The Brief

The Official Journal of the Irish Institute of Legal Executives

2016

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EDITORIAL TEAM

We the Editorial team hereby extend many thanks to all of those who contributed articles as well as photographs for this Edition of the Official Journal of IILEX – "The Brief".

Your contribution and interest in being involved is much appreciated and makes all of the difference towards the production of a quality publication. All of our members and others should really enjoy reading the many interesting features and viewing the various exciting photographs kindly supplied by you,

If you have any social or current events coming up in the near future that you would like to see advertised or written about on the IILEX Website, or further more, maybe for inclusion in the next Edition of "The Brief", then please feel free to send information, photographs and other images to the following address:-

The Irish Institute of Legal Executives.
22/24 Lower Mount Street, Dublin 2 DX No, 15,
Telephone: - (01) 892 4278 Email - info@iilex.ie

Congratulations and well done all.

Mary O'Dwyer, FIILEX
Editor

Front cover picture: The GPO Dublin - Easter Rising 1916 - Permission for use of image Courtesy of the National Library of Ireland -(NLI)

IILEX PRESIDENT'S ADDRESS

Dear Members,

The last year has been a busy one for myself and the Directors of the Irish Institute of Legal Executives, promoting and representing the Institute.

The Institute Directors are very pleased that Griffith Colleges Dublin and Cork continue to work closely with us and are consistently providing Legal Executive Graduates. I attended the Graduation Ceremonies in both Dublin and Cork this year and was delighted to see the high level of achievement that these graduates attained.

I congratulate all of the students who graduated this year and look forward to having them as full members of the Institute in the future.

I am pleased to announce that in the last twelve months membership numbers have increased, I welcome all new members and would encourage all members to promote the Institute to their Legal Executive Colleagues.

Recently at The Irish Law Awards, Paul Brennan of Eugene F. Collins Solicitors was chosen as Legal Executive of the year, I would like to take this opportunity both on my own behalf and on behalf of my fellow directors of IILEX to congratulate Paul on receiving this prestigious award.

May I remind you that the Institute is here to assist you should you have any difficulties please do not hesitate to contact us directly.

I acknowledge all the tireless work that my colleagues on the board of IILEX do for the Institute and you the members and for this work I say a very big THANK YOU.

Patrick J. Courtney
President

You need us for direction
We need you for strength and resources

IILEX
Irish Institute of Legal Executives

Public interest law – getting the law working for those most in need

In 2009, FLAC (Free Legal Advice Centres) established the PILA (Public Interest Law Alliance) project as a public interest law network that seeks to engage the legal community and civil society in using the law to advance social change. Public interest law is a way of working with the law for the advancement and protection of human rights for the benefit of marginalised and disadvantaged people.

PILA works with lawyers, academics, students and non-governmental organisations (NGOs) to change the legal landscape through: the development of pro bono initiatives which match free legal expertise with unmet legal need; capacity building of NGOs to engage in public interest law work; the inclusion of a public interest law element into all levels of legal education and training, and the mobilisation of emerging lawyers; and resources and research on barriers to public interest litigation and public interest law issues more generally. PILA is fundamentally about inspiring a diverse and vibrant network into collective action and collaborative initiatives that support and grow the practice of law in the public interest.

Central to PILA's work is its Pro Bono Referral Scheme, which supports social justice NGOs, independent law centres and community organisations in obtaining pro bono legal assistance where they do not have the resources or in-house expertise. Pro bono is an abbreviation of the Latin phrase pro bono publico, which means "for the public good", and it generally refers to legal services provided free of charge. Over 300 individual lawyers, 24 law firms and 4 in-house legal teams have signed up to provide such free legal assistance to 110 NGOs through PILA.

The type of work referred through the Pro Bono Referral Scheme fits into three broad categories: general legal advice, potential litigation and law reform. The general advice projects usually take the form of opinion work. For instance, organisations often find themselves navigating complex legislative systems in order to assist those they work with. A legal opinion on statutory interpretation of an ambiguous point of law can provide immense aid and peace of mind for an organisation that lacks in-house legal personnel or the financial resources to source an opinion privately. In some instances, the opinion can be used to change the practice of a state agency dealing with marginalised people. For example, one PILA referral involved a barrister providing an opinion for Nasc, the Irish Immigrant Support Centre. Counsel advised that the Department of the Environment's guidelines on social housing for immigrants were ultra vires. The Department ultimately changed the policy to one which Nasc agrees is much fairer.

Potential litigation can sometimes arise out of seemingly straightforward legal opinions, but the referrals can also arise at the stage where it appears that an individual or group has a potential cause of action. These referrals are often indicative of a problem that an organisation has seen repeatedly with groups it works with. These referrals are akin to a type of strategic litigation. For example, a PILA referral for assistance to the Transgender Equality Network Ireland (TENI) led to an equality action against a Dublin hospital. The action ultimately settled and the hospital agreed to provide transgender training for its staff and amend its transgender policy.

Law reform projects often require a team of pro bono practitioners over an extended period to engage in specific pieces of research to assist an organisation or group of organisations that are campaigning for law reform on a specific issue. In many instances, an organisation will have extensive expertise on an issue and the social policy difficulties relating to it, but they will lack the expertise to fully realise a programme for legislative action. These law reform projects often involve the practitioner or team of practitioners working quite closely with the NGO and on occasion speaking at briefings for legislators in the Houses of the Oireachtas. For example, a working group of lawyers was set up to provide research on models of aftercare for children and those over 18 in other jurisdictions for the children's organisation Barnardos. The lawyers provided research on models of aftercare in England & Wales, Scotland, Northern Ireland and Ontario in Canada. This in turn led to a paper on Scotland and Northern Ireland that was presented by one of the lawyers in the group at a Barnardos seminar on aftercare.

PILA also organises a range of legal education sessions that strengthen the capacity of NGOs to access the legal system and use law more effectively in their work. This assists NGOs in advocating for their clients and service users, engaging with the political process and bringing about sustainable positive change in the lives of marginalised and disadvantaged communities. Topics covered are diverse, ranging from data protection and freedom of information, to housing law or social welfare.

More recently, PILA has begun to develop 'Signature Projects' in which a law firm forms an ongoing partnership with an NGO to fill an unmet legal need. Sometimes this involves developing an expertise outside the normal practice of the firm, such as the innovative collaboration between the Irish Refugee Council Law Centre and leading law firm A&L Goodbody, whereby A&L Goodbody works on a pro bono basis to provide legal representation to applicants at the first stage of the asylum process. This unique project helps address a lack of early legal advice for people making an asylum application, bolsters the resources and manpower of a small NGO, while also improving the fairness and quality of the decision-making process.

The beauty of the Pro Bono Referral Scheme is that it can be adapted to fit the varying needs of NGOs, but also the law firm and lawyers providing the service – the options are endless because the need is vast. The PILA model also demonstrates the multi-faceted approaches that can be employed in order to advance the use of the law as a tool for securing change.

For more information on PILA, and to sign up to its fortnightly public interest law e-Bulletin, please visit www.pila.ie.

Rachel Power
PILA Coordinator

THE PAPERLESS OFFICE … just pie in the sky?

As a legal secretary and legal executive for more years than I care to remember, in 2016 the idea of a paperless office, in the legal world anyway, seems further from reality than ever. I would even hazard an educated guess that a modest solicitor's office these days generates far more paperwork than it did twenty years ago. After all, clients like to see a fat file or two under the arm of their solicitor, don't they? It is comforting to know that their case is worthy of such impressive bulk. Being sat down in front of a small electronic implement to squint at scanned documents on a screen as opposed to a well-thumbed file just isn't the same. Worse still, telling certain clients that their documents have been stored on a cloud really is just pie in the sky.

Many email correspondents vainly attempt to encourage an environmentally friendly and paper-free office by suggesting to the reader that their mail not be printed unless absolutely necessary. On the other hand, Microsoft's latter versions of Word have thwarted economy by not allowing the user to print just the latest email in a long line; unless one is careful to command the computer to print off the first page only, the dismal sound of the printer spewing out pages of previously read/filed/responded-to emails can be most depressing in these eco-aware times.

Emails - the bane of modern office life, an unforgiving interruption that distracts us instantly from the job at hand and results in a level of multi-tasking I had never anticipated when I began my first legal secretarial post in the mid-1980s. Mind you, back then (pre-word-processor-and-possibly-a-golfball-typewriter-if-you-were-lucky) there was, sporadically, the inevitable sacrifice of expensive deed paper due to the heinous crime of making one typing error too many on a document which usually involved a number of sheets of carbon paper. Younger readers, I suggest you Google that one.

Perhaps it's like imagining that summers were better in the past, but I firmly believe that office life was just a little calmer in those days. A letter or document was carefully composed and, if you were lucky enough to avoid the dreaded shorthand, transposed onto paper via an early form of dictation known as the cassette tape. (Younger readers may have to Google that one as well). Such great efforts simply did not allow for ponderous consideration of at least twenty five printed versions of essentially the same document. With a few blobs of Tippex (ironically this is still readily available) and a flourish of the writer's pen, the correspondence was ready. With envelope and stamp licked generously, the letter was posted in a post box as opposed to a mailbox. Then it was time to sit back, recover from glue tongue, and wait at least a week for a response. This at least allowed some respite to deal with other important matters at hand.

Nowadays, despite the best efforts of the current generation, the modern legal executive still has filing to do, documents to shred and paper cuts to bandage (thankfully glue tongue is virtually a thing of the past). Ironically, note how terms such as "file" and, funnily enough, "paste" are used in the electronic world of today – really there's just no getting away from it, paper is here to stay.

Wendy O'Brien
Amorys Solicitors

Legal Executive of the Year 2016

Paul Brennan Legal Executive of the Year 2016

Congratulations to Paul Brennan who has been voted Legal Executive of the Year at the AIB Irish Law Awards 2016. Paul works for Eugene F. Collins Solicitors. He has served on the Leinster Council of IILEX and he is a Commissioner for Oaths.

How to deal with disciplinary issues in the workplace

Many employers will have read the newspaper reports on employees being given large awards for what appear to be justifiable and straightforward cases of discipline leading to a dismissal from employment. How straightforward is it to discipline an employee? This article attempts to set out the process which should be followed in cases of employee discipline.

In **Myles Cummins –v- Bernard Keane Limited UD2000/11** the Employment Appeals Tribunal awarded €12500 for Unfair Dismissal to a butcher who was dismissed for taking waste meat and bones home for his dogs. The Tribunal commented that there " ..was a total absence of fair process, in circumstances where no evidence was adduced of any fair or reasonable procedures to deal with disciplinary issues leading up to and including the dismissal of the claimant."

All employers are obliged to have a written disciplinary process and provide employees with a copy of that process. An underlying tenet of any disciplinary or investigative process leading to a disciplinary hearing is that an employer must act fairly, consistently and objectively by adhering to natural justice and fair procedures at all times.

What is natural justice and fair procedures? An employee's right to fair procedures and natural justice stem from the Constitution and the employment contract. At the very least this provides the following minimum rights to the employee:-

- The right of the employee to be informed of the allegations in writing against him or her;
- The right to be heard and respond to those allegations
- The right to representation in presenting that response
- The right to a fair and impartial hearing and determination of the issues

In **An Employee –v- An Employer UD211/2011** the Employment Appeals Tribunal awarded an employee €25000 taking into account that the employee contributed to the dismissal. The Tribunal noted the following:-

- The Respondent did not follow any acceptable procedure in dismissing the Claimant;
- The Claimant received no contract of employment and there were no grievance procedures in place;
- The Claimant was not given any opportunity to have representation at a meeting that lead to her dismissal;
- The Claimant was not made aware of the seriousness of the meeting and she was given no right of appeal;

The case of **Linda Magill –v- Tomkins Limited (in receivership) t/a The Grand Hotel 2014 UD1665/12** the Employment Appeals Tribunal awarded the claimant €20000 stating that "..She was denied due process and, indeed, any process, was not given any details of the complaint against her and had no opportunity to defend herself. Instead, the termination of her employment was presented as a fait accompli.."

The procedure should provide for and encompass the following steps:-

- The investigation
- Provision of information to the employee
- The right to representation
- Conduct of the disciplinary hearing
- Appeal of disciplinary sanction

The Investigation

If the procedure provides for a disciplinary investigation that it should be a thorough fact finding investigation where all the information is gathered on the allegations being made, potential witnesses interviewed and documentary evidence must be prepared by the Employer. This then allows the Employer to make a decision as to whether there are grounds to hold a disciplinary hearing. An investigation report should be compiled and a decision made a recommendation or otherwise that the matter proceed to disciplinary.

It is vitally important that the person who conducts the disciplinary investigation or makes the recommendation of follow up disciplinary action has no further input into the matter.

Providing Information to the Employee

If there is sufficient evidence following the Investigation, the employee should be advised that the matter is to proceed to disciplinary action, a letter of invitation to a disciplinary hearing

"All employers are obliged to have a written disciplinary process and provide employees with a copy of that process. An underlying tenet of any disciplinary or investigative process leading to a disciplinary hearing is that an employer must act fairly, consistently and objectively by adhering to natural justice and fair procedures at all times"

Aidan McGrath, Legal Advisor, Assistant Manager Claim Services, DAS

should be issued outlining a copy of all the allegations and a list and copies of all documentation which the employer will be seeking to rely upon at the disciplinary hearing. The investigation report should be furnished with that letter. The employee's right to be accompanied and represented at that hearing should also be outlined.

The right to representation at a Disciplinary Hearing.

This is a cardinal tenant of fair procedures; an employee has a right to be accompanied to a disciplinary hearing by a friend, work colleague, union representative or other person as set out in the disciplinary policy. The employer must permit the companion to address the hearing in order to do any or all of the following – put forward the employee's case, sum up the case, respond on your behalf to any view expressed at the hearing.

In the High Court case of **Burns and Hartigan –v- Governor of Castlerea Prison 2005 IEHC76,** the Court found that due to the gravity of the sanction that faced the employees, a legal representative should be allowed at disciplinary hearings.

Conduct of the Hearing

An employer must adhere to the rules of natural justice. The employer has a duty to fully inform the employee of the allegations and any evidence to be used against them, and provide the employee with an opportunity to put a case forward, produce evidence to the contrary and if witnesses are produced; to question those witnesses. The employee's representative should be allowed to ask questions during the disciplinary hearing. The employer must not be bias during the investigation or hearing and an objective person must be present, whose duty is solely to take notes and who should not be involved with the hearing in any other way. Any new matters raised during a hearing must be investigated thoroughly and the responses to same provided to the employee and time allowed for the employee to respond further on those new issues. Following the hearing and any resumed hearing the employer should consider the evidence and responses from the employee in full and make an informed determination of the disciplinary sanction to be imposed.

In the case of **Trevor Murtagh –v- TLC Health Services Limited 2014 UD 425/12** the Employment Appeals Tribunal noted that the claimant was denied access to CCTV footage which the Respondent claimed showed nothing. The Tribunal commented that "..the very fact it showed nothing could have been used by the claimant as a defence".

This demonstrates the importance of providing all the evidence to the employee, not just the evidence perceived to prove the employer's claims against the employee. The Tribunal above further commented ".. to disregard those statements exonerating the claimant and to rely only on those accusing the claimant is a fundamental breach of the claimant's right to fair procedure. What is even more alarming is that the respondent placed no importance on the fact that two of the statements, relied upon by the respondent, accusing the claimant, were made by individuals who were not present at all. That too is a fundamental breach of the claimant's right to fair procedures"

The employee must then be advised in writing of the outcome. Once a decision is made the employee can be notified verbally of the decision, however, this should always be confirmed in writing. The letter should always include the nature of the misconduct, time required for the employee to improve, the improvement required and the duration of the penalty on the employee's record, as well as the consequences of further misconduct and appeal details.

The Appeal

An employee should always be notified of the right of appeal. Written notification should state to whom and the deadline by which an appeal must be lodged (five days is usual). The opportunity to appeal against a decision is essential to natural justice. Employee's may choose to raise appeals on a number of grounds which could include the perceived unfairness of the judgement, the severity of the penalty, new evidence coming to light or procedural irregularities. The Employer must consider the grounds when deciding the extent of any new investigation or re-hearing in order to remedy previous defects in the disciplinary process.

DISCIPLINARY AND GRIEVANCE PROCEDURES

Appeals should be dealt with as promptly as possible. A time limit should be set within which appeals should be lodged. This time limit may vary between organisations but five working days for lodging an appeal is usually appropriate. A time limit should also be set for hearing the appeal. Wherever possible the appeal should be heard by an appropriate individual, usually a senior manager, not previously involved in the procedure. You should be informed of the arrangements for appeal hearings and also of your statutory or other right to be accompanied at these hearings. Where new evidence arises during the appeal you or your representative should be given the opportunity to comment before any action is taken.

The appeal may be adjourned to investigate or consider such points. You should be informed of the results of the appeal and the reasons for the decision as soon as possible and this should be confirmed in writing. If the decision constitutes the final stage of the organisation's appeals procedure this should be made clear to you.

All dismissals of employees are deemed to be unfair under the Unfair Dismissal Acts; the onus is on an employer to justify the dismissal. You must be able to demonstrate that the employee's right to natural justice and fair procedures was guaranteed throughout the process. 70% of Unfair Dismissal cases are lost because although a sound reason for disciplinary sanction or dismissal existed; fair procedures were not followed.

"An employee should always be notified of the right of appeal. Written notification should state to whom and the deadline by which an appeal must be lodged (five days is usual). The opportunity to appeal against a decision is essential to natural justice. Employee's may choose to raise appeals on a number of grounds which could include the perceived unfairness of the judgement, the severity of the penalty, new evidence coming to light or procedural irregularities"

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Griffith College Dublin Graduation and Conferring Ceremony 2015

Diploma in Legal Studies and Practice - (QQI) HETAC Level 7 (Special Purpose Award)

The Conferring Ceremony of graduates of the Diploma in Legal Studies and Practice - (QQI) HETAC Level 7 (Special Purpose Award) took place at the Conference Centre in Griffith College Dublin on 11 November 2015. This Course is delivered by Griffith College Professional Law School and run in conjunction with the Irish Institute of Legal Executives (IILEX).

Representing the Irish Institute of Legal Executives on this occasion were Gabriel Canning (Chairman), Mary O'Dwyer (Director of PR/Communications and Frank Crummey - (Fellow and Hon. Life Member of IILEX.)

A total of 24 students graduated with a Diplomas in Legal Studies and Practice - (QQI) HETAC Level 7 Special Purpose Award) as well as a total of 7 students who graduated with Certificates in Legal Studies (QQ1) . Students were formally presented with their respective parchments by the President of Griffith College, Professor Diarmuid Hegarty who congratulated each on their great achievements as well as wishing them every success and happiness in their new lives ahead.

Moya Comer, HSE, Castlebar, Co. Mayo was presented with the Frank Crummey Perpetual Cup as an award for her great achievement as best student of the year 2015 in the Diploma in Professional Studies and Practice (QQI) HETAC Level 7 -(Special Purpose Award).

Students who were not in attendance on the day were conferred in absentia.

It was wonderful to evidence The Griffith College Professional Excellence Award being presented to Mr. Tommy Geoghegan by Minister Jimmy Deenihan, TD in recognition of Mr. Geoghegan's long and very distinguished career serving with a State -Body as well as his very successful dealings and negotiating with the EU on matters pertaining-to his organisation during this time.

The Irish Institute of Legal Executives – (IILEX) were again delighted to learn of the high number of students graduating and thus witness the sustained interest in the pursuance of both the Diploma in Legal Studies and Practice (QQ1) HETAC Level 7 (Special Purpose Award) as well as the Certificate in Legal Studies (QQI). For many graduates of such legal studies this has been recognised as a pathway as well as creating a platform to undergoing further legal studies such as the LLB (Hons.) in Irish Law as well as furthers various Post-Graduate Courses in the legal discipline.

Following the Graduation Ceremony, Directors 'of IILEX were delighted to have the opportunity to meet and speak with Professor Diarmuid Hegarty, President of Griffith College as well as academic staff who included, Siobhán Leonard , Head of Law Faculty ,Ronan Fenelon, Director of the Law School and Karen Sutton , Course Administrator of the DLS&P Programme and Lecturer in the Law Faculty, Anne Driscolll, US Fulbright Scholar and Manager at the Irish Innocence Project, at Griffith College Dublin as well as Director Tomás Mac-Eochagáin and other Directors' of Griffith College.

Moya Comer being presented with the Frank Crummey Cup

Pictures by kind permission of Lafayette Photography

Once again, the entire Conferring Ceremony was a very professional and memorable event and to be present at such was a tremendous honour and was very deeply appreciated by Directors' of the Irish Institute of Legal Executives. Compliments are extended to all including staff of the Examinations' Office of Griffith College- (GCD) who per usual worked very diligently and professionally with an enormous duty of care in organising the logistics in relation to putting in place this entire event . Well done all.

Many thanks to Professor Diarmuid Hegarty , President of Griffith College for the very kind invitation and hospitality extended on this occasion to Directors' of the Irish Institute of Legal Executives.- (IILEX).

Mary O'Dwyer FIILEX
Director of PR/Communications- -IILEX
Editor of The Brief

Seated: - Professor Diarmuid Hegarty , President of Griffith College accompanied by Academic staff of Griffith College Dublin and Directors of the Irish Institute of Legal Executives.
Standing: - Graduates of the Diploma in Legal Studies and Practice who were presented with their parchments by Professor Diarmuid Hegarty.

ISDS TO TRANSFORM IRISH & EU LAW

Widely criticised by legal scholars, a little-known arbitration mechanism inserted into international trade agreements, if adopted at EU level, would usher in an unprecedented transformation of the liberal, constitutional, democratic framework which we all take for granted.

Investor-State Dispute Settlement, or ISDS, is an arbitration mechanism inserted into a 'new generation' of international free trade and investment agreements which allows foreign businesses to bypass the domestic courts and to sue governments for compensation, in private, in front of a panel of part-time, for-profit arbitrators, when they feel state legislation, regulations, licencing decisions and EU directives impact negatively on their existing assets and/or their perceived future, unearned profits.

Legal scholars and practitioners claim ISDS and the threat of it has a chilling effect on potential legislation, overturns the cherished principles of the independence of the judiciary, equality before the law and the democratic state's right to regulate public policy.

Indeed, the German Magistrates' Association,

> *"sees neither a legal basis nor a need for such a court."*

There are 2,400 international trade deals with ISDS; 1,400 of these being between EU Member States and mostly developing countries, yet legal fraternity knowledge of ISDS is alarming low. This however is changing quickly: firstly because 90% of all ISDS cases have been taken in the last 15 years, and secondly because of the possible adoption this year, through an EU-Canada trade deal called CETA, of ISDS at an EU-wide level beyond the remit of Member State parliaments to have a say in its adoption.

a bi-lateral investment free-trade treaty (BIT) which contains ISDS, but the reason it is imperative for the legal fraternity here now to inform itself as to the implications of ISDS is because the European Commission has recently completed, firstly the EU-Singapore Free Trade Agreement (EUSFTA), and secondly, an EU-Canada free trade deal called the Comprehensive Economic Trade Agreement (CETA), both of which contain a form of ISDS and are awaiting adoption by the EU's Council of Ministers and Parliament.

Some examples will serve to illuminate the cause for concern:

1. ISDS arbitrators awarded $2.3 billion to Occidental, a US oil company, because of Ecuador's withdrawal of their drilling rights (due partly the state claimed, to Occidental's flouting of Ecuador's 'hydrocarbons regulations').
2. Veolia sued Egypt for almost $1 billion in compensation for lost future unearned 'profit' accruing they claimed, due to the government's concession to the 'Arab Spring' protesters to increase the monthly minimum wage from $56 to $99; the government claimed it couldn't afford to pay out and so dropped plans to raise the minimum wage before the case concluded.
3. The German government decided to close down the nuclear power industry, and so Vattenfall, a Swedish energy company, decided to bypass the German courts and sue through ISDS for €3.7 billion. ISDS arbitrators have a documented tendency to award compensation at much higher levels than domestic courts, and to incorporates payment for unearned 'profit'.
4. Quebec placed a two-year moratorium on 'fracking' in order to carry out assessments in an environmentally sensitive area which resulted in Lone Pine Resources suing Canada via ISDS for $250 million; the case is ongoing.

TFEU INCOMPATIBILITY

Most alarmingly, the European 'Commission Staff Working Document on the free movement of capital in the EU, SWD (2013) 146 final' states that:

> *"Such agreements clearly lead to discrimination between EU investors and are incompatible with EU law. … This form of international arbitration is incompatible with the exclusive competence of EU courts to rule on the rights and obligations of Member States under EU law. In contrast to national courts, arbitral tribunals are not bound to respect the primacy of EU law and, in case of doubt, are neither required nor in a position to refer questions to the CJEU [Court of Justice of the European Union] for a preliminary ruling. In any case, such investor-to-State arbitration is very costly and thus not easily accessible to SMEs."*

Ireland is the only EU Member State to have never signed

This form of arbitration is not to be confused with business-to-business arbitration. With ISDS, the state comes to arbitration compelled, not voluntarily; only foreign businesses can take cases, only governments can pay compensation; businesses do not have to first exhaust domestic legal remedy; and non-tenured arbitrators are compelled to ignore domestic and international legislation with regard to human rights, workers' rights, environmental protection, consumer safety, food

standards, constitutional safeguards, etc, and to base their rulings solely on the vague, open-to-interpretation clauses of the text of these trade agreements.

In the 2014 United Nations Conference on Trade & Development 'annual review of investor-state dispute settlement cases', they say that from the first ISDS deal in 1968 to the end of 2013, there were 568 known cases initiated around the world and that,

> *"the lack of transparency and coherence often observed in the operations of those ad hoc tribunals, and their apparent pro-investor bias, have given rise to concerns about the entire dispute settlement mechanism".*

Of these cases, 75% have been taken by EU Member States or the USA against developing countries. The UN's 2015 report highlighted that 60% of cases that were heard by ISDS arbitrators have been 'won' by companies and 'lost' by governments.

TTIP's ISDS

More widely known than the EUSFTA or CETA, is the Transatlantic Trade and Investment Partnership, or TTIP. It is another of these 'new generation' trade deals with an ISDS, and the Commission is currently negotiating the details of it with the USA in what is often referred to as potentially the biggest trade deal in history.

It is the threat of an EU-US free investment and trade agreement which would allow US corporations to use ISDS to bypass the courts of EU Member States and to bypass the European Court of Justice (ECJ), so as to sue our governments for compensation for the financial value of their imagined lost future unearned profits which they feel accrues as a result of us Europeans maintaining our high food standards and agricultural regulations, maintaining our high environmental legislation and workers' rights, and for refusing to privatise our state-owned quality public services including health and education, which has galvanised awareness of, and opposition to, the architecture of investor-state dispute settlement (ISDS) in existing and future trade deals.

Some of this opposition includes: over 3,400,000 EU citizens have signed an ongoing self-organised European Citizens' Initiative petition against the TTIP and CETA; over 250,000 people protested against TTIP/CETA in Berlin in October 2015 in the biggest protest in that country in well-over a generation; while in Austria and Germany, over 3,000 small and medium-sized businesses have signed up to 'SMEs Against TTIP' organisations.

LAWYERS REJECT ISDS

In the ongoing TTIP, CETA, EUSTFA debate, much of the citizens', politicians' and business-owners' opposition to ISDS is informed by legal scholars and practitioners who are determined to protect the liberal, constitutional, democratic framework which we have spent centuries establishing.

For example, in 2014, the Commission opened an online public consultation on ISDS. Despite its obtuse, paragraph-length questions, with 149,399 responses of which 97% were negative, it proved the most popular consultation the Commission has ever engaged in. One 5,000-word legal submission to the consultation came from 122 legal scholars based in universities in 17 countries who have expertise in trade and investment law, public international law and human rights, European Union law, global political economy, comparative law, public law and private law. Their submission says that, "Investment arbitration law, after all, is far too important to leave to just investment lawyers".

Their submission, currently hosted online at the Law School of Kent University, expresses,

> *"deep concern about the planned [TTIP] Treaty in general and", voiced "strong criticism of the proposed [investor-state] provisions in particular". With relation to Member States, they said that ISDS, "profoundly challenges their judicial, legal and regulatory systems",*

and that the Commission has failed to provide evidence as to why they are

> *"including investor-state arbitration in the TTIP at all". "At root", they says, "the system involves a shift in sovereign priorities toward the interests of foreign owners of major assets and away from those of other actors whose direct representation and participation is limited to democratic processes and judicial institutions."*

In their submission entitled, 'Statement of Concern about Planned Provisions on Investment Protection and ISDS in TTIP', they say that the Commission's consultation document claims,

> *"that the rights each party grants to its own citizens and companies 'are not always guaranteed to foreigners and foreign investors.' The claim is unsubstantiated."*

EU law actually prohibits governmental discrimination against non-EU companies. No similar law exists in Canada or the USA.

With signatories of the Statement based at such institutions as the SOAS School of Law, Sciences Po Law School and the Osgoode Hall Law School, one has to take seriously their reservations as to the impartiality of ISDS arbitrators who in one case may act as part of a plaintiff company's legal team, and in the next, act as arbitrator. They say:

> *"The Commission seems content to entrust to these same actors [arbitrators] the vital constitutional task of weighing and balancing the right to regulate of sovereign states and the property rights of foreign investors. This task is one of the most profound roles that can be assigned to any national or international judicial body. The proposed text requires arbitrators to determine whether discriminatory measures are 'necessary' in light of the relative importance of the values and interests the measures seek to further; whether the impact of non-discriminatory 'indirect expropriations' have a 'manifestly excessive impact' on investors in light of the regulatory purpose of these measures; whether other non-discriminatory measures amount to arbitrariness or fall short of standards of due process and transparency, and whether prudential regulations are 'more burdensome than necessary to achieve their aim'. To entrust these decisions to the very actors who have an apparent financial interest in the current situation and moreover remain unaccountable to society at large is a contentious situation. In light of the criticism inherent in the consultation document, not to mention the fundamental concerns of many observers of the system, there seems to be consensus that the regime falls short of the standards required of an institutionally independent and accountable dispute settlement system."*

ISDS 'REFORM'

In response to growing European-public and global-legal opinion against ISDS, and their own acknowledged criticisms of its assault on the application of justice in democratic societies, in December 2015, the Commission released what they called a reformed ISDS entitled the 'Investor Court System', or ICS. Canada has agreed to its

insertion into the CETA instead of ISDS.
Unfortunately, ICS, as with ISDS, still delivers legal remedy to foreign business concerns which are denied to citizens and domestic businesses. It still allows non-EU businesses to challenge public policy, legislation, licencing arrangements and EU directives in an arbitration conducted in private, bypassing the domestic, constitutional and European courts, allowing access to international arbitration prior to the exhaustion of legal remedy at a domestic level.
Furthermore, while it is an improvement that the Commission proposes to draft a panel of ICS arbitrators qualified to a level where they could practice as judges in the EU, they are still only to be paid a stipend while on the panel, yet be paid commercial arbitrators rates by-the-day while they arbitrate a case. Most egregiously, where last week a legal practitioner is part of a team challenging via ISDS one government's decision to, let's say for example, not issue a licence for extraction of hydraulic fracturing, and then next week is acting as arbitrator in an ICS taken by the same company against a different government in a similar 'fracking' case: the decision as to whether that constitutes a conflict of interest will be, the Commission proposes, taken by only one person, the 'president' of this proposed Investor Court System.
In what initially appeared to be an improvement to ISDS, the Commission's ICS proposals include an appeals mechanism. Unfortunately, they have likened its functioning to that of the World Trade Organisation's Appellate Body. (Space here doesn't allow a critique of that body's consistent anti-public good, anti-public policy decisions.)

JUDGES REJECT ISDS

In February this year in their 'Opinion on the Establishment of an Investment Tribunal in TTIP - the Proposal from the European Commission 16.09.2015 and 11.12.2015', it states: "The German Magistrates Association [DRB] rejects the proposal of the European Commission to establish an investment court within the framework of the TTIP. The DRB sees neither a legal basis nor a need for such a court."
Stating: "The clearly implied assumption in the proposal for an International Investment Court that the courts of the EU Member States fail to grant foreign investors effective judicial protection, lacks factual basis." They say the remit of the ICS would include,

> *"any type of asset, including stocks, shares in companies, intellectual property rights, movable property and receivables" and, "extend from civil law through to general administrative law and social and tax legislation" and, "would not only relate to questions of civil law, but the administrative, labour, social and fiscal law" as well; claiming that: "Neither the proposed procedure for the appointment of judges of the ICS nor their position meet the international requirements for the independence of courts."*

Most damningly:

> *"An ICS would not only limit the legislative powers of the Union and the Member States; it would also alter the established court system within the Member States and the European Union. In the opinion of the German Magistrates Association, there is no legal basis for such a change by the Union."*

DÁIL EXCLUDED

We are currently awaiting a ruling from the ECJ, which was sought by the Commission, as to whether the EUSFTA (with its ISDS) is an 'exclusive competence' or a 'mixed competence' trade agreement. If the former, as the Commission predicts, EUSFTA can be adopted in a two-step process: a Qualified Majority Vote (QMV) at the Council of Ministers of the European Union (probably the 28 Members States' ministers for foreign affairs), followed by a 51% majority vote at the European Parliament. In this scenario, the 28 Member State national parliaments are legally excluded under the Treaties on the Functioning of the European Union (TFEU) from the decision as to whether to adopt the EUSFTA or not. The Commission insisted that the ruling not be published until after the British referendum on EU membership in June 2016.
Legal opinion among the small group of globally-active law firms specialising in facilitating ISDS cases is that whichever 'competence' the ECJ applies to the EUSFTA, will also apply to the CETA and all other similar EU free trade deals with ISDS/ICS.
The Commission's position is clear that the EUVFTA, the CETA and the EUSFTA are all 'exclusive competence' trade deals and they have no intention of asking for approval for their ratification from the 28 national parliaments.

CONCLUSION

In their 'Opinion':

> *"The German Magistrates Association has serious doubts whether the European Union has the competence to institute an investment court", and that "there is no legal basis for such a change by the Union", adding that ICS, "would alter the essential character of the powers which the Treaties confer on the institutions of the European Union and on the Member States and which are indispensable to the preservation of the very nature of European Union law".*

Article 218 (11) of the TFEU states: "A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

> *"In order to reassert EU citizens' faith in the institutions of the EU as a force for good in the world, in order to ensure that we stay within the liberal, constitutional, democratic framework, surely, given the Commission's stated refusal to do so, the very least we could have expected thus far would have been that progressive political forces in the European Parliament would have already put down a motion to ask the ECJ for a ruling on the compatibility of ISDS with the TFEU, and its coherence with the Treaties'*

stated insistence of the primacy of the ECJ to interpret the Treaties.
Alternatively, wouldn't it be a great day for the Irish political classes and our proud civil service, for our legal fraternity, and for the citizens of Ireland, in this the centenary of the 1916 Rising, should our political representatives be the ones to invoke 218, ask the ECJ for a ruling and potentially save European democracy from this most foul debasement of all we hold dear in the fragile democratic experiment that we call the European Union?

Barry Finnegan,
Senior Lecturer and Programme Director at the Faculty of Journalism & Media Communications, Griffith College, researcher with the Irish branch of international civil society organisation, the Association for the Taxation of financial Transaction for the Aid of Citizens (ATTAC.ie) will present findings on the incompatibility of ISDS with the TFEU at the Griffith College law conference, 10th June, 2016.

TALK IN DUBLIN CITY HALL

Various talks which form part of its ongoing policy (with regard to Continuous Professional Development- CPD) are planned on an annual basis by the Irish Institute of Legal Executives, - IILEX, for the benefit of its registered members.

With this in mind, the talk with a theme:

Local Government Law – An Overview and Developments

Speaker: - David Browne BL

was duly organised on 28th October 2015 in City Hall, Dublin.

***LR – RT:**- Patrick J. Courtney, President of IILEX and David Browne B.L. Speaker.*

At this event, there were a good number of interested parties evident in the audience. Among the attendees were Directors' of the Irish Institute of Legal Executives (IILEX), Legal Executive members registered with the Institute, Students' from Griffith College Dublin, Members of staff from both Dunlaoighre/Rathdown and Meath County Councils respectively. Also present were Councillors Dermot Lacey and Mannix Flynn of Dublin City Council.

A very interesting lengthy presentation was made by David Browne BL in which he gave a complete overview of Local Government Law He described in detail the powers and functions as well as the duty of care to citizens exercised by Local Government in accordance with the various laws/statutes enacted by the Oireachtas over many years.

It is not possible in an article such as this to enter into great detail,

In respect of powers, Mr Browne also stated, that administrative decisions taken by local authorities' may be considered ultra vires - (acting outside of their powers), and can be the subject of an application for judicial review to the Supreme Court provided that the an individual can prove locus standi.- (that the individual has a specific interest /or has /been adversely affected by the a decision taken).

Mr Browne also added that Local Government Law and the work of local authorities is continually evolving and developing. This has been most obvious in the past number of years especially taking in to consideration the massive construction work was carried out in the State.

The following is just one example of many where of recent times Local Government Law is seen as evolving and developing.

Effectively, The Multi-Development Unit Act 2011 was enacted to mainly regulate the area consisting of the numerous apartment blocks that have sprung up over the past number of years. The law provides interalia very specific mandatory obligations on the management company towards the owners' of such apartments as well as on the owner s of such.

Mary O' Dwyer FIILEx
Director of PR/Communications – IILEX
Editor of the Brief

You need us for direction
We need you for strength and resources

iiLEX
Irish Institute of Legal Executives

CONFERRING CEREMONY 2015 at GRIFFITH COLLEGE CORK

DIPLOMA IN LEGAL STUDIES AND PRACTICE (QQI)

The Conferring Ceremony of Graduates of Griffith College Cork took place on Wednesday 19th November 2015 in the Chapel at Griffith College Cork Wellington Road Campus.

The Ceremony was attended by family and friends of Graduates as well as representatives of the validation bodies and local elected representatives. Awards being conferred were:

LAW: Diploma in Legal Studies & Practice (QQI). LLB (Hons) in Irish Law (QQI). LLM in International Commercial Law (QQI).

JOURNALISM: BA in Journalism (QQI).

BUSINESS: BA (Hons) in Accounting & Finance (QQI). BA in Marketing (QQI). BA in Business Studies (QQI). Certificate in Advanced Taxation Planning and Advice (QQI). Diploma in Digital Communications for Business (QQI). Diploma in Investment Operations & Compliance (QQI) Diploma in Business Management (ICM). Diploma in Human Resource Management (ICM). Diploma in Marketing, Advertising, PR & Sales (ICM).

COMPUTING: Higher Diploma in Science in Web Development (QQI).

CENTRE FOR PROMOTING ACADEMIC EXCELLENCE: Certificate in Training & Education (QQI).

Directors in attendance representing Irish Institute of Legal Executives (IILEx) were Patrick Courtney President Director Central Council IILEx, Fintan Hudson International Ambassador for the Irish Institute of Legal Executives, Director Central Council IILEx Denise Hudson and Deirdre Butler Director of Regional & Central Council IILEx.

Other attendees included Deputy Lord Mayor Cork Councillor Mick Nugent, Professor Diarmuid Hegarty President of Griffith College, Jim Daly Director of Griffith College, Cork. Ronan Fenelon, Director of Griffith College. Dr. Niall Meehan Head of the College's Media Faculty, Karen Sutton Programme Director Law Faculty along with other members of the Academic staff of Griffith College Cork.

Professor Diarmuid Hegarty delivered his conferring address congratulating students on their achievements and wishing them success for the future. Councillor Nugent, also in his address, congratulated both graduates, their supporting families and Griffith College Cork staff on a job well done and every success going forward.

Ruth Colgan, Caroline Cooke, Emma Deady, Ina Kerins and Caroline Walsh were successful in attaining their Diploma in Legal Studies and Practice. Emese Baranyi, KevinBowen, Darren Enright, Emmal Field and Jacek Sulej were successful in attaining LLB (Hons) in Irish Law.

Sarah Leahy was successful in LLM in International Commercial Law. The award for Best Academic Achievement for the LLB (Hons) Law Programme went to Kevin Bowen.

Following the Conferring Ceremony, and after photographs were taken, the graduates and guests were invited to enjoy some light refreshments by Griffith College Cork in the Ambassador Hotel to celebrate the graduates achievements. The ceremony, as usual was very well structured thus making it a success. The organisers of the Graduation Ceremony are to be commended, and, of course this day would not have been possible without the hard work of Griffith College Cork and their students.

Being a graduate of Griffith College Cork myself, it is a great honour for me to be invited to participate in this very special occasion. I would like to take this opportunity to thank Professor Diarmuid Hegarty, President, Ms Sian Langley Programme Head/Lead Lecturer, Faculty of Law and all the Griffith College staff and students for the warm welcome given to Irish Institute of Legal Executives.

Deirdre Butler MIILEx
Director of Regional Council/Education
IILEx, Cork

Picture by kind permission of Lafayette Photography

Seated :- *Professor Diarmuid Hegarty, President of Griffith College- (seated 4th from left) accompanied by Academic staff both from Griffith Colleges Cork and Dublin as well as Directors' of the Irish Institute of Legal Executives*

Standing: - *Graduates who were presented with their Diploma in Legal Studies & Practice by Professor Diarmuid Hegarty.*

Caught on Camera!

Pictures at the Cork Conferring Ceremony

COMMISSIONER FOR OATHS APPOINTMENTS IN 2015/16

CONGRATULATIONS TO

Dorothy Van Belle,	Member of IILEX	Karen Hanna,	Member of IILEX
Yvonne Kennedy,	Member of IILEX	Pamela O'Loughlin	Member of IILEX

On being appointed as Commissioner for Oaths, by the Supreme Court in 2015/16.

HOW TO BECOME A COMMISSIONER FOR OATHS

This is open to **Legal Executives** by Application to the Supreme Court.

- Apply by Petition to the Chief Justice.
- You must verify the Petition by an Affidavit, accompanied by Certificate of Fitness signed by six members of the legal profession and by six local businesses.
- You must have Documents stamped and filed in the Office of the Supreme Court.
- You must also obtain a Barrister to move your Application on the date of Hearing.

This process takes persistence and determination but it is so worthwhile. It is a wonderful honour to have and of value, in terms of respect and status is enormous. It is very useful in connecting with local businesses and further your legal career.

Information can be obtained from the Supreme Court Office at 01-8886568 or email supremecourt@courts.ie or if you require help you can also contact the Institute at info@iilex.ie

IF ANY MEMBER HAS BECOME A COMMISSIONER FOR OATHS IN THE LAST YEAR PLEASE LET US KNOW SO THAT WE CAN UPDATE OUR RECORDS

Deborah Walsh MIILEX
(Secretary/Director of IILEX) COMMISSIONER FOR OATHS

CONFESSION EVIDENCE AND THE RIGHT OF REASONABLE ACCESS TO A SOLICITOR IN GARDA CUSTODY

The important judgment in the separate cases of *People (Director of Public Prosecutions) -v- Gormley and People (Director of Public Prosecutions) –v- White,* delivered by the Supreme Court in March of 2014, has, in some circumstances, fundamentally changed the law in relation to the right of access to a lawyer during Garda custody. In the words of Clarke J., the core issue which arose was whether a person arrested on foot of serious criminal charges is entitled to the benefit of legal advice prior to the commencement of any interrogation and prior to the taking of any samples for the purposes of forensic examination. To foreshadow the conclusion, the Court answered yes to the first question, and no to the second.

Mr Gormley had been convicted of attempted rape, contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act 1990, and was sentenced to 6 years' imprisonment. Mr White was convicted of murder and was sentenced to mandatory life imprisonment. Each separately appealed to the Court of Criminal Appeal.

Mr Gormley argued that the trial judge erred in admitting inculpatory statements made by him in custody on two separate grounds: he argued, first, that there had been an unlawful entry into his dwelling and consequently his arrest was in breach of his constitutional rights. As a result, it was said that any evidence obtained thereafter was inadmissible; second, he contended that the relevant interviews were conducted in breach of his constitutional right of access to a lawyer. In respect of the first issue, the Court of Criminal Appeal found that Mr. Gormley had by his words cured any unlawful presence of the Gardaí, and thus his arrest was deemed lawful. On the other contention, the Court was satisfied that it was open to the trial judge to conclude that *bona fide* and reasonable attempts had been made to contact a solicitor nominated by the appellant, and as such the statements were admissible.

Mr White pursued a number of grounds of appeal but, most relevant for our purposes, he argued that the trial judge erred in ruling that the taking of samples from him, pursuant to the Criminal Justice (Forensic Evidence) Act 1990, was lawful, because of what was said to be a breach of his right of reasonable access to his solicitor. The Court of Criminal Appeal rejected this contention on number of grounds, including: that a solicitor was indicated to be on his way immediately, there was no articulation of reservations regarding giving the samples until the trial, and he had consented to the taking of the samples.

The Court of Criminal Appeal granted leave pursuant to s. 29(2) of the Courts of Justice Act 1924 to appeal both the decisions to the Supreme Court.

At this point, it is apt to note the state of the law as it then stood both in terms of a right of access to a solicitor prior to interrogation and prior to the taking of forensic samples.

Reasonable Access Prior to Interrogation Pre Gormley & White

In terms of the right of access prior to interrogation in *The People (Director of Public Prosecutions) v Healy* [1990] 2 I.R. 73, the courts determined that there was a constitutional right of access to a solicitor while in Garda custody, and that this entailed a right of reasonable access. Reasonableness was to be assessed

with reference to the totality of the circumstances including the availability of the advisor sought, the time of the request and other relevant matters. The right required that one be told immediately of the arrival of the solicitor, and a right of immediate access. The issue of whether there was a constitutional obligation to inform the detained person of their right of access was a moot point, although there is a legal obligation pursuant to the Criminal Justice Act 1984. However, a breach of the right of reasonable access would render detention unlawful; as such, any incriminating statements made during a period of unlawful detention would be inadmissible at trial as it had arisen from a deliberate and conscious breach of the person's constitutional rights, under the exclusionary rule as it then stood.

In terms of the margins of reasonableness, in the important decision of *The People (Director of Public Prosecutions) v Buck* [2002] 2 I.R. 268, the Court determined that where bona fide efforts had been made to procure a solicitor, but one had not arrived after a reasonable amount of time, then it was permissible for interrogation to commence prior to their arrival. If any inculpatory statements were made during a period where an accused had not had access to a solicitor then such statements could be admitted at the discretion of the trial judge, taking into consideration factors such as fairness to the accused and public policy considerations. In essence, this permitted questioning prior to the arrival of a solicitor where good faith efforts had been made to obtain one. In subsequent cases, the courts have both admitted statements made and refused to do so. Where it was refused, it was generally arising from some form of subterfuge on the part of the Gardaí where they had engaged in colourful tactics to frustrate the timely arrival of a solicitor.

Finally, in terms of the law as it then stood, in *Lavery v Member in Charge, Carrickmacross Garda Station* [1999] 2 I.R. 390, the Court has ruled that the right of reasonable access does not extend to having a solicitor present during interrogation. Also, in *The People (Director of Public Prosecutions) v O'Brien* [2005] 2 I.R. 206, the Court determined that once a solicitor arrived the constitutional rights of the applicant are restored and the applicant is properly arrested and detained, as such a breach of this right renders detention illegal, but this illegality can be cured by the later arrival of a solicitor so that statements made prior to the arrival may be inadmissible, whereas those made after would be admissible all other things being equal.

Reasonable Access Prior to Taking Samples Pre Gormley & White

The taking of samples in the absence of advice from a requested solicitor was considered by the courts in *The People (Director of Public Prosecutions) v Creed* [2009] IECCA 90. In that case, a number of failed attempts had been made to contact a solicitor. The following day a hair sample was taken, however consent was not required for that action, and no request was made for a solicitor at that time. The Court distinguished between the request for a solicitor the night before, which was adjudged to be for the purposes of interrogation, and the taking of the sample where no request was made. In terms of the first unfulfilled request, and whether that rendered the detention unlawful, on the facts the Court determined that the breach was not deliberate and conscious, in the meaning of the exclusionary rule as it then stood, and as such did not render the detention unlawful. Accordingly, there was discretion as to whether or not to admit the evidence flowing from the hair sample. In essence, this case considered the issue from the perspective of the legality of detention following an earlier request for a solicitor, as opposed to the specific context of the requirement for access to a solicitor prior to the taking of sample.

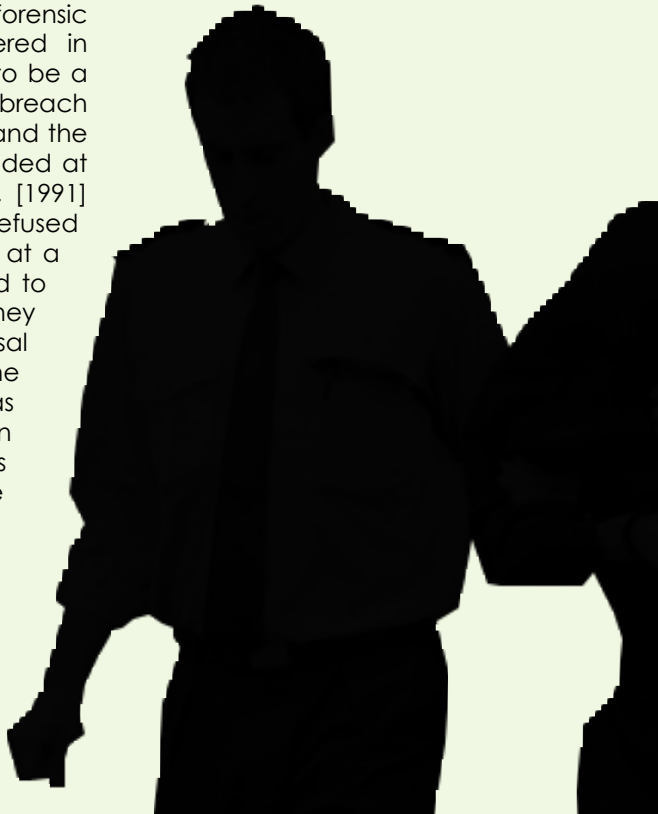
In another circumstance, the right of access prior to obtaining forensic evidence was also considered in the context of there having to be a causative link between the breach of one's constitutional rights and the evidence sought to be excluded at trial. In *Walsh v O'Buachalla*, [1991] IR 56, the accused was refused permission to see his solicitor at a time when the doctor arrived to take a blood sample. Blayney J held even if this refusal amounted to a breach, the sample was not obtained as a result of this refusal, and in any event the detainee was obliged by law to provide the sample so no advice from a solicitor could have changed that position.

The Court in this case, having considered the domestic position, observed, at 5.7, that "to date the jurisprudence has not gone so far, however, as to require that advice from a requested solicitor actually be made available to the relevant suspect prior to questioning or the taking of samples. However, that is the question which falls squarely for decision in these cases."

The Position of the European Court of Human Rights & Other Jurisdictions

The Court then went on to consider the jurisprudence of the ECtHR, and the Constitutional Courts of other common law jurisdictions.

In terms of access to lawyer prior to being questioned while in custody, the Court observed that the ECtHR had determined that a person in custody is in a position of vulnerability, and that the right not to incriminate oneself pursuant to Article 6(3) of the Convention extends to pre-trial proceedings, which are of such relevance as to how evidence is gathered and presented at trial. In summary, cases such as *Salduz v Turkey, Amutgan v Turkey* and *Panovitis v Cyprus* had established that access to a solicitor prior to interrogation is an imperative in terms of protecting a person's right against self-incrimination, and also contributed towards protecting against coercion and abuse, preventing miscarriages of justice and maintaining an equality of arms. The rights of an accused were seen to be irretrievably prejudiced where incriminating admissions were made in the absence of legal advice, and moreover they found that authorities must not adopt a



passive stance but instead must ensure that a person understands their right to representation. A similar position was evidenced in the reasoning of the UK Supreme Court in *Cadder v Her Majesty's Advocate*. Notably the ECtHR has kept its mind open to exceptions, in furtherance of good cause, which, where availed of, would fall to be assessed in terms of whether they imperilled a fair hearing.

The strong protections in terms of access prior to interrogation, evidenced by the jurisprudence of the ECtHR, flow from the right of a person not to incriminate themselves, and consequently the same level of protection is not afforded prior to the taking of forensic samples. The protections associated with the privilege against self-incrimination are associated with the will of an accused being overborne in the absence of legal advice. However, in cases such as *Saunders v United Kingdom* the courts distinguishes forensic samples, e.g. blood, urine, saliva, hair, which may be compulsorily required, and may incriminate. The will of the individual being overborne will not affect the outcome of the forensic test, and as such there is not a requirement to access a lawyer prior to the taking of such samples.

In considering the position of other jurisdictions the Court noted that in the USA, since 1966, the Supreme Court has recognised, as a corollary of the privilege against self-incrimination, that there exists a right to consult a lawyer pre-interrogation, and to have one present during the interrogation. This is a right which must be explained, and expressly waived for incriminating statements made in the absence of a lawyer to be admissible at trial. In Canada, the Supreme Court recently determined that their Charter of Rights and Freedoms enshrines a right to be informed of the right to access a lawyer, and, where exercised, a right not to have interrogation commenced until a lawyer is consulted. Their jurisprudence does admit that these rights are not absolute, and are in particular subject to the accused taking steps to exercise their rights. Furthermore, the right does not extend to the right to have a lawyer present during interrogation, save where the police consent to this.

The situation in Australia was found not to be as clear, although there is a requirement to inform of a right to communicate with a lawyer, though not necessarily for one to attend the station, although where a lawyer indicates they will attend generally police will hold off on the interrogation commencing. In New Zealand, the matter is assessed through the prism of their Bill of Rights Act 1990. The rights thereunder provide that a person shall have the right to be informed of their right to consult a lawyer, and where exercised to consult one without delay. Where a person exercises such a right, the police are barred from taking any positive or deliberate steps to elicit evidence prior to a consultation, however, the courts have been called upon to discern whether information was elicited or volunteered prior to the arrival of a lawyer. Importantly, akin to the Canadian position, the courts have held that there is a duty on a person to exercise this right lest they be regarded as having waived it. Further, the courts have interpreted the right to a lawyer without delay as not requiring the police to delay commencement of interrogation unreasonably where a lawyer has failed to attend in a timely fashion.

Having considered this pattern of jurisprudence, and noting with caution the utility of such case law, the Court identified a pattern, at the very least, of not permitting interrogation to commence where a lawyer has been requested, but has not yet attended.

The New Irish Position

In commencing his analysis of the substance of the case, Clarke J observed that historically any breach of the right of access to a solicitor was understood as rendering the detention of a person unlawful, and, as a result rendering, *inter alia,* incriminating statements inadmissible. However, in this case, the matter was progressed using fairness of the trial process principles flowing from the requirement for a trial in due course of law, pursuant to Article 38.1 of the Constitution. This is important, particularly in terms of the taking of samples, as while Article 38.1 may not be exercised in a particular set of circumstances, there may remain concerns regarding the lawfulness of detention which in itself would be a separate ground to challenge the admissibility of evidence.

An acceptance of the position advanced by the appellants would require a reinterpretation of the scope of the guarantees protected by Article 38.1, and Clarke J prefaced his conclusions by recognising that the Constitution was a living document, which fell to be interpreted in accordance with prevailing norms. Indeed this case is most contemporary example of an updated construction being given to the Constitution with reference to prevailing norms as articulated by human rights courts and the courts of common law jurisdictions.

Accepting that the Constitution was a living document, Clarke J recognised, reflecting on the jurisprudence of the ECtHR, that the arrest of a person represents an important juncture in the criminal process where matters, although investigative, are necessarily preparatory in terms of a future trial, and as such the basic fairness principles identified as inherent to the protections flowing from Article 38.1 extend to pre-trial processes from the time of arrest.

In terms the of the entitlement to legal advice prior to the commencement of interrogation, it was concluded that recognising a right to consult a solicitor prior to questioning, but at the same time saying that questioning can commence prior to their arrival, dilutes the protections afforded to a person. The Court, in a major development, concluded that the protections flowing from Article 38.1 carry with them, at least in general terms and potentially subject to exceptions, an entitlement not to be questioned after a request for a solicitor has been made and prior to their arrival.

Therefore, the position as it stands now is that a person may not be questioned while in Garda custody, where they have requested a solicitor, until such time as a solicitor

has arrived. This right is in the words of the court; "*an important entitlement of high legal value.*" As such while the Court is open to the possibility of exceptions, they would regard this as arising only in wholly exceptional cases, and only where justified by a pressing and compelling need to protect other major constitutional rights, such as the right to life. In addition, the Court was anxious to give practical effect to this right, and have specified that any argument that a person had not invoked their right, or had waived it, will require careful scrutiny, and in particular the Court was at pains to point out that neither the behaviour of Gardaí nor the conditions of detention should be such as to pressure a person into surrendering this right.

This is an important and worthwhile principle, which has much to commend in terms of protecting the rights of persons arrested and interrogated in the investigative stage of the criminal process. It is an important step in the right direction, and is a welcome advance in times when one would be forgiven for seeing the balance tip too far in favour of investigative powers at the expense of fair procedures. It is also important to recognise, in the terms of Hardiman J in his judgment, that the practice of dawn raids and arrests, where persons are handcuffed, searched, taken to a Garda station, and placed in cell, are all circumstances which would deeply affect the most hardened among us, and as a result the protections afforded to any person in this situation should be such as to assist them to have the advice of an expert who can properly conceptualise the situation, and give advice so as a person can assert their rights and defend their interests.

The issue of what exceptions may arise in the future is vexed. It is welcome that the value of this legal right is pitched at a high level thus rendering exceptions conceivable only in exceptional cases. The judgement itself identifies some areas where exceptions may be considered, most particularly where there is considerable delay, and where there is a competing constitutional right in play, i.e. the life of a potential victim. Other matters also remain unresolved arising from the judgment, such as the standard of care which must be taken to ensure a person understands their rights, and the level of assistance which must be provided by the State to those who are impoverished. Finally, there is no resolution as to whether a person is entitled to have a solicitor present during the interrogation; however, the Court did observe that the USA and ECtHR jurisprudence does establish such a right. Of interest, this final question is due to be addressed by the Supreme Court very shortly.

On whether there is a right to consult a solicitor prior to the taking of a forensic sample, the Court followed the jurisprudence of the ECtHR in distinguishing between the protections which are necessary to vindicate the privilege against self-incrimination, i.e. legal advice to ensure one's will is not overborne and one is not pressured into saying something, and the objective quality of forensic material which does not require such protections as the status of one's will or wish to remain silent will not affect the outcome of such an objective test.

It is important to see this case, on this point, through the prism of the fair trial procedures associated with Article 38.1 of the Constitution, which through their extension granted the rights referred to above. The Court expressly stated, on the grounds cited above, that fair trial considerations in terms of the privilege against self-incrimination do not arise in the context of Article 38.1 and the taking of forensic samples. However, the Court, in addition, does continue to recognise that there exists a constitutionally protected right to access to a solicitor while in custody, and the Court left to another day how the failure to vindicate that right might affect the lawfulness of a person's detention, such that forensic samples taken during unlawful detention might be sought to be excluded at trial. The resolution to this quandary will depend very much on the facts of an individual case, and the newly formulated exclusionary rule in relation to unconstitutionally obtained evidence post the JC case. In essence then, there is no specific right of access to a solicitor prior to forensic samples being taken, in circumstances where there is an obligation to provide the sample under law.

Concluding Observations

Both these cases offer welcome clarity in relation to the scope of the right of reasonable access to a solicitor while in Garda custody. The extension of the rights associated with Article 38.1 of the Constitution to the pre-trial investigative stage, such that a person arrested is entitled to consult with a solicitor prior to interrogation, that this is a constitutional protection of high legal value, and that any as yet unidentified exceptions may only arise in exceptional cases is a necessary and timely development which assists those who are in a vulnerable position and provides added vindication to the sometimes under-protected privilege against self-incrimination. The refusal to extend this right to circumstances of having to provide a forensic sample, where one is under a legal duty to do so, and where there is no question of one saying something which may incriminate oneself seems logical and there is little to fault in this regard. Importantly though, there remains the question of the entitlement to legal advice generally while in custody and a failure to vindicate this right can impact on the lawfulness of one's detention. In those types of circumstances, we can expect to see further cases seeking the exclusion of forensic evidence procured while not lawfully detained.

The final point must reflect the judgment of Hardiman J in this case, principally because he characteristically had an eye on State practices which while possibly disreputable, are most certainly so in some cases, and in particular because we have recently lost this great jurist from the halls of justice. He recognised the questionability of common place, no notice, dawn and unusual hour arrests which place a detained person at a distinct disadvantage in obtaining expert legal advice, and one would have to agree that these actions, while at times necessary, should be the exception rather than the norm. Reflecting on these practices, and the operations of the legal system in Ireland, he draws our attention to a requirement that the system be ordered so as to vindicate the right of access to a solicitor prior to interrogation, and that this should not involve lengthy periods of detention "out of hours" so to speak, while awaiting the arrival of a solicitor. In my humble opinion, only two solutions are possible – a change in Garda practices or a State run legal assistance scheme for those in custody.

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