



Cúirt Uachtarach na hÉireann
Supreme Court of Ireland

2018

Annual Report

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Editors:

Sarahrose Murphy,

Senior Executive Legal Officer to the Chief Justice

Patrick Conboy,

Executive Legal Officer to the Chief Justice

Case summaries prepared

by the following Judicial Assistants:

Seán Beatty

Iseult Browne

Paul Carey

Patrick Dunne

Luke McCann

Paul McDonagh Forde

Rachael O’Byrne

Owen O’Donnell

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The Supreme Court sitting as a full Court of all of its members.

The Supreme Court is at the apex of the courts system in Ireland and is the final arbiter and interpreter of the Constitution of Ireland, Bunreacht na hÉireann. According to Article 34.5.1^o of the Constitution, “the Court of Final Appeal shall be called the Supreme Court.”

The Supreme Court enjoys both appellate and original jurisdiction as prescribed by the Constitution. The jurisdiction of the Court was altered in 2014. In principle, a party may bring before the Supreme Court an appeal in respect of any type of case, including a civil law, criminal law, or administrative law case, provided that the case meets the threshold which the Constitution sets out.

An objective of the Supreme Court of Ireland is to ensure that the laws which the Oireachtas (Parliament) enacts are upheld and interpreted in light of the Constitution and the jurisprudence that has developed since it came into force in 1937. The Supreme Court of Ireland is therefore also a constitutional court.

In addition, the Supreme Court has a role in the implementation of the law of the European Union and, as the court of final appeal in Ireland, is obliged under the Treaty on the Functioning of the European Union to refer questions regarding the interpretation of EU law which arise in cases before it to the Court of Justice of the European Union where the interpretation is not clear and clarification is necessary in order for the Supreme Court to decide a question before it.

The Supreme Court, through its decisions, brings finality to the appeals brought and heard before it. As the highest court in the land, the decisions of the Supreme Court have binding precedence on all other courts of Ireland. It is rare, although not unheard of, for the Supreme Court to depart from one of its own previous decisions.

Foreword

by the Chief Justice
Mr. Justice Frank Clarke



It gives me great pleasure to launch this inaugural report outlining the work of the Supreme Court during the course of 2018.

In publishing this report, it is hoped that the work of the Supreme Court, both inside the courtroom and outside, and both in Ireland and abroad, can be highlighted. I hope that the general public can gain a greater understanding of what it is that the Supreme Court actually does and its role in upholding the Constitution and the law.

2018 was a demanding and dynamic year with the Supreme Court determining 157 applications for leave to appeal, disposing of 128 appeals and delivering 91 reserved judgments. Of the appeals disposed of, 67 were appeals brought under the reformed jurisdiction of the Court which has operated since the establishment of the Court of Appeal. Save for a small number of cases which could not yet been disposed of due to particular circumstances surrounding the appeals, the Court has now disposed of its backlog of legacy cases. In 2018, in order to assist the Court of Appeal, the Court also disposed of 42 cases which were returned to the Supreme Court having previously been sent to the Court of Appeal for determination under Article 64 of the Constitution when the Court of Appeal was established.

It is important to stress that the work of the Supreme Court has evolved significantly in recent years. The establishment of the Court of Appeal in 2014 has changed the structure of the caseload of the Court. Each member of the Court is also engaged in extra-judicial work, outside of hearing appeals and delivering judgments. The Supreme Court of Ireland is a member of no less than ten European and International networks and participation in each of these networks requires extensive judicial resources.

The Supreme Court regularly seeks to introduce new systems and processes as a way of making the work of the Court more effective and efficient. During the course of 2018 work progressed on introducing a new eFiling system, which went live in February 2019, whereby all applications for leave to the Supreme Court will now be made through an online web portal.

The judges of the Supreme Court would not be able to carry out their functions without the support and assistance given by the staff of the Courts Service. Through its various offices and units, the Courts Service ensures that cases progress through the Court in an effective and efficient manner and I wish to take this opportunity to record the Court's appreciation of the work of our staff.

2019 will undoubtedly present its own unique challenges and opportunities (not least those posed by Brexit), but I remain confident that, with the continued support of our staff and the members of the Court, together we can meet those challenges head on and capitalise on the opportunities, so as to ensure that the Supreme Court continues to fulfil its central constitutional role in Irish life and contributes to Ireland's international standing.

A handwritten signature in black ink, appearing to read 'Frank Clarke'.

Mr. Justice Frank Clarke
Chief Justice

Dublin
February, 2019

Introduction

by the Registrar of the Supreme Court
John Mahon



I am very pleased to introduce this annual report which gives an insight into the breadth of the work of the Supreme Court. 2018 was another busy and challenging year for the Court itself, and consequently also, for the Office of the Court. The implementation of initiatives for reform and modernisation of the Court's practice and operations proceeded while at the same time the Court saw a continuing increase in its caseload.

There was a 10% increase in the number of applications for leave to appeal filed in the Office when compared to the position in 2017. This compounded an 18% increase in 2017 on the 2016 position.

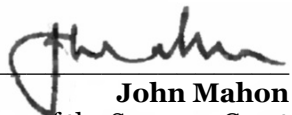
The Court's new jurisdiction by virtue of the Thirty-third Amendment to the Constitution has been successfully bedded in in the period since October, 2014. The two-stage appeal process is working well to ensure that the Court hears and determines the cases where matters of general public importance arise or where there are particular interests of justice which require it.

Time was taken by the Chief Justice and judges of the Court in conjunction with practitioners and with the Office to review the appeal process during 2018 and the fruits of this review came into effect in January 2019 with the introduction of revised rules and a new Practice Direction.

As the Chief Justice has stated in his Foreword, work progressed on an eFiling system for applications for leave to appeal which went live in February, 2019. This is an important administrative tool for the Court and practitioners. The Office will be engaging with practitioners during 2019 to optimise its use.

This year also saw the second sitting of the Court outside Dublin. The sitting of the Court in Limerick in March 2018 was a great success and provided an opportunity for the Court to engage locally with the public and with the legal and academic community in the City.

I am grateful to the Chief Justice and Judges of the Court for their continued support throughout the year. I am also grateful to the staff of the Office for their unstinting efforts during 2018 in support of the Court's important work and in response to our customers varied needs. I believe that we are in a strong position to meet the further challenges in the year ahead.

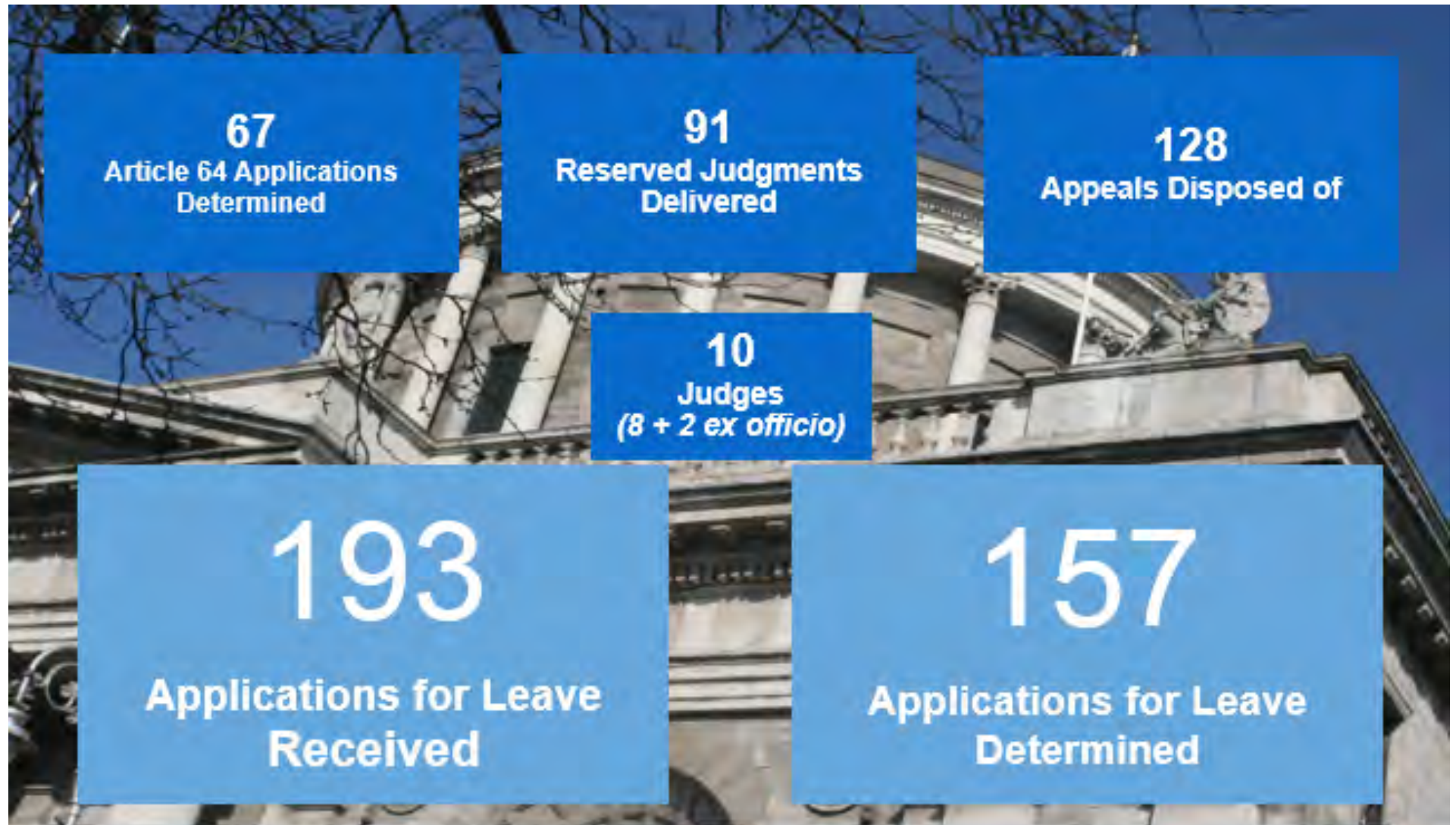


John Mahon

Registrar of the Supreme Court

February 2019

2018 at a glance







“The Court of Final Appeal shall be called the Supreme Court.”

Article 34.5.1º, Bunreacht na hÉireann



Part 1

About the Supreme Court of Ireland

Supreme Court of Ireland
Annual Report 2018

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Part 1 | About the Supreme Court of Ireland

Article 6 of the Constitution of Ireland, or Bunreacht na hÉireann in the Irish language, prescribes that “[a]ll powers of government, legislative, executive and judicial, derive under God, from the people...”. Accordingly, the principle of separation of powers applies in Ireland.

Article 34.1 of the Constitution provides that “[j]ustice shall be administered in courts established by law by judges appointed in the manner provided by [the] Constitution.” As members of the highest court in Ireland, judges of the Supreme Court are part of one of the three branches of government: the Judiciary, with the other two being the Legislature and the Executive.

The Supreme Court was established pursuant to Article 34 of the Constitution of Ireland of 1937. It is the final court of appeal in all areas of law and is the highest of the five tiers of court jurisdiction in Ireland.¹ The Court considers appeals from the Court of Appeal where it is satisfied that the relevant decision involves a matter of general public importance or that it is in the interests of justice necessary that there be an appeal to the Supreme Court.

In addition, the Supreme Court considers appeals directly from the High Court, bypassing the Court of Appeal, where there are exceptional circumstances which warrant such a direct appeal. An appeal directly from the High Court to the Supreme Court is colloquially referred to as a “leap-frog” appeal.

The Supreme Court, as the court of final appeal, determines all appeals properly brought to it on all matters of fact and law the subject of a decision in the High Court or Court of Appeal as the case may be. Such appeals often involve questions of interpretation of the Constitution, and of legislation, and may involve the question of the validity of any law having regard to the provisions of the Constitution.

The Supreme Court also has original jurisdiction to determine the constitutionality of Bills which the President of Ireland refers to it. In addition, the Supreme Court is the body which, under Article 12.3 of the Constitution, is required to determine if the President is permanently incapacitated.

¹ The five courts of Ireland are: the District Court, Circuit Court, High Court, Court of Appeal and Supreme Court.

Jurisdiction

Background

Prior to the establishment of the Court of Appeal in October 2014, there were four tiers of court jurisdiction in Ireland: the District Court, the Circuit Court, the High Court, and the Supreme Court. The Constitution provided for an almost automatic right of appeal from the High Court, a constitutionally established Superior Court of Ireland with first instance full original jurisdiction, to the Supreme Court in relation to civil cases which originated in the High Court.

As a result of a constitutional referendum, the Constitution now provides for a Court of Appeal which occupies an appellate jurisdictional tier between the High Court and the Supreme Court.

In essence, the Supreme Court exercises three jurisdictions:

- i. Appellate;
- ii. Appellate constitutional; and
- iii. Original.

1. Appellate jurisdiction

Article 34.5.3^o of the Constitution provides that:-

“The Supreme Court shall, subject to such regulations as may be prescribed by law, have appellate jurisdiction from a decision of the Court of Appeal if the Supreme Court is satisfied that –

- i. the decision involves a matter of general public importance, or
- ii. in the interests of justice it is necessary that there be an appeal to the Supreme Court.”

In addition, Article 34.5.4^o of the Constitution provides that:-

“Notwithstanding section 4.1^o hereof, the Supreme Court shall, subject to such regulations as may be prescribed by law, have appellate jurisdiction from a decision of the High Court if the Supreme Court is satisfied that there are exceptional circumstances warranting a direct appeal to it, and a precondition for the Supreme Court being so satisfied is the presence of either or both of the following factors:

- i. the decision involves a matter of general public importance;
- ii. the interests of justice.”

The Supreme Court has a particular role in the application of EU law as it is, as the court of final appeal, obliged to refer questions of EU law arising in cases before it concerning (a) the interpretation of the EU Treaties or (b) the validity and interpretation of acts of institutions, bodies, offices or agencies of the Union to the Court of Justice of the European Union where necessary to enable the Supreme Court to decide the case before it.

2. Appellate Constitutional jurisdiction

Article 34.4.5^o of the Constitution provides:-

“No law shall be enacted excepting from the appellate jurisdiction of the Supreme Court cases which involve questions as to the validity of any law having regard to the provisions of this Constitution.”

As a result, the Supreme Court may be said to function as a constitutional court as it is the final arbiter in interpreting the Constitution of Ireland. This is a role of particular importance in Ireland as the Constitution expressly permits the courts to review any law, whether passed before or after the enactment of the Constitution, in order to ascertain whether it conforms with the Constitution. While such cases must be brought in the first instance in the High Court, there is an appeal from every such decision to the Court of Appeal, and the Supreme Court if the threshold is met. Subordinate legislation and administrative decisions may also be subjected to such constitutional scrutiny.

3. Original jurisdiction

The Constitution of Ireland confers on the Supreme Court two first instance functions.

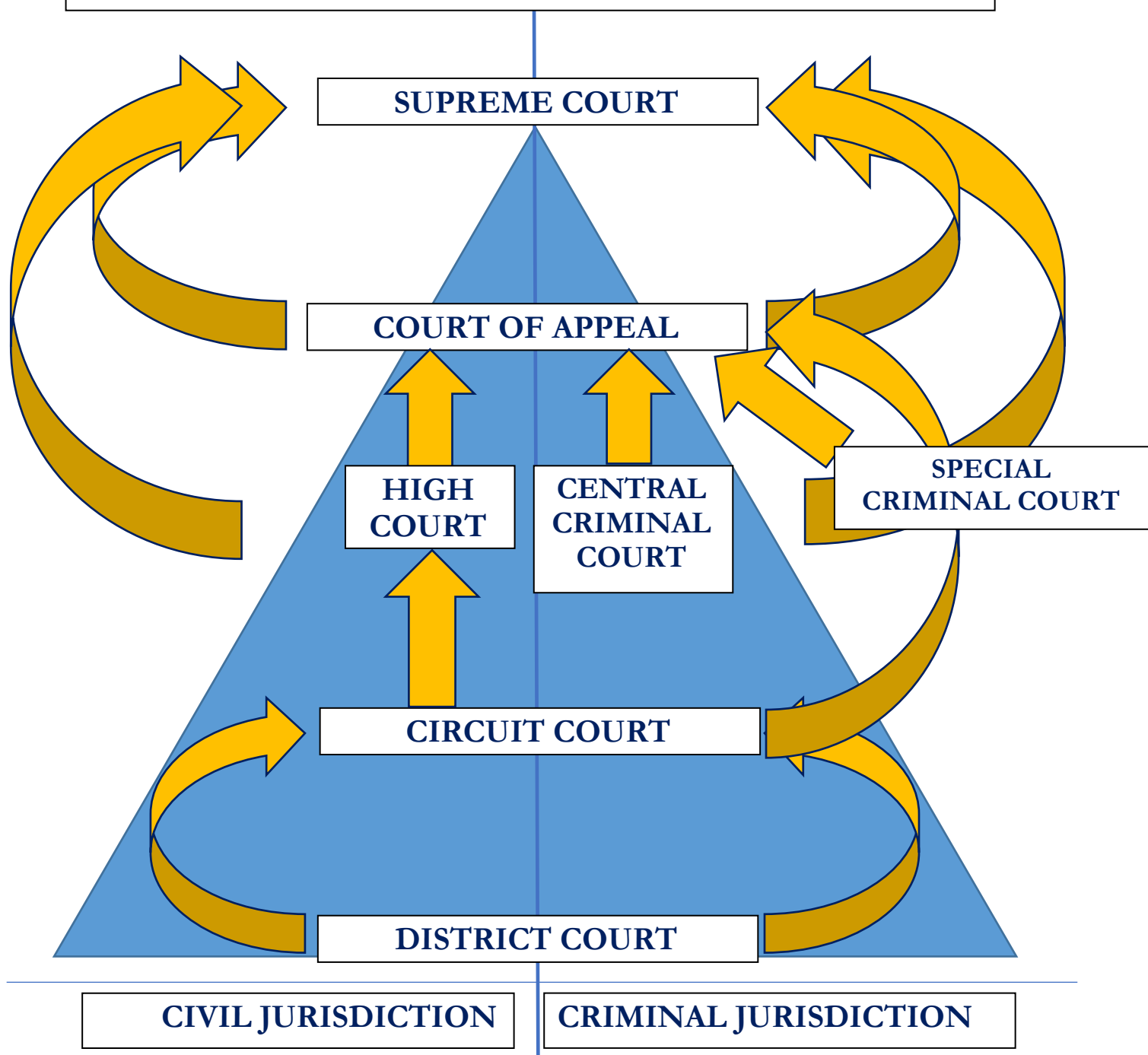
Under Article 26 of the Constitution, the President of Ireland may, after consultation with the Council of State² refer a legislative Bill deemed to have been passed by both Houses of the Oireachtas for a decision on the question of whether such Bill or any specified provision or provisions of such Bill is or are repugnant to this Constitution or to any constitutional provision. Should the Court decide that the Bill, or any of its provisions, is incompatible with the Constitution it may not be signed or promulgated as law by the President. If the Supreme Court concludes that a Bill which has been referred to it under Article 26 of the Constitution is not incompatible with the Constitution the legislation in question cannot be challenged again before the courts for as long as it remains in force.

Since the establishment of the Constitution of Ireland in 1937, the Article 26 procedure has been invoked by the President on 15 occasions, with the Supreme Court determining in seven of those cases that the Bill or a part thereof was repugnant to the Constitution. Although the President retains a sole discretion to invoke the Article 26 procedure, its use is rare and the last year in which the Supreme Court was asked to consider a Bill under the Article 26 procedure was in 2005.

The second first instance jurisdiction of the Supreme Court, which has never been exercised, is provided for in Article 12 of the Constitution which states that the question of whether the President of Ireland has become permanently incapacitated must be determined by not less than five judges of the Supreme Court

² The Council of State is a body established under Article 31.1 of the Irish Constitution to aid and counsel the President on all matters as specified in the Constitution.

STRUCTURE OF THE COURTS OF IRELAND



Ireland has a five-tiered court system with both the District and Circuit Courts serving as courts of local and limited jurisdiction. The High Court enjoys full and original jurisdiction in all matters of fact and law, whether criminal or civil. These three Courts are courts of first instance and their respective jurisdictions are prescribed by the Constitution and in legislation. The Court of Appeal has, since its establishment in 2014, appellate jurisdiction from decisions of the Circuit Court and High Court in both criminal and civil matters.

Seat of the Supreme Court



The seat of the Supreme Court is located in the Four Courts complex in Dublin city. The Four Courts has been the heart of the Irish legal system since 1796. The name of the building derives from the location of the four superior courts which it housed prior to Irish independence: King's Bench, Common Pleas, Exchequer, and Chancery.

The two courtrooms used by the Supreme Court for oral hearings are located in the original building, partly designed by Thomas Cooley and later developed and completed by James Gandon. The Irish court structure was created in 1924 following the establishment of an Irish Free State in 1922. During the civil war in the lead up to the establishment of the Irish Free State, the Four Courts was the scene of devastating destruction in June 1922. During the reconstruction of the Four Courts, the courts moved to King's Inns and later to Dublin Castle, where they remained until 1931.

Neither of the two courtrooms used by the Supreme Court today existed in the original Gandon building or at any stage up to the substantial destruction which occurred during the Civil War.

While much of the main building was reconstructed to resemble its form prior to destruction, the area currently occupied by the main Supreme Court courtroom, the Supreme Court Office (including the Chief Justice's Chambers) and the Hugh Kennedy Court was a new design arising out of the reconstruction of the Four Courts.

The primary seat of the Supreme Court today remains that of its predecessor (the Supreme Court of the Irish Free State) which sat in the purposely constructed courtroom when the Four Courts reopened in 1931.

To signify that the Supreme Court of Ireland is sitting, both display the national flag of Ireland. As in all other courtrooms across Ireland, the courtrooms used by the Supreme Court are equipped with Digital Audio Recording (‘DAR’) facilities to record all court proceedings.

The Supreme Court Courtroom



The Supreme Court courtroom is the main courtroom in which the Court hears cases and pronounces judgment. In general, it accommodates compositions of the court sitting in panels of three, five or, exceptionally, seven judges. As the reformed jurisdiction of the Supreme Court requires that the Supreme Court consider cases having been satisfied that the decision involves a matter of general public importance, or in the interests of justice it is necessary that there be an appeal to the Supreme Court, cases are now generally heard by a panel of five judges in the main courtroom.

Most cases are heard in public in accordance with the Constitution. The courtroom contains a viewing gallery where members of the public may observe court proceedings. There is a dedicated area for members of the press, judicial assistants, ushers and visiting judges or officials from other jurisdictions.

The Hugh Kennedy Courtroom

The Hugh Kennedy Courtroom, named in honour of the first Chief Justice of Ireland, is adjacent to the main Supreme Court courtroom and is used by the Supreme Court when it sits in more than one panel at a time.

As most new jurisdiction cases involve a sitting of five judges to hear an appeal in the main courtroom, a parallel sitting of the Court in the Hugh Kennedy courtroom is limited to a small number of circumstances.

First, case management hearings which are conducted by a single judge nominated by the Chief Justice or interlocutory matters are sometimes considered in the Hugh Kennedy Courtroom while a substantive hearing or other case management or interlocutory matters are taking place in the main courtroom. Secondly, the Supreme Court, in 2018, devoted a number of weeks to hearing cases returned to it by the Court of Appeal in order to alleviate a backlog of cases in the Court of Appeal. During the course of two weeks, members of the Supreme Court and Court of Appeal sat together in two panels of three judges in both the main Supreme Court courtroom and the Hugh Kennedy Courtroom.

In 2019, the Supreme Court intends to hear further cases returned from the Court of Appeal in 2019. As a result of discussions between the Chief Justice and the President of the Court of Appeal, it has been agreed that, in the event that if legislation is enacted to increase the numbers on the Court of Appeal and new Court of Appeal judges appointed, the Court of Appeal will become the primary user of the Hugh Kennedy Court. Its use by the Supreme Court would then be confined to consideration of case management and interlocutory applications.

Journey of a typical Appeal

An appeal before the Supreme Court begins its journey following a decision of the High Court and/or the Court of Appeal. A party to proceedings who wishes to bring an appeal against a decision of the High Court or Court of Appeal may file an application for leave to appeal to the Supreme Court. A new system of filing applications for leave to appeal online will be introduced in 2019.

The party wishing to bring an appeal (known as the ‘Applicant’) must inform the party on the opposing side of the case (known as the ‘Respondent’) that they have lodged an application for leave to appeal and the Respondent is required to file a notice setting out whether it opposes the application for leave to appeal and, if so, why. In practice, there are only a minority of cases in which the Respondent opposes leave to appeal as both parties express the view that it is important that the Court provide clarity on an issue of law.



Panel of the Supreme Court considering an Application for Leave (‘AFL’), with the Registrar of the Supreme Court in attendance.

On receiving the application for leave to appeal and the respondent’s notice, a panel of three Judges of the Supreme Court convenes to consider whether the constitutional threshold for granting leave to appeal has been met. In addition to the application for leave and respondent’s notice, the panel reviews the written judgment(s) of the High Court and/or Court of Appeal. Having considered the application, the panel prepares and issues a written determination stating whether or not leave to appeal has been granted. The determination is then circulated to the affected parties.

While most hearings are conducted orally and in public, consideration of applications for leave to appeal generally take place in private, as is specifically provided for in the Court of Appeal Act 2014, which makes provision in relation to the new jurisdiction of the Supreme Court and the Court of Appeal. The Court may direct an oral hearing where it considers it appropriate to do so. Pursuant to the constitutional requirement that justice is administered in public, the Supreme Court publishes its written determination and accompanying documentation on the website of the Courts Service of Ireland.

A Judge of the Supreme Court is assigned to case manage the appeal to ensure that the procedural requirements are met and that the appeal can be conducted in an efficient manner.

Both the Applicant (who is now referred to also as the ‘Appellant’) and the Respondent must prepare and lodge written submissions, in which both sides set out their reasons as to why the decision being appealed should be reversed or upheld. As the Irish legal system is part of the common law legal tradition, decisions of the Superior Courts of Ireland are binding on courts of lower jurisdiction by virtue of the doctrine of precedent and case law constitutes an important source of law. Therefore, legal submissions of the parties generally rely on previous court decisions in support of their respective arguments.

The submissions, together with other relevant documentation, are reviewed by each Supreme Court judge who is part of the panel which will be hearing the case before the oral hearing is conducted.

At the oral hearing, both the Appellant and the Respondent are allocated a period of time in which to make their respective arguments. At the end of the oral arguments of the Respondent, the Appellant is provided with an opportunity to respond to arguments made by the Respondent. When this has concluded, the Supreme Court usually reserves its judgment which it delivers it at a later date and retires to consider its decision.



A composition of the Supreme Court at hearing



A composition of the Supreme Court in conference

Occasionally the Supreme Court delivers an oral judgment immediately following the hearing, which is known as an *ex tempore* judgment. The delivery of *ex tempore* judgments is rare since the implementation of the new jurisdiction of the Court.

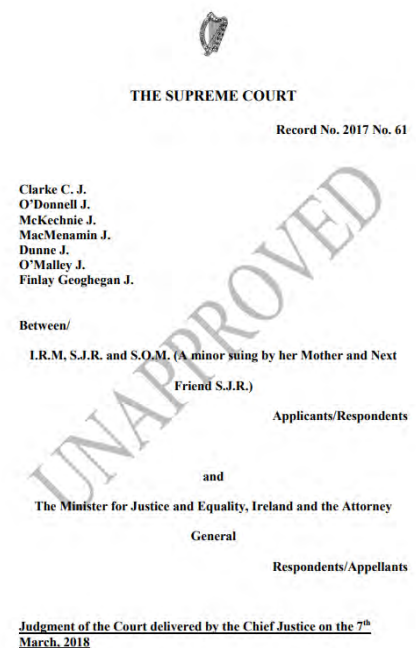
The composition of the Supreme Court which has heard the appeal meets in what is referred to as a conference and deliberates. Each judge arrives at his or her decision independently of the other members of the Court. As the Court sits in odd numbers of three, five or seven, a decision is arrived at, either unanimously or by majority.

By tradition, at the first case conference after the oral hearing, the most junior judge on the panel which has heard the case makes the first observations followed by the other judges in ascending order of seniority.

Owing to the importance and the complexity of the appeals to be determined, it is often necessary for the Court to hold subsequent case conferences to decide the case and to enable the members of the Court to reach their individual decisions.

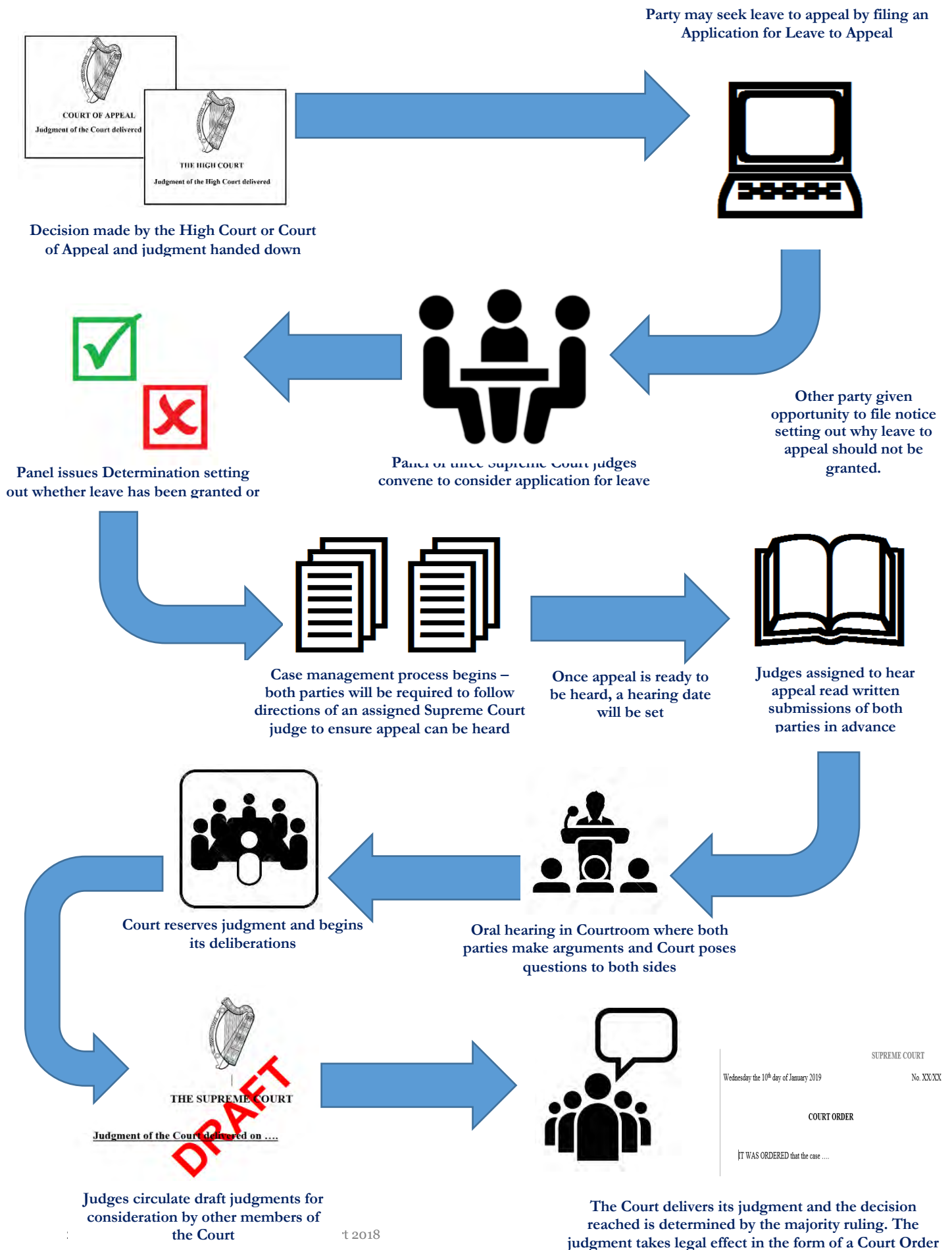
The decision reached by each judge is formulated in written judgments (with the exception of judgments delivered *ex tempore*) which set out the reasons for either allowing or dismissing the appeal. Each judge may deliver his or her own separate judgment and a number of concurring judgments may together form a majority. A judge who does not agree with the decision taken by the majority of the Court may deliver a dissenting judgment.

When the written judgments are ready to be delivered, the Court sits in public and pronounces its decision, communicating its reasons to the parties. The decision reached by the majority of the Court is given formal effect by an order of the Court. Any cost or ancillary applications are generally also considered on the delivery of the judgment of the Court.



Whilst judgments of the Supreme Court are available online soon after delivery, it is the practice to distribute hard copies to parties in Court once the judgment has been pronounced.

Journey of a typical Appeal



The new jurisdiction of the Supreme Court - an evolving one

The passage of the Thirty-third Amendment to the Constitution has heralded the largest single change in the structure of the courts of Ireland since the State gained its independence in 1922 and perhaps the most significant change since the introduction of the Judicature Acts in the 1870s and 1880s.

The Thirty-third Amendment to the Constitution had the twin effect of establishing a new constitutional institution, the Court of Appeal, and transforming the jurisdiction of the Supreme Court, refining its role to the extent that it could be said that the Supreme Court of Ireland is now on a similar footing as its other common law counterparts.

The genesis for the establishment of a Court of Appeal was born out of a state of affairs in the mid-2000s whereby the complexity of litigation and the number of cases increased to such a degree that it resulted in extensive delays in appeals coming on before the Court. In some cases, appeals were waiting four and a half years for a hearing.

In 2009, a working group established to consider whether to establish a Court of Appeal, resulted in the Government of the day accepting the working group's proposal that such a court be introduced. Subsequently, in 2013, a proposal was put to the People by way of a Referendum to amend the Constitution to provide for, *inter alia*, the establishment of the Court of Appeal. The proposal was approved by a majority of the People and in 2014 legislation was enacted by the Oireachtas to provide for the Court of Appeal.

The formal establishment of the Court of Appeal on the 28th October, 2014 represented another monumental change in the Irish courts system. The appellate jurisdiction of the Supreme Court transformed so that the Court now essentially determines what appeals it will hear in accordance with the threshold as laid down in the reformulated Article 34 of the Constitution. The threshold stipulates that a case must be either 'of general public importance' or it is 'in the interests of justice' that there be an appeal.

In 2015, in the early days of the new jurisdiction of the Supreme Court, the Court, through a series of determinations, began to shed greater light on the calibre of cases which will successfully be granted leave to appeal to the Supreme Court. In one of its first written determinations, *Fox v. Mahon* [2015] IESCDET 2, the Supreme Court determined that, if issues raised in the case could benefit from clarification in the Court of Appeal and that it was likely that the decision of that Court would be subsequently appealed to the Supreme Court, the case should be heard by the Court of Appeal in the first instance.

Furthermore, the Court stated that the new constitutional regime presumes:-

“(i) that the ordinary entitlement to have an appeal from a determination of the High Court continues but is now to be fulfilled by an appeal to the Court of Appeal; and
(ii) that, in the absence of exceptional circumstances, even where an appeal to this Court might be constitutionally warranted by reason of it raising an issue of general public importance or it being otherwise in the interests of justice that such an appeal be brought, it is presumed that such an appeal is better taken when the issues have been refined by the hearing of an appeal in the Court of Appeal. In so saying, it does, of course, have to be acknowledged that the Constitution itself does recognise that there may be exceptional circumstances where the latter imperative does not apply. That leap-frog jurisdiction is, however, expressly stated in the Constitution to be an exceptional one.”³

³ [2015] IESCDET 2 at para 11.

In the four years since the establishment of the Court of Appeal, the jurisdiction of the Supreme Court, as recalibrated with the passage of the Thirty-third Amendment to the Constitution, has evolved since the formative days where the first applications for leave were received and the Supreme Court began to issue determinations.

Where appropriate, the Supreme Court has, by way of a series of its written determinations, sought to provide guidance to parties and practitioners in relation to the threshold that is required to be reached for a case to be granted leave to appeal.

Many of the determinations issued by the Supreme Court set out the change in function of the Supreme Court, namely that:-

“... the constitutional function of [the Supreme Court] is no longer that of an appeal court designed to correct alleged errors by the trial court. Where it is said that the High Court has simply been in error in some material respect the constitutional regime now in place confers jurisdiction to correct and such error as may be established by the Court of Appeal.”

Since the determination in *Fox v. Mahon*, the Supreme Court has provided further guidance on the parameters that a case must be within before consideration can be given to determining whether leave should be granted.

In a determination of a panel consisting of all the members of the Supreme Court in *B.S. v. Director of Public Prosecutions* [2017] IESCDET 134 the Supreme Court reiterated that it “is no longer a Court for the correction of error but rather a Court which has the principal constitutional task of determining issues of general importance.” The Court went on to set out a number of principles, namely:-

“[I]t can rarely be the case that the application of well-established principles to the particular facts of the relevant proceedings can give rise to an issue of general public importance. It must, of course, be recognised that general principles operate at a range of levels. There may be matters at the highest level of generality which can be described as the fundamental principles applying to the area of law in question. Below that there may well be established jurisprudence on the proper approach of a Court to the application of such general principles in particular types of circumstances which are likely to occur on a regular basis. The mere fact that, at a high level of generality, it may be said that the general principles are well established does not, in and of itself, mean that the way in which such principles may be properly applied in different types of circumstances may not itself potentially give rise to an issue which would meet the constitutional threshold.”

In a unanimous judgment of the Court delivered by Mr. Justice O'Donnell in *Quinn Insurance Limited v. Price Waterhouse Cooper*⁴, the Court reiterated the concluding principle as set out in *B.S. v. Director of Public Prosecutions*, stating that:-

“[t]he question of the degree of particularisation which is necessary, is one which affects all litigation, and is therefore of general application.”

The Court concluded that the proper application of the principles in the instant case was a matter of general public importance. The determination in *B.S. v. Director of Public Prosecutions*, together with the findings of the Court in *Quinn Insurance Limited v. Price Waterhouse Coopers* demonstrates that the Supreme Court is constantly engaged in an

⁴ [2017] IESC 73

evolving process of explaining the principles relating to the new jurisdiction as underpinned by the constitutional threshold as set out in Article 34.

‘Leapfrog’ Appeals

The exceptional nature of the ‘leapfrog’ appeal was considered by the Supreme Court in *Barlow v. Minister for Agriculture, Food and Fisheries* [2015] IESCDET 8 where it stated that:-

“[W]here the court is satisfied that that constitutional threshold has been met the court will have to consider whether, either deriving from the nature of the appeal itself or from external circumstances such as urgency, it can be said that there are exceptional circumstances justifying a leapfrog appeal. In attempting to reach an assessment on that question the court may well have to analyse the extent to which, on the one hand, there may be perceived to be a disadvantage in not going through the default route of a first appeal to the Court of Appeal and balance that against any disadvantage, whether in the context of putting the courts and the parties to unnecessary trouble and expense or in relation to a delay in achieving an ultimate resolution of urgent proceedings, which might be involved by running the risk of there being two appeals. In that later context it should be acknowledged that there will only truly be a saving of time and expense for both the courts and the parties, if it is likely that there will be a second appeal irrespective of the decision of the Court of Appeal.”⁵

In cases that give rise to a temporal urgency, the Supreme Court noted that:-

“[t]here clearly will be cases where, in one way or another, a clock in the real world is ticking. In such cases, even if there may be perceived to be some merit in, or advantage to, an intermediate appeal, the balance may favour a direct appeal to this Court, precisely because the downside of any delay which would be caused by two appeals would be disproportionate in the circumstances of the case.”⁶

Case management

One unique feature in procedural terms of the new jurisdiction is the provision for a dedicated case management judge. The practice which has evolved in respect of new jurisdiction appeals is that, as soon as it is clear that an appeal is going to proceed, the Chief Justice nominates a single judge of the Court to act as the case management judge for the purposes of the appeal in question.

Provision is made both in the relevant statute and rules of court for the appointment and jurisdiction of a case management judge, including proportionate powers to ensure that parties comply with the applicable Rules of Court and Practice Directions. It can be said with confidence that multiple benefits derive from such an appointment. For the parties, it brings clarity to what is expected of them in terms of bringing the appeal on for hearing and that the conduct of that hearing will be in a manner that will result in greater efficiencies. For the panel of the Court that will be convened to hear the appeal, the case management judge can appraise his or her colleagues at the pre-conference hearing of how the oral hearing will be conducted, time allocated to each side, etc.

⁵ [2015] IESCDET 8 at para. 17.

⁶ Ibid at para. 16.

Members of the Supreme Court of Ireland



Current members of the Supreme Court of Ireland

Back (Left to Right): Ms. Justice Iseult O'Malley, Ms. Justice Elizabeth Dunne, Mr. Justice John MacMenamin, Mr. Justice Peter Charleton, Ms. Justice Mary Finlay Geoghegan

Front (Left to Right): Mr. Justice Donal O'Donnell, President George Birmingham, Chief Justice Frank Clarke, President Peter Kelly, Mr. Justice William M. McKechnie.

The Supreme Court is currently composed of the Chief Justice, who is the President of the Court, and seven ordinary judges. In addition, the President of the Court of Appeal and the President of the High Court are *ex officio* members of the Supreme Court. Legislation provides for ten members of the Supreme Court, including the Chief Justice and nine ordinary judges. There are currently two vacancies on the Court.

Appeals are heard and determined by five judges unless the Chief Justice directs that any appeal or other matter (apart from matters relating to the Constitution) should be heard and determined by three judges. In exceptional cases, the Supreme Court sits as a composition of seven judges.

Applications for leave to appeal are considered and determined by a panel of three judges of the Supreme Court. When exercising its original and constitutional jurisdiction, a minimum of five judges must sit.

The Chief Justice or an ordinary judge of the Supreme Court may sit alone to hear certain interlocutory and procedural applications. As a matter of practice, the Chief Justice appoints a judge of the Court to case manage appeals for which leave to appeal has been granted.

Mr. Justice Frank Clarke

Chief Justice



Mr. Justice Frank Clarke was appointed the 12th Chief Justice of Ireland on the 28th July, 2017, by the President of Ireland, His Excellency Mr. Michael D. Higgins.

Chief Justice Clarke was born in Dublin and educated Drimnagh Castle CBS, University College Dublin (B.A. in Mathematics and Economics), and The Honorable Society of King's Inns (B.L.).

Having completed his legal studies at The Honorable Society of King's Inns he was called to the Bar in 1973 and to the Inner Bar in 1985. He practiced mainly in the commercial and public law fields (including constitutional law) and was twice appointed by the Supreme Court as counsel to present argument on references of Bills to the Supreme Court by the President under Article 26 of the Constitution. He also acted as counsel to the Public Accounts Committee on its inquiry into the DIRT tax issue and was external counsel to the Commission to Inquiry into Child Abuse (Laffoy and Ryan Commissions). In 1994, Mr. Justice Clarke became a Benchers of the Honorable Society of King's Inns. He was elected as an honorary member of the Canadian Bar Association in 1994, and admitted as an honorary member of the Australian Bar Association in 2002. In 2018, he was made an honorary Benchers of The Honorable Society of the Middle Temple.

While at the Bar, Mr. Justice Clarke served for many years on the Bar Council including for a term of two years (1993-1995) as its Chair. He also served as Chair of the Council of King's Inns from 1999 until 2004. He was a member of the Council of the International Bar Association from 1997 to 2004, serving as co-Chair of the Forum for Barristers and Advocates (the international representative body for the independent referral bars) from 1998 to 2002.

Mr. Justice Clarke was appointed a judge of the High Court in 2004 and was mainly assigned to the Commercial list and also presided over the establishment of the Chancery and Non-Jury List in Cork. While a judge of the High Court, he was chairman of the Referendum Commission on the 28th Amendment of the Constitution (Lisbon Treaty II) in 2009.

In 2012, Mr. Justice Clarke was appointed as a judge of the Supreme Court. Since 2013, he has been a representative of the Supreme Court on the Association of Supreme Administrative Courts of the European Union (ACA-Europe). On his appointment as Chief Justice, he became a Member of the Network of the Presidents of the Supreme Judicial Courts of the European Union and was elected a member of the Board of that Network in 2018.

Mr. Justice Clarke has since March 2018 been a member of the panel provided for in Article 255 of the Treaty on the Functioning of the European Union, the function of which is to provide an opinion on the suitability of persons for appointment as Judge and Advocate General of the Court of Justice and General Court of the European Union.

In the academic field Mr. Justice Clarke was a professor at King's Inns from 1978 to 1985 and has been Judge-in-Residence at Griffith College Dublin from 2010 to date. He was appointed Adjunct Professor in the Law School in Trinity College, Dublin in September 2012, and Adjunct Professor of University College Cork in 2013. He was awarded the Griffith College Distinguished Fellowship Award in 2017.

The Role of the Chief Justice

The Chief Justice of Ireland is the President of the Supreme Court and the titular head of the Judiciary, the judicial arm of government.

President of the Supreme Court and judicial function

The Chief Justice is responsible for the management of all aspects of the Court including the listing of cases in conjunction with the Registrar of the Supreme Court and assignment of cases to Judges. The Chief Justice regularly sits of cases which come before the Court and invariably presides in cases concerning the constitutionality of statutes, the reference of a Bill to the Supreme Court by the President pursuant to Article 26 of the Constitution and other cases of importance. The Chief Justice is *ex officio* a member of both the High Court and the Court of Appeal.

Constitutional functions

The Constitution confers on the Chief Justice specific additional functions. Under Article 14 of the Constitution, the Chief Justice is the first member of the Presidential Commission, which exercises the powers and functions of the President of Ireland in his or her absence. The other members of the Presidential Commission are the Ceann Comhairle (Chairman of Dáil Éireann, the chamber of deputies) and the Chairman of Seanad Éireann (the Senate).

In addition, under Article 31 of the Constitution, the Chief Justice is a member of the Council of State, a body which aids and counsels the President of Ireland in the exercise of such of his or her powers as are exercisable under the Constitution after consultation with the Council of State.

Entry into office of the President of Ireland

It is the Chief Justice who generally takes the declaration from a newly elected President of Ireland pursuant to Article 12.8 of the Constitution. On the 11th November 2018, President Michael D. Higgins was inaugurated for a second term as President.

The Constitution requires that the President, upon entering into his or her office, must make a public declaration in the presence of members of both Houses of the Oireachtas, judges of the Supreme Court, Court of Appeal, High Courts and other public personages.



Chief Justice Frank Clarke administering the declaration required to be made by Michael D. Higgins before entry into office as the ninth President of Ireland on 11 November 2018
(Photo credit: Maxwell Photography)

Other responsibilities

In addition to the judicial duties and administrative responsibilities associated with the Supreme Court itself, the Chief Justice has a range of other administrative responsibilities. For example, the Chief Justice chairs the Board of the Courts Service of Ireland, the Judicial Appointments Advisory Board, the Committee for Judicial Studies and the Superior Courts Rules Committee.

Appointments

Commissioner for Oaths

A Commissioner for Oaths is a person who is authorised to verify affidavits, statutory declarations and other legal documents. Affidavits are statements made in writing and on oath. Persons wishing to be appointed as a Commissioner for Oaths are made by petition to the Chief Justice sitting in open Court.

Admittance of barristers to practice

The Chief Justice calls to the Bar persons admitted to the degree of Barrister-at-Law by the Benchers of The Honorable Society of King's Inns. It is the Call to the Bar by the Chief Justice which permits barristers to practise before the Courts of Ireland. The Call to the Bar is a formal ceremony entitled the 'Call to the Outer Bar' in the Supreme Court at which the Chief Justice, sitting with other members of the Court admits the new barristers to practise in the Courts of Ireland. Once called to the Bar, the barristers are referred to as junior counsel.

King's Inns admits to the degree of Barrister-at-Law persons who qualify by following its professional course, barristers from jurisdictions with whom there are reciprocal arrangements (at present only Northern Ireland) and qualified lawyers practising in other jurisdictions whose qualifications are recognised and who satisfy the other requirements of King's Inns

The Government recognises the desirability of maintaining, in the public interest, an 'Inner Bar' which can provide with exceptional skill a wide range of specialist advice and advocacy in all courts and tribunals in areas of national, European and international law. The Government, at its discretion, grants Patents of Precedence at the Bar on the recommendation of an Advisory Committee to suitable persons with at least ten years' experience of practise at the Outer Bar.

Following receipt by successful applicants of Patents of Precedence from the Government, the Chief Justice calls those individuals to the Inner Bar of Ireland. Barristers called to the Inner Bar of Ireland are referred to as Senior Counsel and use the suffix S.C. after their name. The process of being called to the Inner Bar is colloquially referred to as 'taking silk', which derives from the black silk robes worn by Senior Counsel.

Notaries Public

A Notary Public is an officer who serves the public in non-contentious matters usually concerned with foreign or international business. Notaries certify the execution in their presence of a deed, a contract or other writing. The Chief Justice appoints qualified persons as notaries are appointed by the Chief Justice. The process of appointment involves a formal Petition to the Chief Justice in open Court. The Faculty of Notaries Public, which is the body responsible for the advancement and regulation of notaries and the Law Society of Ireland, the educational, representative and regulatory body of the solicitors' profession Ireland, are notice parties to notary applications.

Statement to Mark the Opening of the 2018/2019 Legal Year

In 2018, the Chief Justice continued the practice he adopted when appointed in 2017 by delivering a public statement to mark the opening of the legal year in Ireland in October. In his statement, the Chief Justice emphasised the following key priorities for the 2018-2019 legal year:

- Enhancing access to justice through improved accessibility and modernisation of court procedures, major increase in the use of ICT in courts, including online systems, and encouragement of consultation with the Legislature in relation to potential impact of new legislation on the courts;
- Increased accessibility of court proceedings, including, for example, the sitting of the Supreme Court outside of Dublin and consideration of further developments in relation to broadcasting of Supreme Court proceedings;
- The importance of international engagement, in particular in the context of Brexit, and the need to ensure availability of judicial and support resources to adequately participate in international meetings and bodies;
- The need to carefully consider the parameters of any schemes of guidelines, such as in sentencing or personal injury cases, to ensure that such guidelines strike an appropriate balance between consistency and flexibility.

International Engagement

Part of the role of the Chief Justice involves representing the interests of the Supreme Court, the Judiciary and the legal system of Ireland at international level. In 2018, the Chief Justice delivered remarks on a number of occasions on the implications of Brexit on the legal system of Ireland, including at Fordham University, New York where he gave an address as “Ireland as a Common Law Port after Brexit” and in Chicago. He also spoke at the launch of the New York Chapter of Arbitration on ‘Ireland as a potential location for dispute resolution post Brexit’.⁷ The Chief Justice shared



his experience of the reform of the jurisdiction of the Court with the Judiciary of Cyprus, where similar reforms are being considered, in a lecture on “Lessons from Recent Reform of the Appellate Structure of the Irish courts”. The Chief Justice also engages with courts in other jurisdiction in the context of international meetings and organisations in which the Court is involved, which is outlined in Part 4 of this report.

⁷ This topic also formed the basis of a lecture the Chief Justice gave on Ireland as a dispute resolution hub after Brexit at the Institute of International and European Affairs, Dublin, 21st November 2018, available at <https://www.iiea.com/wp-content/uploads/2018/11/IIEA-Ireland-as-a-Dispute-resolution-hub-after-Brexit-20-11-2018.pdf>.

Mr. Justice Donal O'Donnell



Mr. Justice Donal O'Donnell was born in Belfast and educated at St. Mary's C.B.S., University College Dublin (B.C.L.), The Honorable Society of King's Inns (B.L.), and the University of Virginia (LL.M.).

Mr. Justice O'Donnell was called to the Bar of Ireland in 1982, commenced practice in 1983 and was called to the Bar of Northern Ireland in 1989. In 1995, he was appointed Senior Counsel and has practised in all the Courts of Ireland, in the Court of Justice of the European Union (C.J.E.U.) and the European Court of Human Rights (E.Ct.H.R.).

He was a member of the Law Reform Commission 2005 -2012. He delivered the John Kelly lecture (U.C.D.), the Brian Walsh lecture (I.S.E.L.), the Brian Lenihan lecture (T.C.D.) the Dan Binchy lecture (Brehon Law School) and the keynote address at a conference in the University of Limerick to mark the 80th anniversary of the Constitution. He has published articles on a variety of legal topics in the *Northern Ireland Legal Quarterly*, *The Irish Jurist*, the *Dublin University Law Journal*, the *Judicial Studies Journal*, and has contributed to volumes of essays on legal issues. He was a director of Our Lady's Hospice from 2009 - 2014 and is the current chairman of the Judges' Library Committee and a member of the Incorporated Council for Law Reporting and of the Council of the Irish Legal History Society.

In 2009, he became a Bencher of the Honorable Society of King's Inns.

Mr. Justice O'Donnell was appointed to the Supreme Court in 2010.

His father, Lord Justice Turlough O'Donnell, was a judge of the High Court and Court of Appeal in Northern Ireland and was later a member of the Irish Law Reform Commission.

Mr. Justice William M. McKechnie



Mr. Justice McKechnie was educated at Presentation Brothers College, University College Cork, from which he graduated in 1971, University College Dublin, and The Honorable Society of King's Inns, Dublin. He was called to the Bar in 1971, and admitted to the Inner Bar in 1987. As a barrister he practised in the area of commercial, chancery and local authority law and had a special interest in medical negligence.

He held a number of senior positions in the Bar Council of Ireland for several years and was elected Chairman in 1999, and re-elected in 2000.

He was appointed a High Court Judge in 2000 and took charge of the competition list from 2004 to 2010. As such, he presided over all competition cases, both civil and criminal. He made the first Declaration of Incompatibility under the European Convention on Human Rights Act 2003, in the case of *Foy v. An tArd Chláraitheoir*, which was instrumental in bringing about significant changes in that area of law.

Mr. Justice McKechnie was Chairman of the Valuation Tribunal from 1995 to 2000, and was previously the Chairperson of the Editorial Board of the Judicial Studies Institute Journal. He has been a member of the Courts Services Board for several years, as well as the Rules Making Committee. He is a member of the Executive Council of the Association of Judges of Ireland and is heavily involved with the European Law Institute.

He was appointed to the Supreme Court in June, 2010.

In 2010 he was elected President of the Association of European Competition Law Judges, which represents each of the 27 Member States of the European Union, as well as judges from the Court of Justice and the General Court of the European Union, and from the EFTA Court. He is the third President of the Association following Sir Christopher Bellamy and Dr. Joachim Bornkamm. He holds a Masters Degree in European Law.

He has written several papers, participated in and presided over many conferences and delivered the Fourth Annual C.C.J.H.R. Lecture at U.C.C. on 4th March, 2010.

He is a Bencher of The Honorable Society of King's Inns.

Mr. Justice John MacMenamin



Mr. Justice John MacMenamin was appointed to the Supreme Court in 2012.

He was born in Dublin, and educated at Terenure College, University College Dublin, (B.A. (History), and The Honorable Society of Kings Inns (B.L.). As a student he was a Council Member of the Free Legal Advice Centre, and was involved in running a Free Legal Advice Centre in Ballyfermot.

Mr. Justice MacMenamin was called to the Bar of Ireland in 1975. He was called to the Inner Bar in 1991, and engaged first in general practice, then specialising in Judicial Review, Administrative Law and Defamation. He acted for a number of clients before the Flood/Mahon Tribunal of Inquiry, and for the Department of Health and members of the then Cabinet, including the Taoiseach, before the Ryan Tribunal.

He was legal assessor to the Fitness to Practice Committee of the Medical Council for ten years. Having previously served four terms as an ordinary member, he was elected Chairman of the Bar Council in 1997, serving in that office up to 1999. He was a Director of the V.H.I. from 1995 to 1997.

Mr. Justice MacMenamin was appointed to the High Court in 2004. There he dealt primarily with Judicial Review matters; cases with a constitutional or human rights dimension; the rights of asylum seekers; children in need of special care; treatment of prisoners; and single parents. He was in charge of the High Court Minors List for three years. He was appointed a member of the Special Criminal Court in 2009.

He was also, for a period of three years, Ireland's representative on the C.C.J.E., the Consultative Council of European Judges, an advisory committee to the Council of Minister of the Council of Europe.

Mr. Justice MacMenamin has written and lectured on a range of legal subjects. He delivered the 2014 National University of Ireland Garrett Fitzgerald Lecture on the future of the European Union. He has lectured in St. Louis University School of Law, and led a course of lectures on comparative constitutionalism at NALSAR, The National Academy of Legal Studies & Research at Hyderabad, India. He is an Adjunct Professor at Maynooth University. In 1998 he was elected a Benchler of the Honorable Society of Kings Inns. In 2019, Mr. Justice MacMenamin will be appointed as Judge-in-Residence at Dublin City University

Ms. Justice Elizabeth Dunne



Ms. Justice Elizabeth Dunne was appointed to the Supreme Court in 2013.

Ms. Justice Dunne was born in Roscommon and educated at University College Dublin (B.C.L.), and The Honorable Society of King's Inns (B.L.).

Ms. Justice Dunne was called to the Bar of Ireland in 1977. During her practice, Ms. Justice Dunne was elected to the Bar Council.

Ms. Justice Dunne was appointed as a judge of the Circuit Court in 1996 and was subsequently appointed to the High Court in 2004. She served as a member of the Education Committee of the Honorable Society of the King's Inns and subsequently served as Chair of that Committee for a number of years.

In 2004, Ms. Justice Dunne became a Bencher of the Honorable Society of King's Inns.

In 2013, Ms. Justice Dunne was appointed as the Chair of the Referendum Commission that was established in advance of the Referendums to establish the Court of Appeal and abolish Seanad Éireann.

Ms. Justice Dunne is currently the correspondent judge for the Supreme Court of Ireland on ACA-Europe. ACA-Europe is an European association composed of the Court of Justice of the European Union and the Councils of State or the Supreme administrative jurisdictions of each of the members of the European Union.

Mr. Justice Peter Charleton



Mr. Justice Peter Charleton was appointed to the Supreme Court in 2014.

Mr. Justice Charleton was born in Dublin and educated at Trinity College Dublin and The Honorable Society of King's Inns. He lectured in Trinity College Dublin from 1986 to 1988 in criminal law and in The Honorable Society of King's Inns in tort law from 1982 to 1984.

Mr. Justice Charleton was called to the Bar of Ireland in 1979, In 1995, he was called to the Inner Bar. From 2002 to his appointment to the High Court in 2006 he was counsel to the Morris Tribunal; a statutory enquiry which looked into certain misconduct in An Garda Síochána. In the High Court he was assigned principally to the commercial list.

From February 2017 to June 2018 he was the Chairman of the Tribunal of Inquiry into protected disclosures made under the Protected Disclosures Act 2014 and certain other matters. The tribunal published two substantive reports on the issues before it, the last in October 2018.

He has published on intellectual property, criminal law, torts, constitutional law and executive power in journals, including the Maastricht Journal of European and Comparative Law, the International Journal of Law and the Family, the Yearbook of the International Commission of Jurists, Intellectual Property Law and Policy, the Journal of Criminal Law, the Bar Review, the Journal of the Judicial Studies Institute of Ireland, the Irish Law Times, the Gazette of the Incorporated Law Society of Ireland and the Irish Criminal Law Journal.

Mr. Justice Charleton is the author of:

Controlled Drugs and the Criminal Law (An Cló Liúir, 1986)

Offences Against the Person (Round Hall Press, 1992)

Criminal law: Cases and Materials (Butterworth, 1992)

Irish Criminal Law (Butterworth, 1999, with McDermott and Bolger

and

Lies in a Mirror: An Essay on Evil and Deceit (Blackhall Publishing, 2006)

Mr. Justice Charleton was a founder member of the RTÉ Philharmonic Choir and was chairman of the National Archives Advisory Council from 2011-2016. He is the Irish representative on the Colloque Franco-Britannique-Irlandais.

Ms. Justice Iseult O'Malley



Ms. Justice Iseult O'Malley was appointed to the Supreme Court in 2015.

Ms. Justice O'Malley was born in Dublin and educated at Trinity College Dublin, and The Honorable Society of King's Inns (B.L.).

Ms. Justice O'Malley was called to the Bar of Ireland in 1987, In 2007, she was called to the Inner Bar. She practised at the Bar for twenty-five years, mainly in criminal law and also had experience in judicial review, extradition, immigration and housing law.

She was a Director of the Free Legal Advice Centre (F.L.A.C.) from 1985 to 2012 and was Chairperson of the organisation for three years.

In 2012, Ms. Justice O'Malley was appointed to the High Court.

She is a former Chairperson of the Refugee Agency and a former member of the Employment Appeals Tribunal from 1995 to 1998 and the Hepatitis C. Compensation Tribunal from 1995 to 1999.

In 2004, she received an E.S.B. Rehab Person of the Year Award for her work with F.L.A.C.

In 2012, Ms. Justice O'Malley became a Benchler of the Honorable Society of King's Inns.

Ms. Justice Mary Finlay Geoghegan



Ms. Justice Mary Finlay Geoghegan was appointed to the Supreme Court in 2017. She was born in Dublin and educated at the Convent of the Sacred Heart, Monkstown, University College Dublin (B.A. in Mathematics/Mathematical Physics, 1970), and the College of Europe, Bruges.

She practised as a solicitor from 1974 to 1979 before being called to the Bar of Ireland in 1980. In 1988, she was called to the Inner Bar and practised primarily in the areas of constitutional law, European law, administrative law and commercial law. She was also called to the Bar of England and Wales (1987), the Bar of Northern (1989) and the Bar of New South Wales, Australia (1992).

While at the Bar, she was a member of the Law Reform Commission, Head of the Irish Delegation to the Council of the Bars and Law Societies of European Communities (C.C.B.E.) and Chairman of the C.C.B.E. Standing Committee to the Court of Justice of First Instance. She was a member of the Constitutional Review Group; the Working Group on Qualifications for Appointment as Judge of the High and Supreme Courts; and Chair of the Incorporated Council of Law Reporting

Ms. Justice Finlay Geoghegan was appointed a judge of the High Court in 2002 and was assigned principally to the Commercial Court upon its establishment in 2004. She was an ad-hoc judge of the European Court of Human Rights from 2009 to 2010. She chaired the Referendum Commission on the Thirty-first Amendment of the Constitution of Ireland in relation to the rights of children (2012) and was a member of the Working Group on a Court of Appeal established by the President of the High Court (2013-2014). She was a member of the Superior Courts Rules Committee from 2016 to 2017. Upon its establishment in 2014, Ms. Justice Finlay Geoghegan was appointed a judge of the Court of Appeal.

In 1996, Ms. Justice Finlay Geoghegan became a Bencher of the Honorable Society of King's Inns. In addition, she is a Bencher of Middle Temple (2013) and is a member of the Standing Committee of the Council of King's Inns and chair of the Law School Development Committee (2000 to date)

Ms. Justice Finlay Geoghegan is the daughter of Thomas A. Finlay, former Chief Justice of Ireland. She is married to Mr. Justice Hugh Geoghegan, former judge of the Supreme Court.

Ex-officio member

Mr. Justice George Birmingham

President of the Court of Appeal



Mr. Justice George Birmingham was appointed President of the Court of Appeal in 2018.

President Birmingham was born in Dublin and educated at St. Paul's College, Trinity College Dublin and The Honorable Society of King's Inns (B.L.).

President Birmingham was called to the Bar of Ireland in 1976. In 1999, he was called to the Inner Bar.

In 2007, he was appointed as a Judge of the High Court and in 2014, upon its establishment, was appointed as a Judge of the Court of Appeal. In the same year, President Birmingham became a Bencher of the Honorable Society of King's Inns.

From 1981 to 1989, he was a member of Dáil Éireann and served as a Minister of State of the Government of the day from 1982 to 1987.

In 2002, as a Senior Counsel, President Birmingham was requested by the Department of Health to conduct a preliminary investigation into allegations of historical clerical child sex abuse in the Roman Catholic Diocese of Ferns.

In 2006, President Birmingham was the sole member of a Commission of Investigation set up pursuant to the Commissions of Investigation Act 2004 in relation to the late Dean Lyons.

Ex-officio member
Mr. Justice Peter Kelly
President of the High Court



Mr. Justice Peter Kelly was appointed President of the High Court in 2015.

Mr. Justice Peter Kelly was born in Dublin and educated at O'Connell's School, University College Dublin, and The Honorable Society of King's Inns (B.L.).

President Kelly was called to the Bar of Ireland in 1973, commencing practice in 1975. He was called to the Bar of England and Wales in 1981 and the Bar of Northern Ireland in 1983. In 1986 he was called to the Inner Bar.

He was appointed as a Judge of the High Court in 1996 and was the judge in charge of the Chancery List 1997-1999, the Judicial Review List 1999-2003 and was head of the Commercial Court since its inception in 2004. Upon its establishment in 2014, he was appointed as a Judge of the Court of Appeal.

In 1996, President Kelly became a Bencher of the Honorable Society of King's Inns. In 2014 he was elected a Bencher of Middle Temple.

Recently Retired Members of the Supreme Court

Ms. Justice Mary Laffoy

Ms. Justice Laffoy was appointed to the Supreme Court in 2013, having served as a High Court judge since 1995.

In June 2017, she retired from the Supreme Court. During her tenure as a Supreme Court Judge, she delivered lead judgments in a number of significant cases, including *In Re J.D. Brian Limited (In Liquidation)*⁸, *In Re Seán Dunne (a Bankrupt)*⁹, and *Corrigan v. Corrigan*¹⁰

Speaking on the occasion of Ms. Justice Laffoy's retirement the then Chief Justice Susan Denham, quoting the philosopher Socrates, who stated that:

“Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially.”

All four belonged to Ms. Justice Laffoy, Chief Justice Denham said.

In December 2018, Ms. Justice Laffoy was appointed by the Government as President of the Law Reform Commission. Her former colleagues on the Supreme Court wish her every success in her new role.



Ms. Justice Susan Denham



In July 2017, Ms. Justice Susan Denham retired from the Supreme Court after a distinguished and illustrious 25 year term in which she spent the final six years as Chief Justice.

Speaking at her valedictory ceremony, Mr. Justice O'Donnell acknowledged the transformative effect that Ms. Justice Denham made in reforming the court and judicial system, in particular in her role in establishing the Courts Service and subsequently identifying the need for a Court of Appeal.

Her former colleagues on the Supreme Court continue to wish her well in her retirement.

⁸ [2015] IESC 62, [2016] 1 I.R. 131

⁹ [2015] IESC 42

¹⁰ [2016] IESC 56

Remembering Adrian Hardiman | 1951 – 2016

The Supreme Court, and indeed the Irish legal community, were shocked to wake up to the news on Monday 6 March 2016 of the sudden death of our esteemed colleague and friend Mr. Justice Adrian Hardiman.

Adrian Patrick Hardiman was born in 1951 and was educated at Belvedere College, and graduated from University College Dublin with a B.A.

He was called to the Bar in 1974 and took silk in 1989. In 2000, he was nominated by the Government of the day to be appointed directly to the Supreme Court.

His tenure on the bench will be remembered for his analysis and engagement of the cases on which he adjudicated on. The unique style he adopted in his written judgments were revered by students and academics alike.



Writing at the time of his death, his colleagues lamented that “his judgments, his interventions in court and his contributions in conference and discussions were all incisive and illuminating.”

At a hastily convened sitting of the Supreme Court, in which all the members of the Court sat, the presence of Mr. Justice Hardiman’s empty chair illustrated the sudden loss and shock at the news of his death. Delivering a statement on behalf of the Court, then Chief Justice Susan Denham remarked that:

“The State has lost a colossus of the legal world: and a good and true friend has been lost by his colleagues on the Court.

Mr. Justice Hardiman had a most successful career as a barrister, he was a leader at the Bar, was renowned for his extensive practice and great skill, including in cross-examination.

...

His profound knowledge of the law, and his fluency in expressing his views, have added immensely to the legal jurisprudence of this State.”

Adrian was a renowned author and prior to his untimely death in 2016, Adrian had been working on a book on the impact of the writings of James Joyce on the Irish legal landscape. His work, titled ‘*Joyce in Court*’ was published by Head of Zeus in June 2017.

Our thoughts continue to be with his wife Yvonne, sons Hugh, Owen and Daniel and family.

“Doras feasa fiafraí”

(The Door to wisdom is to ask questions)

The Constitution of Ireland

Bunreacht na hÉireann, the Constitution of Ireland, is the basic law of the State and provides that Ireland is a sovereign, independent and democratic State.¹¹ It provides for three branches of Government – the Legislature, the Executive, and the Judiciary¹² – and a tripartite separation of powers between these three organs.¹³ This principle provides a system of checks and balances between the institutions of State.



In 1937, a Plebiscite was held which asked the People to determine whether or not they wished to ratify a draft Constitution. The Plebiscite resulted in 685,105 voters approving the draft Constitution, with the total number of votes not approving being 526,945. As the majority of the votes cast at the Plebiscite signified approval, the draft Constitution was deemed to have been approved by the People and on 29th December, 1937, the new Constitution, Bunreacht na hÉireann, came into force.

Comprising of 50 Articles, the first portion of the Constitution relates to the institutions of State prescribing their respective powers.

A significant section of the Constitution is devoted to the protection of specified fundamental rights. Since the 1960s when, in the case of *Ryan v. Attorney General* [1965] 1 I.R. 294, the High Court made a finding, which was upheld in the Supreme Court, that Article 40.3 of the Constitution guaranteed personal rights not expressly referred to in the Constitution, the Supreme Court has identified specified unenumerated rights.

Every part of the Constitution is set out in both the Irish and English languages. Article 8 states that the Irish language is the first official language and that the English language is recognised as a second official language.

Ireland is a dualist State, Article 29.6 of the Constitution providing that international agreements have the force of law to the extent determined by the Oireachtas. This means that international treaties entered into must be incorporated into domestic law by legislation before they are applicable within the State (for example, incorporation of the Vienna Conventions on Diplomatic and Consular Immunities was effected by the Diplomatic Relations and Immunities Act 1967). The exception to this is European Community law, which, under the terms of Article 29 of the Constitution, has the force of law in the State. This means that any law or measure, the adoption of which is necessitated by Ireland's membership of the European Union, may not, in principle, be invalidated by any provision of the Constitution.

Article 25.5.2^o of the Constitution provides that the text of the Constitution enrolled for record in the office of the Registrar of the Supreme Court is the definitive version of the Constitution and is conclusive evidence of its existence.

¹¹ Article 5 of the Constitution of Ireland.

¹² Article 6.1 of the Constitution of Ireland.

¹³ See Articles 46 and 47 of the Constitution of Ireland.

The Constitution establishes the Courts of Ireland and confers on the Superior Courts the power to review the constitutionality of legislation, and to invalidate legislation which is incompatible with the Constitution.

Amending and Interpreting the Constitution

The Constitution of Ireland has been described as “a living document”¹⁴ and as far back as the 1970s it was stated by Mr. Justice Brian Walsh that:

“...no interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts.”¹⁵

The Supreme Court, as the ultimate interpreter of the Constitution, has interpreted the Constitution over the past eight decades as protecting constitutional rights such as the right to bodily integrity (*Attorney General v. Ryan*¹⁶) and marital privacy (*Attorney General v. McGee*¹⁷). The Court recently held that the absolute ban on asylum seekers working was contrary to the constitutional right to seek employment (*NVH v. Minister for Justice & Equality*¹⁸).

The Constitution may only be amended by a Referendum of the People. Where a Bill to amend the Constitution is passed by the Oireachtas it is then put to the People for them to determine whether they approve or reject the proposal to amend the Constitution. Since 1937, there have been 31 amendments to the Constitution. The nature of the amendments include a change in the social landscape of the State, whilst some amendments have been necessary as part of Ireland’s membership of the European Union. Other amendments have included removing the death penalty from the Constitution, ratifying Ireland’s membership of the International Criminal Court and to insert a new Article into the Constitution in relation to children’s rights. In recent years there have been a series of proposals put to the People to amend the Constitution. These have included amending the Constitution to provide for the establishment of the Court of Appeal, marriage equality, removal of the offence of Blasphemy.

It is worth noting that there have been a number of referendums have been held where the proposal put to the People was not approved by a majority. Such proposals include reducing the age of eligibility for nomination to the Office of President and also the abolition of the Upper House of Parliament, the Senate (Seanad Éireann).

2017 marked the 80th anniversary of the coming into force of the Constitution. The Constitution of Ireland continues to undergo change by the People through the Referendum process. The Superior Courts continue to be tasked in interpreting the Constitution in cases where constitutional law issues arise. In doing so, the Courts are bound by the provisions of the Constitution and the jurisprudence that has developed over the past 80 years.

¹⁴ Per Denham J., *Sinnott v. Minister for Education* [2001] 2 I.R. 545 at 664.

¹⁵ *McGee v. Attorney General* [1974] I.R. 284.

¹⁶ [1965] 1 I.R. 294

¹⁷ [1974] I.R. 284.

¹⁸ [2018] 1 I.R. 246.



Part 2

The Supreme Court in 2018

Supreme Court of Ireland
Annual Report 2018

2

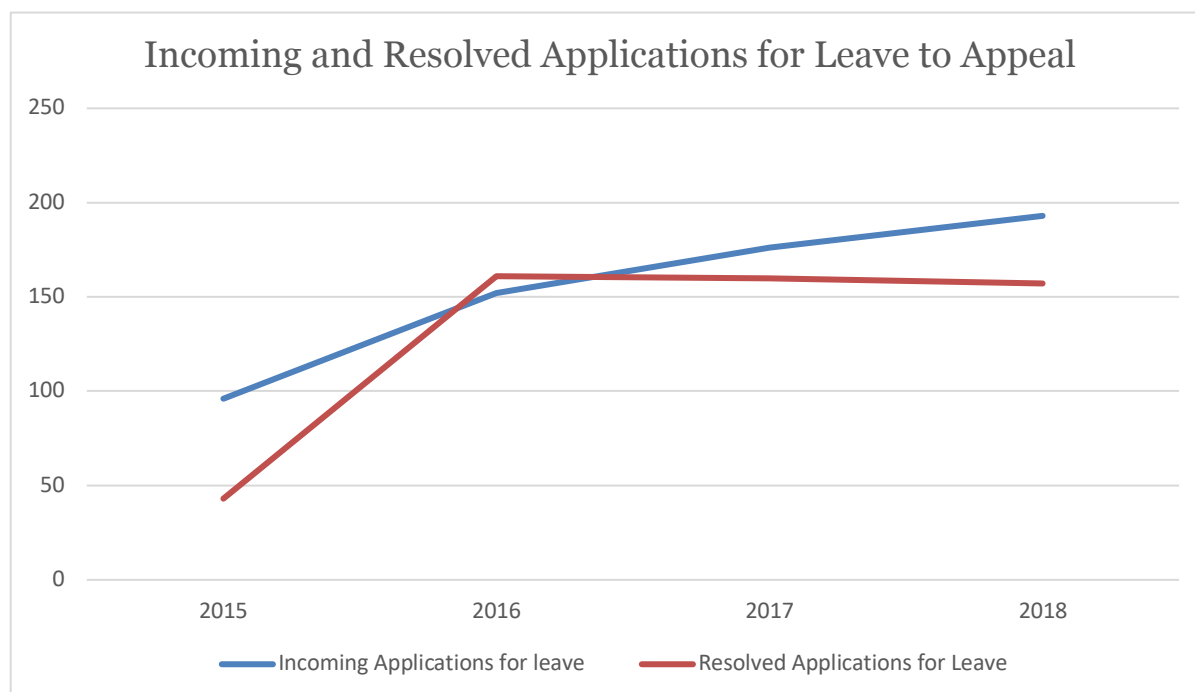
Part 2 | The Supreme Court in 2018

Statistics

Applications for Leave to Appeal

The Supreme Court first began to control the flow of appeals to the Court in 2014 upon the coming into force of its new jurisdiction. Since then, 521 applications for leave to appeal have been resolved.¹⁹ Figures compiled by the Supreme Court Office indicate that, in 2018, the Court determined 157 applications for leave to appeal and granted leave in respect of 58 of such applications (37%).

The below graph illustrates the increasing number of applications for leave to appeal brought to the Supreme Court each year since the first year in which it began to consider such applications. There has been a 10% increase in applications for leave to appeal in 2018 compared to 2017 and an overall increase of 101% since 2015. Such increase reflects the transitioning by the Court into its new jurisdiction and the below graph illustrates a stabilising of the number of applications for leave to appeal.



¹⁹ Annual statistics for cases considered by the Supreme Court each year can be found in the Annual Reports of the Courts Service, available at www.courts.ie.

Categorisation of Applications for Leave to Appeal

It must be stressed that the foregoing categorisation comes with a *caveat* that many of the cases involve issues which fall under more than one area of law. For example, quite a few major criminal cases involve constitutional issues. Likewise, the same substantive claim against the State can be framed both in private law (such as tort) but also in public law (such as legitimate expectation).

The categorisation in this Chapter seeks to identify the single category which is most central to the case but it should not be taken to mean that there may not be other aspects to the case which raise important questions under other headings.

Although the task of categorising applications for leave to appeal is subjective and, in reality, one case may encompass legal issues across a number of areas of law, a categorisation by case type indicates that the highest number of applications for leave to appeal were brought in criminal law cases and cases involving judicial review proceedings in the area of immigration law.

Applications for Leave to Appeal from the High Court and Court of Appeal

The graph on page 50 categorises all applications for leave to appeal brought to the Supreme Court in 2018 into areas of law. The categorisation is based on a consideration of the published determinations of the Court in 2018.

The breakdown indicates that the areas of law which gave rise to most applications for leave to appeal were: criminal law; immigration law and cases involving procedural issues. Cases involving issues of immigration law brought by way of judicial review proceedings accounted for 24% of cases for which applications for leave to appeal was granted.

Applications for Leave to Appeal directly from the High Court

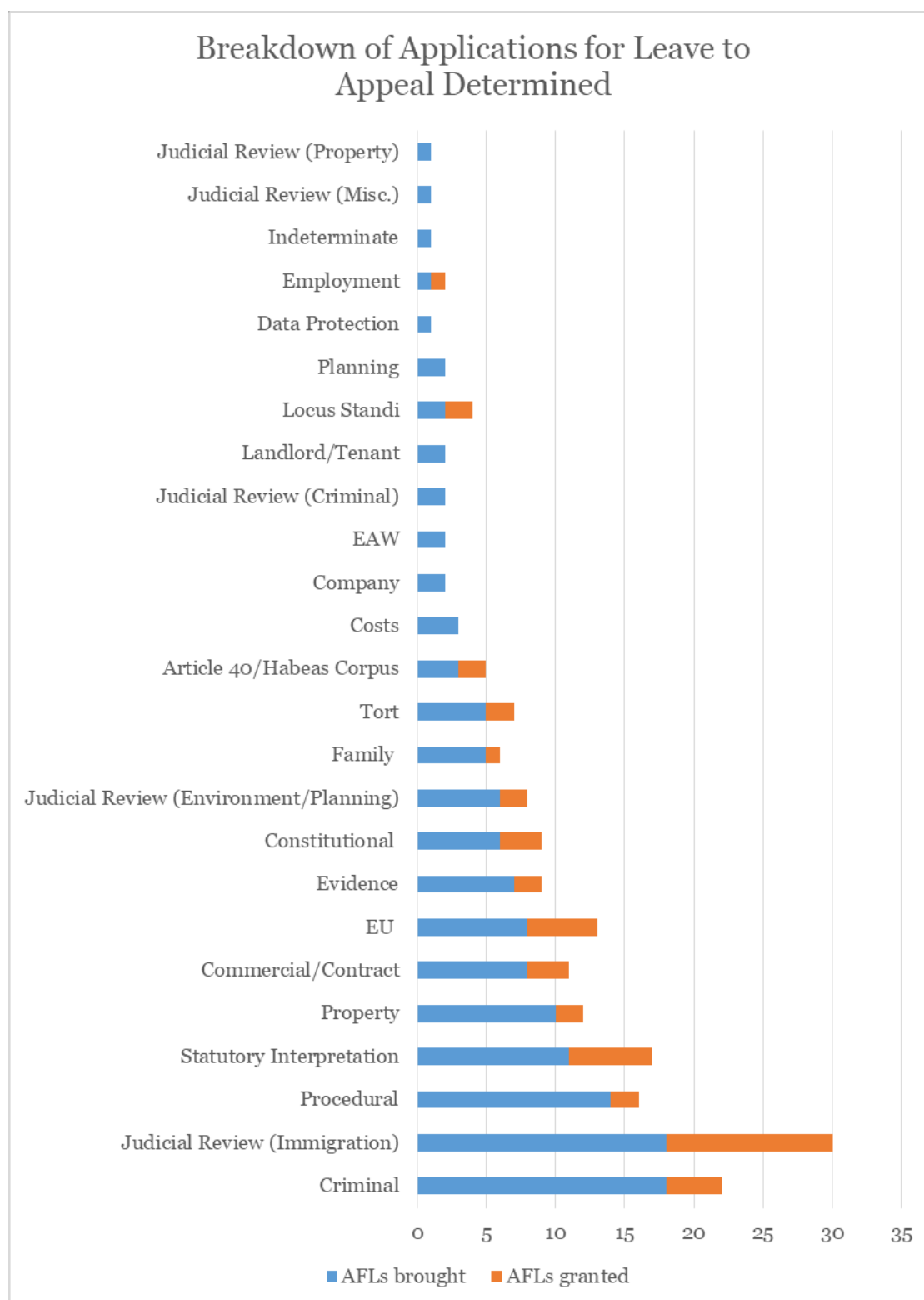
The Constitution provides for a direct appeal, known as a 'leapfrog' appeal from the High Court to the Supreme Court in exceptional circumstances. In 2018, 50 of the published determinations of the Supreme Court involved applications for which leapfrog appeals were granted. In 12 of the 50 determinations (24%) the Supreme Court granted leave to appeal directly from the High Court. A breakdown of the categories of cases in which applications for a leapfrog appeal were made illustrates that 9 of the 50 applications (18%) related to cases involving immigration law issues brought by way of judicial review proceedings and that 56% of such leapfrog applications for leave to appeal were granted.

The category in which the next highest number of leapfrog applications was brought was environmental or planning law cases. Five of the 50 applications (10%) involved such issues and leave to leapfrog appeal was granted in one such case.

Of the 12 instances in which leave to 'leapfrog' appeal was granted from the High Court to the Supreme Court, five (42%) were in cases in which the High Court had refused to certify that an appeal to the Court of Appeal was justified. Such a certificate is required by statute in certain circumstances before an appeal from a High Court decision can be brought to the Court of Appeal. However, the Supreme Court has noted in its determinations that, as a consequence of

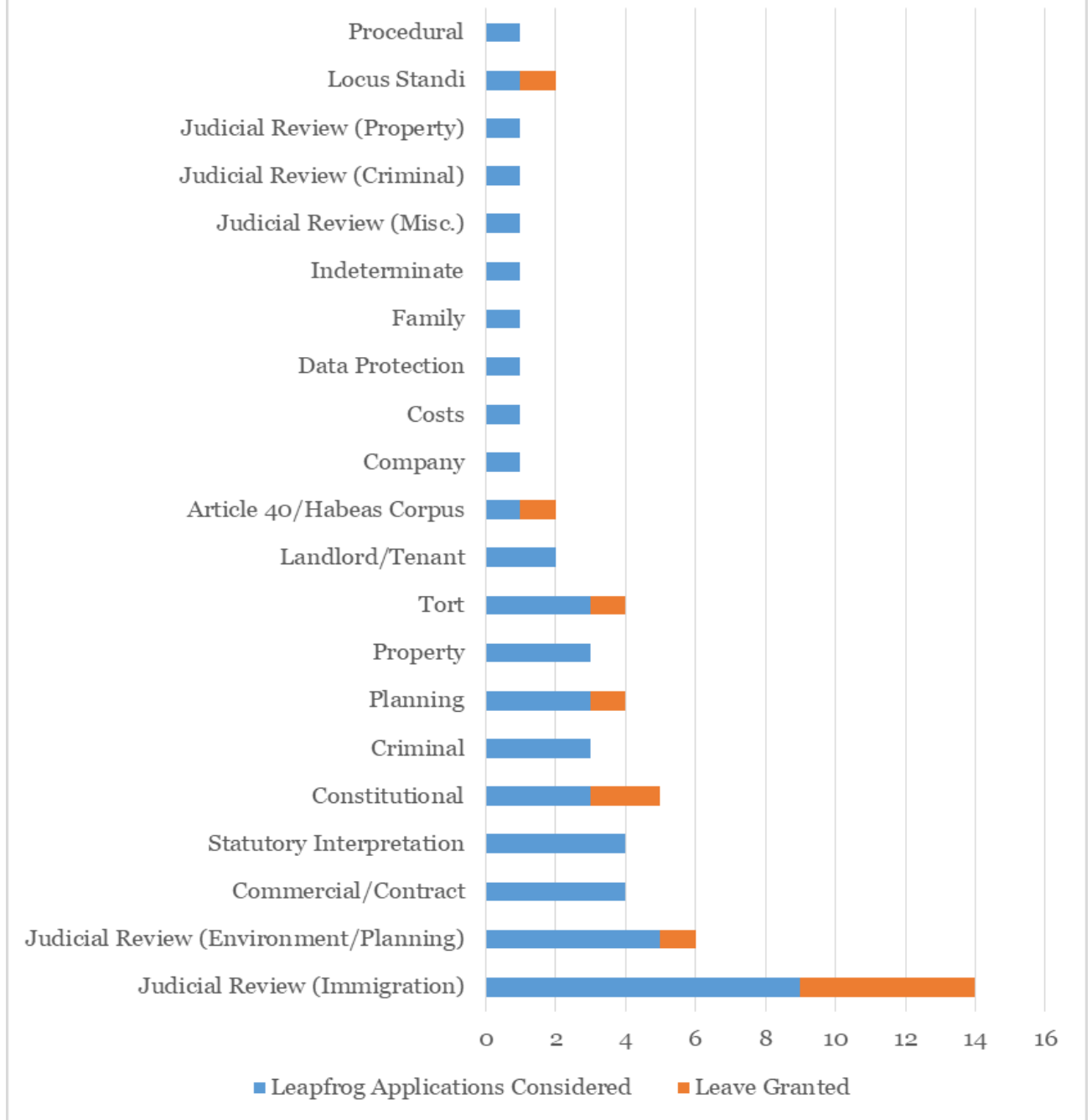
the appellate structure in place following the Thirty Third Amendment of the Constitution, even if the High Court refuses to grant such a certificate, this does not preclude a party from applying for leapfrog leave to appeal directly to the Supreme Court.

Indeed, the Court has stated that where it is satisfied that the leapfrog application presents an issue of public importance, and thus meets the base-line constitutional standard for leave to appeal, the very fact that the High Court has refused a certificate might satisfy the exceptional circumstances requirement in leapfrog cases, thus justifying the granting of leave to appeal.



Categorisation of determinations of AFLs from High Court and Court of Appeal published in 2018.

Breakdown of Leapfrog Applications Determined



Categorisation of determinations of AFLs from High Court to Supreme Court published in 2018.

Full Appeals Determined in 2018

New Jurisdiction Appeals

A majority of the appeals considered by the Supreme Court are new appeals. The Supreme Court disposed of 128 ‘full appeals’ in 2018, 67 of which were ‘new’ appeals which were brought under the jurisdiction of the Court which came into force when the Court of Appeal was established in 2014.

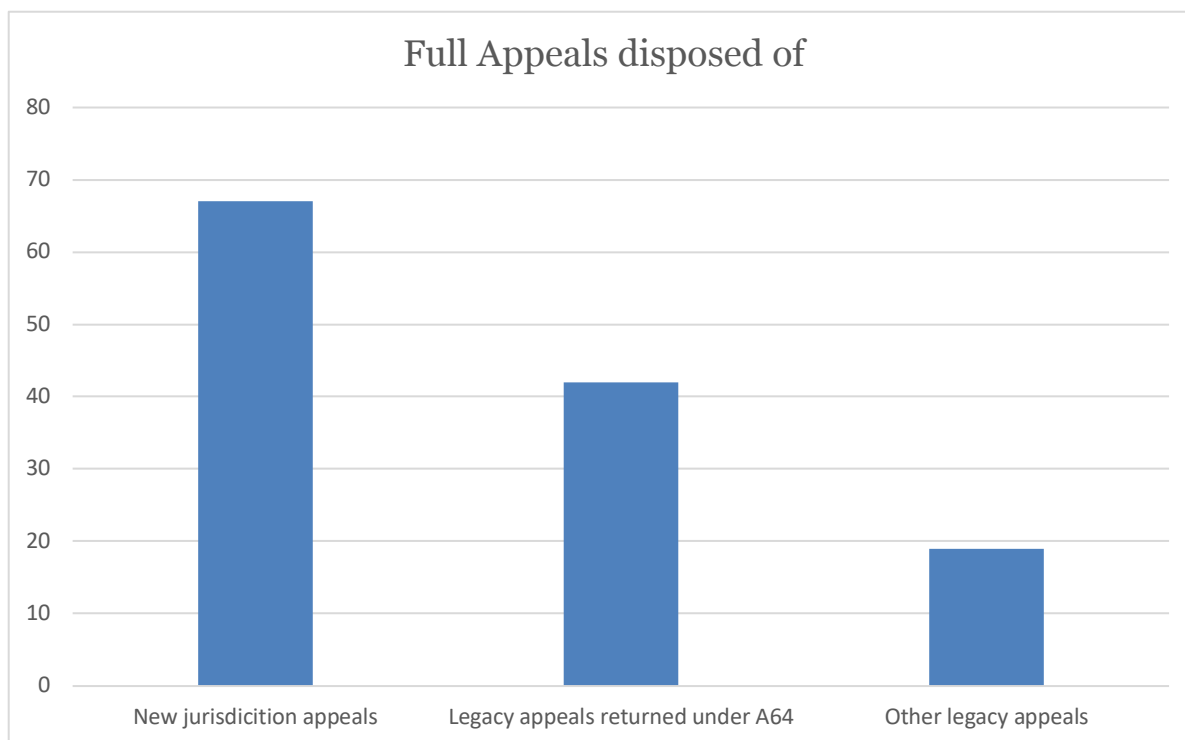
Article 64 ‘Returns’

When the Constitution was amended to establish the Court of Appeal, Article 64, a transitory provision (meaning that it does not now feature in the printed edition of the Constitution) provided that on the day of the establishment of the Court of Appeal, the Chief Justice, if satisfied that it is in the interests of the administration of justice and the efficient determination of appeals to do so, and with the concurrence of the other judges of the Supreme Court, may direct that specified appeals be heard and determined by the Court of Appeal. In October 2014 the then Chief Justice Susan Denham issued a direction transferring 1355 appeals to the Court of Appeal.

The Supreme Court retained over 800 appeals under its previous jurisdiction, which are colloquially referred to as ‘legacy appeals’. The establishment of the Court of Appeal enabled the Supreme Court to dispose of a backlog of such legacy appeals which had accumulated as a result of an almost universal right of appeal which lay to the Supreme Court prior to the establishment of the Court of Appeal. The Court has now effectively disposed of all of its legacy cases, save for a small number of cases where certain procedural issues have not allowed for such cases to be dealt with in full.

However, the constitutional amendment altering the appellate jurisdiction of the Superior Courts had the effect of transferring the near automatic right of appeal from the Supreme Court to the Court of Appeal with only nine Court of Appeal judges to consider appeals in the new Court. As a result, a backlog of appeals in the Court of Appeal ensued. In order to alleviate this backlog, the Chief Justice and President of the Court of Appeal agreed that a number of appeals which had been transferred to the Court of Appeal under Article 64 of the Constitution should be transferred back to the Supreme Court.

In 2018, the Supreme Court, sitting in panels comprised of judges of the Supreme Court and Court of Appeal determined 42 so-called ‘Article 64 return’ cases in order to assist the Court of Appeal to reduce its backlog. In particular, as part of the management process leading to the return of cases to the Supreme Court, the Court of Appeal was able to dispose of more legacy appeals without a full hearing.



Article 64 Applications

Article 64.3.3 provides that the Supreme Court, on an application to it, may, if it is satisfied that it is just to do so, make an order that can either cancel the effect of the direction or cancel or vary the effect of any provision of that direction so far as it relates to that appeal.

In 2018, the Supreme Court determined 67 applications seeking the transfer of cases from the Court of Appeal back to the Supreme Court. Of the 64 determinations published in relation to such applications, 57 were transferred back to the Supreme Court.

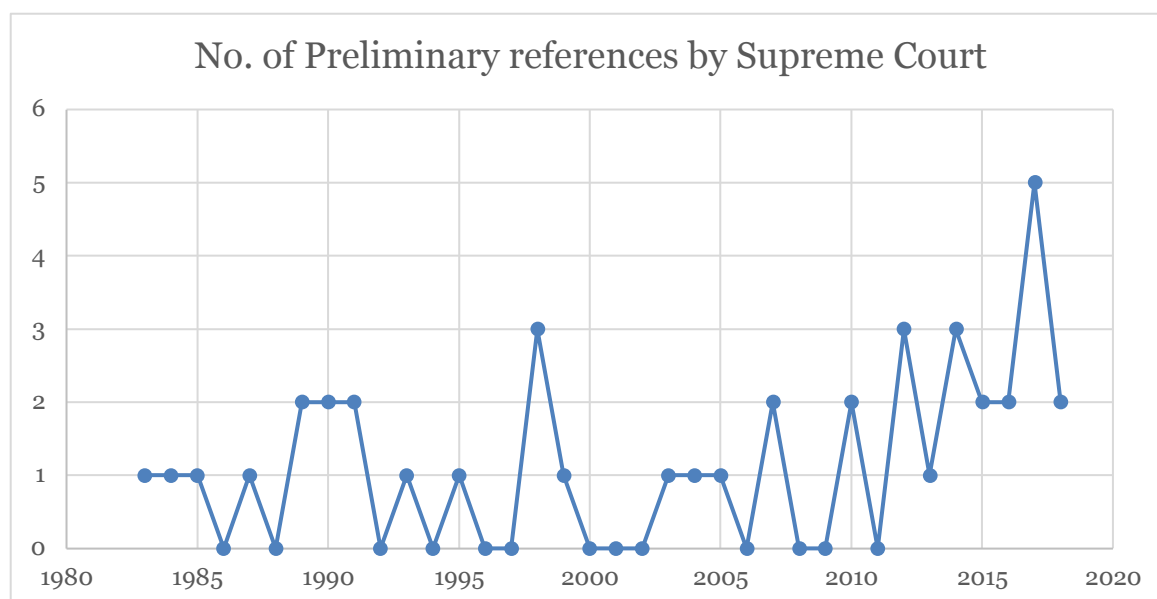
Requests for Preliminary Rulings by the Supreme Court to the Court of Justice of the European Union

Article 267 of the Treaty on the Functioning of the European Union provides a mechanism under which national courts which apply European Union law in cases before them may refer questions of EU law to the Court of Justice of the European Union where such a reference necessary to enable them to give judgment. The Supreme Court, as the court of final appeal, is under a duty to refer questions to the Court of Justice where necessary before it concludes a case.

The Supreme Court of Ireland has made preliminary references under Article 267 TFEU (or formerly Art 234 EC) in 41 cases since 1983.

The below graph illustrates the number of preliminary references made by the Supreme Court each year.

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Questions referred by the Supreme Court in 2018

In 2018, the Supreme Court made two requests for preliminary rulings in the cases of *Minister for Justice and Equality v. Lisauskas* [2018] IESC 42 and *Minister for Justice and Equality v. Dunauskis* [2018] IESC 43 .

***Minister for Justice and Equality v. Lisauskas* [2018] IESC 42**

***Minister for Justice and Equality v. Dunauskis* [2018] IESC 43**

In interim rulings made on 31st July, 2018, Ms. Justice Finlay Geoghegan, for the Supreme Court, made a reference to the Court of Justice of the European Union pursuant to Article 267 of the Treaty on the Functioning of the European Union. The issue in both appeals is whether the issuing judicial authority is a judicial authority within the meaning of Article 6(1) of the Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between member states (the “Framework Decision”).

The appellants in both appeals were the subject of the execution of a European Arrest Warrant and were unsuccessful in the High Court in objecting to being surrendered to Lübeck in Germany in the case of Mr. Dunauskis and Lithuania in the case of Mr. Lisauskas. Both individuals raised objections as to the standing of the respective prosecution authorities, contending that they were not a judicial authority within the meaning of Article 6(1) of the Framework Decision and hence the Irish European Arrest Warrant Act 2003.

Mr. Dunauskis subsequently appealed to the Court of Appeal and his appeal was heard along with that of Mr. Lisauskas. The Court of Appeal upheld the decision of the High Court. On the question of the independence the Court of Appeal applied a test of “functional independence” and operating de facto independently in reliance of the approach of Lord Dyson taken in *Assange v. Swedish Prosecution Authority (Nos 1 and 2)* [2012] 2 A.C. 471.

In considering the matter, the Supreme Court acknowledged that there is some difficulty in reaching definitive conclusions, in the context of Mr. Dunauskis’ appeal, in relation to the role of the Lübeck Public Prosecutor with regards to the administration of justice in Germany. In respect of Mr. Lisauskas’ appeal, the Supreme Court observed that while it remains clear that

to be a judicial authority a public prosecutor must have a role in the administration of justice, the extent and nature of the role that satisfies this test is more uncertain.

In both cases, the Supreme Court referred a number of questions to the Court of Justice of the European Union including whether the public prosecutor in Lübeck in Germany and the public prosecutor in Lithuania are judicial authorities within the meaning of Article 6(1) of the Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between member states.

***Minister for Justice v. O'Connor* [2018] IESC 3; [2018] IESC 19**

The Supreme Court referred to the Court of Justice questions arising out of the impact, if any, on the operation of European Arrest Warrants arising from the fact that the United Kingdom has given notice under Article 50 of the Treaty on European Union of its intention to withdraw from the EU. The respondent, who was the subject of a request for the United Kingdom for his surrender on the basis of a European Arrest Warrant, contended that, as a consequence of Brexit, he would be surrendered to another jurisdiction in circumstances where there is a real risk that he would be required to serve a period of imprisonment and thus be detained beyond the time when the United Kingdom is a member of the EU.

The Court sought that the CJEU deal with the case under its urgent preliminary ruling procedure (PPU procedure) on the basis that there were a number of cases in the High Court which were held up pending the decision of this Court in relation to the application and the potential impact of the case on other areas of the law and indeed on international relations. The CJEU did not accede to that case.

However, in a different case, *Minister for Justice, Equality and Law Reform v. R.O.* [2018] 2 I.L.R.M. 199, which involved a similar issue before the High Court in circumstances where, unlike in the circumstances of *O'Connor*, the person concerned was in custody. In that case the High Court decided that it too should refer almost identical questions to the Court of Justice in order to enable it to resolve the case in question. The Court of Justice gave judgment in that case (*R.O.* (Case C-327/18 PPU) EU:C:2018:733) in which the answers given were unfavourable to the case made on behalf of Mr. R.O. to the effect that his surrender should not take place by virtue of the anticipated Brexit. Consequently, the request made by the Supreme Court in *O'Connor* was withdrawn.

Case summaries

NOTE

The following case summaries are provided solely to provide an overview of some of the cases considered by the Supreme Court in 2018. They do not form part of the reasons for the decision in the respective case and do not intend to convey a particular interpretation of the case summarised. The case summaries are not binding on the Supreme Court or any other Court. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://www.courts.ie/judgments/>

Garda Representative Association & anor v. Minister for Public Expenditure and Reform [2018] IESC 4

Changes to sick leave regime of An Garda Síochána not unlawful in circumstances where relevant legislation did not oblige the Minister to consult with An Garda Síochána. It was unnecessary to consider whether there was a right to a specific form of consultative process in circumstances where there had in fact been extensive consultation.

This appeal concerned a challenge by the appellants (“the GRA”) to the legality of the Public Service Management (Sick Leave) Regulations 2014 (S.I. 124 of 2014) (“the Regulations”) which had the effect, amongst other things, of altering the sick leave regime applicable to the Irish police force, An Garda Síochána. The Regulations were made by the respondent Minister (“the Minister”) under powers granted by the Public Service Management (Recruitment and Appointments) (Amendment) Act 2013 (“the 2013 Act”).

The GRA brought judicial review proceedings in the High Court challenging the lawfulness of the Regulations on a number of grounds. The claim failed before the High Court and on appeal to the Court of Appeal. The Supreme Court granted leave to appeal. The central question which arose concerned the extent to which parties who are potentially adversely affected by proposed changes in the terms and conditions of public sector employees have a legal entitlement to be consulted before any such measures are adopted.

The Chief Justice delivered the unanimous judgment of the five-panel Supreme Court. The first issue considered was whether any entitlement for the GRA to make representations arose under the relevant statutory provisions. The Court concluded that the relevant statutory regimes did not, of themselves, confer any right to be consulted prior to the making of the Regulations. While other legislative provisions were identified which may have conferred such a right, the Regulations were made under the 2013 Act, which provides for its application notwithstanding any other legislative provision.

The Court considered whether it was arguable that an entitlement might arise as a result of restrictions which are placed on the ability of An Garda Síochána to conduct industrial relations, or whether the history of the engagement between the GRA and the Government prior to the introduction of the Regulations was such as to give rise to a legitimate expectation that some form of right to make representations might be afforded. The Court concluded that under neither of those headings was it arguable that there could be a right to any specific form of process. Rather the height of the argument could only extend to an entitlement to a generalised form of consultation or facility to make representations. On the facts, even if such a general entitlement could be said to exist, it could not have been breached as there had been lengthy engagement between the GRA and the Government. The Court therefore concluded that it was unnecessary to examine whether any such right actually existed.

Therefore, the appeal was dismissed and the orders of the lower courts were affirmed.

The rule relating to the exclusion of evidence obtained in breach of the constitutional rights of an accused in criminal trials is not applicable to forfeiture proceedings, but the Court has a discretion to refuse a forfeiture order, with a presumption in favour of doing so where there has been a grossly negligent breach of the constitutional rights.

The case involved an appeal against orders under the Proceeds of Crime Act 1996 in relation to the forfeiture of cash to the value of approximately €20,000 on the grounds that the material was the proceeds of criminal activity. The cash was discovered by the Gardaí during a search of the respondent's dwelling on foot of a warrant granted pursuant to s. 29 of the Offences Against the State Act 1939. Section 29 was subsequently declared unconstitutional by the Supreme Court in *Damache v. Director of Public Prosecutions* [2012] 2 I.R. 266.

The respondent argued that the cash was secured as a result of an unlawful search. The unlawfulness of the search was not contested. The main question for the Court to consider was whether a rule existed excluding unlawfully obtained evidence from subsequent civil (as opposed to criminal) proceedings or specifically for proceedings under the 1996 Act. The exclusionary rule is traditionally associated with unconstitutionally obtained evidence in criminal proceedings.

The High Court refused the application, finding that proceedings of this kind were *sui generis* (unique) and constituted proceedings *in rem* (here meaning relating to property) rather than *in personam* (here meaning an action against an individual). On this basis, none of the policy considerations that apply to excluding unconstitutionally obtained evidence in a criminal trial applied to this trial, which was an action to seize the proceeds of crime and not a criminal trial with a view to sanctioning an accused person(s). The Court of Appeal upheld the judgment of the High Court, finding that it was not necessary to consider exclusionary rule test applicable to evidence in a criminal trial as the cash could not be described as “evidence” at all, but was “very property itself whose provenance is covered by the application [of the 1996 Act]”.

Delivering the unanimous judgment of a five-judge Supreme Court, Ms. Justice O'Malley emphasised that the cash was not truly “evidence” as it was not being utilised to prove a fact in a trial. It was therefore unhelpful to frame the action as one concerning unconstitutionally obtained evidence. The Court emphasised that leaving the legality of the search aside, no constitutional rights flow from the possession of the proceeds of crime.

Having reviewed relevant case law of the courts of Ireland and the United States, the Supreme Court held that the exclusionary rule prevents breaches of constitutional values that can arise both in a criminal and civil context resulting from actions using “coercive legal power”. The constitutional values in question here were the administration of justice and compliance with the law by agents of the State. The Court found that no order should be granted if doing so would lead the Court's process to a deliberate and conscious breach of constitutional rights by the State. If the breach is grossly negligent or reckless, a judicial discretion applies with a presumption in favour of refusing the order. When evidence “in the true sense” is called into question in civil trials, the conventional exclusionary rule test applies with the civil burden of proof (on the balance of probabilities) substituted for the criminal burden (beyond reasonable doubt). The issue was remitted to the High Court for rehearing.

Minister is obliged to consider the fact of pregnancy of the partner of the proposed deportee as a relevant factor in any decision to revoke a deportation order and is obliged to give separate consideration to the likely birth in Ireland of a child of the potential deportee.

The rights of an unborn do not exist independently of Article 40.3.3^o of the Constitution.

This case, whilst primarily an immigration case, required the Court to consider whether the rights of the unborn existed independently of Article 40.3.3^o of the Constitution as it was in force at the material time. Article 40.3.3^o was inserted into the Constitution in 1983 by the Eighth Amendment.

The primary issue that fell to be considered by the Court were the factors that the respondent Minister must take into account when considering an application relation to a deportation order where it was expected that the potential deportee would become the father of a child who would, on birth, become an Irish citizen.

In February 2018, the Supreme Court granted leave in respect of an application brought by the Minister for Justice and Equality in respect of a decision of the High Court.

In a judgment, to which all members of the Court contributed, the Supreme Court held that the Minister is obliged to consider the fact of pregnancy of the partner of the proposed deportee as a relevant factor in any decision to revoke a deportation order and is obliged to give separate consideration to the likely birth in Ireland of a child of the potential deportee.

In its conclusions, the Court held that Minister is obliged to consider the fact of pregnancy of the partner of the proposed deportee as a relevant factor in any decision to revoke a deportation order and is obliged to give separate consideration to the likely birth in Ireland of a child of the potential deportee. In addition, the Minister is obliged to take into account the fact that an Irish citizen child will acquire, on birth, constitutional rights which may be affected by deportation. As a result, the Supreme Court found that the decision of the High Court on this aspect of the case was correct and that the declaration made by the High Court was upheld. The Minister's appeal against the declaration was dismissed.

The Supreme Court found that the most plausible view of the pre Eighth Amendment law was that there was uncertainty in relation to the constitutional position of the unborn which the Eighth Amendment was designed to remove. In addition, the provisions of the two subparagraphs to Article 40.3.3^o introduced by the Thirteenth and Fourteenth Amendments support the Court's view that the present constitutional rights of the unborn is confined to the right to life guaranteed in Article 40.3.3^o with due regard to the equal right to life of the mother.

However, the Supreme Court reversed the findings of the High Court in respect of the Minister's obligation to treat the unborn as having constitutional rights other than those contained in Article 40.3.3^o. In addition, the determination that the unborn is a child for the purposes of Article 42A was also reversed.

This decision gained considerable national and international attention as a result of the respective deliberations by both the Irish Government and Parliament in relation to the question of whether to hold a referendum to repeal the Eighth Amendment to the Constitution, which inserted Article 40.3.3^o.

The People (at the suit of The Director of Public Prosecutions) v. K.M.
[2018] 1 I.R. 810

Although the making of a voluntary statement is a clear waiver of the right to silence to that extent, it does not follow that a suspect thereby waives the right to silence in respect of either a prior or subsequent refusal to answer questions in interview.

The appellant was arrested in June 2011 in relation to a complaint of sexual assault. He had previously been made aware of the allegations against him and brought a pre-prepared written statement to the police station. He was cautioned in the standard manner and asked various uncontroversial questions to which he replied fully. When the questioning turned to the allegations against him he referred to his written statement and said that he had nothing further to say. He was then asked a number of questions arising from the written statement of the complainant. In response to each question he replied with the sentence “I have nothing to say other than what's written in my statement” (or some slight variation thereof).

At the trial, counsel for the prosecution led evidence of the additional questions and responses. The trial judge refused an application to discharge the jury, holding that the case was not comparable with *DPP v. Finnerty* [1999] 4 I.R. 364, as the appellant had not said “no comment” but stated that he was relying on the contents of his statement. He was not asked about the interview in evidence-in-chief or cross examination nor was it the subject of comment by counsel in their closing speeches. Further, the contentious part of the interview was not mentioned by the trial judge in his charge to the jury. However, the entirety of the interview memorandum was made an exhibit and given to the jury. The appellant was convicted and sentenced to two years’ imprisonment. An appeal against conviction was dismissed by the Court of Appeal which concluded that, in the circumstances, the appellant had not been exercising his right to silence and that the evidence of the additional questions and responses was both relevant and probative.

Leave to appeal to the Supreme Court was granted on the issue of whether, where a person has volunteered an exculpatory statement and thereafter responds to questions by referring to the statement and saying that he or she has nothing further to say, such responses should be seen as: (a) an exercise of the right to silence, or (b) relevant and probative evidence in the trial.

In allowing the appeal and quashing the conviction the Supreme Court noted that the right to silence was a right protected under the Constitution, as well as at common law and under the European Convention on Human Rights. While waiver of such a right is possible, the Court held that it must be clear from either an express statement or by necessary implication that the suspect has spoken freely and voluntarily in the knowledge that he or she is not obliged to do so. In cases of dispute, it is for the prosecution to prove this beyond reasonable doubt. Further, a consideration of the context is essential and no particular formula of words is mandatory. Although the making of a voluntary statement amounts to a clear waiver of the right to silence to that extent, the Court held that it does not follow that a suspect thereby waives the right in respect of either a prior or subsequent refusal to answer questions. The constitutional protection afforded to the right to silence is such that waiver cannot be held to be implied by ambiguous words.

On the facts of this case, the Court concluded that the refusal of the appellant to answer questions about the allegation was an exercise of his right to silence. In the absence of any guidance as to how the jury should approach the evidence, or what it was intended to prove, there was a real possibility that it drew an inference that the deliberate refusal of the appellant to engage with the specific questions reflected adversely on the credibility of his sworn evidence.

State is obliged under the Constitution to protect vulnerable persons suffering from mental illness within context of extradition application, as it is in relation to all persons, but burden on proposed extraditee to establish substantial grounds for believing that if extradited he would be exposed to a real risk of being subjected to treatment contrary to Article 3 ECHR or equivalent fundamental rights under the Constitution not satisfied in present case.

The Appellant opposed an extradition request from the United States of America where United States authorities wished to prosecute him for conspiracy to distribute narcotics, conspiracy to commit computer hacking and conspiracy to commit money laundering. Mr. Davis was arrested on foot of a US extradition warrant.

During the High Court proceedings and subsequent appeals in both the Court of Appeal and the Supreme Court, Mr. Davis contended that his surrender to the US would violate, among other rights, his right to life and bodily integrity and that his likely incarceration in a US detention facility would amount to inhuman and degrading treatment. Mr. Davis' contentions were based on his underlying mental and psychological health, primarily that his health would deteriorate if he were to be subjected to pre-trial and/or post-conviction detention.

The challenge was unsuccessful in the High Court and on appeal to the Court of Appeal, which dismissed the appeal primarily on the basis that the right of appeal in extradition matters is restricted to one based on a point of law. As the Appellant sought to rehearse the objections made in the High Court, the Court of Appeal held that the matters raised were matters of fact and not of law and that it was well-settled law that an appellate court would not disturb the findings of fact made in the High Court.

The Appellant was granted leave to appeal to the Supreme Court on the issue of whether the State is obliged to protect vulnerable persons suffering from mental illness from the execution of an extradition application. In addition, it was necessary to determine whether the condition of appellant in this case was so severe that, as a matter of law, he should not be extradited to the US.

In delivering the unanimous judgment of the five-panel Supreme Court, Mr. Justice McKechnie held that issues of fact can sometimes be regarded as issues of law for the purposes of an appeal under the applicable extradition statute, having regard to the principles enunciated by previous decision of the Supreme Court. The Court held that the State is obliged, under the Constitution, to protect vulnerable persons suffering from mental illness within the context of an extradition application and that such a duty extends to all persons and not just those suffering from mental illness. The burden is on the proposed extraditee to establish by evidence that there are substantial grounds for believing that if he were extradited to the requesting country he would be exposed to a real risk of being subjected to treatment contrary to Article 3 ECHR or equivalent fundamental rights under the Constitution.

Finally, the Court, having reviewed the evidence in its entirety, was satisfied that the High Court was entirely justified in concluding that the Appellant had not demonstrated such a risk, a conclusion which is objectively justified on the facts of the case. Consequently, the appeal was dismissed.

In the matter of the Adoption Act, 2010, Section 49(2), and in the matter of JB (a minor) and KB (a minor) [2018] IESC 30

There is a duty to vindicate the constitutional rights of the child as far as practicable in the face of significant non-compliance with the legislation governing inter-country adoption, and absent evidence of deliberate conscious breach of the Act, or culpable recklessness as to compliance, so that if the other legal tests and requirements are met, the High Court may, exceptionally, direct the Authority to register an inter-country adoption pursuant to s.92 of the Act.

This appeal related to the Adoption Act, 2010 (“the Act”), which transposed the 1993 Hague Convention on the Protection of Children and Co-operation in respect of Inter-Country Adoptions (“the Convention”) into domestic law. The Adoption Authority (“the Authority”) brought a case stated to the High Court under s. 49(2) of the Act. The applicants, CB, the husband, and PB, the wife, were a married couple with Irish citizenship. JB and KB were the children of PB’s brother and were born in “Country A”. The applicants sought to effect an inter-country adoption, but stated that they received incorrect advice from the authorities in Ireland. Consequently, their efforts were in breach of the terms of the Act and the Convention. Stating that they also received incorrect advice in Country A, they obtained an adoption in Country A, brought the children to Ireland and requested that this be recognised by the Authority. These steps were at variance from the Convention. The applicants should have applied in Ireland to the Authority for an intra-family inter-country adoption as a first step. Given the length of the ensuing litigation, at the time of this judgment, JB and KB had lived with the applicants in Ireland for over six years.

On appeal from the High Court, the Authority submitted that, whatever the reasons for the breach, compliance with the Act and the Convention is essential, and allowing circumvention in this case could have serious “downstream” consequences. Thus, a question arose as to whether, in the face of significant non-compliance, and absent evidence of deliberate conscious breach of the Act, or culpable recklessness as to compliance, a formal legal decision might be required to protect the best interests of the children under Article 42A.4.1^o of the Constitution where statutory non-compliance might normally be a bar to registration of an adoption?

The Supreme Court answered this question in the affirmative, finding that there was a duty to vindicate the children’s rights as far as “practicable”. It found that, considering Article 42A.4.1^o of the Constitution, and if the other legal tests and requirements are met, the High Court may, exceptionally, direct the Authority to register an inter-country adoption pursuant to s.92 of the Act. Although “outside the Convention”, this path would be consistent with its spirit in dealing with exceptional cases such as this and accord with domestic law. In concurring judgments Ms. Justice Dunne and Ms. Justice O’Malley indicated that it would be necessary for the High Court to give “particularly careful consideration” to the circumstances of the breaches of the statutory requirements.

A minority of the Court (Mr. Justice McKechnie and Mr. Justice O’Donnell) held that the Court should not have regard to the provisions of Article 42A of the Constitution as an “external source”, capable of nuancing the interpretation of the Convention or the Act or overruling their provisions entirely. In relation to the primary additional issues contained in the case stated, Mr. Justice MacMenamin held that the Authority did not have jurisdiction to make an adoption order having regard to the pre-existing Country A adoption as this was in unambiguous infringement of the Convention, and that following the Act, the common law rules of recognition of adoptions made in foreign jurisdictions under *MF v. An Bord Uchtála* no longer remain good law.

A decision provided by An Bord Pleanála when granting planning permission for a wind farm development complied with the duty to give reasons. However, the Board had failed to comply with standards required by European law to make complete, precise and definitive scientific findings to justify the its conclusion where an "appropriate assessment" has been carried out.

Following the refusal of Clare County Council of planning permission for wind turbines, the decision was appealed to An Bord Pleanála (the national planning appeals board) and planning permission was granted following the usual procedures required by Irish law and two procedures required by EU law: an Environmental Impact Assessment (EIA) and an Appropriate Assessment (AA). The appellant initiated judicial review proceedings seeking the quashing of the decision on the grounds that the Board failed in its legal duty to provide adequate reasons for its decision, and failed in its more specific duties to provide reasons for steps taken on foot of both the EIA and AA.

The High Court accepted the arguments of the Applicant and quashed the decision of the Board. The trial judge held that it was not sufficient for the reasons for the decision to be contained in “an ocean” of accompanying documentation. He further held that sufficient reasons were not provided in relation to how the EIA was conducted, the pre-AA “screening” or the AA itself, and reasons outlining how this impacted the eventual decision. Leave was granted to the Board to appeal to the Supreme Court.

In delivering the unanimous judgment of a five-judge panel of the Supreme Court, the Chief Justice dismissed the Board’s appeal but held that the decision should be quashed on much narrower grounds than those in the decision of the High Court. The Supreme Court held that the duty to give reasons exists for two primary reasons: the first is so an individual can know “in general terms” why a decision was made, and the second is that there should be sufficient information to allow the party to make an informed decision on whether to seek judicial review (and accordingly sufficient information for the trial judge to make an informed decision in those circumstances).

The Court held that some administrative decisions by their nature involve complex and scientific material. On that basis, it cannot always be expected that the reasons provided will be simple or straightforward, particularly when the subject matter is not. It further found that the decision constituted an appropriate middle-ground between a “box-ticking” exercise that provided a list of reasons, and a lengthy discursive judgment of a court of law. The decision could be utilised by any interested party to discern the reasons for the Board’s decision, even if this required the use of supplementary documentation. There is no requirement that the court review the merits or whether there was “a sustainable basis” for the conclusions of the Board. This aspect of the High Court’s decision was reversed. The Supreme Court held that the principle of subsidiarity (deference to national law in a European context in the absence of an alternative) facilitated the application of Irish law on the duty to give reasons to the question of the EIA, and therefore reversed the findings of the High Court on this question.

Finally, the Supreme Court found that, once a decision is made to carry out an AA, the legislation and case law requires that “complete, precise and definitive scientific findings” must be set out to support the conclusions reached. If these are not set out, the Board has no jurisdiction to make a planning decision in respect of the site in question in the first place. It was held that no such findings were provided here and consequently, the decision of the High Court was upheld on this specific and narrower ground.

Data Protection Commissioner & anor v. Facebook Ireland Limited & anor [2018] IESC 38

Whether an appeal lay from the High Court in circumstances where it had made a reference to the Court of Justice of the European Union and, if so, the type of appeal were issues of very considerable significance affecting the proper interaction of the Irish Constitution with the reference procedure set out in Article 267 TFEU and met the constitutional threshold for leave to appeal.

This judgment relates to an application for leave to appeal from the High Court to the Supreme Court. The Chief Justice delivered the unanimous judgment of the five-panel Court.

The High Court referred certain questions of EU law to the Court of Justice of the European Union (“CJEU”) concerning the validity of certain EU instruments. During the course of the High Court judgment, the trial judge made findings in relation to the law of the United States (which are treated as findings of fact), and it was, at least in part, on the basis of these findings that the High Court decided to refer questions to the CJEU.

The defendant (“Facebook”) applied for leave to appeal to the Supreme Court. Two broad issues arose on the application for leave: whether an appeal lay at all from the decision of the High Court to make a reference, and, even if such an appeal did lie, whether the Supreme Court should overturn the findings of fact made by the High Court in relation to US law.

The Court decided it was necessary to conduct an oral hearing in relation to the application for leave. In particular, the Court had to address the arguments made by both the Data Protection Commission and by the notice party (“Mr. Schrems”) that, as a mixed question of European Union law and Irish constitutional law, no appeal lay in circumstances where the High Court had decided to make a reference to the CJEU under Article 267 of the Treaty on the Functioning of the European Union.

After assessing the leading Irish and European authorities on this issue, the Chief Justice concluded that it was at least arguable that an appeal did lie, in some form. He stated that the issues as to whether an appeal lay at all and, if so, the type of appeal which may be permitted, as a matter of both Irish and EU law, were issues of very considerable significance affecting the proper interaction of the Irish Constitution with the reference procedure set out in Article 267 TFEU. He concluded that those issues met the constitutional threshold for leave to appeal and were of general importance.

Next, the Court addressed the issue of the factual findings which Facebook would seek to challenge if it were later decided that an appeal lay, in one form or another. The Chief Justice concluded that, without prejudice to the merits of the arguments either way, it was at least arguable that Facebook might be in a position to persuade the Court that some or all of the facts under challenge should be reversed. The Court also concluded that, although alleged errors of fact would not usually meet the constitutional threshold for leave to appeal, this was a case where it would be in the interests of justice to grant leave to appeal on these issues alongside the earlier issue of whether an appeal lay in the first place. It was concluded that splitting up the issues of fact and law would not make sense in this case.

The Court also concluded that, not least because of the urgency arising from the fact that a reference to the CJEU had already been made, exceptional circumstances arose justifying a direct appeal from the High Court to the Supreme Court.

No entitlement in law for a third person to be heard in the process whereby An Bord Pleanála forms an opinion that an application to have a proposed development designated a Strategic Infrastructure Development and thus be subject to an alternative planning process. The right to fair procedures does not extend to such third parties as the designation of a development as a Strategic Infrastructure Development is a preliminary procedural matter and does not bind the planning authority in its subsequent consideration of the planning application.

This appeal concerned the strategic infrastructure development (“SID”) planning permission procedure as set out in the Planning and Development Act 2000 (as amended). There are two stages to this procedure. At the first stage, if a developer thinks that their proposed development would be an SID, within the statutory meaning of that term, they can apply to An Bord Pleanála (“the Board”) to seek to have the planning application dealt with under a streamlined procedure. Then, if the Board has decided at the first stage that a proposed development would be an SID, at the second stage of the procedure the application for planning permission is brought directly to the Board, as opposed to first going to a local planning authority. Importantly, at the first stage of the SID procedure, only the developer and the Board participate. No other parties are allowed to intervene at this stage.

Here, the appellant (“Mr. Callaghan”) wanted to challenge a decision made by the Board at the first stage of the SID procedure that a proposed windfarm development would qualify as an SID. Mr. Callaghan’s challenge failed before the High Court. However, the High Court judge allowed Mr. Callaghan to appeal to the Court of Appeal on a question of law. In substance, the issue raised was whether a person such as Mr. Callaghan had an implied entitlement to be heard at the first stage of the SID procedure. The Court of Appeal said that no such implied entitlement existed.

Mr. Callaghan was granted leave to appeal to the Supreme Court. Mr. Callaghan’s argument before the Supreme Court was that he had an entitlement to be heard at the first stage of the SID procedure. He argued that the Board’s decision at the first stage of the SID procedure meant that it had already made a decision as to the strategic importance of the development in circumstances where Mr. Callaghan was not allowed to be heard. He argued that the Board would not be able to revisit that issue when it ultimately decided whether or not to grant permission and that it would weigh in favour of granting permission. Mr. Callaghan also argued that the first stage decision to go down the SID route had material consequences which went against his interests and as such he was entitled to be heard at that first stage.

The Chief Justice delivered the unanimous judgment of the five-panel Supreme Court. Firstly, he concluded that the Board, when considering whether to grant or refuse permission for a development which has gone down the SID route, remains obliged to consider on the merits any questions concerning the strategic importance of the project for which permission is sought. He concluded that the Board’s earlier opinion as to the strategic importance of the project, at the first stage of the process, could not, as a matter of constitutional construction, in any way legitimately influence the Board’s final decision.

The Chief Justice also rejected the argument that the decision to go down the SID route had “material practical effects” on Mr. Callaghan’s rights within the meaning of that term as set out by the Supreme Court in a previous judgment. Therefore, no entitlement to be heard arose on this basis either and the appeal was dismissed.

A human person in legal proceedings has the option of representing himself or herself but does not have the right to be represented by any third party other than a qualified lawyer, save where permitted by the courts in exceptional circumstances, which were not present in this case.

This appeal concerned the entitlement of a company to be represented in proceedings before the Superior Courts by a person who is not a lawyer. The underlying proceedings related to special summons proceedings commenced by the plaintiff bank seeking, amongst other things, an order for possession and an order for the sale of lands belonging to the defendant company (“the Company”). During the special summons proceedings, the managing director and principal shareholder of the company applied to the High Court for permission to represent the Company in the proceedings.

This application was refused by the High Court in May 2013, which was appealed. In November 2013, the Supreme Court made an order permitting the Applicant to enter an appearance on behalf of the Company and remitting to the High Court the question of further representation of the Company in the proceedings. In March 2015, the High Court refused the Applicant permission to represent the Company, and this order was upheld by the Court of Appeal in March 2017. The Supreme Court dismissed the appeal.

Ms. Justice Finlay Geoghegan, delivering the judgment of the Court, explained that the general rule which confines the right to be represented by another to those legally qualified is a rule which exists in the interests of the administration of justice and serves the public interest. A human person in legal proceedings has the option of representing him or herself, but does not have the right to be represented by any third party other than a qualified lawyer, although the courts can exercise their jurisdiction to permit an exception to the rule against lay representation in exceptional circumstances.

The Court then proceeded to uphold the rule as first set out in *Battle v. Irish Art Promotion Centre Limited* [1969] I.R. 252, that a limited company cannot be represented in court proceedings by a person other than a lawyer with a right of audience. This rule is founded upon the separate legal personality of a limited company, which allows directors and shareholders to conduct business without the risk of being liable for losses incurred. As the company may not be able to compensate parties who litigate with them, they are subject to certain constraints in the interests of their potential creditors.

The Court held that provided there is an inherent jurisdiction to make exceptions to the general rule in *Battle*, when justified in the interests of the due administration of justice, then such a restriction is not prohibited by the Constitution. In this case, exceptional circumstances were not established that would warrant the Court permitting lay representation. The impecuniosity of a company, or the possession of a good arguable defence, were held not to constitute an exceptional set of circumstances.

C v. Minister for Social Protection [2018] IESC 57

The Court has jurisdiction to delay the making of a declaration of invalidity or to make a deferred order but this jurisdiction should be exercised carefully, cautiously and will be exceptional. a declaration of invalidity does not of itself give rise to a claim for damages, but that there may be circumstances in which damages are appropriate.

On foot of the recent decision in *NHV v. Minister for Justice* [2017] IESC 35, *PC v. Minister for Justice* concerned the scope of “suspended declarations” of invalidity of legislative provisions. This case involved a challenge to the constitutionality of s. 249 of the Social Welfare (Consolidation) Act 2005, which prevented the appellant from receiving pension payments while he was imprisoned. This matter had been previously heard by the Supreme Court, where MacMenamin J held that the section operated as an “additional punishment not imposed by a court” and was thus unconstitutional. However, the Court did not make an immediate declaration of invalidity of this section and the question of the circumstances in which a court may decline to make an immediate declaration, or a deferred declaration, arose.

In its decision of the 28th November 2018, the Court unanimously held that the Court has jurisdiction to delay the making of a declaration of invalidity or to make a deferred order, but the Court stressed that this jurisdiction should be exercised “carefully, cautiously... and will be exceptional.” In delivering the lead judgment, Mr. Justice O’Donnell noted that “if the legal problem is complex, there is no reason why the remedy should not be nuanced. If that is the position in private law, it cannot be excluded in public law, where the issues may be more difficult and the consequences more far-reaching.” The Court held that the effect of such a declaration of invalidity is to deem that section not to have formed part of the law at least since the time when, by virtue of the changes in the scope of its application, it became only applicable in the case of those culpably imprisoned. This formed the majority view of the Court. On this issue, Mr. Justice MacMenamin presented a differing view. He was of the view that “in general, a declaration of invalidity should be prospective” and holds that the section is only invalid from the handing down of this decision that declares the section as repugnant to the Constitution.

On the issue of damages, the majority view of the Court is contained in the judgment of Mr. Justice O’Donnell, which is that a declaration of invalidity does not of itself give rise to a claim for damages, but that there may be circumstances in which damages are appropriate. The majority found that, as the appellant would have been entitled to pension payments but for the existence of section 249 of the act, he is entitled to a payment of €10,000 in line with the principles espoused in *Murphy v. Attorney General* [1982] I.R. 241. The Court noted that “no person who had not issued proceedings would be entitled to claim any entitlement. On this issue, the Chief Justice and Mr. Justice McKechnie held that, in light of the treatment of the approach identified in *Murphy* in this case, they “reserve the right to revisit the precise approach which may be appropriate in cases such as this should that question arise again.” Mr. Justice MacMenamin, in determining that the section is invalid only from the date of this judgment and that the appellant has no constitutional (as opposed to statutory) right to a pension, notes that concluding that the appellant is entitled to damages would “be to elide the logical steps and to remove from the analysis any consideration of the basis in legal principle upon which the appellant should be so entitled.

Each judgment handed down by the Court indicated that the appropriate form of order to make is one declaring the statutory provision to be invalid as in breach of the Constitution.

Questions which are little more than an evolution of issues relating to the case made in the lower Court and the terms on which leave to appeal was granted can be permitted to be pursued on appeal provided that they do not give rise to any risk of prejudice, but any more significant development of the issues would require special circumstances to be permissible.

This appeal concerned a challenge to planning permission granted by the first named respondent (“the Board”) for the development of a data centre by the second named notice party (“Apple”). The planning permission granted by the Board related only to one data centre and related works, however it was clear from Apple’s master plan that it was envisaged that seven further data centres would be constructed at the same site in the future.

The applicants sought to challenge the grant of permission in the High Court. The principal focus of the challenge was that the Board had not complied with its obligations under Irish and European law to carry out an environmental impact assessment (“EIA”). The applicants argued, amongst other things, that Board were obliged to take into account the entire masterplan in carrying out the EIA, and that they had not done so. The challenge in the High Court failed and the Court refused to grant a certificate allowing the applicants to appeal to the Court of Appeal, as is required by statute in certain cases.

The applicants were granted leave to appeal directly to the Supreme Court. During the course of the case management process, two issues arose. The first issue concerned the question of which issues properly arose before the Supreme Court on appeal. The second concerned whether it was necessary to refer a question of European law to the Court of Justice of the European Union (“CJEU”) at this stage. A brief oral hearing took place concerning those issues.

The Chief Justice delivered the unanimous judgment of the five-panel Supreme Court. The judgment was solely concerned with the two preliminary issues identified above. With regards to the scope of appeal issue, the Court concluded that the proper approach of the Supreme Court with regard to determining the issues which are properly before the Court is to consider the case made in the lower courts and the terms on which leave was granted. Those are issues which can clearly be pursued on appeal. It was also held that questions which are little more than an evolution of those issues can be permitted to be pursued, provided that they do not give rise to any risk of prejudice. Any more significant development of the issues would require special circumstances to be permissible.

Applying those principles, the Court held that the applicants should be permitted to argue both for the position adopted in the High Court that there is an obligation on the Board to carry out a full EIA of the entire master plan (insofar as practical) and, further, to argue for any lesser obligation on the Board in the EIA context as a fall-back position.

Regarding the question of whether it was necessary at this stage to refer a question of European law to the CJEU, the Court concluded that it was not clear at this stage in the proceedings that such a reference was appropriate. However, it was acknowledged that it may be necessary to make such a reference at a later stage.

Although finding of constitutional invalidity in respect of legislation will not result in final judicial decisions being set aside, it was for the Court to look at the conduct of the proceedings and the decisions taken therein to determine whether the individual is debarred from relying on the findings of invalidity and the appellant was entitled to rely on the relevant finding of unconstitutionality in the circumstances of this case.

The appellant's suspended sentence had been reactivated pursuant to a procedure in subs. 99(9) and (10) of the Criminal Justice Act 2006 which provided for the revocation by a court of a suspended sentence of imprisonment on the commission of an offence during the period of suspension. This appeal concerned the issue of whether he could rely on a subsequent finding by the High Court that subs. 99(9) and (10) were unconstitutional to challenge his detention.

The Circuit Court reactivated suspended sentences pursuant to s. 99(10) of the 2006 Act, and imposed a sentence of five and a half years' imprisonment in respect of the further offences. The appellant appealed these orders. In April 2016, the High Court declared subs. 99(9) and (10) of the 2006 Act unconstitutional in *Moore & Ors v. D.P.P.* [2016] IEHC 244. The appellant subsequently made an application for leave to seek an order quashing the order of the Circuit Court made pursuant to s. 99(10), which was refused in the High Court.

The Supreme Court allowed the appeal. Ms. Justice Dunne, delivering the majority judgment of the Court, held that *A. v. Governor of Arbour Hill Prison* [2006] 4 I.R. 88 is clear that a finding of constitutional invalidity in respect of legislation will not result in final judicial decisions being set aside. A defendant who adopts a particular strategy in the course of a criminal trial cannot adopt a different approach on appeal to make an argument that was not made, or was inconsistent with the approach taken at trial, in order to take advantage of a finding of unconstitutionality made during or after the trial. The Supreme Court held that it was for the Court to look at the conduct of the proceedings and the decisions taken therein to determine whether the individual is debarred from relying on the findings of invalidity.

The Court found that the appellant's proceedings were not finalised, that the appellant did not adopt any strategy during proceedings which could preclude him from relying on the finding of invalidity made in *Moore*, and that he did not acquiesce in a process which he knew to be unconstitutional. The Court held that the Circuit Court judge lacked jurisdiction to revoke the suspended sentence, and that he was entitled to the reliefs sought.

Mr. Justice O'Donnell addressed the issue of whether the existence of an appeal might provide grounds to refuse relief in judicial review proceedings. On the basis that the Appellant would be entitled to assert the invalidity of s. 99(10) in his appeal, as an appellate court would not preclude him from raising a point going to the jurisdiction of the Circuit Court to reactivate the sentence, he held that there was no good reason to prevent the appellant from raising the point in these proceedings.

Dissenting, Ms. Justice Finlay Geoghegan considered that the appellant had not objected to the jurisdiction of the trial judge to consider both the s. 99 reactivation and the additional sentencing, and had sought that the Court observe the principle of totality when determining the appropriate sentence to be imposed. Therefore, the appellant had acquiesced in the process and jurisdiction of the Court and sought to obtain some benefit for himself in mitigating the additional sentence to be imposed, and he should be debarred from relying upon the declaration of unconstitutionality. This would not give rise to an apprehension of a real injustice, as the suspended sentences could have been alternatively reactivated pursuant to subs. 99(13) or 99(17) of the 2006 Act.

The absence of consent is an ingredient in the offence of assault causing harm under section 3 of the Non-Fatal Offences Against the Person Act 1997

The accused was found guilty by unanimous jury verdict of the offence of assault causing harm contrary to s. 3 of the Act of 1997 and was sentenced to three years' imprisonment. The injured party gave evidence that, while in prison, he was attacked by the accused. During cross-examination it was put to the injured party that he asked the accused to attack him in order to facilitate a transfer to another prison and that he consented to the assault, which the injured party denied. At the close of the prosecution case, counsel on behalf of the defence made an application that the trial judge should allow the defence of consent go to the jury. The defence of consent is available under the offence of assault under s.2 of the Act of 1997 and it was argued that, insofar as s. 3 builds on s. 2 of the Act of 1997, the criteria under s. 2 must also be satisfied in order for the crime of "assault causing harm" to be established pursuant to s. 3. Counsel for the prosecution argued that s. 3 of the Act of 1997 is a standalone offence in which the element of consent was not relevant and that to conclude otherwise would be contrary to public policy.

The trial judge ruled that ss. 2 and 3 of the Act of 1997 are standalone offences and that the injured party could not have consented to the imposition of an injury on him by the applicant. On appeal, the Court of Appeal upheld the decision of the trial judge to the effect that absence of consent is not a necessary ingredient in a s. 3 assault.

Delivering the majority judgment of the five-panel Supreme Court, Ms. Justice Dunne concluded that the term assault as used in ss. 2 and 3 of the Act of 1997 has the same meaning. The Court further concluded that the concept of consent as provided for in s. 2(1)(a)(b) of the Act of 1997 is not removed from s. 3(1) of the Act. Section 2 and s. 3 of the Act of 1997 are separate and distinct offences but insofar as they both use the word "assault", that word has the same meaning in both sections. The Court concluded that the question as to whether or not courts can dictate public policy contrary to the express intentions of the legislature did not arise. However, while the ruling of the trial judge may have been erroneous, the nature of the consent in this case was unlawful and therefore, there was no effectual consent. Accordingly, the conviction could stand and the appeal was dismissed.

In a dissenting judgment, Mr. Justice McKechnie (Ms. Justice Finlay Geoghegan concurring) was in agreement that ss. 2 and 3 are follow-on offences with the same definition of assault, save for the degree of harm in s. 3. However, he departed from the view of the majority on the nature of, and purpose for the consent. He disagreed that the words "without lawful excuse" as they appear in s.2 meant anything other than force which was non-justified in law and was thus criminal.

Ms. Justice O'Malley, concurring with the majority, disagreed with the contention that an accused cannot be convicted of an offence under s. 3 if there was consent on the part of the alleged victim and that the purpose of the consent is irrelevant.



Part 3

Education and Outreach

Supreme Court of Ireland
Annual Report 2018

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Part 3 | Education and Outreach

The Supreme Court views external engagement with bodies, such as with educational establishments and other institutions, as an important way of creating an awareness of the Court and its work. It is considered that building relationships through such engagement improves the accessibility of Supreme Court proceedings and provides opportunities for members of the Court to discuss the law and various aspects of the legal system. Events involving engagement by members of the Court with educational institutions also provides students with an insight into possible career paths in the law.

Supreme Court Sitting in Limerick

In March 2018, the Supreme Court travelled to Limerick city to sit at the newly constructed Courthouse located at Mulgrave Street. Sitting for only the second time in its history outside of Dublin, three appeals were listed for hearing and the Court delivered judgment in the case of *I.R.M. & ors v. Minister for Justice and Equality & ors* [2018] IESC 14, a case in the area of immigration law which involved issues relating to the constitutional rights of the unborn.²⁰ The delivery by the Court of its unanimous judgment was televised live by national broadcaster, Raidió Teilifís Éireann (RTÉ).



Members of the Supreme Court sitting in Limerick Courthouse, Mulgrave Street

In parallel to this visit the Court collaborated closely with the University of Limerick and members of the solicitor profession under the auspices of the Limerick Solicitors Bar Association and members of the Bar of Ireland South Western Circuit.

²⁰ See page 59 for summary of this decision.

During the course of the visit, members of the Supreme Court, Mr. Justice O'Donnell, Mr. Justice MacMenamin, Ms. Justice Dunne and Ms. Justice O'Malley participated in round table seminars at the University of Limerick on recent criminal law and constitutional law decisions of the Court, with faculty members, PhD, postgraduate and undergraduate students in attendance. Mr. Justice O'Donnell also delivered a lecture on 'An English "spy", a briefless barrister, and a Supreme Court Judge: legal stories of the Howth Gun Running, July 1914'. Students of Limerick Institute of Technology also observed proceedings of the Court.

At the commencement of the sitting of the Court in the newly opened courthouse, the Chief Justice remarked:

"As the Court moves to its new constitutional role of concentrating on those cases which are of general public importance it is, in my view, all the more vital that the Court is seen as a Court for all the people and not just Dublin. If the cases are of general public importance then they are, by default, important to all of the public."

The sitting of the Supreme Court in Limerick followed on from the success of its visit to Cork in 2015 at the initiative of former Chief Justice, Mrs Justice Susan Denham, where it sat for the first time outside of Dublin and outside of the Four Courts since its refurbishment in 1931. The visit involved seminars and lectures by members of the court at University College Cork and for the Southern Law Association, and the delivery by Mr. Justice Clarke of the Inaugural Kevin Feeney Memorial Lecture in memory of the late Mr. Justice Kevin Feeney.

Preparations are underway for the inaugural sitting of the Supreme Court in Galway in March 2019, when it will hear cases for the first time at a university at the National University of Ireland Galway and engage in a variety of educational seminars hosted by the university.

Broadcasting of Supreme Court proceedings

In a landmark development in 2017, court proceedings were filmed and broadcast for the first time in Ireland by national broadcaster, RTÉ. Although cameras had been permitted in courts on a very limited number of occasions in the past to record brief ceremonial matters, the recording of court proceedings had never been permitted.



The Constitution of Ireland requires that justice be administered in public save in exceptional circumstances provided for by law. This means that, with the exception of a limited number of types of cases, both the oral hearing and the delivery of the judgment of the Court takes place in public in an open courtroom. The recording and televising of two judgments of the Supreme Court represented an important step in increasing transparency and access to the Court. The Supreme Court is happy to allow RTÉ to film and share with other broadcasters any judgment

which it requests subject to cases in respect of which there is a legal barrier to publicity. Discussions are underway between representatives of the Supreme Court, the Courts Service and RTÉ to determine how best to progress the project of allowing for the recording and broadcast of oral argument.

Third Level Institutions

Outside of their work in the Supreme Court, members of the Court continue to engage with law schools throughout the country, in roles such as Adjunct Professors of Law.

The Chief Justice is an Adjunct Professor of the Law School of Trinity College Dublin and of University College Cork, a Judge in Residence at Griffith College Dublin and recipient of the Griffith College Distinguished Fellowship Award. Mr. Justice MacMenamin is an Adjunct Professor of the National University of Ireland Maynooth. Ms. Justice O'Malley is a Judge in Residence at Dublin City University.



Mr. Justice MacMenamin addressing participants in the Dublin City University Moot Court Grand Final in the Helix, DCU.

Members of the Court regularly deliver lectures and papers and participate in initiatives of third level educational institutions around the country. The Chief Justice delivered a keynote address at the Seminar on Court Reform at NUI Galway in January 2018. Mr. Justice O'Donnell is chairman of the UCD Sutherland School of Law John M. Kelly Lecture Committee. The 2018 lecture entitled 'On Lord Ellenborough's Law of Humanity' was delivered by Professor Gerry Whyte of Trinity College Dublin. Mr. Justice O'Donnell also launched the Centre for Constitutional Studies at UCD and chaired a session on Recent Developments in Public Law which marked the opening of the Centre. Mr. Justice Charleton delivered a lecture at the University of Limerick School of Law on "Thoughts on Homicide" and a lecture on "Truth and the Law" as part of the UCD Humanities Institutes public lecture series, Truth be Told.

Mooting Competitions

Moot competitions allow students to act as legal representatives in simulated court hearings. Throughout 2018, members of the Supreme Court judged a number of moot competitions. Ms. Justice Elizabeth Dunne judged the National Moot Court Competition for universities, which was hosted by Dublin City University at the Criminal Courts of Justice. Mr. Justice O'Donnell was a judge of the King's Inns Brian Walsh Memorial Moot.



Ms. Justice Elizabeth Dunne presiding over the final at the National Moot Court Competition held at the Criminal Courts of Justice in November 2018

The Chief Justice, Mr. Justice MacMenamin and Ms. Justice Finlay Geoghegan judged The Bar of Ireland Adrian Hardiman Memorial Moot Competition in the Supreme Court.

Mr. Justice MacMenamin presided over the DCU Moot Court Grand Final, which took place in the Helix in March 2018 and Ms. Justice Finlay Geoghegan was on the judging panel of the Grand Final of the Junior Mock Trial Competition organised by Trinity College Dublin.

Student Law Reviews

The Supreme Court is very supportive of student law reviews, which allow law students to produce and contribute to academic publications on a variety of legal topics. In 2018, Volume XXI of the Trinity College Law Review was launched by the Chief Justice. The Cork Online Law Review of University College Cork was launched by Mr. Justice McKechnie and Ms. Justice Finlay Geoghegan was a guest speaker at the launch of Volume 18 of the University College Dublin Law Review. The Chief Justice is a patron, and Ms. Justice Finlay Geoghegan is a friend of the King's Inns Law Review.

The Irish Supreme Court Review

The Irish Supreme Court Review (ISCR), hosted by Trinity College Dublin, was launched in 2018. The ISCR is a forum for in-depth analysis of the functions and jurisprudence of the Supreme Court of Ireland. Its first conference, which took place in October 2018, included a panel discussion on the role of the Supreme Court as an apex court and its interaction with other apex courts for which the Chief Justice delivered a paper on 'Apex court dialogue: the view from Dublin'. Further panels discussed some of the leading cases of the Court's 2017 to 2018 legal year. Publication of the first annual ISCR journal is expected in 2019 and a website of the ISCR comments on the work of the Supreme Court throughout the year.

Publications and extra-judicial speeches

Judges of the Court often speak at events and publish materials in legal publications.

The Irish Judicial Studies Journal is a legal publication aimed at the Irish judiciary and produced under the auspices of the Judicial Studies Institute, a statutory body with the function of organising training, seminars and study visits. The journal aims to provide Irish judges with information and opinions that are relevant and useful to them in their work and is published by an editorial team of the University of Limerick. Supreme Court members of the editorial board are the Chief Justice (*ex officio*), Ms. Justice Finlay Geoghegan and Mr. Justice Peter Charleton, who published an article with Ms. Ciara Herlihy in one of the two 2018 editions entitled 'The Impact of the digital age on law'.

Other publications of members of the Court in 2018 included chapters authored by the Chief Justice on 'The shape of things to come – the conduct of appeals in the Supreme Court after the 33rd Amendment' and Mr. Justice O'Donnell on 'Some Reflections on the Independence of the Judiciary' in the Institute of Public Administration book, *Judicial Power in Ireland*.

The Honorable Society of King's Inns

The Honorable Society of King's Inns is the institution of legal education with responsibility for the training of barristers in Ireland. It also offers a Diploma in Legal Studies and a range of advanced diploma courses for both legally qualified and non-legally qualified participants. King's Inns is comprised of barristers, students and benchers, which include all of the judges of the Supreme Court, Court of Appeal and High Court. Members of the Supreme Court and other senior judges serve on a number of committees of King's Inns which, in 2018, included Ms. Justice Finlay Geoghegan's membership of the Standing Committee, Ms. Justice Dunne's membership of the Education Committee, Ms. Justice O'Malley's membership of the Education Appeals and Mr. Justice MacMenamin's membership of the Disciplinary Committee. The affairs of King's Inns are managed by a Council which includes a Judicial Benchers Panel of which the Chief Justice is *ex officio* a member.

The Bar of Ireland and the Law Society of Ireland

In Ireland, there are two branches of the Irish legal profession – barristers and solicitors. The Bar of Ireland is an independent referral bar of which approximately 2,300 practising barristers are members. The Law Society is the educational, representative and regulatory body of the solicitors' profession in Ireland. Members of the Supreme Court cooperate with the practising professions primarily through participation in education and outreach initiatives of The Bar of Ireland and the Law Society.

One such initiative is the Law Society of Ireland and Bar of Ireland Law and Women Mentoring programme for which Mr. Justice MacMenamin, Ms. Justice Dunne and Ms. Justice Finlay Geoghegan act as mentors.

The Chief Justice is a mentor for the Denham Fellowship. The programme, named after Mrs. Justice Susan Denham, former Chief Justice, which is operated by The Bar of Ireland in association with The Honorable Society of King's Inns, assists annually two aspiring barristers who come from socio-economically disadvantaged backgrounds to gain access to professional legal education at the King's Inns and professional practice at the Law Library.

In 2018, Mr. Justice O'Donnell addressed an advocacy training workshop hosted by the Voluntary Assistance Scheme of The Bar of Ireland for 'Speaking for Ourselves', which was established to assist charities and Non-Governmental Organisations to develop their advocacy skills and enhance their capacity to communicate as an organisation.



L-R: Chief Justice Frank Clarke, Ms. Justice Beverley McLachlin, Ms. Justice Susan Denham, Baron Neuberger of Abbotsbury and Glen Rogers, Editor, Hibernian Law Journal

In May, the Chief Justice was delighted to chair a formal ceremony which took place at the Law Society of Ireland at which former Chief Justice of Ireland, Mrs Justice Susan Denham, former President of the Supreme Court of the United Kingdom, Baron Neuberger of Abbotsbury, and The Right Hon. Ms Justice Beverley McLachlin, the former Chief Justice of Canada were awarded the inaugural Hibernian Law Medal. The Hibernian Law Journal is a legal journal co-ordinated by trainee and newly qualified solicitors. The Hibernian medal is awarded annually to individuals who have made outstanding contributions, in any combination, to the advancement of justice, the integrity of the rule of law, the independence of the judiciary and the legal profession, and public access to and understanding of the legal system.

Chief Justice's Summer Internship Programme for Law Students

The Chief Justice welcomed twenty-three university law students for a one-month internship programme in the Courts in June. The Law Schools of: Dublin City University; NUI, Galway; NUI Maynooth; Trinity College Dublin; University College Cork; University College Dublin; and the University of Limerick, each nominated students to participate in the programme. Students from Fordham University, New York and Bangor University Law School, Wales added an important international dimension to the programme, which was further expanded this year to include students nominated by the University of Missouri-Kansas City School of Law and from South Africa.

The students were placed with judges of the Supreme Court, Court of Appeal and High Court. The interns spent time observing court proceedings, conducting legal research and providing judges with other assistance. Other events organised for the programme included: tours of the Four Courts, and Criminal Courts of Justice by the Judicial Researchers Office; talks by Judicial Assistants on their roles; and a tour of Green Street Courthouse by the Reform and Development Directorate. Students also observed a sitting of the Drug Treatment Court where they spoke with the presiding judge and team.

The programme was an excellent opportunity for the participating students to gain practical experience of the law and to consider potential future career paths in law. Many of the students commented on the uniqueness of the internship programme in that it provided them with an opportunity to engage on a one-to-one basis with members of the Judiciary in relation to the cases which they observed:

"I really enjoyed being able to talk to judges and ask them questions about their work and experience and also enjoyed meeting the Judicial Assistants to discuss their work and future careers. In terms of future studies, this internship enabled me to discover a new legal system with a different practice than what I had encountered before. I would definitely recommend the programme to my university colleagues."

Anaïs Contat, Bangor University, Wales

The Chief Justice and members of the Supreme Court will welcome students for an internship programme in 2019.



Pictured in the Supreme Court with Mr. Justice Frank Clarke, Chief Justice: Bottom L to R: Roger Hewer-Candee (Fordham), Anaïs Contat (Bangor), Eric Freiman (Fordham), David Sacco (Fordham), Joseph Salazar (Missouri). Top L to R: Cormac Hickey (UCC), Sarah Murphy (UCD), Evana Lyons (UL), Chloe Wilkinson (DCU), Cian Henry (TCD), Rebecca Lalor (UL), Ruth Corrigan (Maynooth), Eimear O'Donoghue (DCU), Christopher McMahon (TCD), Emma Echafi (Bangor), Ciara O'Connell (Maynooth), Alison O'Brien (NUI Galway), Alicia O'Connor (UCD).

The Hardiman Lecture Series

A lecture series, organised by Mr. Justice Peter Charleton, forms an important part of the Chief Justice's Summer Internship Programme. The lectures take place twice a week in the Four Courts during the course of the one-month programme in honour of the late Mr. Justice Adrian Hardiman, former judge of the Supreme Court, who participated as a speaker in all previous years of the programme during his life.

In 2018, the series included the following diverse range of lectures delivered by members of the Judiciary and legal practitioners:

- **'On this, most swear to Truth: a judge looks at the New Testament'**, Mr. Justice Peter Charleton, Judge of the Supreme Court;
- **'Tribunals of Inquiry'**, Kathleen Leader BL (now SC);
- **'A Star is Made: Practice, Critique and Clinical Legal Education in the US'**, Michael W. Martin, Clinical Professor of Law & Director of Clinical Programs, Fordham University School of Law;
- **'The Practicalities of a Defamation Action'**, Andrea Martin, Principal, MediaLawyer Solicitors;
- **'Reflections on a Legal Career'**, Ms. Justice Mary Finlay Geoghegan, Judge of the Supreme Court
- **Remedies for Constitutional Invalidity'**, Mr. Justice Donal O'Donnell, Judge of the Supreme Court; and
- **'A judge's reflection on 15 years of the International Criminal Court'**, Ms Justice Maureen Harding-Clark, former Judge of the International Criminal Court and the High Court of Ireland

The lectures were open to student interns, judges, judicial assistants, researchers, other Courts Service staff and member of The Bar and Law Society.

Tribunal of Inquiry into protected disclosures made under the Protected Disclosures Act 2014 and certain other matters

From February 2017 to October 2018, Mr. Justice Charleton was Chairman of the Tribunal of Inquiry into protected disclosures under the Protected Disclosures Act 2014 and certain other matters ('the Disclosures Tribunal'). Tribunals of Inquiry may be established by resolution of both Houses of the Oireachtas to enquire into matters of urgent public importance, report and, if appropriate, make recommendations in accordance with specific terms of reference. The Disclosures Tribunal was established by the Minister for Justice on the 17th February 2017 and has produced three interim reports, which are accessible on the website, www.disclosuretribunal.ie.



Part 4

International Engagement

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Part 4 | International Engagement

There is, of course, a formal link between the senior courts within the European Union and the Court of Justice in Luxembourg which takes place within what is described as a “dialogue” facilitated by the preliminary reference system. It is also the case that the higher courts of countries within the common law world frequently refer to judgments of other jurisdictions where the same or similar issues are addressed. Such judgments, although not binding, are considered to be of persuasive authority. In addition, the Irish courts are required, under the provisions of the European Convention on Human Rights Act 2003, to have regard to the jurisprudence of the Court of Human Rights in Strasbourg. However, beyond these formal legal relationships, there is an increasing co-operation between the Supreme Court and other senior courts which principally takes place through regular or occasional bilateral meetings or through the membership of the Supreme Court of international bodies.

Meetings with Neighbouring Jurisdictions

In keeping with a longstanding arrangement under which senior members of the Irish Judiciary participate in biennial meetings with senior members of the Judiciary of the United Kingdom, the Supreme Court of the United Kingdom hosted the 2018 bilateral meeting in London in June 2018.



Members of the Judiciaries of Ireland and the United Kingdom photographed in the Supreme Court of the United Kingdom on the occasion of their bilateral meeting in London. Photo courtesy of the Supreme Court of the United Kingdom.

The Chief Justice and members of the Irish Judiciary were delighted to welcome the Lord Chief Justice and members of the Judiciary of Northern Ireland to Dublin for a bilateral meeting in November 2018. The meeting was an excellent opportunity to consider topics of interest and to further foster the ties between the Judiciary of Ireland and Northern Ireland.

The Supreme Court considers its longstanding bilateral engagement to be of utmost importance having regard to our shared history, close geographical proximity and similar legal systems which share a common law legal tradition.

Other Bilateral Engagement

The Judiciary of Ireland also benefits from trilateral engagement under the Comité Franco-Britannique-Irlandais, an organisation which strengthens cooperation between judges of the highest courts of France, the United Kingdom and Ireland through the organisation of Colloquia, the most recent of which was hosted in Dublin in 2017.

In addition to such established meetings, there has in recent years been an increasing emphasis on bilateral exchanges with other courts within and outside of the European Union. For example, a bilateral exchange recently took place between the Supreme Court of Ireland and Federal Constitutional Court of Germany (Das Bundesverfassungsgericht). The Supreme Court travelled to the seat of the Federal Constitutional Court in Karlsruhe where it participated in a series of working sessions and the visit was reciprocated in 2017 when the Supreme Court of Ireland hosted the President, Vice President and members of the Federal Constitutional Court for a bilateral meeting in Dublin.

Bilateral meeting with the Court of Justice of the European Union

The Supreme Court visited the Court of Justice of the European Union in Luxembourg in June 2018 and enjoyed a programme which included roundtable meetings with the President and members of the Court of Justice, attendance at a hearing before the Grand Chamber of the Court of Justice and working sessions with representatives of Ireland on the Court of Justice and General Court of the European Union.





Members of the Supreme Court of Ireland with Koen Lenaerts, President of the Court of Justice of the European Union and Eugene Regan, Judge nominated by Ireland to the Court of Justice. Photograph courtesy of the CJEU.



Members of the Supreme Court engaged at working sessions at the CJEU.

Meeting with the European Court of Human Rights

In December 2018, the Chief Justice, President of the Court of Appeal, President of the High Court and a delegation of members of the Judiciary from across the five tiers of court jurisdiction participated in a meeting with the President and Members of the European Court of Human Rights in Strasbourg. The meeting allowed for an exchange of views on the practical application of the European Convention on Human Rights by the Courts of Ireland and the relationship between the Constitution of Ireland, the Convention and other instruments under which fundamental rights are protected.



Members of the Judiciary of Ireland with members and court staff of the European Court of Human Rights © Council of Europe

International Organisations

The Supreme Court cooperates on a multilateral basis via its membership of a number of international networks and organisations which facilitate cooperation with courts and institutions in other jurisdictions. Given the wide-ranging nature of the jurisdiction of the Supreme Court, the area of interest to each of these organisations varies. However, they have in common the aim of providing a forum in which courts of similar jurisdiction can meet and discuss their work, the nature of their functions and the organisation of their systems and promote dialogue between such courts.

There are many international bodies and networks with which individual members of the Judiciary in each of the five courts of Ireland regularly engage. Some organisations of which the Supreme Court or Chief Justice is a member include:

ACA-Europe - an organisation comprised of the Councils of State or the Supreme administrative jurisdictions of each of the members of the European Union and the Courts of Justice of the European Union. Through ACA-Europe, the Supreme Court exchanges views and information with other member institutions on jurisprudence, organisation and functioning, particularly with regard to EU law. In 2018, ACA Europe Correspondents on behalf of the Supreme Court, the Chief Justice and Ms. Justice Elizabeth Dunne, attended a number of ACA Europe seminars and participated in a number of projects and studies under which ACA Europe engages with EU institutions. The Supreme Court of Ireland looks forward to welcoming members of ACA Europe to Dublin in March 2019 when it will host a seminar on the topic of 'How Courts Decide'.

Network of the Presidents of the Supreme Judicial Courts of the European Union – a network of the Presidents of the Supreme Courts of EU Member States with general jurisdiction (and not constitutional courts or courts with final jurisdiction in particular areas of law, such as supreme administrative courts). Supreme Court Presidents, including the Chief Justice of Ireland participate in meetings and exchange information through this network, which also consults with institutions of the EU. As a member of the Network, the Chief Justice participated in a meeting of the Network and the Court of Justice in Luxembourg in March 2018 and the Colloquium and General Assembly hosted by the German Federal Court of Justice in September 2018, where he was elected to the Board of the Network.

Judicial Network of the European Union – an association which was established on the initiative of the President of the Court of Justice of the European Union and the Presidents of the Constitutional and Supreme Courts of EU Member States at the Meeting of Judges hosted by the Court of Justice in 2017. The JNEU is based on an internet site designed to promote greater knowledge, in particular from a comparative law perspective, of law and legal systems of Member States and contribute to the dissemination of EU law as applied by the Court of Justice of the European Union and the national courts.

Conference of European Constitutional Courts - an organisation comprised of 40 European constitutional or equivalent courts with a function of constitutional review. Meetings and exchange of information on issues relating to the methods and practice of constitutional review are the key feature of this organisation. The Conference is currently chaired by the Constitutional Court of the Czech Republic which will host the XVIIIth Congress in 2020 for which the Chief Justice participated in a preparatory meeting and conference in Prague in July 2018.

Venice Commission Joint Council on Constitutional Justice and World Conference of Constitutional Justice – Through the Joint Council on Constitutional Justice, the Supreme Court cooperates with constitutional courts and courts of equivalent jurisdiction in Member States of the Venice Commission, the Council of Europe's advisory body on constitutional matters. This is primarily achieved through the sharing of information between liaison officers of member courts, including officials in the Office of the Chief Justice of Ireland. Liaison officers prepare summaries of important constitutional cases, which are published by the secretariat of the JCCJ in bulletins. Liaison officers also pose and answer questions via a number of fora on a restricted website.

Judicial exchange programmes

In 2018, the Supreme Court continued its practice of hosting judges from other countries for judicial study visits organised as part of the Supreme Court's membership of international organisations. In November 2018, the Court hosted Mr. Erik Kersevan, Judge of the Supreme Court of Slovenia, Ms. Wenche Elizabeth Arntzen, Judge of the Supreme Court of Norway and Ms. Päivi Hirvelä, Judge of the Supreme Court of Finland for two week programmes organised by ACA-Europe and the Network of the Presidents of the Supreme Judicial Courts of the European Union with the support of the European Commission. Mr. Matthieu Schlesinger, member of the French Conseil d'Etat also participated in a one-week study visit in December.

The visiting judges observed proceedings in all five courts of Ireland and met with the Presidents and members of the Supreme Court, Courts of Appeal and High Courts, in addition to other members of the Judiciary, to discuss the work of the Irish courts and share information on practices and experience. Courts Service officials, including Registrars, members of the Reform and Development Directorate and Judicial Assistants provided tours and information sessions on the Irish legal system, including the format of court hearings and processing of cases in the offices of the Supreme Court and Court of Appeal.

Visiting judges also enjoyed the tradition of dining at the Honorable Society of King's Inns, where they also attended a guest lecture by Professor Hilary Biehler of Trinity College Dublin on the new jurisdiction of the Supreme Court.

Visits to the Supreme Court



The Court received many international visitors throughout the year for which the Judicial Support Unit of the Court Service organised specifically tailored programmes. The visits involved Information Sessions provided by Judicial Assistants and staff of the Reform and Development Directorate, observation of court proceedings and meetings with judges of each of the Courts of Ireland.

In 2018 members of the Supreme Court met with members of the Judiciary from the Ukraine, Austria, the United States of America and Croatia. Visitors also included Ms. Maud de Boer, UN Special Rapporteur on the sale and sexual exploitation of children, members of the New York State Bar Association and students of the University of Pasau in Germany.



Part 5

Supporting the Supreme Court — The Courts Service

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Part 5 | Supporting the Supreme Court – The Courts Service

The Supreme Court is supported by the Courts Service, the organisation which is responsible for the administration and management of all courts in Ireland.

The Courts Service

The Courts Service is an independent body established pursuant to the Courts Service Act, 1998. It manages all aspects of court activities, with the exception of judicial functions, which is a matter exclusively for the judiciary. The functions of the Courts Service are to:

- manage the Courts;
- provide support services for Judge
- provide information on the Courts system to the public;
- provide, manage and maintain court buildings;
- provide facilities for users of the Courts; and
- perform such other functions as are conferred on it by any other enactment.

The Court Service Board is chaired by the Chief Justice and is comprised of 17 other members, including the court Presidents, judicial representatives from each court, a staff representative, a representative of the Minister for Justice and representatives from the legal professions, trade unions and business world. The function of the Board is to consider and determine policy in relation to the Service, and to oversee the implementation of that policy by the Chief Executive Officer. Courts Service staff are civil servants of the State.



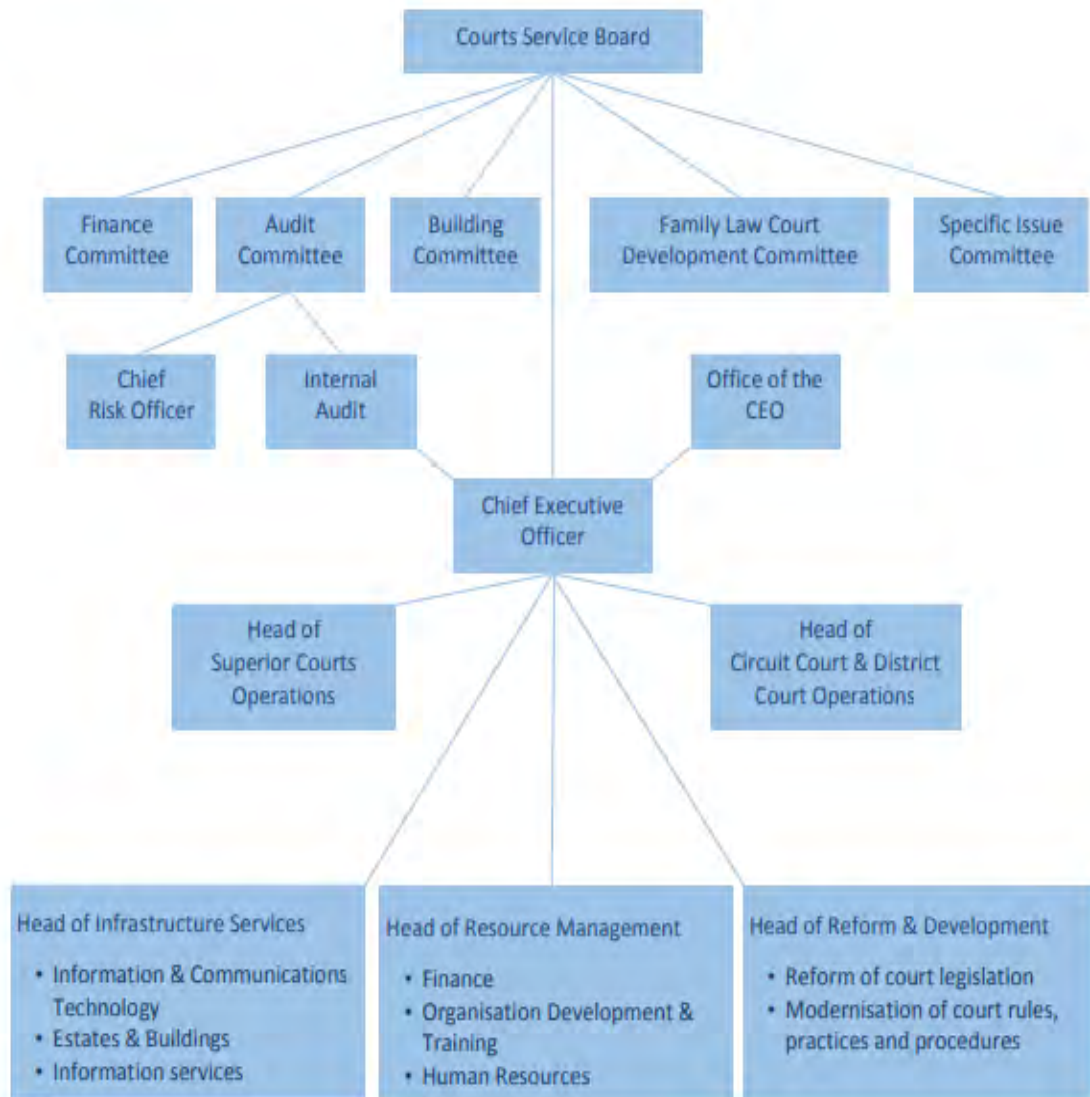
The Chief Executive Officer, Brendan Ryan is responsible for the implementation of policies approved by the Board, the day-to-day management of the staff, administration and business of the Service.

The Chief Executive Officer is supported by the Senior Management Team comprising a Head of Superior Courts Operations, a Head of Circuit Court and District Court Operations and three support Heads: Reform and Development, Resource Management and

Infrastructure Services. The Chief Executive Officer liaises closely with the Chief Justice, judges of the Supreme Court and staff of the relevant offices in supporting the Court.

A Judicial Support Unit within the Office of the Chief Executive provides support to judges of all jurisdictions, including the Supreme Court in a wide variety of areas, such as foreign travel, protocol matters, internal and external liaison and coordination of visits.

ORGANISATIONAL STRUCTURE



The organisational structure of the Courts Service, Courts Service Annual Report 2017

Offices and units of the Courts Service collaboratively provide support to the Supreme Court and other courts. However, certain directorates, offices and officials provide support directly to the Court on a daily basis.

Registrar of the Supreme Court

The position of Registrar of the Supreme Court is a statutory one and the Registrar has superintendence and control of the Office of the Supreme Court. He is responsible to the Chief Justice for the business of the Court transacted in the Office. He is also subject to the general direction of the Courts Service for matters of general administration. The current Registrar is John Mahon.

Supreme Court Office

The Supreme Court Office provides administrative and registry support to the Court. It has a public office where applications for leave to appeal and appeal documentation are filed. The Registrar is supported by an Assistant Registrar and six additional members of staff.

The Rules of Court require that all applications, appeals and other matters before the Supreme Court are prepared for hearing or determination in a manner which is just, expeditious and likely to minimise the costs of the proceedings.

The Office and its staff is responsible for the following functions:

- Reviewing filings and documentation for compliance with the rules and practice of the Court
- Managing applications for leave to appeal and appeals to ensure that they are progressed fairly and efficiently
- Listing of applications and appeals
- Issuing and publication of the Court's Determinations and Judgments
- Drafting and finalisation of the Court's orders
- Enrolling of the text of the Constitution embodying amendments in accordance with Article 25.5.2° of the Constitution and enrolling of Acts of the Oireachtas in accordance with Article 25.4.5° of the Constitution
- Processing of applications to be appointed as a Notary Public or a Commissioner for Oaths
- Authenticating the signatures of Notaries or Commissioners on legal documents for use in Ireland or other jurisdictions
- Supporting protocol functions including the swearing in of new judges by the Chief justice and calls to the Bar of Ireland.



New Developments

During 2018 the Office began preparations for the introduction of an online system for eFiling of applications for leave to appeal and the paperless consideration of these applications by the Court. The Chief Justice had announced this important initiative in September 2017 as part of a continuing programme of modernisation and reform.

The specification of the new system has been developed in conjunction with Courts Service IT personnel and it is anticipated that the first phase of the system will go live in February 2019.

In parallel with the development of the new system the Chief Justice and the Court initiated during 2018 a review of the Rules and Practice Direction in force from October 2014 when the Court's jurisdiction was radically changed by the 33rd Amendment to the Constitution. Following consultation with practitioners revised Rules and a revised primary Practice Direction were drafted which will come into force in January 2019.



L-R: Staff of the Supreme Court Office Patricia Cuddihy, Sonia Murphy, Mary O'Donoghue, John Mahon, Audrey McKeon, Sinead Mehlhorn and Monica Litwin. Absent from the photograph is Ciara Fitzgibbon.

Superior Court Operations Directorate



Geraldine Hurley
Head of Superior Court Operations

The Superior Court Operations Directorate provides administrative support and resources for the Supreme Court, Court of Appeal and High Court. The Directorate is responsible for managing the offices attached to these courts and the staff associated with such offices, including judicial assistants and secretaries assigned to judges of the Supreme Court. The Head of the Directorate, Geraldine Hurley and three other members of the Court Service carry out the day-to-day work of the Superior Court Operations Directorate.



L-R: Staff of Superior
Court Operations
Directorate Colin
Mehigan, Sheila
Kulkarni, Brian Battelle

Judicial Assistants



During the course 2018, 14 Judicial Assistants supported judges of the Supreme Court. The work of a Judicial Assistant varies depending on the requirements of the judge to whom they are assigned. However, it typically involves carrying out legal research, the preparation of pre-hearing memoranda for judges in advance of oral hearings and proof-reading judgments prior to their delivery.

Judicial Assistants must possess a law degree at a minimum of level 8 on the National Framework of Qualifications or an appropriate professional qualification, as well as an extensive knowledge of Irish Law and the Irish legal system.

In addition to work of a legal nature, a number of the Judicial Assistants undertake the functions traditionally undertaken by Court Ushers as, since the enactment of the Financial Measures in the Public Interest (Amendment) Act 2011, the assignment of Ushers has been replaced by the recruitment of Judicial Assistants.

Judicial Assistant are recruited by the Courts Service on a three-year non-renewable contract. The Courts Services advertises competitions for the recruitment of Judicial Assistants on its website, www.courts.ie.



Back L-R: Judicial Assistants Ciara Ní Ghabann, Iseult Browne, Paul Carey, Angelina Cox, Taghg O'Scanaill, Owen O'Donnell, Patrick Dunne, Sean Beatty, Paul McDonagh-Forde
Front L-R: Ciara Herlihy, Rachael O'Byrne, Luke McCann, Shauna Keniry). Absent from the photograph is Joe Holt BL.

Ushers

During 2018, five Ushers provided practical support to judges of the Supreme Court. In general, the role of an Usher involves attending court with the judges to whom he is assigned, maintaining order in court, assisting with papers and correspondence of the judge, directing litigants and litigants to court and assisting with managing the judges' Chambers.



L-R: Ushers of the Supreme Court Seamus Finn, Tony Carroll, Pat Fagan, John Fahey and Chris Maloney

Judicial Secretaries

In 2018, seven Judicial Secretaries provided administrative and secretarial assistance to the judges of the Supreme Court. The responsibilities of the Judicial Secretary involve typing and formatting judgments and memoranda dictated by Judges, maintaining diaries and arranging appointments.



L-R: Judicial Secretaries Mary Gill, Margaret Kearns, Tina Crowther Carol Kelly and Sharon Hannon. Absent from the photograph are Jean Coyle and Bernadette Hobbs.

Office of the Chief Justice

The Chief Justice in carrying out his judicial and administrative functions at domestic and international level is supported by a team comprising:

- Senior Executive Legal Officer to the Chief Justice, Sarahrose Murphy, who provides legal and administrative support to the Chief Justice and other judges nominated by the Chief Justice in the discharge of their international functions and their engagement with international organisations and ensuring that the Chief Justice has assistance when discharging domestic administrative and organisational functions;
- Executive Legal Officer to the Chief Justice, Patrick Conboy who joined the Office of the Chief Justice in September 2018 to provide legal and administrative support, in particular in light of the increasing involvement of the Court in international bodies;
- Judicial Assistant, Luke McCann, who provides legal research assistance to the Chief Justice;
- Private Secretary, Carol Kelly, who provides secretarial support to the Chief Justice; and
- Tony Carrol, who is Usher to the Chief Justice.



L-R: Patrick Conboy, Tony Carroll, Carol Kelly, Chief Justice Frank Clarke, Sarahrose Murphy, Luke McCann



Part 6

A Look to 2019

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Part 6 | A Look to 2019

Sitting of the Supreme Court in Galway

The Supreme Court will sit at the National University of Ireland, Galway, where the Chief Justice will be joined by other members of the Court, including *ex officio* members, President George Birmingham, President of the Court of Appeal and President Peter Kelly, President of the High Court. The sitting will take place from the 4th to the 6th March 2019 and will be the first time that the Supreme Court has sat in the province of Connacht.



The Court will hear two appeals while in Galway, *Promontoria (Oyster) DAC v. Hannon and Fitzpatrick & anor v. An Bord Pleanála & ors.* In addition, members of the Supreme Court will engage with local practitioners of both the barrister and solicitor professions, whilst dedicating a day to meeting with students of NUI Galway and CAO applicants.

The Galway sitting is a continuation of an initiative that began in 2015 where the Supreme Court sat in Cork. This was the first time in the history of the Supreme Court that the Court sat outside Dublin. In 2018, the Supreme Court sat in Limerick.

Speaking in advance of the special sitting in Galway, the Chief Justice said:

“As the Supreme Court of Ireland, it is important that the Supreme Court conduct court sittings outside of Dublin and 2018 saw the Supreme Court sit in Limerick city over the course of three days. Building on the successful sittings of the Supreme Court in Cork in 2015 and Limerick this year, the Supreme Court will sit in Galway in March 2019.

The members of the Court and I very much look forward to continuing such special sittings outside of the Capital as it demonstrates the importance the Supreme Court places on the constitutional obligation to administer justice in public and in doing so in a way that the People of Ireland have the opportunity to see and visit the Supreme Court sitting in their region.”

New Rules and Practice Direction following the work of the Committee set up to review procedures in 2018

Arising from the work of the Supreme Court Procedures Review Committee, a Consultation Paper on proposed changes to the Court’s procedures was circulated to nominated members of the legal professions. There followed a meeting between the Committee and nominated legal representatives at which a discussion of the proposals was held. A draft revised Order 58 and Practice Direction were prepared by the Reform and Development Directorate, who have responsibility for the preparation of proposals on modernisation and simplification of court rules and terminology.

At a meeting of the Superior Court Rules Committee on 13th December, 2018, that Committee approved the making of the Rules of Court which, inter alia, revised Order 58. As is required by Statute, the Minister for Justice and Equality concurred with the making of these Rules.

Rules of the Superior Court

The Rules of the Superior Courts (Supreme Court) 2018 (S.I. 583 of 2018) came into operation on 10th January 2019. The primary effect of this Statutory Instrument was to amend the Rules of the Superior Courts by substituting Order 58.

Order 58, rule 2(1) requires that all “applications, appeals and other matters before the Supreme Court shall be prepared for hearing or determination in a manner which is just, expeditious and likely to minimise the costs of the proceedings.”

The revised Order 58 stipulates the documentation that is required to be filed by parties in respect of an Application for Leave to appeal and the corresponding Respondent’s Notice. In addition, new measures have been introduced to make the conduct of both case management and oral hearings more efficient.

Order 58, rule 14 provides that where there is non-compliance with the requirements of Order 58, the Registrar of the Supreme Court may refuse to issue any notice of application for leave or notice of appeal. A party aggrieved by such a refusal may apply within a prescribed time period to the case management judge or to the Supreme Court, to authorise the issue of the document concerned.

Practice Direction

A new Practice Direction relating to the conduct of proceedings in the Supreme Court – SC19 – came into effect on 10th January 2019. This new Practice Direction compliments the revised Order 58 and provides practical details for parties in ensuring compliance with the newly revised Rules of Court as they apply to Supreme Court proceedings.

An implementation phase is provided for in the Practice Direction to facilitate parties to transition to the Supreme Court e-filing system. During this phase, the electronic filing and issuing of documents will not be mandatory but will become mandatory upon the conclusion of the implementation phase.

Electronic filing of Applications for Leave to Appeal

In February, applications for leave to the Supreme Court will be able to be filed electronically through the Courts Service Online (CSOL) web portal. This new development will bring about a number of improvements including further developing the single case management system to manage civil business conducted through the Courts. It will enable practitioners to create applications for leave to appeal through a new user friendly interface.

In addition, the electronic filing capability will be integrated with a new document repository, Alfresco, within the wider Courts system. This repository will allow for paperless consideration of an application for leave on a computer screen or tablet device in an application for leave panel conference or where an oral hearing arises.

ACA-Europe Seminar on Decision Making

On the 25th and 26th March 2019, the Supreme Court will host a seminar in conjunction with ACA-Europe, the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union. The seminar will be on the topic of ‘How Courts Decide: the Decision-Making Processes of Supreme Administrative Courts’ and will be a sister seminar to an ACA-seminar which will be hosted by the Federal Administrative Court of Germany in May on ‘Functions of and Access to Supreme Administrative Courts’. The Court looks forward to welcoming approximately 40 representatives of Supreme Administrative Courts and institutions of equivalent jurisdiction for the seminar, which will take place in Dublin Castle over the course of two days at Dublin Castle. The seminar will be an important opportunity for the highest courts of Europe exercising Supreme jurisdiction in administrative law cases to discuss the inner workings of their institutions, such as how cases are allocated, who decides and assists in deciding cases and methods of hearing and deliberating cases.

