courts, based on both the Constitution and the Convention. Incidentally, the *Offen* case is but one example of a myriad of cases in the English courts in recent years in which the Convention principles have been applied to the domestic criminal justice system. Even a short perusal of the excellent text, *Human Rights and Criminal Justice*[30] will show how profoundly the domestic implementation of the Convention in the UK has influenced the jurisprudence in that jurisdiction. Irish criminal lawyers have traditionally been inclined to scorn the human rights protections in the UK criminal justice system; but that attitude requires significant adjustment in light of recent developments.

V. THE REQUIREMENT OF AN INDEPENDENT AND IMPARTIAL DECISION-MAKER IN THE MILITARY AND PRISON DISCIPLINE SYSTEMS

A. The Convention concept of a 'criminal charge'

Domestic legal systems have to engage with the reality that the Convention employs an autonomous concept of 'criminal charge', independent of the classification of a matter within the domestic system. Where a measure punishes past conduct by depriving a person of his liberty, there is a strong presumption that the measure is a penal one, attracting the protections in Articles 5 and 6 of the Convention (liberty and fair trial, respectively).

The implications of this have been teased out at European level in at least two areas of interest to Ireland, namely, the area of military discipline, and that of prison discipline. It became clear in the decision in *Engel v. Netherlands*[31] that certain offences and penalties within the military justice system could

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[30] Emmerson, Ashworth and MacDonald, *Human Rights and Criminal Justice* (2nd ed., London: Sweet and Maxwell, 2007).
[31] (1976) 1 E.H.R.R. 647.

come within the purview of Convention protections. The more the penalty resembled imprisonment, and the longer it lasted, the more likely it would fall into Article 5 and 6 territory. Perhaps less obviously, in a prison disciplinary context, the deprivation of liberty can arise, this time in the form of a loss of remission. The Court decided in *Ezeh and O'Connor v. United Kingdom*[32] (in respect of the first applicant) that a penalty of 40 days additional custody, being the equivalent of a court imposing an 11-week sentence of imprisonment, falls within Article 6; and further (in respect of the second applicant), that 7 days additional custody, being the equivalent of a court-imposed sentence of 2 weeks imprisonment, also falls within Article 6. More recently, in *Young v. United Kingdom*,[33] the Court held that the potential loss of liberty of 42 days and actual loss of 3 days was sufficiently consequential as to be considered to fall within the 'criminal charge' within Article 6, even though the nature of the charge was of a purely disciplinary nature (disobeying a lawful order). In *Black v. United Kingdom*,[34] the applicant also risked a potential detention of 42 days and actually received 5 days for disobeying a lawful order, and again the Court held this to fall within Article 6.

The range of penalties under military law also encompass a variety of other measures, such as dismissal, reduction in rank, forfeiture of rank, severe reprimand, reprimand, and warning. Such penalties are obviously not the penalties one typically associates with matters of a criminal nature. However, their impact on a person's career can be significant, either directly, or more indirectly, as where penalties imposed are taken into account in deciding whether a person's contract will be renewed. In this context, it is noted that the Court has sometimes employed, in deciding whether or not the 'criminal charge' limb of Article 6 applies to a given set of facts, the somewhat elastic formula of what is 'at stake' for the Applicant in deciding whether the gravity of the penalty brings the matter within the remit of a 'criminal charge'.[35] This concept might be considered sufficiently

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[32] (2004) 39 E.H.R.R. 1.
[33] European Court of Human Rights, unreported, 16 April 2007.
[34] European Court of Human Rights, unreported, 16 January 2007.
[35] See, for example, *Weber v. Switzerland* (1990) 12 E.H.R.R. 508; *Demicoli v. Malta* (1991) 14 E.H.R.R. 47.

flexible to encompass disciplinary measures such as dismissals or reductions in rank.

B. Why is it significant if Article 5 and 6 protections are extended to military and prison disciplinary proceedings?

The particular aspect of Article 6 that impacts upon military and prison disciplinary proceedings is the requirement that the decision maker *be impartial and independent*. This, as one can imagine, tends to conflict with the hierarchical systems operating within the command structure of the military law system of both Ireland and the UK, both of which were, in their essentials, identical until recently. Further, the need to maintain order in a prison context has not been conducive to the development of systems of discipline with features similar to criminal trials. In a series of cases stemming from the UK, the Court has subjected to careful scrutiny the precise arrangements concerning the administration of justice in the army, the navy and the air force. To summarise the principles emerging from these cases, it may be said that the Court has regard to a number of factors in assessing whether a body or person is 'impartial or independent' for the purpose of Article 6 as follows:

(i) the manner of the person's appointment;

(ii) their term of office;

(iii) the existence of any guarantees against outside pressures (*e.g.* legal qualifications; the presence of judicial members on a panel with non-judicial members; whether the decision is subject to confirmation or review; and whether there are criminal offences of attempting to interfere with the decision-makers);

(iv) whether the body presents the appearance of independence;

(v) whether the body is subjectively free from personal prejudice or bias; and

(vi) whether the body is objectively free from prejudice or bias.

In one of the leading UK cases, *Findlay v. United Kingdom*,[36] the court-martial process then in force was held not to be independent where a senior officer in the accused's regiment convened the court martial; appointed all the judges; prepared the evidence; appointed the prosecuting and defending officers; and had the power to quash or vary the court martial decision. By the time of *Morris v. United Kingdom*,[37] a number of changes to the UK system had been introduced. The Court examined the position of the Permanent President of the Court Martial and described him as being a significant guarantee of independence on the tribunal given the following facts;

(a) that he was appointed to the position until retirement;

(b) that he was outside the chain of command; and

(c) that he had *de facto* security of tenure.

The Court said that:

> his term of office and *de facto* security of tenure, the fact that he had no apparent concerns as to future army promotion and advancement and was no longer subject to army reports, and his relative separation from the army command structure, meant that he was a significant guarantee of independence on an otherwise *ad hoc* tribunal.[38]

However, as regards the two serving officers who were appointed on an *ad hoc* basis, the Court said that the *ad hoc* nature of their appointment emphasised the need for other safeguards. It held that such safeguards were absent or inadequate, because of the risk of outside pressure being brought to bear on two relatively junior serving officers; referring to their lack of legal training; the fact that they remained subject to army discipline and reports, and the absence of any statutory or other bars to their being made subject to external influences while

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[36] (1997) 24 E.H.R.R. 221.
[37] European Court of Human Rights, unreported, 26 February 2002.
[38] *Morris v. United Kingdom*, para. 69.

sitting on the case.[39] Also, the Court said, it was contrary to Article 6 to have the possibility of a review of a court martial by a 'reviewing authority', which was empowered to quash his conviction and sentence, reach any finding of guilt that could have been reached, and to substitute any sentence that could have been imposed by the original body subject to it not being longer than the sentence actually imposed.[40]

Further changes were made to the domestic system, and by the time of *Cooper v. United Kingdom*,[41] the Grand Chamber of the Court found that the new procedure, as applied to a member of the RAF, complied with Article 6. However, in *Grieves v. United Kingdom*,[42] in a judgment delivered on the same date, the Court found that, as regards a naval court martial, that there were insufficient guarantees of independence where there was no permanent presiding officer who was irremovable and not subject to reports.

As regards the summary disposition of offences before a Commanding Officer, the Court in *Thompson v. United Kingdom*[43] found breaches of Article 6 in a situation where the applicant was awarded 28 days military detention by his Commanding Officer. The Court described the dual role of the Commanding Officer as both prosecutor and judge as presenting "even clearer structural independence and impartiality problems than those established" in the *Findlay* case. This was applied more recently in *Bell v. United Kingdom*.[44] The offence at issue, that of using insubordinate language to a superior officer, was disciplinary in nature. The maximum detention liable to be imposed was 28 days, and the actual detention imposed was 7 days. The Court applied the *Thompson* case and found a breach of Article 6 by reason of the dual role played by the Commanding Officer (prosecutor and judge), as well as a breach of Article 6(3)(c) by reason of lack of legal representation.

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[39] *Morris v. United Kingdom*, paras. 71-72.
[40] *Morris v. United Kingdom*, paras. 74-75.
[41] (2004) 39 E.H.R.R. 171.
[42] (2004) 39 E.H.R.R. 51.
[43] European Court of Human Rights, unreported, 15 June 2004.
[44] European Court of Human Rights, unreported, 16 January 2007.

Mention should also be made of the impact of Article 5(3) in the military setting. In *Hood v. United Kingdom*[45] the Court held that the remand of a soldier in close arrest by a Commanding Officer was incompatible with Article 5(3) when the same officer was likely to play a central role in his subsequent prosecution and trial by court martial.

As regards the Article 6 requirement of independence and impartiality in the prison setting, the Court addressed this in *Whitfield and Others v. United Kindgom*.[46] It was held that since prison governors were answerable to the Home Office, drafted and laid the charges against the applicants, investigated and prosecuted those charges and determined the applicants' guilt or innocence together with sentence, it could not be said that there was structural independence between the roles of prosecution and adjudication. Thus, there had been violations of Article 6. The Court also found a violation Article 6(3)(c) on the basis of lack of legal representation at the prison adjudication hearings. The same conclusion was reached in the more recent cases of *Young v. United Kingdom* and *Black v. United Kingdom* referred to above.

C. The Defence (Amendment) Act, 2007

In response to these developments, the Defence (Amendment) Act, 2007 makes substantial changes to the system of military justice in Ireland. As a substantial Act running to 93 pages, one can only touch on the main provisions here. Crucially, it creates a number of new key positions within the system. It is abundantly clear that what is intended to be achieved is two-fold; (a) a clear separation of functions, moving firmly away from the old system in which there was a blurring and overlap of functions; and (b) provisions to ensure the independence and impartiality of decision-makers, particularly in non-summary matters. The sections creating these positions have already been brought into force.

One of the new positions is that of the Court-Martial Administrator (see section 32 of the 2007 Act). He is appointed by the Judge Advocate-General and acts under his general

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[45] (2000) 29 E.H.R.R. 365.

[46] European Court of Human Rights, unreported, 12 April 2005.

supervision, although he is required to be 'independent in the performance of his functions'. One of his important functions is to convene courts-martial and to specify the members of the courts-martial board.

The new Director of Military Prosecutions (see section 33 of the 2007 Act) must be an officer of the Permanent Defence Force not below the rank of colonel who is a practicing barrister or solicitor of not less than 10 years standing. He or she is appointed by the Minister on the advice of a committee consisting of the Chief of Staff, a Judge of the High Court and the DPP. He is required to be 'independent in the performance of his functions'. There are, interestingly, detailed provisions concerning the removal from office of a DMP; influenced, perhaps, not only by the type of considerations that apply to non-military judges, but also the recent experiences with regard to the attempted removal of a member of the 'ordinary' judiciary.

The Military Judge (section 34 of the 2007 Act) is another new position. This judge is appointed by the President on the advice of the Government, and must have not less than 10 years experience as a barrister or solicitor and must not be below the rank of colonel. The Government is advised on suitable candidates by a committee consisting of the Chief of Staff, the Judge Advocate-General and a Judge of the High Court. A military judge must be 'independent in the performance of his judicial functions' and may not hold any other office or employment in respect of which remuneration is payable. There is a prohibition on the remuneration of a military judge being reduced during his continuance in office. Again there are detailed provisions concerning the removal of a judge from office. There is also provision for the appointment of a Chief Military Judge.

The 2007 Act also creates an entirely new type of court-martial, namely the summary court-martial. This brings to a total of three the type of court-martial that can be held; summary, limited or general. The jurisdiction of each results from a combination of offence-type and accused-rank. There are detailed provisions concerning the membership of the different kinds of court-martial. Section 41 goes on to disqualify certain key persons from membership of a court-martial, including, *inter alia*, the Court Martial Administrator or a member of his staff, the

Director of Military Prosecutions or a member of his staff, "a member of the Defence Forces who has examined into or advised on the matters on which any charge against the accused is based" and "a member of the Defence Forces who investigated the charge against the accused or took down any summary or abstract of evidence against the accused or who was a member of a court of inquiry inquiring into the matters on which the charge against the accused is based", and "an officer or non-commissioned officer who is serving in the same military chain of command as the accused". Of particular interest also is section 41(2) which provides that a member of a court-martial board "shall neither report on, nor be the subject of any report in respect of, the performance of his functions as such member under this Act".

What has happened to summary disposal of charges? What appears clear in the scheme is that while there is an area in which summary justice applies and the Commanding Officer continues to play a role, it is more limited and more regulated than before. Further, it is clear that, as regards penalty following summary disposition, detention simply does not feature. The only penalties available are penalties such as a fine not exceeding 7 days pay, reprimands, and reductions on the scale of pay of the person by an increment for a period not exceeding one year or deferral of the next increment due. In terms of procedures, a person is entitled to written notice of the charge sheet, a list of the witnesses, and, where available, an abstract of the evidence, at least 24 hours in advance of the hearing. Further, there is an appeal to a summary court-martial.

VI. ISSUES RAISED BY MY COLLEAGUES' PAPERS

James MacGuill deals with the issue of delay in criminal proceedings, and the *Barry* case,[47] in his paper.[48] I agree with his view that there now seems to be a more acute awareness within our system that delays should be avoided, and that this appears to have been prompted by Strasbourg decisions such as the *Barry*

[47] *Barry v. Ireland*, European Court of Human Rights, unreported, 15 December 2005.

[48] See MacGuill, "The Impact of Recent ECHR changes on the Constitution", (2007) 2 *Judicial Studies Institute Journal* 50.

case. An important distinction between the Irish jurisprudence on delay and that of the ECHR is that in domestic law, applicants have invariably sought prohibition of their trial, whereas in Strasbourg, the remedy sought is a declaration coupled with damages. This procedural difference also reflects the greater complexity of the substantive issues the domestic courts have had to grapple with, namely the complex interaction between the concept of the 'fairness' of the trial and the concept of 'delay' before reaching trial. The ECHR authorities, on the other hand, tend to deal with delay *simpliciter*. The difference between the reliefs sought in each system was touched on in *D.P.P. v. Sweetman*,[49] where de Valera J. granted prohibition in respect of a murder trial, in a case in which the challenge had been brought on both Convention and constitutional grounds. More recently, in *T.H. v. D.P.P.*[50] the Supreme Court (Fennelly J. delivering judgment) discussed differences between the domestic and European jurisprudence, and, in refusing the relief sought by the applicant, laid emphasis on the fact that the European cases such as the *Barry* case did not deal with, or provide guidance with respect to, the remedy of prohibition.

Another point that might be made in the 'delay' context is the exclusion of the courts from the definition of 'organ of State' in the ECHR Act, 2003. The delays in dealing with a particular criminal case may be partly attributable to the availability of hearing dates in the court system and partly attributable to the conduct of the DPP in prosecuting the case. Given the exclusion of courts from 'organ of State', it may be that 'system' delays cannot be factored into Convention arguments taking place in the domestic courts, whereas the same 'system delays' are highly important if and when the case reaches Strasbourg.

As regards the drawing of inferences from silence, discussed in detail by Michael Farrell,[51] it seems likely that we are about to embark on a period of intensive scrutiny of the relationship between the precise circumstances in respect of which the accused is asked to provide an explanation, and the

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[49] [2005] I.E.H.C. 435.
[50] [2006] I.E.S.C. 48.
[51] See Farrell, "The Challenge of the ECHR" (2007) 2 *Judicial Studies Institute Journal* 76.

level of access to his solicitor at the time he was asked to give the explanation. An obvious practical way to avoid unnecessary complications in this area would be to permit a solicitor to be present during questioning of a suspect, at least during any interview in which the 'inference' provisions are to be invoked. I would draw a distinction, however, between the solicitor and suspect being made aware of the precise circumstances in respect of which the interviewing Gardaí claim that it is reasonable to call for an explanation, on the one hand, and informing them of 'the current state of the investigation', on the other. The argument grounded on fair procedures is much stronger in respect of the narrower of these two formulations.

Further, careful training of interviewing Gardaí, together with the devising of appropriate cautions at the commencement of such interviews, are essential if any such inferences are to survive and play a probative role in the trial.

As regards the *Martin Kelly* case[52] discussed by Michael Farrell, it may be noted that in that particular case there was, in addition to the 'belief evidence', the evidence of a lay witness who alleged that the accused had represented himself to be a member of the IRA to him in the context of seeking protection money. The Convention arguments concerning the right to cross-examine in respect of the Chief Superintendent's belief may be thrown into sharper relief in a case where 'belief evidence' and 'inference from silence' evidence' are the only two forms of evidence offered by the prosecution. Such a case might arise if, for example, other evidence in the case were to be ruled inadmissible in the course of the trial, as it seems unlikely that the DPP would currently commence a prosecution where those two forms of evidence were the only ones available.

VII. CONCLUDING THOUGHTS

It is still the view of some Irish criminal practitioners that the Convention jurisprudence has little or nothing to add to the development of the criminal law in this country, because of the detailed treatment of the Irish courts to liberty and fair trial rights

[52] *D.P.P. v. Kelly* [2006] 3 I.R. 115.

under the Irish Constitution. It is sometimes thought that the Convention will be most influential in non-criminal justice areas, such as privacy rights, freedom of expression rights and other forms of personal right not related to criminal trials. It is true that Irish criminal law has been, to a significant extent, 'constitutionalised' over the last seventy years and that many of the principles already developed here mirror, and in some cases, surpass, the standards required under the Convention. However, as the various topics examined in this paper illustrate, the converse is also true. In certain areas of the criminal law, Convention law offers, at least, new insights, and, sometimes, more rigorous standards in certain areas than Irish constitutional law has done to date. Furthermore, when one considers the impact of the Convention in the areas of criminal insanity and military justice, for example, it is interesting to observe that these are areas that Irish criminal lawyers consider to be the 'heartland' of our constitutional guarantees, namely, the right to liberty, and the right to trial of a criminal charge in due course of law. Why, then, were these core constitutional guarantees underdeveloped in certain particular contexts?

One could suggest that the sheer volume of Convention jurisprudence stemming from the diverse experiences of the many legal systems subject to Convention law will inevitably throw to the surface legal problems that may simply not arise in a small jurisdiction such as Ireland. More persuasively, one could argue that practitioners in any jurisdiction become settled into particular legal grooves of argument, and that we perhaps sometimes forget that the fundamental guarantees in the Constitution may be deeper and richer than our own legal imaginations. It can take a line of jurisprudence from elsewhere to illuminate a perspective on a human right hitherto unexplored in our own system. It is not surprising that the areas in which practitioners are mounting challenges on Convention grounds are those where there are already 'off the shelf', 'ready-made' Convention lines of authority. For practitioners, one of the lessons to be learnt is not merely that we should look at Convention authorities for ideas, but the deeper lesson of always returning to fundamental principles when confronted with a potential injustice. One could also point to the wording of the Constitution and the Convention

respectively, each in turn influenced by its immediate historical context and its own preoccupations, leading inevitably to differences in emphasis in the manner in which rights are protected. An interesting paper could be written about such matters, but that of course is another day's work

It is an interesting coincidence that the ECHR Act, 2003 has come into force around the same time as far-reaching legislative changes to the criminal justice system have been introduced, including inference-drawing provisions, provision for longer periods for suspects to be kept in investigative detention, and mandatory minimum sentences. We are likely to be entering a period of numerous legal challenges to the fairness of these measures, in which fundamental principles will be at the forefront of any analysis. It can only be helpful to have the combined wisdom of two streams of human rights jurisprudence – that from the Constitution and that from the Convention – in assessing whether such measures respect and comply with fair procedures.