## Supplemental Case-Law / Syllabus Updates

### Part 2 – Freedom of Expression to the Family

#### FREEDOM OF EXPRESSION

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#### ARTICLE 38.1 – TRIAL IN DUE COURSE OF LAW

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Freedom of Expression

General Principles


Students should really read this (relatively) short case in full. It is only available at www.courts.ie at this point in time, but is a perfect study aid for the freedom of expression. In this case the Planning Tribunal requested the Court to hold that it has power to require that documents which it circulates prior to public hearing of its modules be treated as confidential and to make general orders restraining the defendant and, in effect, all media of communication, from publishing them until they are disclosed at a public hearing. This case arose out of the Sunday Business Post’s intention to publish various matters arising out of Tribunal papers.

In the majority judgment for the Supreme Court Fennelly J recognised that what was sought was a form of prior restraint – i.e. restriction of expression before it is actually expressed. It is interesting to note the comments made on the public interest nature of the speech:

\[\text{The courts do not pass judgment on whether any particular exercise of the right of freedom of expression is in the public interest. The media are not required to justify publication by reference to any public interest other than that of freedom of expression itself. They are free to publish material which is not in the public interest. I have no doubt that much of the material which appears in the news media serves no public interest whatever. I have equally no doubt that much of it is motivated, and perfectly permissibly so, by the pursuit of profit.}\]

Fennelly J held that:

\[\text{The right of freedom of expression extends the same protection to worthless, prurient and meretricious publication as it does to worthy, serious and socially valuable works. The undoubted fact that news media frequently and implausibly invoke the public interest to cloak worthless and even offensive material does not affect the principle.}\]

And he noted that in this kind of case, the onus was on the Tribunal to persuade the Court to a particularly high degree that this form of restraint was necessary. The major reason for rejecting the argument seemed to be that, in borrowing from ECHR
law, the Supreme Court felt that the restriction had to be “prescribed by law” and it could find no clear legal power for the Tribunal to insist on such restraint. The Court scrutinised the common law principles of confidentiality, but did not find this to be of assistance. There was not, therefore, any question of the proportionality of such a restriction, given that it was not prescribed by law. However, Fennelly J did note that:-

_It would represent a substantial departure from the existing law if courts were to make general orders of prior restraint in protection of the good name of individuals, even in applications at the suit of those individuals themselves. In the exceptional cases where that is done, the person moving the court must place before it cogent material to demonstrate that his or her name will be irreparably and seriously damage if an impending publication takes place. The orders sought at present would be made on the presumptive and entirely speculative basis that publication of material circulated by the Tribunal would damage the good name of unnamed and unspecified individuals without any showing whatever on the question of damage._

Students should query whether - assuming such power was prescribed by law – it would be (a) constitutional or (b) whether its exercise would be subject to particularly intense review on the part of the Court.

**Article 10 – ECHR**

**Independent News and Media & Independent Newspapers Ireland Ltd v Ireland (App No 55120/00) [2005] ECHR 402 (16 June 2005)**

This case concerned the _Sunday Independent_’s article about de Rossa which, in some ways, associated him with “political friends” in the Soviet Union who were “no better than gangsters” and allege that the Workers Party, of which he was then leader, was involved in “special activities”. We have already considered the Irish case where de Rossa received IR£300,000 in damages and the refusal of the Supreme Court to insist on particular directions for the jury. The ECtHR held that:-

_[T]he essential question to be answered in the present case is whether, having regard to the size of the present award, there were adequate and effective domestic safeguards, at first instance and on appeal, against disproportionate awards which assured a reasonable relationship of proportionality between the award and the injury to reputation._

The Court held that review of adequacy of safeguards would only apply where it could first characterise the award as “unusual” – which it did by reference to its relationship with previous, and far lower, Irish awards for libel. It was held that, in fact, the trial judge had given proper directions to the jury – in excess of what _Tolstoy_ may have required even though the trial judge did not, per _Tolstoy_ refer to the purchasing power of any award. The ECtHR held that this may not be necessary and moved to consider the Supreme Court decision.

_The Supreme Court (see paragraphs 31-36 above) took into account a number of relevant factors, including the gravity of the libel, the effect on Mr de Rossa (a leader of a political party) and on his negotiations to form a government at the time of publication, the extent of the publication, the conduct of the first applicant newspaper and the consequent necessity for Mr_
Having assessed these factors, it concluded that the jury would have been justified in going to the top of the bracket and awarding as damages the largest sum that could fairly be regarded as compensation. While IR£300,000 was a substantial sum, it noted that the libel was serious and grave, involving an imputation that Mr de Rossa was involved in or tolerated serious crime and personally supported anti-Semitism and violent Communist oppression. “Bearing in mind that a fundamental principle of the law of compensatory damages is that the award must always be reasonable and fair and bear a due correspondence with the injury suffered and not be disproportionate thereto”, the Supreme Court was not satisfied that the present jury award went beyond what a reasonable jury applying the law to all the relevant considerations could reasonably have awarded and considered it “not disproportionate to the injury suffered by the Respondent.”

This, it was said, was adequate – the Supreme Court had carried out its own review of the proportionality of the award.

Equality

General Principles

Zappone & Gilligan v Revenue Commissioners (High Court, 14 December 2006)

This decision is not publicly available. Note that no neutral citation has been provided. The IRLII index for the High Court is only now including cases from mid-December nor it is even available on www.courts.ie.

Article 38.1 – Trial in Due Course of Law

General Principles

CC v Ireland [2006] 2 ILRM 161

In this case the Supreme Court held that s.1(1) of the Criminal Law Amendment Act, 1935 was inconsistent with the Constitution because it effectively provided for a crime of absolute liability. This section governed the offence of what is sometimes referred to as statutory rape or, in more precise terms, defilement of a girl under the age of fifteen years. In short, if one had sex with a such a girl then one was guilty of the offence regardless of whatever belief one held about the girl’s age (i.e. that she was over seventeen).

By reason of the absolute elimination of any defence of honest mistake the Supreme Court held that this unconstitutional. But note that it was a limited holding. Hardiman J noted

_I cannot regard a provision which criminalises and exposes to a maximum sentence of life imprisonment a person without mental guilt as respecting the liberty or the dignity of the individual or as meeting the obligation imposed on the State by Article 40.3.1 of the Constitution._
It is perhaps not essential to the decision that the exposure was to a maximum of life, but students should bear in mind just how extreme this offence was – it was one of absolute liability and it was for this reason it fell – it allowed no defence. See per Hardiman J

\[\text{[It is necessary to restate the absolute nature of the offence in question here. It affords absolutely no defence once the actus reus is established, no matter how extreme the circumstances. Rather than hypothesise such circumstances one might take the facts actually found in the well known case of }} R. v. Prince [1875] LR 2 CCR. This case is fully discussed in the judgment of Fennelly J. in the earlier aspect of this applicant’s case. There, the jury found that the girl in question appeared to be “very much” over the relevant age of sixteen, had told the defendant, believably, that she was eighteen, was genuinely believed by the defendant to be eighteen, and that this belief was reasonable on his part. But there was no defence. So absolute an offence is rare, even by comparison with other offences which address serious social problems, and offences that are the subject of serious societal condemnation. For example, the relatively recent child pornography legislation deals with the question of age by a system of presumptions but does not exclude their rebuttal.\]

**DPP v Eamonn Matthews [2006] IECCA 103 (14 July 2006)**

The Applicant was convicted by the Special Criminal Court (O’Donovan, J., J. Matthews, and D.J. Malone) on the 7th December 2004 of the offence of membership of an unlawful organisation, namely, the Irish Republican Army, otherwise Oglaigh Na hEireann, otherwise the IRA, on the 13th June 2003, contrary to the provisions of the Offences Against the State Act 1939, as amended, and was found guilty, after a trial which lasted eleven days. Many issues were raised relating to particular aspects of evidence and criminal procedure. One aspect was about drawing inferences from failures to respond to particular questions under the Offences Against the State (Amendment) Act, 1998. The more “constitutional” argument was that evidence not considered persuasive in a previous trial (for possession of explosives) should have been adduced in this trial.

The Court noted that when the trial court, in the first trial, found the Applicant not guilty, it made no finding whatsoever as to whether the same evidence might or might not support a different charge. It would be otherwise if the same facts were being relied upon by the prosecution to support a second identical charge. In that event, it was said, a prohibition or restriction on adducing that evidence could be validly invoked, to avoid any question of the Applicant being placed in double jeopardy.

**Purcell v AG & Anor [2006] IESC 64 (28 November 2006)**

Here challenges were made to the “new” systems for breath-testing. As Murray CJ put it:-

\[\text{The gist of the plaintiffs’ case is that they have been denied the opportunity of an independent breath sample or other sample whereby the same can be independently tested and the test results independently verified, as a result of which they contend they are denied the possibility of an effective defence.}\]
A lot of the case at the High Court turned on whether the machines (the Intoxilyzer and the Intoximeter) were reliable. Counsel had argued that British law (Road Traffic Act, 1988) provided extra safeguards not applicable in Irish law whereby, inter alia, two readings would be taken with the lowest result relied on or where the chance to provide blood or urine was there in cases where breath specimens might have provided a sufficiently low reading to raise doubts. The Supreme Court, however, pointed out that:-

However as McKechnie J. pointed out in his judgment, it remains open to the appellants, as with any person accused of an offence contrary to s. 49(4) of the Act of 1961, inter alia to adduce evidence of the amount of alcohol they had consumed, in seeking to show that the relevant apparatus should be considered as having been defective.

Effectively, the Court rejected the view that a statement generated of the alcohol content of breath was “conviction by printout”. “For instance”, it was said “the prosecution must establish all of the following matters”:-

(a) That the accused was the person driving or attempting to drive the vehicle.
(b) That what was being driven or was the subject of an attempt to drive was a mechanically propelled vehicle.
(c) That the driving or attempt occurred in a public place.
(d) The time of driving.
(e) That the accused was validly arrested.
(f) That a valid s. 13 requirement was made.

The Court concluded:-

The Court is satisfied that there is no basis for disturbing the findings of the learned High Court judge which means in effect that the internal mechanisms and safeguards associated with the intoxilyzer apparatus and its readings are such as to provide reassurance of the most empathic nature of the accuracy of the results produced by the Medical Bureau. In the view of this Court it can not be any part of the State’s obligation as an element of fair procedures, when highly efficient technology is available to it, to provide some corresponding means or technology to an accused whereby he or she can seek to carry out his or her own tests. That would be an absurd application of any ‘equality of arms’ doctrine.

Undue delay in child sex abuse cases

M(P) v DPP [2006] 2 ILRM 361

The decision in H v DPP changed things in respect of complainant delay in child sex cases. However, as pointed out in JK v DPP [2006] IESC 56 (27 October 2006) this decision was not necessarily about prosecutorial delay. The decision in M(P) is well summarised by the Supreme Court in JK v DPP as follows:-

The general issue of prosecutorial delay and the specific right to a trial with reasonable expedition was also dealt with in some detail in the recent case of P.M. v D.P.P. [2006] 2 I.L.R.M. 361. In that case Kearns J. held, as set out in the head note, that a balancing exercise is the appropriate mechanism to be adopted by a court in determining whether blameworthy prosecutorial delay
should result in an order of prohibition. An applicant for such relief must put something more into the balance where prosecutorial delay arises to outweigh the public interest in having serious charges proceed to trial. Where blameworthy prosecutorial delay of significance has been established by the applicant, that is not sufficient per se to prohibit the trial, but one or more of the interests protected by the right to an expeditious trial must also be shown to have been so interfered with such as would entitle the applicant to relief. It is important to note that a clear distinction is made in this as in other cases between the core issue of a right to a fair trial and the separate and more nuanced right to an expeditious trial.

H(T) v DPP [2006] IESC 48 (25 July 2006)

The applicant wished to prohibit his trial on a charge of sexual assault. His central claim was that the Director of Public Prosecutions, the appellant, had applied improper pressure on him to plead guilty in the District Court. The High Court rejected the argument but prohibited the trial on the basis of delay. The DPP appealed this, arguing that delay was caused by “the unmeritorious proceedings taken by the applicant and the way in which he conducted them”.

Fennelly J noted:-

This Court is not unfamiliar with applications to prohibit criminal trials where there has been lengthy delay. According to a well-developed jurisprudence, applied in many cases in recent years, the Court has jurisdiction to prevent the further prosecution, on the ground of delay, of offences alleged to have been committed many years previously. It is, however, unusual, to say the least, and unique in my experience, for an accused person to profit from delay which is the result of unmeritorious proceedings which he has himself prosecuted.

The High Court decision was overturned. The Supreme Court found that:-

The overwhelming impression left by a consideration of this history is that, while there was significant delay on the part of the appellant, the principal if not the only reason for the failure to get the prosecution on was that the applicant had brought unfounded judicial review proceedings. In the course of those proceedings, he conducted a sort of war of attrition with the appellant in respect of discovery, from which he secured minimal benefit. Almost all of the delay was due to the discovery process.

And it was held that:-

It is of prime importance, at the outset, that the applicant was the initiator of the entire judicial review process and that his application was without merit. It is true that it survived the low threshold for leave to apply for judicial review. However, it must always have been obvious to the applicant and his advisers that the applicant was not, in fact, put under any pressure to plead or not to plead. Whatever may be said about the initial mistaken approach of the Director, the applicant himself, with the benefit of the legal advice which he had at his disposal, knew his rights. More importantly, it was, as the learned trial judge said in his judgment, “of fundamental importance …… that the accused person was never asked how he proposed to plead, he never pleaded and was never in any other way, or by any other means “put on his
election.” This fundamental fact was known to the applicant when he initiated his judicial review application and, in my view, it has a very significant bearing on the court's consideration of the entire matter. Moreover, from the moment of commencement of the judicial review proceedings, the Director has been restrained, at the behest of the applicant, by injunction from continuing with the criminal prosecution.

**Unconstitutionally Obtained Evidence**

DPP (Walsh) v Cash [2007] IEHC 108 (28 March 2007)

This case is freely available at www.courts.ie. It contains an excellent summary on the case-law on unconstitutionally obtained evidence. Students are advised to read it. It was argued here that any piece of information that might lead to a step in the criminal process, including an arrest, must be proved by the prosecution to have been obtained in strict compliance with law. Charleton J considered the case-law including the Kenny decision. In judgment highly critical of the current law, he held it had three consequences:-

**Firstly,** every error on the part of the agents of the State which takes their action outside the strict letter of the law causes the exclusion at trial of any evidence which directly results therefrom.

**Secondly,** the second consequence that has resulted from Kenny’s case is that every breach of an accused person’s rights is always pleaded at trial as an infringement of the Constitution.

**Thirdly,** the third consequence of the decision in Kenny’s case is that it has become practically impossible to say when a constitutional right begins and ends.

He held that:-

In my judgment it should now be possible, in considering whether to exclude evidence which has been unlawfully obtained, to take into account factors other than the isolated interests of the accused, divorced from any other consideration. Criminal trials are about the rights and obligations of the entire community; of which the accused and the victim are members. It is not a function of the criminal courts to discipline police officers by causing the exclusion of evidence. Sometimes, however, the balancing of competing interests requires that exclusion in the overall interests of the administration of justice.

He summed up his answer to the case-stated as follows:-

1. A suspicion which gives rise to reasonable cause for arrest does not have to be justified on the basis that every element of it arose solely on the basis of evidence that was properly obtained.
2. It follows that evidence resulting from a detention based upon a suspicion that cannot be proved as being founded entirely upon evidence lawfully obtained is not, for that reason, made unlawful.
3. Members of An Garda Síochána have the power to seek the cooperation of individuals in the investigation of crime. They are entitled to take...
fingerprints, clothing, or any other samples, with the consent of a citizen, be he a suspect or not.

4. A garda is entitled to seek the consent of a citizen, be he a suspect or not, in relation to the gathering of relevant samples.

5. The district court is bound by the decision of the Supreme Court in The People (DPP) v. Kenny [1990] 2 I.R. 110. However, that decision should not be extended as to its effects to require the prosecution to prove that every element of an investigation was entirely proper and in accordance with statutory powers. The rule requires the exclusion of evidence where, as result of a mistake, an identifiable constitutional right of the accused is infringed by the agents of the State.

6. A judge is entitled to assess the evidence in deciding whether there was consent to the taking of any samples proposed to be given in evidence.

7. If a judge is satisfied that evidence has been obtained lawfully, the decision in Kenny's case does not apply and there is no judicial basis for the exclusion of evidence on the ground of the mistaken infringement of any constitutional right.

Unfair Pre-Trial Publicity

JK v DPP [2006] IESC 56 (27 October 2006)

This case is not about pre-trial publicity at all. It is about the state of the law as regard delay post the decision in H v DPP. The application was an 84 year old man accused of sexual offences against his niece, nephew and grand-niece. Now, before H v DPP it seemed that one had to show that the complainant’s delay in complaining to the authorities was demonstrably due to dominance of the complainant by the applicant or at least by an inhibition of the complainant brought about through the fault of the applicant.

The decision in H, of course saw the Supreme Court hold that:-

The court has found that in reality the core enquiry is not so much the reason for a delay in making a complaint by a complainant but rather whether the accused will receive a fair trial or whether there is a real or serious risk of an unfair trial. In practice this has invariably been the essential and ultimate question for the court. In other words it is the consequences of delay rather than delay itself which has concerned the court...In all events, having regard to the court’s knowledge and insight into these cases it considers that there is no longer a necessity to enquire into the reason for a delay in making a complaint. In all the circumstances now prevailing such a preliminary issue is no longer necessary.

So, was a fair trial impossible? The Supreme Court first rejected the argument that various aspects of specific prejudice put forward were well-founded. One argument was that evidence of ability at a Christening when offences were alleged to have taken place existed – i.e. that the accused sat and talked with a particular person, now dead, when he was alleged to have been abusing one of the complainants. The Court rejected this argument:-

This potential witness’s evidence concerns what took place at a family christening. Clearly many other family members must have been present at this occasion. The applicant’s family circle is large and close-knit, as set out in
detail in the judgment of the learned trial judge. It seems unlikely that other witnesses as to the applicant's behaviour on that occasion would not be available.

The accused also argued that general prejudice existed by reason of the delay. The Court noted that the “proper approach of the court in cases where such general prejudice is pleaded has been set out by this court (Denham J.) in the recent case of D.C. v D.P.P. [2006] 1 I.L.R.M. 348 at 350-351 as follows”:-

However, bearing in mind the duty of the courts to protect the constitutional rights of all persons, in exceptional circumstances the court will intervene and prohibit a trial….Such a jurisdiction to intervene does not apply where the applicant has minutely parsed and analysed the proposed evidence and sought to identify an area merely of difficulty or complexity. The test for this court is whether there is a real risk that by reason of the particular circumstances that the applicant could not obtain a fair trial.”

However, the Supreme Court noted that directions to the jury could be utilised to, effectively, mitigate any prejudice which may arise – i.e. there may be a risk of an unfair trial, but it was not an unavoidable risk.

**Article 38.5 – Trial by Jury**

The case of DPP v Haugh (No.1) was not included in your manual specifically in the context of Article 38.5 but was included in relation to unfair pre-trial publicity. This case about the power of a trial judge to issue a questionnaire to jurors to, essentially, weed out those who may have been prejudiced in the trial of Charles Haughey. It was held that the as the power to do so was not contained in the Juries Act, 1976, the trial judge was acting ultra vires. The case, however, is also important for the comments of the High Court whereby it seemed to be held that the Act, as it stood, was a sufficiently protective code for weeding out prejudicial jurors. Carney J held:-

Section 15 (3) of the Juries Act, 1976, is the statutory scheme designed by the Oireachtas in the first instance as the final filter to eliminate disqualified and ineligible jurors and secondly to eliminate biased jurors in the broadest sense of that term and it works well. It is part of an all embracing statutory code and this code does not make provision for the jury being questioned in writing in advance of the ballot. The respondent does not have the statutory power either express or implied to take the initiative he did. The fair procedures arguments fail by reason of the respondent's ruling on the adjournment application that at the present time there was not a real or serious risk that the first notice party would receive an unfair trial.

O'Donovan and Laffoy J's approach was somewhat similar. They effectively held that the Act of 1976 had sufficient protections contained therein whereby prejudice could be avoided at least insofar as jury selection went. The argument one could made on the basis of this case would be that the High Court has specifically considered the 1976 Act and viewed it, as a whole, as a conscientious response to the de Burca decision and a response which seems to protect, quite well, against the possibility of a prejudicial jury.
Locus Standi, Mootness and Justicability

Locus Standi

Grace v Ireland & Anor [2007] IEHC 90 (7 March 2007)

This concerned a challenge to the constitutionality of bankruptcy law. Specifically, it was argued that exposes a bankrupt, once the bankruptcy “veil” had lifted, to the costs incurred in the bankruptcy proceedings had to be discharged was unconstitutional. This would only kick in once the “veil” was to be lifted, which would only apply after 12 years of bankruptcy – i.e. the “problem” would only occur after such a 12 year period when the question of an entitlement (not a right) to discharge would arise. Laffoy J held that:-

The plaintiff, on whom the burden of showing that he has standing rests, has not discharged the onus of establishing that a precondition to his entitlement to a discharge has arisen. Therefore, to adopt the words of Henchy J. in Cahill v. Sutton, his case “has the insubstantiality of a pure hypothesis”.

Jus Tertii

TD v Minister of Education [2001] 4 IR 259

It was argued here that none of the children applicants would actually benefit from the relief sought. Keane CJ recited the argument

There had been no evidence in the High Court as to the particular needs of the applicants: in particular, it had not been demonstrated how the requirement that particular high security and high support units should be provided would meet the particular needs of these applicants. It was further urged that even if the court was entitled to conclude that the rights of the applicants had been infringed by the failure of the respondents to provide the units now directed by the court to be provided, which was not accepted, that was a breach which could only be dealt with by way of an award of damages. He said it was clear that, rather than addressing the specific needs of the applicants in these proceedings, the judgment and order was seeking to ensure the existence of a series of units which would be available to any children who may need them over the coming years.

Keane CJ then noted:

In the present case, it is clear that, having regard to their respective ages, some of the applicants will derive no conceivable benefit from the order granted by the High Court. Indeed, since all of them are in the catchment area of the Eastern Health Board and the units to be provided on foot of the order are, without exception, situated outside that area, it is difficult to see what benefit will accrue to any of them from the provision of these units. While it may be that a general improvement in the provision of facilities on a national basis would ensure that the facilities available in the Eastern Health Board area were not being used to meet any deficiencies in other areas and that, in that indirect manner, children in need of facilities, including the applicants, might derive some benefit from their provision, the fact remains that, as the evidence clearly demonstrated, the damage was already done in the case of
the applicants by the undoubted failure of the State to deal adequately with this problem in the past.

But he held that:-

However, I am satisfied that the submission advanced on behalf of the applicants that these considerations are relevant to the form of relief to which the applicants might be entitled rather than to their locus standi or lack of it is well founded. They have undoubtedly been affected by the failure on the part of the State agencies to meet their particular needs and that, of itself, would appear to me to afford them locus standi in these proceedings.

Construction Industry Federation v Dublin City Council [2005] 2 IR 496

This case seems to hit on the general question of an unincorporated trade association like the CIF has standing to maintain suit on behalf of, essentially, the interests of its members. This case concerned an attempt to judicially review a development contribution scheme made up by the respondent. Such schemes provide for contributions by developments to be made as part and parcel of planning permission grants towards the costs of public infrastructure and facilities provided by or to be provided by the local authority in its area, whether or not it is of benefit to the particular development concerned. Gilligan J held that:

The applicant is an unincorporated association representing the interest of parties involved in the construction industry. I am satisfied that its constituent members are clearly persons who will be affected by the operation of the development contribution scheme as brought into operation pursuant to s. 48. I take the view, following the dicta of Henchy J. in Cahill v. Sutton [1980] I.R. 269 that the impugned provision is directed at or operable against a grouping which goes to make up the constituent members of the applicant federation and I am satisfied that the applicant has a common interest with those affected because it represents those persons involved in the construction industry. I take the view that in the particular circumstances of this case, there is a need for a reasonably generous approach to the question of standing and I do not believe, in the interests of justice, that it would be appropriate that I adopt a severely restrictive approach to locus standi in the circumstances of this case where the decision of the respondent is being challenged. Accordingly, I find that the applicant has locus standi in this matter.

Justiciability

Doherty & Anor v South Dublin County Council & Ors [2007] IEHC 4 (22 January 2007)

This was considered on last supplemental hand-out.

Effect of declarations of invalidity or inconsistency

A v The Governor of Arbour Hill Prison [2006] 2 ILRM 481
Recall that in *CC v Ireland*, the Supreme Court held that the pre-1937 crime of “statutory rape” was unconstitutional. This created a difficult problem since if it fell, then, in theory, those imprisoned on foot of it were in prison in relation to an offence that never existed as a pre-1937 law later declared to be unconstitutional is deemed never to have been carried over (by Article 50) into the post-1937 constitutional order. The Supreme Court got around this difficulty in *A v Governor of Arbour Hill Prison* [2006] IESC 45. Murray CJ noted that:-

*The abstract notion of absolute retroactivity of the effects of a judicial decision invalidating a statute is incompatible with the administration of justice which the Constitution envisages, as many of the dicta of this Court indicates in cases which it has already decided...However attractive the argument of the applicant, when taken in isolation, would at first superficially appear, and however complex the issue in practice may appear to be, it is not one which has been shown compatible with any ordered constitutional system and in my view is not compatible with ours.*

The Chief Justice examined the law under the ECHR, the law of Canada, the United States, India of the EU and held that:-

*The foregoing case-law highlights the fact that other constitutional courts with similar or analogous powers to review the constitutionality or validity of legislation, including where the judicial decision in principle means that the legislative act was void ab initio, have found that the notion of complete or absolute retrospectivity is inherently incompatible with the broader notions of legal certainty and justice in an ordered society.*

In short, the logic of Murray CJ was to distinguish between declaring a statute void ab initio and the retrospective effects of such a decision. However, it is quite clear that the judgment does not proceed on cold logic, but rather on a broader approach, concerned with matters of practical common sense and justice:-

*Absolute retroactivity based solely on the notion of an Act being void ab initio so as to render any previous final judicial decisions null would lead the Constitution to have dysfunctional effects in the administration of justice. In the area of civil law it would cause injustice to those who had accepted and acted upon the finality of judicial decisions. Rights which had become vested in third parties as a consequence of such decisions would be put in jeopardy. The application of a principle of absolute retroactivity consequent upon the unconstitutionality of an Act in the field of criminal law would render null and of no effect final verdicts or decisions affected by an Act which at the time had been presumed or acknowledged to be constitutional and otherwise had been fairly tried. Such unqualified retroactivity would be a denial of justice to the victims of crime and offend against fundamental and just interests of society.*

Denham J held that:-

*In relation to both types of legislation, both pre and post 1937, no principle of retrospective application of unconstitutionality has been developed. The precise detail of the application of the judgment may be addressed in the judgment itself, or by subsequent queries raised by a party in relation to the judgment, or by subsequent cases...Thus while a law may be void ab initio, the application of that decision retrospectively is a different and additional matter for consideration. No principle of the general retrospective application of declarations of unconstitutionality has been developed in our jurisdiction.*
And she pointed out that:-

Pursuant to Article 50.1, a declaration that a statute is inconsistent with the Constitution means that it was not carried over by the Constitution and is null and void since 1937. However, the declaration of invalidity of a law and any order relating to the application of that declaration are two quite separate matters, two different issues. The inherent jurisdiction of the Superior Courts to administer justice is applicable to the decision on both issues. Consequently, the appropriate application of an order may be considered by a court in all the circumstances of the case, for the purpose of doing justice. While it has never been so decided, and it would require a full argument, it appears to me that the issue of additional remedies in relation to the application of such a declaration, for example the suspension of an application of a declaration of invalidity, could be raised in our courts.

And that:-

When a law has been treated as valid law for decades it is impossible, unjust, and contrary to the common good, to reverse the many situations which have arisen and been affected, in all their myriad forms, over the decades. In fact, even if a law has been presumed valid for only a few short years it will have affected people and institutions in ways not reversible. The community accepted the law, the way it was assumed or presumed it to be, and acted accordingly. The clock cannot be put back. The egg cannot be unscrambled.

Hardiman J agreed in principle and held that:-

This judgment recalls that no-one has yet succeeded in impeaching a conviction or sentence arising under a statutory provision which, later, another person succeeds in having declared unconstitutional; the principles giving rise to the established power to continue to give force and effect to such an order of the Court; the very great imperative, especially in a grave case of crime against an individual person, to preserve such an order, and the totally exceptional circumstances, involving injustice, oppression or departure from natural justice, which might prevent that being done in a particular case.

These propositions, and the constitutional provisions and decided cases on which they are based, enable one to derive a principle of non-retrospectivity in the effect of a declaration of inconsistency or invalidity of a statutory provision on concluded cases (other than that in relation to which the declaration is granted) save in exceptional individual cases of the sort mentioned. This is wholly consistent with the decisions of the Courts for more than three decades, prior to which the issue does not appear to have arisen. During that period no exception to which the researches of counsel can point has been found.

Geoghegan J added:-

In conclusion, I am of the view that concluded proceedings whether they be criminal or civil based on an enactment subsequently found to be unconstitutional cannot normally be reopened. As I have already indicated, I am prepared to accept that there may possibly be exceptions. But in general it cannot be done.
The ECHR

Caldwell v Mahon & Ors [2006] IEHC 86 (15 December 2005)

Insofar as matters of practice and procedure are relevant, this case is really only of interest as it applies the ratio the Fennell case in the context – i.e. that Convention issues were not really that relevant as a matter of binding law to matters pre the 31st December 2003. However, ECHR materials (such as judgments of the ECtHR) may be persuasive in respect of such periods. Hanna J held that:-

This view I imported into my decision in this case and I applied it in a manner which rendered the relevant decision, that of November, 2003, and any subsequent transactions thereafter, if I might so term them, were reiterations of that decision. However, although the European Convention of Human Rights, for the purposes of this case, does not form part of the domestic law of Ireland, nevertheless, decisions of the European Court of Human Rights may be of persuasive authority (see judgment of Denham J. - O’Brien v Mirror Group Newspapers [2001] 1 IR 1, at p. 33).

Grace v Ireland & Anor [2007] IEHC 90 (7 March 2007)

We looked at this above in relation to locus standi. Part of the argument here was that whereas Grace was relying on the ECHR, he was attempting to argue that it was of retrospective effect. Laffoy J held that:-

I have no doubt that, if the plaintiff in these proceedings was seeking to challenge the validity of his adjudication as a bankrupt in reliance on the provisions of the Convention and the Act of 2003, he would not be entitled to do so. That situation would be entirely analogous to the situation which arose in the Fennell case where, on an appeal to the Circuit Court against an order of the District Court granting Dublin City Council possession of premises on foot of a notice to quit served pursuant to s. 62 of the Housing Act, 1966, both the notice to quit and the order of the District Court having preceded the coming into operation of the Act of 2003, Mrs. Fennell sought to invoke the provisions of the Act of 2003 and, in particular, ss. 2 and 3 thereof. Kearns J., with whom the other judges of the Supreme Court agreed, having examined the texts and authorities on the issue of retrospectivity of statutes, concluded (at p. 318) that the Act of 2003 cannot be seen as having retrospective effect or as affecting past events.

Now, there is an issue of complexity here. Fennell concerned the argument that the State had not acted in a manner consistent with the ECHR at a point before the 31st December, 2003. Grace concerned an application, under s.5 of the ECHR Act, 2003, for a declaration of incompatibility. The argument was the declaration would apply retrospectively so as, effectively, render provisions of the bankruptcy code unlawful retrospectively. Laffoy J rejected this:-

If the plaintiff could establish that the impugned requirement in s. 85(4) is incompatible with the State’s obligation under the Convention, the declaration would only operate prospectively to require the Taoiseach to comply with sub-s. (3) of s. 5 and to entitle the plaintiff to pursue a claim for an ex gratia payment of compensation under sub-ss. (4) and (5). The declaration would
not affect any legal rights and obligations of the plaintiff or any other party. For instance, the declaration would not disentitle the Official Assignee to the payment of the expenses, fees and costs due in the bankruptcy, nor would it disentitle the Revenue Commissioners to the preferential payments due. Accordingly, in my view, the making of a declaration of incompatibility would not have a retroactive effect and the plaintiff is not barred from pursuing it.

The Family

As you can see from past-exams, the examiner tends to ask questions relating to the family involving a consideration of State or other interference or intervention in family life. There are decades of case-law on this, but recent cases tend to sum up the position quite well. An added matter relates to the constitutional position of natural, but not married parents – but this is dealt with adequately in the manual already. The following extracts are lengthy but the cases from which they come tend to be massive.

N & Anor v Health Service Executive & Ors [2006] IESC 60 (13 November 2006)

This case is an excellent summary of the law as it applies to custody disputes in adoption “change of mind” cases. This concerned the use of the habeas corpus procedure by parents to seek the return of their daughter from prospective adopting parents. The child was then aged about two years and four months old. The parents were not married at conception and birth and placed the child for adoption. She was placed with a prospective adopting coupled. Before an order was made for adoption they changed their mind, and told the Adoption Board which did not act very quickly.

Hardiman J noted:-

The applicants are the natural parents of the child and are now married to each other. These persons constitute a family within the meaning of Article 41 of the Constitution. The institution of the family is there defined “as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law”. Moreover, by Article 42, this family possesses the status of “the primary and natural educator of the child”, extending to the right and duty to provide religious and moral, intellectual, physical and social education. This plainly involves the proposition that the parents have, and are entitled to have, the custody and society of the child on a day to day basis. These provisions clearly put the applicants in a strong position.

These prerogatives, rights and duties of the parents may in limited circumstances be displaced, on the basis of what is provided in Article 42.5 of the Constitution:

“In exceptional cases, where the parents for physical or moral reasons fail in their duty towards their children, the State as guardian of the common good, by appropriate means shall endeavour to supply the place of the parents but always with due regard for the natural and imprescriptible rights of the child.”.

Accordingly, any resistance to the right of the applicants to the custody of the child for the purpose of rearing her in accordance with their constitutional
rights and duties, must find a basis in Article 42.5 as it has been expounded by the Courts in several decisions discussed below. The threshold for such resistance is a high one, and requires that there be established “exceptional” circumstances “where the parents for physical or moral reasons” have been shown to have “failed in their duty towards their children…”.

He also pointed out:-

It appears to me to follow from this language that the State has adopted a preference for a familial model in its attempts to secure the welfare of a child in respect of whom the nurturing of his or her natural family is unavailable. But this is a default position: the child has a right to the nurture of his or her natural family where that is possible.

So, was there a failure of parental duty? The main question here -was the relevance of the placing of a child for adoption in relation to whether such “failure” occurred. To cut it short, Hardiman J cited many of the previous authorities which had upheld the right of mother to withdraw consent and thus held that placing a child for adoption could not, per se, constitute a failure in parental duties. He also held that:-

By parity of reasoning I do not believe that inevitable passage of time involved in those procedures, during which a child will naturally bond with those of who have custody of him or her, can constitute a failure in duty... The learned trial judge also appears to have taken into account, as a matter grounding a finding of a failure in parental duty by the applicant, the distrust which now existed between the parties, including the professionals involved. I do not believe that this distrust is attributable wholly, or even mainly, to the applicants.

Of course, this did not end the matter. The Court had to consider whether there were “compelling reasons” not to return the child. The trial judge essentially found that the bonding would now be so strong with the Doyles that there would be grave risk of causing serious harm to the child by a transfer and that even if such a transfer was made in a gradual and careful manner in accordance with advice of experts, he did not believe that there would be the necessary cooperation between the Doyles and the Byrnes to achieve such transfer with minimal damage as in his view there was a breakdown of trust. Hardiman J disagreed with this as a matter of evidence. He thus ordered the release of the child into the custody of its natural parents.

Fennelly J’s judgment is very important for students as it contains a very detailed summation of the decision in North Western Health Board v W&W:-

The context is always the constitutional presumption that the rights of the child are best secured within the family constituted by nature and by marriage.

Perhaps the most cogent example of that presumption in action is the decision of this Court in North Western Health Board -v- HW and CW [2001] 3 IR 635. In that case, the parents of a fourteen-month old child had refused to permit the administration to their child of the P.K.U. screening test. The medical case for the administration of the test was overwhelming. All the conditions which it is designed to screen are readily treatable and there is no risk attached to its carrying out. There was no legislation requiring parents to consent to the test. Nonetheless, the majority of this Court (Keane C. J. dissenting) held that an exceptional case had not been made out for the
intervention of the State. The judgments consider the application of Article 42, section 5 of the Constitution. Denham J held that at page 728:

“The defendants exercised their parental responsibility and duty to the child. It has not been established that they have failed in their duty to the child so that the child’s constitutional rights have been or are likely to be infringed, in order that the courts, as guardian of the common good, should intervene to order the taking of the P.K.U. test by way of the blood test as suggested, having regard to the paramountcy of the welfare of the child but with due regard to the rights of the child, including all his constitutional rights.”

Murphy J observed at page 732:

“The Thomistic philosophy - the influence of which on the Constitution has been so frequently recognised in the judgments and writings of Walsh J. - confers an autonomy on parents which is clearly reflected in these express terms of the Constitution which relegate the State to a subordinate and subsidiary role. The failure of the parental duty which would justify and compel intervention by the State must be exceptional indeed. It is possible to envisage misbehaviour or other activity on the part of parents which involves such a degree of neglect as to constitute abandonment of the child and all rights in respect of it”

Murray J, as he then was, stated at page 740:

Decisions which are sometimes taken by parents concerning their children may be a source of discomfort or even distress to the rational and objective bystander, but it seems to me that there must be something exceptional arising from a failure of duty, as stated by this court in The Adoption (No. 2) Bill, 1987 [1989] I.R. 656, before the State can intervene in the interest of the individual child.

Hardiman J said at page 757:

“The sub-article does not constitute the State as an entity with general parental powers, or as a court of appeal from particular exercises of parental authority.……….. It does not seem to me possible to hold that the defendants have failed in their duty towards their children……….. I do not view a conscientious disagreement with the public health authorities as constituting either a failure in duty or an exceptional case justifying State intervention.”

I believe that it is intrinsic to these judgments that there must be a clearly demonstrated failure of duty before the State may exercise its power to supply the role of parents. The Article requires that such a failure of duty be for “physical or moral reasons.” I cannot see how any of the matters listed by the learned trial judge as amounting in combination to a failure of duty can amount to either failure for physical or moral reasons. The learned trial judge was at pains not to accuse the Byrnes of anything that could be described as “moral” failure. Nor did he specify any “physical” failure. Rather he appeared to exclude it.

One of the cases upon which the learned trial judge placed reliance to find that there is an expanded notion of failure of duty was The Adoption (No. 2)
Bill 1987, cited above. The key passage in the judgment of the Court delivered by Finlay C.J. at page 663 was as follows:

“Article 42, s. 5 of the Constitution should not, in the view of the Court, be construed as being confined, in its reference to the duty of parents towards their children, to the duty of providing education for them. In the exceptional cases envisaged by that section where a failure in duty has occurred, the State by appropriate means shall endeavour to supply the place of the parents. This must necessarily involve supplying not only the parental duty to educate but also the parental duty to cater for the other personal rights of the child.”

That passage, of course, does not address, in any way, the meaning of “physical or moral reasons.” The learned trial judge attached importance to a further passage on the same page of the judgment of the Court as follows:

“The Court rejects the submission that the nature of the family as a unit group possessing inalienable and imprescriptible rights, makes it constitutionally impermissible for a statute to restore to any member of an individual family constitutional rights of which he has been deprived by a method which disturbs or alters the constitution of that family if that method is necessary to achieve that purpose. The guarantees afforded to the institution of the family by the Constitution, with their consequent benefit to the children of a family, should not be construed so that upon the failure of that benefit it cannot be replaced where the circumstances demand it, by incorporation of the child into an alternative family.”

That passage, however, concerns the specific question which arose on the Article 26 reference, namely the possibility of a statutory provision for the adoption of a child of married parents, where, as the long title of the relevant Bill stated, in exceptional cases, “the parents for physical or moral reasons have failed in their duty towards their children.” In the course of that judgment, the Court, in construing Sub-clause (I)(A) of the Bill said that a failure of duty for physical or moral reasons need not “in every case be blameworthy.” The Court continued: “it does mean that a failure due to externally originating circumstances such as poverty would not constitute a failure within the meaning of the sub-clause.” The Court did not say that a failure for moral reasons would not necessarily be blameworthy.

The learned trial judge interpreted the judgment of McGuinness J in the case of Northern Area Health Board -v- An Bord Uchtála, cited above, to establish the proposition that “that in the context of adoption failure to provide for the day to day needs of the child constituted a failure of duty even though there was nothing blameworthy or culpable in the actions of the parent or parents.” In support of that proposition, he cited the following passage from the judgment of McGuinness J:

“In the instant case the trial judge had before him ample evidence to establish that on account of her disability the notice party had been unable to fulfil her parental role not alone for the required 12 month period but for the entire of J’s life. He stressed that this inability was not blameworthy; it was from what is described in both the statute and Article 42.5 as “physical reasons”, I would concur with the trial judge in
On the facts of the case Fennelly J held, like Hardiman J, Geoghegan J and Murray CJ, that the child should be returned.


This concerned the IBC/05 scheme which dealt with applications for residency based solely on parentage of an Irish born child. The scheme was, essentially, favourable towards these applications – as was said in evidence:-

"... it was then decided that, rather than engaging in a case by case analysis, as a gesture of generosity and solidarity to the persons concerned, a general policy would be adopted of granting those persons permission to remain in the State provided that they fulfilled certain criteria which were designed to reflect the factors that had given rise to the decision to adopt a generous attitude towards these persons and to protect the public interests in the safety and security of the residents of the State."

One the requirements one had to meet was continuous residence in the State since the child’s birth. This was challenged on the basis that in considering this, no consideration was made of the rights of the child. Finlay Geoghegan J held:-

The State guarantee of the personal rights of a child are continuing guarantees under Article 40.3.1. The qualified right of the citizen child is to have those personal rights defended and vindicated apply at all times. Accordingly, I have concluded that when the respondent established in January, 2005 the IBC/05 Scheme and when he received applications from the parents of the citizen children and proceeded to consider and determine those applications, at all times he was bound to act in a manner consistent with the State guarantee to defend and vindicate as far as practicable the personal rights of the citizen child including the right to live in the State and to be reared and educated with due regard for his welfare...Accordingly, I have concluded that it was in breach of the rights of the citizen child under Article 40.3 for the respondent having committed himself by the announcement made in January, 2005 to consider applications for permission to remain in the State based upon the parentage of a citizen child to then refuse such an application without any consideration of the rights of the citizen child.

This is obviously a relatively limited case – i.e. the problem was simply the failure of the Minister to take into account the proper factors.

**O(CP) & Ors v Minister for Justice, Equality & Law Reform & Ors [2006] IEHC 345 (14 November 2006)**

This case does not seem to be available. No databases seem to have it by the citation provided.