THE IMPACT OF RECENT ECHR CHANGES ON THE CONSTITUTION

JAMES MACGUILL*

INTRODUCTION

Some years ago I was involved in a case where I was trying to assist a woman, an Irish citizen, who had travelled to live in the Kingdom of Saudi Arabia with her Arab husband whom she had met in Ireland. They had a child together and she had two previous children. When in Dublin he was a most gregarious and affable man and liked a good party. Upon his return to Riyadh things changed dramatically and he displayed various forms of violent cruelty towards my client. She had to flee and subsequently we were endeavouring to reunite her with her daughter. At the time, the *Sunday World*, the well known paper of record, reported on the case: "Top lawyer to bring Saudi Arabia to the European Court of Human Rights". Clearly this was never a possibility but the fact that the *Sunday World* reported it as fact may very well have led people to believe that I would be deluded enough to think that it could be true.

When I saw the title assigned to me by Professor Fennell where I might be expected to propose that the Constitution of Ireland could, contrary to all earlier jurisprudence[1] be in any way subject to the European Convention on Human Rights I wondered whether I was being asked to argue the absurd.

However the more one thinks of the topic, particularly in the context of a realist approach to jurisprudence, the more it has substance.

During the Dáil Committee Stage of the Incorporation of the European Convention on Human Rights Bill many contributors, including the Human Rights Commission and the

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[1] *In re Ó Laighléis* [1960] I.R. 93.

Law Society of Ireland, were harshly critical in their submissions to the committee of the dilute fashion in which the State had sought to incorporate the Convention, determined as clearly the then Minister was to ensure that there would be no change in our constitutional framework. Forceful arguments were advanced on many occasions by government to the effect that the Convention would not add to our constitutional rights and indeed no additions were necessary. Such arguments were to simply ignore those cases where the Supreme Court failed to protect fundamental rights of citizens which only found resonance in Strasbourg. Obvious examples are the cases of *Airey*,[2] *Norris*,[3] *Croke*,[4] *Heaney and McGuinness*[5] and *Quinn*.[6] As recently as *Barry v. Ireland*,[7] which is dealt with later, deficits in the protection of rights continue to be identified by the Strasbourg Court.

A particular criticism of the method of incorporation was that, contrary to the position adopted by the United Kingdom under the Human Rights Act 1998,[8] our Government specifically excluded courts from the definition of organs of State.[9] The rationale quite simply was that if the Court was an organ of State (equivalent to the UK public authority) then there would be a

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[2] *Airey v. Ireland* [1979] 2 E.H.R.R. 305.

[3] *Norris v. Attorney General* [1984] I.R. 23; *Norris v. Ireland* [1989] 13 E.H.R.R. 185.

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

[5] *Heaney and McGuinness v. Ireland*, [1994] 3 I.R. 593 (H.C.); [1996] 1 I.R. 580 (S.C.); [2001] 33 E.H.R.R. 12.

[6] *Quinn v. Ireland* [2001] 33 E.H.R.R. 12.

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

[8] Section 6(3) of the 1998 Act provides that "public authority" includes –

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

[9] Section 1 of the 2003 Act provides as follows:

""organ of the State" includes a tribunal or any other body (other than the President or the Oireachtas or either House of the Oireachtas or a Committee of either such House or a Joint Committee of both such Houses or a court) which is established by law or through which any of the legislative, executive or judicial powers of the State are exercised."

positive obligation on the Court to act of its own motion to ensure that rights guaranteed by the Convention were observed.

Another major criticism concerned the ineffective remedies that were provided by the Act.[10] The declaration of incompatibility is clearly much weaker than the constitutional remedy of striking down a provision as being repugnant to Bunreacht na hÉireann. The concept of finding an acknowledged breach of a citizen's fundamental rights which only fell to be compensated on an *ex gratia* basis is frankly outrageous.

However, this approach gives rise to the possibility at least that a court, in seeking to defend the fundamental rights of citizens, will avoid finding a purely dilute Convention right incapable of effective enforcement, but will rather use Convention rights acknowledged in the Strasbourg jurisprudence, or indeed in the jurisprudence of other domestic courts perhaps (particularly the courts of England and Wales) and use those identified rights to point to hitherto unidentified unenumerated constitutional rights, whether arising under Article 40.1, or as part of the bundle of fair trial rights under Article 38.

I propose to consider a number of cases that I believe feed into and support the proposition that long into the future our courts will be declaring constitutional rights rather than finding breaches of the Convention in circumstances where, if the Convention had never been incorporated as part of our law, there is a question as to whether the right would ever have been identified at all.

Before proceeding to look at these questions I think it is important that we examine some of the dicta of the Supreme Court in *Fennell v. Dublin Corporation*.[11] The facts of *Fennell* are well known and need not be repeated here. The kernel of the issue was whether a violation of Convention rights which

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[10] Section 5 of the 2003 Act provides "In any proceedings, the High Court, or the Supreme Court when exercising its appellate jurisdiction, may, having regard to the provisions of section 2, on application to it in that behalf by a party, or of its own motion, and where no other legal remedy is adequate and available, make a declaration (referred to in this Act as "a declaration of incompatibility") that a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions.

[11] *Dublin City Council v. Fennell*, Supreme Court, unreported, Kearns J., 12 May 2005.

occurred prior to the incorporation of the Convention into Irish law on 31st December 2003 were justiceable by proceedings brought post-incorporation where the effects of the wrong were continuing. Kearns J. posited that he "was satisfied…that the 2003 Act cannot be seen as having retrospective effect or as affecting past events".[12]

The High and Supreme Court held that the provisions of the Convention could not be applied retrospectively notwithstanding that there was a clear continuing breach. Such an approach lies uneasily with the Court, who are clearly reluctant to ignore the traditional mandate "*Ubi Jus Ibi Remedium*". Kearns J. stated that:

> …the pronouncement of this court in *Hamilton v. Hamilton* … which upheld the presumption against retroaction in the interpretation of statutes, is perhaps the clearest pointer suggesting that the issue in the Case Stated be answered in the negative. The decision in *Hamilton* can also be seen as the strongest authority in Irish law upholding the presumption that retrospective legislation which affects vested rights is *prima facie* unjust, a view repeated and confirmed by this court in *the Matter of Article 26 of the Constitution & In the Matter of the Health (Amendment) (No.2) Bill, 2004*...[13]

There is nothing less palatable to a court than to find itself constrained from doing justice on procedural grounds. In the *Carmody*[14] case Laffoy J. overcame the problem by viewing the issue of a fair trial as a continuing issue rather than one which had become crystallised at the time the charge was preferred, stating that:

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[12] *Dublin City Council v. Fennell*, Supreme Court, unreported, Kearns J., 12 May 2005, p.47.

[13] *Dublin City Council v. Fennell*, Supreme Court, unreported, Kearns J., 12 May 2005, pp.45-46. See also *In the Matter of Article 26 of the Constitution & In the Matter of the Health (Amendment) (No.2) Bill*, 2004, Supreme Court, unreported, 16 February, 2005, p.39; and *Hamilton v Hamilton*, [1982] I.R. 466 (S.C.).

[14] *Carmody v. The Minister for Justice, Equality and Law Reform*, High Court, unreported, Laffoy J., 21 January 2005.

> The standing of the plaintiff to prosecute these proceedings derives not from the fact that he was granted a legal aid certificate under s. 2 in October, 2000, but from the fact that he is facing trial on criminal charges with the benefit of a certificate under s. 2, which he contends will not enable him to be effectively represented and will expose him to the risk of an unfair trial. In my view, the pursuit by the plaintiff of a declaration of incompatibility under s. 5(1) does not involve any element of retrospectivity.[15]

In this paper I propose to argue that another way in which courts will overcome the restrictive reasoning in the *Fennell* case will be to find that there is a constitutional right of the same import as the Convention right, but which obviously is not constrained in terms of retrospection.

I. *MAGEE V. FARRELL*[16]

In this case I acted on behalf of the parents of a young boy who had been arrested and detained in Garda custody where he died on the 26th of December 2002. While this pre-dated incorporation of the Convention the inquest was not to be held until after incorporation, 12th of February 2004.

By that time, this very issue had fallen for consideration in the United Kingdom in the case *R. (Amin) v. Secretary of State for the Home Department*.[17]

The next of kin were anxious to be represented at the inquest but were not in a position to meet the cost. This is a position that has confronted many families in Ireland in the seventy years since Bunreacht na hÉireann was passed.

Proceedings were brought relying on both Article 2 of the European Convention[18] (right to life) and the provisions of

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[15] *Carmody v. The Minister for Justice, Equality and Law Reform* High Court, unreported, Laffoy J., 21 January 2005, p.16.

[16] *Magee v. Farrell & Ors*., High Court, unreported, Gilligan J., 26 October 2005.

[17] [2004] 1 A.C. 653.

[18] Article 2 and/or Article 13 of the ECHR.

Bunreacht na hÉireann.[19] The State argued the applicability of the *Fennell* decision successfully but the Court found in favour of the family on the basis of constitutional rights. *Per* Gilligan J.:

> Thus the plaintiff's claim for the provision of a publicly funded legal representation in respect of the inquest must fail insofar as it is grounded upon the provisions of the European Convention on Human Rights (as implemented by the Act of 2003) as the Act was not in force on the relevant date of the event to which the inquest relates. Thus it appears that the plaintiff's claim must fall back on constitutional grounds.[20]

Gilligan J. quoted from *Stevenson v. Laney & Others*,[21] in which Lardner J. quoted O'Higgins C.J.'s statement in *The State (Healy) v. Donoghue*[22] to the effect that:

> The requirements of fairness and justice must be considered in relation to the seriousness of the charge brought against the person and the consequences involved for him. Where a man's liberty is at stake, or where he faces a very severe penalty which may affect his welfare or his livelihood, justice may require more than the application of normal and fair procedures in relation to his trial. Facing as he does, the power of the State which is his accuser, the person charged may be unable to defend himself adequately because of ignorance, lack of education, youth or other incapacity. In such circumstances his plight may require, if justice is to be done, that he should have legal assistance. In such circumstances, if he cannot provide such assistance by reason of lack of means, does justice under the Constitution also require that he be aided in his defence? In my view it does.[23]

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[19] Article 38 and /or Article 40.1.

[20] *Magee v. Farrell & Ors*., High Court, unreported, Gilligan J., 26 October 2005 , p.4.

[21] *Stevenson v. Landy & Others*, High Court, unreported, Lardner J., 10 February 1993.

[22] *The State (Healy) v. Donoghue* [1976] I.R. 325.

[23] *The State (Healy) v. Donoghue* [1976] I.R. 325, at 350.

Gilligan J. went on to note that, having quoted that passage, Lardner J. had continued:

> That Statement was made in relation to a criminal prosecution. The present case is of a different nature. Having considered the circumstances of the Applicant and in which the application for legal aid to be represented in the wardship proceedings is made, I have come to the conclusion that the dicta which I have quoted are applicable, mutatis mutandis, to the wardship proceedings.[24]

Accordingly, Gilligan J. concluded that:

> Having regard to the fact that the coroner presides over the relevant inquest and his role is judicial in nature, that the inquest of itself is inquisitorial and that a jury will record a verdict, it appears reasonable to come to the conclusion, applying the rationale of Kelly J. in *O'Donoghue v. The Legal Aid Board* and Lardner J. in *Stevenson v. Landy and Others* and *Kirwan v. Minister for Justice,* that, due to the unfortunate circumstances of the plaintiff in the present case and the fact that her son's death occurred within a very short period of time of him becoming unconscious while in the custody of An Garda Síochána, fair procedures under the Constitution require that she be provided with legal aid for the purpose of being adequately represented at the forthcoming inquest into her son's death.[25]

The case is under appeal to the Supreme Court by the State and it is obviously unclear what the outcome might be.

However there is no doubt that the State is acutely aware of where its obligations lie in this area. In the Coroners Bill,[26] which had been introduced in Seanad Éireann prior to the fall of the 29th Dáil, the situation was specifically addressed in section 85:

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[24] *Stevenson v. Laney & Others*, High Court, unreported, Lardner J., 10 February 1993, p.9. quoted at p.9 of Gilligan J.'s judgment.

[25] *Magee v. Farrell & Ors.*, High Court, unreported, Gilligan J., 26 October 2005, p.16.

[26] Coroner's Bill 2007, Bill number 33 of 2007.

(1) The Coroner Service shall make arrangements for all documents previously preserved under section 29 of the Coroners Act 1962, by a coroner, or a county registrar for the county or county borough in which the district of such coroner was, immediately prior to the commencement of this Act, situate to be transferred to the Coroner Service.

(2) The Coroner Service shall preserve all documents transferred under *subsection (1)*.

(3) A copy of any document preserved by the Coroner Service under *subsection (2)* shall be furnished to every applicant therefore on payment of such fee and in such manner as may, from time to time, with the consent of the Minister for Finance, be prescribed.

(4) Where an application under *subsection (3)* is made on behalf of—

(*a*) a person in receipt of legal advice in respect of his or her involvement in an investigation under this Act,

(*b*) a person in receipt of a legal aid certificate in respect of his or her representation at an inquest under this Act,

(*c*) a Minister of the Government,

(*d*) the Garda Siochána,

(*e*) the Defence Forces,

(*f*) a statutory body under another enactment,

(*g*) the Garda Ombudsman Commission,

no fee shall be payable under that subsection.

(5) All fees payable to the Coroner Service under this section shall be paid into or disposed of for the benefit of the Exchequer and the Public Offices (Fees) Act 1879 shall not apply in respect 35 of them.

It is understood that the measure which has been long awaited will be re-introduced by the present Oireachtas and therefore either by the intervention of the courts domestically, or ultimately at Strasbourg, or by the passage of legislation, that persons will be entitled to State-funded legal representation in the circumstances identified in the litigation and in draft section 85.

Naturally, the proposal that the representation would be provided under the Civil Legal Aid Act 1995 may also fall to be considered as to whether or not it adequately provides the form of representation that is required in these cases. There is an obvious read across from the wording of Article 6 of the Convention[27] to the effect that persons might, in particularly sensitive cases of this kind, need "legal assistance of his own choosing" particularly if

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[27] Article 6 ECHR:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
   (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
   (b) to have adequate time and the facilities for the preparation of his defence;
   (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
   (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

that is what is available to the other parties to the inquest and what would be available to a person of adequate means.

Interesting thoughts on the right to select one's own lawyer have been articulated in the High Court in a constitutional context: both in the context of *Freeman v. Connellan*[28] and in the recent case of *Law Society v. Competition Authority*[29] which has not been appealed to the Supreme Court. In that case Mr. Justice O'Neill stated that:

> …in civil proceedings such as the type conducted by the respondents there must be a strong presumption in favour of freedom of choice of representation. Although it is the case that in these proceedings the clients will invariably be paying for their own lawyers, this factor does not in my view add significantly to the weight or strength of this presumption. Regardless of who is paying for the representation the principle must in my view remain essentially the same.
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> It could not in my view be said that a person availing of the Criminal Free Legal Aid Scheme should have less autonomy or control over the conduct of their defence and in particular what lawyers were selected to conduct that defence, than would be the case if they were contracting for the services and paying for them themselves.
>
> I am satisfied that were a tribunal, empowered to veto a choice of lawyer made by a party appearing before it, invariably this would give rise to a perception of unfairness, on the part of the person denied freedom of choice. Where the tribunal was in effect the adversary as in the position of the respondents, that perception will be very strong indeed. The interference by a tribunal with a choice of lawyer will in many instances cause actual unfairness because of the disruption of confidence, which is an essential aspect of every successful lawyer/client relationship.
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> I am satisfied that a person facing a tribunal in respect of which it is appropriate to have legal representation

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[28] *The State (Freeman) v. Connellan* [1986] I.R. 433 (H.C.).

[29] *The Law Society of Ireland v. The Competition Authority*, High Court, unreported, O'Neill J., 21 December 2005.

> does, as an incident or aspect of the right to fair procedures, have a constitutional right pursuant to Article 40.3 of the Constitution to freely select the lawyers that will represent him or her, from the relevant pool of lawyers willing to accept instructions.[30]
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> …
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> This brings me to a consideration of whether or not the content of Articles 3 and 4 of the impugned notice constitute a breach of Article 6(1) of the E.C.H.R.
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> Article 6(1) of the E.C.H.R. reads as follows:
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> *"Right to a fair trial.*
>
> *1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*
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> *…*
>
> *3. Everyone charged with a criminal offence has the following minimum rights:*
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> *…*
>
> *(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require…".*
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> Those cases decided by the European Court of Human Rights that concern choice of lawyer are mainly concerned with the choice of lawyer in the circumstances where legal representation is being provided by the State. It is clear in that circumstance, there is not under the convention a right to an unfettered choice of lawyer and the cases illustrate a variety of circumstances in which that freedom of choice has been curtailed. However in *Croissant v. Germany* 16 EHRR 135 at paragraph 27 of the judgment the following was said:
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> *"Again, the appointment of more than one defence counsel is not of itself inconsistent with the Convention it may indeed be called for in specific cases in the interests of justice. However, before nominating more than one counsel a court should pay heed to the accused's views as to the number*

[30] *The Law Society of Ireland v. The Competition Authority*, High Court, unreported, O'Neill J., 21 December 2005, pp.26-27.

> *needed, especially where, as in Germany, he will in principle have to bear the consequent costs if he is convicted. An appointment that runs counter to those wishes will be incompatible with a notion of a fair trial under Article 6(1) if, even taking into account a proper margin of appreciation, it lacks relevant and sufficient justification."*

Further on at paragraph 29 the following was said:

> *"It is true that Article 6(3)(c) entitles 'everyone charged with a criminal offence' to be defended by counsel of his own choosing. Nevertheless, and notwithstanding the importance of a relationship of confidence between lawyer and client, this right cannot be considered to be absolute. It is necessarily subject to certain limitations where free legal aid is concerned and also whereas in the present case, it is for the courts to decide whether the interests of justice require that the accused be defended by counsel appointed by them. When appointing defence counsel the national courts must certainly have regard to the defendants wishes; indeed German law contemplates such a course. However, they can override those wishes when they are relevant and sufficient grounds for holding that is necessary in the interests of justice."*[31]

Clearly, when the section is enacted, submissions will be made to the legal aid board as to the manner in which they should discharge their obligations under the Civil Legal Aid Act 1995, including that they should provide a proper private practitioner in cases of this kind where there is not only huge personal and emotional distress on the part of the next of kin, but also the question as to whether or not it is appropriate that an independent investigation of the conduct of the State should properly be handled by persons who are in effect State employees on the principle that "justice must be seen to be done".

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[31] *The Law Society of Ireland v. The Competition Authority*, High Court, unreported, O'Neill J., 21 December 2005, pp.36-38.

II. DELAY CASES

Prior to the recent decision of the Supreme Court in *T.H. v. D.P.P.*[32] there was, to say the least, immense confusion in the judgments from the courts. While one hesitates, particularly in the presence of Mr. Justice Hardiman, to talk of result-oriented decisions, there is at least the appearance of there being no small element of chance as to when and by what composition of the court a case is heard.

For the purpose of this paper I propose to examine briefly the propositions of the Court in *T.H. v. D.P.P.* and, in a case not concerning sexual offences, in *MacFarlane v. D.P.P.*,[33] and to compare them with the recent expressions of the Strasbourg court in the Cork case of *Barry v. Ireland*.[34]

This audience will be very familiar with the local case of *Barry v. Ireland* where Dr. Barry was the subject a substantial number of pending criminal charges which had been the subject of a multi-faceted challenge brought by him by way of judicial review. Having been unsuccessful in the judicial review proceedings he brought a separate case to Strasbourg complaining that the judicial review proceedings that he himself had initiated were a source of additional systemic delay which was a violation of his rights. The Strasbourg Court held for him in the following terms:

> The Court considers that the judicial review proceedings, relied on by the Government, were not capable of expediting the decision by the criminal courts. The aim of the judicial review proceedings was to stay future criminal proceedings, not to expedite them. Moreover, the judicial review proceedings themselves took over seven years. Even if this was longer than normal, it indicates that judicial review proceedings were not sufficiently swift to be preventative of future delay

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[32] *T.H. v. D.P.P.*, Supreme Court, unreported, Fennelly J., 25 July 2006;

[33] *McFarlane v. D.P.P.*, Supreme Court, unreported, Hardiman J., 7 March 2006 7 March 2006; High Court, unreported, Quirke J., 8 November 2006. Currently under appeal.

[34] European Court of Human Rights, unreported, 15 December 2005.

> In addition, the Court does not consider that the judicial review proceedings were capable of providing adequate redress for delays that had already occurred. There is no evidence that such proceedings would have been capable of providing damages and the Government accepted that there was no domestic legal provision for an award of damages in following proceedings.
> …
> Accordingly, the Court considers that there has been a violation of Article 13 of the Convention on account of the lack of a remedy under domestic law, at the time when the applicant lodged his application, for past and future delay in his criminal proceedings.[35]

Having succeeded in Strasbourg his domestic prosecution then came on for hearing. This would obviously have given rise to substantial arguments as to whether or not the proceedings should be stayed by virtue of the Strasbourg ruling. As events turned out, however, the Director of Public Prosecutions entered a *nolle prosequi* and the issue did not come on for determination. In the subsequent case of *T.H. v. D.P.P.*, the Supreme Court took the opportunity of engaging in a thorough review of the jurisprudence on delay, ultimately concluding that the current law requires that, to be successful, an applicant will have to demonstrate actual rather than presumptive prejudice. In practice this is a test that few will overcome. In giving their judgment, however, the Supreme Court betrayed a scathing disrespect for the Strasbourg Court and establishes beyond doubt that to that extent at least the Supreme Court may be viewed as euro-sceptics.

III. *T.H. v. D.P.P.*

McKechnie J. in the High Court[36] held that there had been delay on the part of the appellant as a result of the seven years it had taken to dispose of the case, that the applicant's right to an expeditious trial had been breached and that there could not now be a fair trial. The applicant had claimed, *inter alia*, that:

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[35] European Court of Human Rights, unreported, 15 December 2005, paras. 52, 53 and 56.
[36] *T.H. v. D.P.P.*, High Court, unreported, McKechnie J., 9 March 2004.

> there has been delay which would make the further prosecution of the alleged offence otherwise than in accordance with law and contrary to Article 38.1 and Article 40.3 of the Constitution and Article 6 of the European Convention on Human Right (sic).[37]

In the subsequent appeal to the Supreme Court, the following excerpt from the judgment of Fennelly J. is of note:

> [McKechnie J.] concluded that he should apply a balancing test, measuring, on the one hand, the rights of the accused person to trial with reasonable expedition, and on the other, the interest, in the public good, of continuing the prosecution.[38]
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> …
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> There are two distinct aspects of the ruling of McKechnie J. Firstly, he held that the applicant had been deprived, by reason of blameworthy delay on the part of the appellant of his right to a speedy or expeditious trial. Secondly, and finally, he expressed concern about the possibility of a fair trial and concluded that there was a real risk that the applicant would not have a fair trial:[39]
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> …
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> It is, of course, an essential precondition to being permitted to argue a ground for judicial review that leave shall have first been obtained. This was not done in respect of the allegation of a real risk of an unfair trial. I would, therefore, allow that appeal insofar as the ruling is based on this second aspect of the ruling of the learned trial judge.
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> I turn then to the first and principal ground.[40]
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> …
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> I am satisfied that the application of that test could not possibly lead to the criminal prosecution of the applicant being prevented. Firstly, he is overwhelmingly the party responsible for the delay. Secondly, for reasons already given, the applicant is unable to point to any real risk of

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[37] *T.H. v. D.P.P.*, High Court, unreported, McKechnie J., 9 March 2004, p.2.
[38] *T.H. v. D.P.P.*, Supreme Court, unreported, Fennelly J., 25 July 2006, p.12.
[39] *Ibid*., p.15.
[40] *Ibid*., p.16.

> an unfair trial. Thirdly, the applicant is able, at most, to refer to some prolongation of the natural stress and anxiety necessarily associated with a pending criminal trial. Fourthly, this is insufficient to displace the public interest in his being prosecuted.
> I must, however, refer to the decision of the Court of Human Rights in *Barry v Ireland.*[41]
> …
> It is important to clear up any misunderstanding concerning the import of such decisions of the Court of Human Rights. The Court does not and did not, in that case, hold that the prosecution had to be stopped. It would be most surprising if a judgment of that Court holding that the prosecuting authorities were *"partially or completely responsible"* for certain periods of delay had the automatic consequence that a prosecution had to be halted. Such a conclusion would, in any legal system, call for some consideration of the public interest in the prosecution of crime.
> …
> In brief, the decision in *Barry v Ireland* adds nothing to the applicant's claim to have his trial stopped.
> …
> I am satisfied that the learned trial judge was correct in dismissing the applicant's application for judicial review but mistaken in granting an order prohibiting his further prosecution. Therefore, I would allow the appeal.[42]

Whatever debate there might be as to whether or not prohibition is the only remedy appropriate where there is a failure to provide a trial with due expedition, it strikes me, from the tenor of those remarks, that the Court is uncomfortable with the Strasbourg concept of the right to a trial with due expedition being a free-standing right.

The Strasbourg approach is well summarised in the work *Human Rights and Criminal Justice*:

> In order to establish a breach of Art.6(1) on the ground of excessive delay, it is unnecessary to show that the

[41] *Ibid*., p.25.
[42] *Ibid*., p.27.

> accused has suffered prejudice in the preparation or presentation of his defence. The right to trial within a reasonable time is a free-standing right safeguarded by Art.6(1), as recognised by the House of Lords in *Porter v Magill.* The factors to be taken into account are well established:
> The reasonableness of the length of proceedings is to be assessed in the light of the particular circumstances of the case, regard being had to the criteria laid down in the Court's case law, in particular the complexity of the case, the applicant's conduct and the conduct of the competent authorities.
> A failure on the part of the defendant to co-operate with the judicial authorities is not necessarily to be held against him since Art.6 does not require active co-operation: indeed, the Strasbourg Court has re-asserted that a defendant is not to be blamed for taking advantage of whatever procedural possibilities are provided by the domestic legal system for defence against a criminal charge.[43]

If, in a future case, the Supreme Court can be convinced that the right to a speedy trial is a free-standing right, independent entirely of proof of prejudice, could they be convinced to identify it as a constitutional right, either under Article 38 or Article 40.1? If so, what measures would be taken by the Court to enforce this right? Perhaps akin to the exclusionary rule, if it is not to stay the proceedings.

It is clear from decided cases around the world that breaches of Article 6, or equivalent provisions in domestic constitutions modelled on Article 6, do not lead, in every instance, to a stay. Equally, however, proof of actual prejudice is not always necessary to succeed in an abuse of process claim.

As the US Supreme Court held in *Doggett v. United States*:[44]

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[43] Emmerson, Ashworth and McDonald, *Human Rights and Criminal Justice* (2nd ed., London: Sweet and Maxwell, 2007) pp.14-15.
[44] (1992) 505 U.S. 647.

> Between diligent prosecution and bad faith delay, official negligence in bringing an accused to trial occupies the middle ground. While not compelling relief in every case where bad faith delay would make relief virtually axiomatic, neither is negligence automatically tolerable simply because the accused cannot demonstrate exactly how it has prejudiced him.[45]

This approach has also been adopted in Canada and New Zealand, where courts have taken the view that the psychological effects of delay on a defendant may constitute a strong argument that the delay is unreasonable, even if a fair trial could still be held.

For this reason also I believe that certainly in the Supreme Court the likelihood is that a sound legal argument based on Convention principles will be more likely to succeed if it is capable of being stated in the alternative as a constitutional right.

IV. *MCFARLANE V. D.P.P.*

The issue of systemic delay on which Dr. Barry was successful in Europe will come before the Supreme Court again shortly in the case of *McFarlane v. D.P.P.*

The facts of this case are striking. Mr. McFarlane is charged with offences arising from the kidnap of Don Tidey and the subsequent siege at Derrada Wood in Leitrim. He was a suspect from the outset but was not apprehended at that time. He was subsequently arrested and imprisoned in the North of Ireland from which he escaped in the mass break out from Long Kesh in September 1983. He was ultimately traced to Holland and was extradited from there to Belfast. He had completed his sentence and was at liberty on license when, on his way back to the prison to sign his final license papers, he was arrested by An Garda Siochána on 5th January 1998 and charged with the 1983 offences. He sought judicial review on the basis that he was prejudiced by the delay in charging him with an offence for which he was a suspect from 1983 but was not moved against until the time of his arrest, when for most of that period he was available

[45] (1992) 505 U.S. 647, at 656-657

to the authorities. In addition to the delay itself there was also the question of whether or not original exhibits, which had been misplaced but which had been the subject of testing and copying, were essential for the fair trial. Mr. McFarlane won in the High Court but lost in the Supreme Court, although Mr. Justice Kearns dissented in his favour. The following passage from the judgment of Hardiman J. may be noted:

> The applicant/respondent (hereafter the applicant) has sought to prohibit his trial on these charges on the basis of prejudicial delay and secondly on the basis that during the time which has elapsed certain exhibits have gone missing.[46]
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> …
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> The applicant further contends that the delay, or events happening during the period of delay, have caused him irreparable prejudice in his ability to defend himself, so that there is a real and serious risk of an unfair trial. In part this is put forward as a general proposition and in part more specifically. Heavy reliance is placed on the fact that the three items on which fingerprints were allegedly found are no longer in possession of the Gardaí. Insofar as this ground is urged on the basis of general prejudice, I am unimpressed by it. The whole of the case in this regard is based on a single sentence from the grounding affidavit of Mr. McGuill, solicitor for the applicant, which is quoted above.[47]
>
> …
>
> Quite obviously the gardaí have been in breach of their duty to preserve the evidence, but in this case, unlike the others, this breach has not resulted in the loss of that evidence in an independently verifiable form.[48]

Mr. McFarlane commenced fresh judicial review proceedings essentially claiming that the inefficiency of the court system which led to a period of X years passing between the inception and determination of his judicial review is in itself an

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[46] *McFarlane v. D.P.P.*, Supreme Court, unreported, Hardiman J., 7 March 2006, p.2.
[47] *Ibid*., p.11.
[48] *Ibid.*, p.20.

unconscionable delay and a violation of his constitutional and/or Article 6 rights. He lost in the High Court, Quirke J. holding that:

> Mr. Gageby S.C… says that the applicant's constitutional right to a trial with reasonable expedition has been violated by reason of delays inherent in the court process within this jurisdiction. He argues that the right conferred upon the applicant by Article 6 (1) of the European Convention on Human Rights to a hearing within a reasonable time has also been violated by the delay.[49]
> …
> He says that the applicant is now entitled to relief by reason of the combination of delay on the part of the prosecution authorities in bringing the applicant before the court and delay within the court process itself.
> …
> He points to the State's duty to act with particular expedition in such circumstances.[50]
> …
> The Supreme Court has held that the applicant's constitutional right to a trial with reasonable expedition has not been violated by reason of any delay on the part of the State in prosecuting the applicant up to and including the 1st November 1999.
> The applicant now says that his trial should not proceed because the DPP and the courts did not deal with his judicial review application with sufficient expedition.[51]
> …
> It is to be inferred that the applicant suffered an increase in the level of his anxiety, stress and inconvenience as a result of the additional delays attributed to the State during particular periods of time throughout the conduct of the judicial review proceedings. However, any increased levels of stress, anxiety and inconvenience cannot be said to outweigh the community's very considerable interest in having offences of the gravity of

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[49] *McFarlane v. D.P.P.*, High Court, unreported, Quirke J., 8 November 2006, p.5.
[50] *Ibid.*, p.6.
[51] *Ibid.*, p.8

> those which are the subject of these proceedings prosecuted to a conclusion.[52]
>
> …
>
> Furthermore the applicant has not established by way of evidence or otherwise in these proceedings that culpable or blameworthy delay within the State's court process has affected or interfered with any constitutional or other right enjoyed by him.
>
> It follows from what I have found that the applicant is not entitled to the relief which he seeks and his claim will be dismissed.[53]

The case is under appeal to the Supreme Court and in light of Mr. Justice Fennelly's observations in the case of *T.H. v. D.P.P.* the outlook is not particularly promising from a Convention point of view. It is likely, therefore, that the bulk of the argument will be channelled to Article 38 and Article 40 points. It is, to say the least, a real possibility that the Strasbourg Court will get another opportunity to consider the systemic delays in the Irish Court system.

Whatever about the barely concealed abhorrence for the Strasbourg ruling in *Barry*, practitioners will be acutely aware that all courts are applying great pressure to parties to get proceedings on much more quickly than heretofore. The recent substantial enlargement of the number of judges in Ireland will only fuel that pressure further.

V. TREATMENT OF PERSONS IN CUSTODY

This is another area where the Irish Courts have been in conflict with the jurisprudence in the Strasbourg Court. In fact Ireland lost cases brought by Heaney, McGuinness and Quinn who each challenged the provisions of Section 52 of the Offences Against the State Act which made it a criminal offence to fail to answer questions posed while in custody. The offending section has not been repealed though it is no longer invoked in practice, at least insofar as prosecutions are concerned, although one does

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[52] *Ibid*., p.15.
[53] *Ibid*., p.16.

from time to time find the ordinary interviewing Garda who believes that it is still in place.

Having learned from that experience, the measures in the Criminal Justice Act 2007 which are restrictive of an accused's right to silence proceed, not on the basis of compelling answers, but of permitting inferences to be drawn from silence in appropriate cases.

The relevant sections are the amended sections 18 and 19 of the Criminal Justice Act 1984, the new section 19A of the same Act and the amended section 2 of the Offences Against the State (Amendment) Act 1998.

These new sections draw heavily from the "logic" of the decision of the Strasbourg Court in the case of *Murray v. United Kingdom*.[54] Once again unfortunately this is a clear example of hard cases making bad law. At the time of his arrest, Mr. Murray was in a house where a person suspected of informing on the activities of the IRA was being held hostage and had been tied up. The suggestion was that the object of the exercise was to secure from the prisoner a confession which would then lead to his summary execution. Murray was present in the house and was arrested effectively "red handed". In detention he remained silent and chose not to give evidence at trial. On the basis of the relevant law the court could draw inferences from this silence and did so. Mr. Murray brought his case to Strasbourg.

In many ways it appears a strange case to rely on inferences as there was ample first hand evidence to lead to the conviction. Again, somewhat unfortunately, in addition to his right to silence point, Mr. Murray had been denied access to a lawyer while in the first 48 hours of detention and the Strasbourg Court was going to hold for him on that point in any event.

It is therefore a strange combination of factors which led to the Strasbourg Court effectively relying on "common sense" to identify situations in which inferences ought to be drawn. It is against this backdrop, therefore, that the government amended the sections quoted above in the Criminal Justice Act 2007. They were also particularly mindful to include in each of the amended sections a sub-section as follows:

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[54] *Murray v. United Kingdom* (1996) 22 E.H.R.R. 29.

> Sub-section (X) shall not have effect unless.
>
> *(b)* the accused was afforded a reasonable opportunity to consult a solicitor before such failure or refusal occurred.

We can see where this is drawn from the Strasbourg decision in the case of *Murray*:

> The Court is of the opinion that the scheme contained in the Order is such that it is of paramount importance for the rights of the defence that an accused has access to a lawyer at the initial stages of police interrogation. It observes in this context that, under the Order, at the beginning of police interrogation, an accused is confronted with a fundamental dilemma relating to his defence. If he chooses to remain silent, adverse inferences may be drawn against him in accordance with the provisions of the Order. On the other hand, if the accused opts to break his silence during the course of interrogation, he runs the risk of prejudicing his defence without necessarily removing the possibility of inferences being drawn against him.[55]

This leads me on to a final example of where I believe the Constitution will in fact be influenced by the Convention. The critical view in detentions henceforth will be what amounts to reasonable access. The Irish constitutional law at present is set out in the judgment of *Lavery v. Member in Charge Carrickmacross Garda Station*.[56]

The legislation under consideration in that case was those provisions of the 1998 Offences Against the State Amendment Act which provided for the drawing of inferences from a failure to answer material questions. During the course of his detention Mr. Lavery's solicitor was not advised whether or not it was contended that Mr. Lavery had failed to answer any questions, nor indeed was any information conveyed as to what were

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[55] *Murray v. United Kingdom* (1996) 22 E.H.R.R. 29, para. 66.
[56] [1999] 2 I.R. 390 (S.C.).

considered to be the material issues in the detention. This contrasts with the position in other jurisdictions where, prior to advising a person in custody, the arresting authorities have an obligation to make preliminary disclosure of the matters which the detaining police authorities believe justify the detention and interrogation of the suspect. To overcome the unwillingness to furnish this information, Mr. Lavery's solicitor sought access to the notes of the interview so that at least it would be possible to see if there were questions in respect of which no answers were recorded. This facility was refused and an application was made to the High Court for Mr. Lavery's release under Article 40.4. Mr. Lavery was successful in the High Court and released. He was never charged with any offence arising from his detention but the State nonetheless appealed the High Court ruling to the Supreme Court which found in their favour. The Supreme Court *per* O'Flaherty J. held as follows.

> The State appeals to this Court. The question for resolution is this: Does… as the solicitor for the detained man suffered in this case mean that the detention of the Respondent was rendered unlawful? Without any doubt if a person in custody is denied blanket access to legal advice, or if he is subjected to ill treatment by way of assaults, for example, then that would render his detention unlawful.
>
> However the garda must be allowed to exercise their powers of interrogation as they think right, provided they act reasonably. Counsel for the State submitted to the High Court Judge that in effect what the solicitor was seeking was that the garda should give him regular updates and running accounts of the progress of their investigation and that was going too far. I agree. The solicitor is not entitled to be present at the interviews. Neither was it open to the applicant, or his solicitor, to prescribe the manner by which the interviews might be conducted, or where. The point of whether there were adequate notes taken of any interview might, or might not, be of significance if there was a subsequent trial.
>
> I think all the members of the Court were struck by the apparent inconsistency in the State's attitude: that although the detained man could see notes of the

> interview his solicitor could not. While this may have been a somewhat incongruous course of conduct, it does not render the detention unlawful. It should be noted, too, that of course if a charge had followed on the detention both the accused and his legal advisors would have been entitled to all relevant documentation.[57]

I have to say that even considering that this judgment was given in the wake of the Omagh bomb and at a time when a court might have been reluctant to appear to be interfering with the manner in which the legislature was combating terrorism, that the judgment itself is an extraordinary weak one wholly lacking in principle. It has been roundly criticised by many expert commentators for being wrong and for failing to have proper regard to fundamental rights arising from Article 38 and Article 40 of the Constitution. Of course, the judgment referred to the Strasbourg Court was not considered by them on the basis that Mr. Lavery was not a victim within the jurisprudence of that Court, he not having been charged. There is no doubt in my mind that once the new inferences provisions are invoked across the board that there will be considerable challenges as to what is reasonable in the context of drawing inferences. I myself cannot see how it could be reasonable to draw an inference from an accused's failure to mention something in interview if his interviewers have not themselves disclosed the strength of their case to him, thus triggering the requirement for an explanation. If the prisoner is entitled to the information, then is it not also that his lawyer is entitled to the same information for the purpose of advising him? If the lawyer is entitled to receive the information should he not receive it at the time and in the fashion that the prisoner receives it, perhaps by being present throughout the interview?

In my view the incorporation of the new Criminal Justice Act 2007 sub-sections is because the government is concerned as to what attitude Strasbourg would take where it is more likely that they would be more exacting than the Supreme Court was in the *Lavery* case. That being so, and given that the constitutional right of access has now a grounding in the legislation, it is in my view

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[57] [1999] 2 I.R. 390, at 395 (S.C.).

likely that the domestic courts will interpret the legislation having regard to domestic and constitutional parameters which will of course have an extraordinary similarity to Convention rights previously found!

CONCLUSION

In conclusion, therefore, I believe that the Convention, now that it has been incorporated as part of our domestic law, will continue to play an immensely important role setting standards of fundamental rights. However, as I hope I have illustrated, I believe that the force of the Convention will not be immediately visible as Convention rights will fall and be determined by the courts as constitutional rights, even though they had never been identified as such previously or the right will be incorporated in legislation not primarily because of a concern over a declaration of incompatibility, but out of a residual concern on the part of government that the courts might very well strike down as repugnant to the Constitution legislation that does not reflect Strasbourg values.