

**THE CONSTITUTION, THE EUROPEAN  
CONVENTION ON HUMAN RIGHTS ACT 2003  
AND THE DISTRICT COURT – A PERSONAL  
VIEW FROM A JUDICIAL PERSPECTIVE.**

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INTRODUCTION

When originally contacted, by the Law Society in respect to delivering a paper at a Law Society CPD (Continuing Professional Development) course on today's topic, I expressed my reservations for a number of reasons. Firstly, in deference to my judicial colleagues and myself, there is a perception that as a matter of the day-to-day life in the District Court, that it's better not to involve the Constitution and simply to proceed on the evidence and facts alone, and leave any questions of law for higher courts to resolve.

Secondly, there is a perception, in so far as the European Convention is concerned, that it has little or no relevance to the District Court at all. Indeed, it has been stated to me some time ago that the only difference the Convention would make was that in passing a sentence now, the District Judge would be obliged to give reasons for same!

In my opinion, these perceptions are unfortunate as I feel that, if properly approached, the District Court could prove to be a very fertile venue for raising both constitutional and Convention matters.

In this paper, I intend to look briefly at the position of the District Court *vis-à-vis* the Constitution. I then intend to look briefly at how the European Convention on Human Rights Act 2003<sup>1</sup> affects the District Court. I also intend to look at some of the decisions of the Supreme and High Courts which have been

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<sup>1</sup> Operative 31 December 2003.

handed down in recent times. I will proffer some personal views as to what the future might hold *vis-à-vis* the courts. I have also included a bibliography which I hope will be considered both useful and informative.<sup>2</sup>

### I. THE CONSTITUTION

Article 38.2 of the Constitution provides that: “Minor offences may be tried by courts of summary jurisdiction.” The Article goes on to provide that, with this exception and with the exception of offences tried by special courts and military

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<sup>2</sup> Byrne & McCutcheon, *The Irish Legal System* (4<sup>th</sup> ed., Butterworths, 2001), Clayton and Tomlinson, *The Law of Human Rights – and Second Annual Updating Supplement* (Oxford University Press, 2003), Doolan, *Principles of Irish Law* (5<sup>th</sup> ed., Gill & McMillan: 1999), Gordon, Ward and Eicke (eds.), *The Strasbourg Case Law, Leading Cases from the European Human Rights Reports* (London: Sweet & Maxwell, 2001), Greer, *The European Convention on Human Rights. Achievements, Problems and Prospects* (Cambridge University Press, 2006), Harris, O’Boyle and Warwick, *Law of the European Convention on Human Rights* (London: Butterworths, 1995), Jacobs & White: *The European Convention on Human Rights* (2<sup>nd</sup> ed., Oxford: Clarendon Press, 1995), Janis, Kay and Bradley, *European Human Rights Law: Text & Materials* (2<sup>nd</sup> ed., Oxford: University Press, 2000), Hogan and Whyte, JM Kelly’s *The Irish Constitution* (4<sup>th</sup> ed., Butterworths, 2003), Kilkelly (ed.), *ECHR and Irish Law* (Jordan Publishing Ltd., 2004), Kilkelly, *The Child and the European Convention on Human Rights*, (Ashgate Publishing, 1999), Leach, *Taking a Case to the European Court of Human Rights* (London: Blackstone Press Ltd., 2001), Moriarty and Mooney Cotter (eds.), *Human Rights Law* (Law Society of Ireland manual) (Oxford University Press, 2004), Mowbray, *Cases and Materials on the European Convention on Human Rights* (London: Butterworths, 2001), Nash and Furse, *Essential Human Rights Cases* (2<sup>nd</sup> ed., Bristol: Jordan Publishing Ltd., 2003), O’Connell, Cummiskey, Mornaghan, O’Connell, *ECHR Act 2003, A Preliminary Assessment of Impact* (Dublin: Dublin Bar Association and Law Society of Ireland, 2006), O’Malley, *Sources of Law* (2<sup>nd</sup> ed., Roundhall Sweet & Maxwell, 2001), Plowden and Kerrigan, *Advocacy and Human Rights: Using the Convention in Courts and Tribunals* (London: Cavendish Publishing Ltd., 2002), Reid, *A Practitioner’s Guide to the European Convention on Human Rights* (2<sup>nd</sup> ed., London: Thomson-Sweet & Maxwell, 2004), Shannon, *Child Law* (Thomson Roundhall, 2005), Starmer, *Blackstone’s Human Rights Digest* (London: Blackstone Press Ltd., 2001), Walsh, *Criminal Procedure* (Dublin: Thomson Round Hall, 2002).

tribunals, no person may be tried on any criminal offence without a jury. In *Conroy v. Attorney General*,<sup>3</sup> Walsh J. stated:

The Constitution does not give an accused person the right to a trial by jury for minor offences or a right to trial in a court of summary jurisdiction for a minor offence. The provisions of section 2 in relation to minor offences are permissive. 34The Oireachtas may determine that minor offences may be tried with a jury or without a jury.<sup>4</sup>

In accordance with s. 4(5) of the Interpretation Act 1923, the expression “court of summary jurisdiction” means the District Court.

The modern District Court is governed, in the main, by the provisions of the Courts (Establishment and Constitution) Act 1961,<sup>5</sup> which provides that the District Court is a court of local and limited jurisdiction. As a creation of statute, the general rule is that the jurisdiction of the District Court is restricted to whatever has been expressly conferred by legislation.

Currently the District Court has a civil, criminal, family, commercial, environmental, planning and licensing jurisdiction. Potentially, the European Convention has a relevance to all of these. The District Court also has a jurisdiction to deal with children, now defined as any person under the age of 18 years under the provisions of the Children Act 2001,<sup>6</sup> which also specifically provides for the establishment of the Children Court.<sup>7</sup>

In so far as the criminal jurisdiction of the District Court is concerned, some common examples of the types of offences that are dealt with are as follows:<sup>8</sup>

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<sup>3</sup> [1965] I.R. 411 (S.C.).

<sup>4</sup> [1965] I.R. 411, at 434 (S.C.).

<sup>5</sup> See also Courts (Supplemental Provisions) Act 1961, Courts and Court Officers Act 1995, Courts and Court Officers Act 2002.

<sup>6</sup> It may be noted that only certain sections of this Act have been implemented to date.

<sup>7</sup> Part. 7, Children Act 2001; S.I. 151 of 2002.

<sup>8</sup> For a more detailed analysis of the jurisdiction of the District Court, see O'Donnell, “Summary v. Indictable: Choices in the Disposal of Criminal Cases” (2006) 6(1) *Judicial Studies Institute Journal* 15.

## (i) Offences triable summarily only:

- s. 47 Road Traffic Act 1961, as amended – speeding
- s. 49 Road Traffic Act 1961, as amended – drink driving
- s. 2 Non-Fatal Offences Against the Person Act 1997 – assault
- ss. 4, 6, 8 Criminal Justice (Public Order) Act 1994 – intoxication, threatening and abusive behaviour and failure to comply with or obstruction of a Garda
- s. 3 Misuse of Drugs Act 1997 – simple possession

## (ii) Indictable offences, dealt with summarily on certain conditions being satisfied, namely:

- (a) The District Judge is satisfied that the facts proved or alleged constitute a minor offence;
- (b) The DPP consents to summary disposal;
- (c) The accused on being informed of his right to a trial by a judge and jury consents to summary disposal e.g.
  - s. 4 Criminal Justice (Theft and Fraud Offences) Act 2001 – theft
  - s. 17 Criminal Justice (Theft and Fraud Offences) Act 2001 – handling

## (iii) Offences triable summarily or on indictment at the behest of the DPP, subject to the right of a District Judge to decline jurisdiction, e.g.

- s. 3 Non Fatal offences against the Person Act 1997 – assault causing harm.
- s. 15 Misuse of Drugs Act 1997 – sale and supply
- s. 9 Firearms and Offensive Weapons Act 1990 – possession of weapons

These are usually referred to as hybrid offences.

One of the characteristics of trial in the District Court is the speed and informality compared to trial on indictment. Having said this, there is an overriding obligation on every District Judge

to ensure that the constitutional rights of an accused are at all times observed and protected.<sup>9</sup>

Another feature of the District Court (and the Circuit Court), is that the constitutional validity of any statute cannot be challenged.<sup>10</sup> Any such challenge is a matter for the High Court and the Supreme Court. This factor is of major significance when it comes to considering the operation of the European Convention on Human Rights Act 2003.

## II. THE EUROPEAN CONVENTION ON HUMAN RIGHTS ACT 2003

It is not intended in this paper to give a historical overview of the origins of the European Convention on Human Rights Act 2003 (hereinafter referred to as “the ECHR Act 2003”) or indeed to go through the relevant sections. There is no doubt that the debate preceding incorporation and the method of incorporation ultimately used, was a cross between apoplexy, legal gymnastics and no small amount of confusion. Various methods were suggested and thoroughly debated. There were three possibilities proffered:

- (a) Constitutional incorporation, by means of a constitutional referendum.
- (b) Legislative incorporation, *i.e.* higher in rank than ordinary legislation yet at a sub-constitutional level.
- (c) Indirect/interpretive legislation, *i.e.* legislation that would simply oblige domestic courts to take account of the Convention guarantees.<sup>11</sup>

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<sup>9</sup> See *People (D.P.P.) v. Lynch* [1982] I.R. 64 (S.C.); *Coughlan v. Judge Patwell* [1993] 1 I.R. 31 (H.C.); *Nevin v. Judge Crowley* [2001] 1 I.R. 113 (S.C.). See also Walsh, *Criminal Procedure* (Thomson Round Hall, 2002) p. 673.

<sup>10</sup> See *People (D.P.P.) v. Dougan* [1996] 1 I.R. 544 (H.C.); *O’Sullivan v. Judge Hartnett* [1983] I.L.R.M. 79 (S.C.).

<sup>11</sup> See Egan, “The European Convention on Human Rights Act 2003: A Missed Opportunity for Domestic Human Rights Litigation”, (2003) 25 *Dublin University Law Journal* 230.

The third option was the method adopted by the legislature and led to the enactment of the European Convention Act 2003. Effectively, under the legislation enacted, a domestic court cannot strike down a piece of domestic legislation as being invalid by reference to Convention provisions. The best that can be done is for the High Court (and the Supreme Court on appeal) to make a declaration of incompatibility in certain limited circumstances.<sup>12</sup>

The provisions of the ECHR Act 2003 aim to give further effect to the Convention in Irish law. In particular, s. 2(1) provides:

In interpreting and applying any statutory provision or rule of law, a court shall, in so far as possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.

In short, this section imposes a duty on *all* courts to interpret and apply statute law and rules of law in line with the Convention where possible.

Furthermore, s. 4 provides that "judicial notice" shall be taken of the Convention provisions and of any declaration, decision, advisory opinion, judgment of the European Court of Human Rights, the European Commission of Human Rights and the Committee of Ministers.

Effectively this means that the entire jurisprudence of the European Commission and the European Court of Human Rights can be raised in all domestic courts. However, there is a very significant rider contained in the preamble of the Act. While the Convention is now deemed to be part of our domestic law, it all remains "subject to the Constitution". Another matter of importance is that for some reason "the courts" have been excluded from the definition of "organ of State".<sup>13</sup>

What in effect does all this mean? Does it mean that while a domestic court is obliged to listen to any Convention points that

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<sup>12</sup> s. 5.

<sup>13</sup> s. 1.

are raised, to consider the jurisprudence submitted, to act in a manner which is compatible with the State's obligations under the Convention, at the end of it all the Court is not bound by it!

From a District Court perspective, consider the following practical example. In December 2000 two very important judgments were handed down by the European Court of Human Rights against Ireland, namely the *Heaney and McGuinness* and *Quinn* decisions.<sup>14</sup>

The *Quinn* Case is the more significant in that it had its origins in the District Court. In short, a man, namely Paul Quinn, was arrested in the wake of the shooting dead of Detective Garda Jerry McCabe and the wounding of his colleague Detective Garda Ben O'Sullivan, following a botched armed robbery carried out by the IRA in Adare, Co. Limerick in June 1996.

Following his arrest, Mr Quinn was brought before a sitting of Limerick District Court on a number of charges, in particular a charge under s. 52 of the Offences Against the State Act 1939, for failure to account for his movements. He was tried and convicted in the District Court and sentenced to 6 months imprisonment. The sentence was appealed to the Circuit Court where it was affirmed. However, before the Circuit Court appeal was dealt with, the defendant had lodged a complaint with the European Court of Human Rights complaining that his Article 6 right to silence and presumption of innocence had been violated.

It should also be stated that s. 52 of the Act of 1939 had already been challenged in the High Court<sup>15</sup> and Supreme Court<sup>16</sup> and found to be constitutionally sound by both Courts.

In the European Court of Human Rights, the State vigorously contested the case, stating that any impingement of the applicant's right to silence imposed by s. 52 was proportionate and justified when balanced against public order and State security concerns.

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<sup>14</sup> *Heaney and McGuinness v. Ireland* (2001) 33 E.H.R.R. 264; *Quinn v. Ireland* (2001) 33 E.H.R.R. 264.

<sup>15</sup> *Heaney and McGuinness v. Ireland and the A.G.* [1994] 3 I.R. 593 (H.C.).

<sup>16</sup> *Heaney and McGuinness v. Ireland and the A.G.* [1996] 1 IR 580 (S.C.). Interestingly, reference was made to the jurisprudence of the ECHR in the High Court, but not in the Supreme Court.

The European Court of Human Rights, however, rejected this argument, holding that the security and public order concerns of the Government cannot justify a provision which extinguishes the applicant's right to silence and against self incrimination guaranteed under Article 6(1) of the Convention. The Court was also satisfied that there was a violation of the presumption of innocence guaranteed by Article 6(2).<sup>17</sup>

Despite these judgments, no steps have been taken to change our existing legislation and s. 52 still remains on the statute books.<sup>18</sup> The manner by which the State has dealt with this is simply not to prosecute persons under this particular section any more.

What would happen however if a similar prosecution were brought before a District Court today? First, as stated, s. 52 is still on the statute books. Secondly, in accordance with the judgment of the Supreme Court s. 52 is still deemed to be constitutionally sound. Thirdly, while the court is obliged to take judicial notice of the European Court of Human Rights judgments, and indeed, to try to interpret our laws in a manner compatible with the State's obligation, the ECHR Act still carries this rider "subject to the Constitution". What about the State's obligation to abide by the judgments of the European Court of Human Rights under Article 46 of the Convention?

It is accepted that this example may be somewhat extreme, but it does illustrate potential conundrums that could arise under the ECHR Act 2003 in the District Court.

A further example is provided by a decision of the European Court of Human Rights entitled *Kyprianou v. Cyprus*,<sup>19</sup> which was a case involving a criminal defence lawyer, of over forty years experience, defending a man on a murder charge before a three-judge court. During the course of his cross-examination of a

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<sup>17</sup> The decision in the *Heaney and McGuinness* case was similar.

<sup>18</sup> Contrast this with *Norris v. Ireland* [1991] 13 E.H.R.R. 186, where, as a result of the European Court finding that Ireland was in violation of the applicants Article 8 (respect for private life), the Oireachtas passed legislation decriminalising homosexual activity between consenting adults, under the provision of the Criminal Law (Sexual Offences) Act 1995.

<sup>19</sup> *Kyprianou v. Cyprus* [2005] E.C.H.R. 873. Judgment of Grand Chamber, 15 December 2005.



police witness, he was interrupted by one of the judges and took umbrage to this. He asked to withdraw from the case but this was declined. He then refused to continue his cross-examination and further stated that he noticed that during the course of his cross examination that the judges appeared to be talking amongst each other and passing notes to each other. After a series of heated exchanges, the Court advised him that he was being held in contempt of court and that he could either apologise for his behaviour or face a penalty for contempt of court. He chose not to apologise and was promptly sentenced to 5 days imprisonment, a portion of which he served immediately.

He lodged an application with the European Court of Human Rights, alleging that, amongst other things, that his right to a fair trial in accordance with Article 6 had been violated as he did not receive a fair trial before an independent and impartial tribunal.

The judgment in this is extremely interesting not only because it has a resonance in every domestic court, but particularly in the District Court given the volume of people that pass through it. Another feature of this case was that Member States were invited to make submissions to the Grand Chamber, and both Ireland and the United Kingdom made very robust submissions in defence of the contempt procedure.

The Court held that in the circumstances of this case, there was a violation of Article 6 and awarded the applicant €15,000 in damages together with costs.

What would happen if a similar situation arose in the District Court tomorrow? How should it be handled? Should the Judge consider disqualifying himself from hearing the contempt aspect? What happens to the defendant in the proceedings, if his trial is stopped so that the issue of the contempt can be dealt with? If another Judge has to hear the contempt case, would the original Judge be obliged to become a witness? Or could it be said that the District Court, not being an organ of the State, is not bound by the judgment of the European Court of Human Rights?

## III. DEFENCE OF THE REALM

Having attended a number of seminars on the incorporation of the European Convention, it is clear that a common belief exists that the judiciary would be reluctant to engage in any discussion in respect of it. Indeed, at a recent seminar it was suggested that it might take a whole new generation of judges to be in place before the Convention's principles would be fully absorbed into our legal system. This, in my view, is very disingenuous. Indeed, it is fair to say that there is now a constant flow of decisions emanating from the High Court and Supreme Court which have engaged with both constitutional issues and Convention issues.

Even the Law Society itself has very successfully used the European Convention to augment its argument with the Competition Authority.<sup>20</sup>

Two cases are of particular interest to the District Court. The first, *Dublin City Council v. Fennell*,<sup>21</sup> was a case involving the eviction of a local authority tenant pursuant to s. 62 of the Housing Act 1966. It was argued on behalf of Mrs Fennell that the summary nature of the eviction procedure was incompatible with the guarantee of family life under Article 8 ECHR. This particular section, s. 62, has been the source of considerable controversy, particularly in light of the fact that, if the Housing Authority has their proofs in order, a Judge of the District Court is bound by law to make an order for possession.

In the Supreme Court, this case failed to win the Convention point as the original order for possession was made prior to the coming into force of the ECHR Act 2003 and did not have retrospective effect.

The other case which is currently on appeal to the Supreme Court is the case of *Carmody v. Minister for Justice Equality and Law Reform*.<sup>22</sup> In this case the accused was charged with a number of offences under the Disease of Animal Acts before the District Court. He applied for and was granted legal aid under the provisions of the Criminal Justice (Legal Aid) Act 1962 and was

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<sup>20</sup> *Law Society of Ireland v. The Competition Authority*, High Court, unreported, O'Neill J, 21 December 2005.

<sup>21</sup> [2005] 2 I.L.R.M. 228 (S.C.).

<sup>22</sup> [2005] 2 I.L.R.M. 1 (H.C.).

assigned a solicitor from the legal aid panel. The Minister for Agriculture, however, was to be represented by counsel. The accused argued that because of the complexity of the case, he should also be entitled to counsel and that the legal aid arrangements were deficient in that he was being denied effective representation as required under the provision of Article 6 of the Convention. Laffoy J. was satisfied that the 1962 Act was not incompatible with the Convention and so he jailed on this point. Needless to say, if the Supreme Court were to rule in Mr Carmody's favour, this could potentially have an enormous effect on the legal aid scheme as we know it.

Again, it is not often that one sees a decision of the Master of the High Court published. However in a recent case entitled *Crowley v. Roche Products (Ireland) Ltd. & Others*,<sup>23</sup> the failure of a plaintiff to file a statement of claim within a period of three years was deemed to be a *prima facie* breach of the defendant's right to a hearing within a reasonable time, under Article 6.

There are now in existence a number of decisions which clearly indicate that the European Convention is beginning to have a significant impact on the jurisprudence emanating from the superior courts. While it is early days yet, in so far as the ECHR 2003 Act is concerned, it is appropriate to point out that because of the manner of incorporation, the main method being used to raise the Convention is by way of judicial review.<sup>24</sup> As a result of this there seems to be very little appetite to raise Convention points in the lower courts, and indeed if they are raised, they are not raised with any great conviction.

There is also the belief that the Constitution effectively covers all the rights set out in the Convention, indeed in some cases better than the Convention does, and that in these circumstances it is pointless raising Convention points in the

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<sup>23</sup> High Court, Master of the High Court, unreported, 20 January 2006. See also *Gilroy v. Flynn*, Supreme Court, unreported, 3 December 2004.

<sup>24</sup> See for example *M.J.L. v. Minister for Justice, Equality and Law Reform* (High Court, unreported, Laffoy J., 30 April 2004); *P.P.A. v. The Refugee Appeals Tribunal* (High Court, unreported, MacMenamin J., 7 July 2005); *D.P.P. v. Mark Desmond* (Court of Criminal Appeal, unreported, McCracken J., 3 December 2004); *J.F. v. D.P.P.* (Supreme Court, unreported, 26 April 2005); *Arra v. Governor of Cloverhill Prison and Others* (High Court, unreported, Ryan J., 26 January 2005).

lower courts. However, collectively, we all need to get over this psychological block that the Convention is there to undermine the Constitution. The opposite is the truth, and the Convention should be and can be a very effective tool, if used properly, to augment a client's case even at the risk of incurring judicial wrath!

In fact, is it a bridge too far to suggest that in time, it may be very important to raise Convention points in the lower courts, at the risk of being estopped from raising them at a later stage? It is interesting to note, for example, that the State has often argued this point very strongly in their opposition to cases in the European Court of Human Rights.<sup>25</sup> It may be suggested that an appeal is effectively a *de novo* hearing and that it is open to an appeal to raise new issues.<sup>26</sup> However, it is interesting to note through the jurisprudence of the European Court of Human Rights, they note with interest as to whether Convention issues were raised in the domestic proceedings.

As proof of the judicial review route one only has to look at the amount of cases and decisions emanating from the High Court, particularly in relation to asylum seekers. This would appear to be the natural consequence as a result of the method of incorporation of the ECHR Act 2003.

Without stating the obvious, Article 6 (the right to a fair trial) is probably the Article which will exercise the minds of all courts the most. It is prudent therefore to point out some areas in particular which will, in my view, cause problems in the District Court and that I hope will be addressed sooner rather than later, and that is the area of legal representation.

Under Part 3 of the Children Act 2001 a Health Board, (now the Health Service Executive) will in appropriate circumstances be able to apply for special care orders. Although as yet not yet implemented it is envisaged that this will happen in the very near future. The impact of such orders is that a child can be detained in a special care centre for a period of three to six months. Once implemented, these applications are made to the District Court. What happens if the parents don't consent? What happens if the parents are not in agreement? What happens if the parents consent

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<sup>25</sup> See for example *Quinn v. O'Leary and Others*, High Court, unreported, Ó Caoimh J., 23 April 2004.

<sup>26</sup> See *D.P.P. (Nagle) v. Flynn* [1987] I.R. 534 (S.C.).

and the child doesn't? Is the child not entitled to effective representation? What happens if there is a serious urgency about the application? If the difficulties encountered in having a guardian *ad litem* appointed is anything to go by, then there is potential for serious difficulties. It is quite clear that this whole area has the potential of raising many Convention issues also.<sup>27</sup>

Again, under part 9 of the Children Act 2001, there is the possibility of imposing three types of order on the parents of a child who has been convicted of a crime, namely, a parental supervision order;<sup>28</sup> a compensation order<sup>29</sup> and a binding to the peace order.<sup>30</sup> The latter two sanctions are in force since May 1<sup>st</sup> 2002. While a court must be satisfied that there has been wilful failure on the part of the parents on the supervision of the child and that the parents must be given the opportunity to be heard, it should be noted that the making of any such order or the breach of any such order can have serious consequences. Furthermore, the question must be asked: are not the parents entitled to be separately represented? Bearing in mind that they are not charged with any criminal offence, are they entitled to legal aid under the Criminal Legal Aid Scheme? Are they entitled to be represented under the Civil Legal Aid Scheme? Will they have to make an application to the Legal Aid Board and satisfy a means test? How long will this take? What happens in the event that they are not granted legal aid?

Another piece of legislation recently implemented is the Mental Health Act 2001. Under the provisions of s. 25 of the Act, an application can be made in the District Court for the detention of a child in an appropriate detention centre. Again, the issue of representation arises. Also contained in this section is the power to apply for an order approving psycho-surgery<sup>31</sup> or electro-convulsive therapy<sup>32</sup> being administered to a child, which raises

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<sup>27</sup> See "Children's Rights in Court Proceedings with Particular Reference to the European Convention on Human Rights", address by Dr. Ursula Kilkelly to the Judicial Studies Institute National Conference, November 2003.

<sup>28</sup> s. 111 Children Act 2001.

<sup>29</sup> s. 112 Children Act 2001.

<sup>30</sup> s. 114 Children Act 2001.

<sup>31</sup> s. 25(12) Mental Health Act 2001.

<sup>32</sup> s. 25 (13) Mental Health Act 2001.

huge issues let alone the very important issue of proper and effective representation.

It is not contended for one moment that the Convention *per se* is the answer to all these problems but, as stated before, it has the potential to be used as a very powerful and persuasive tool in vindicating the rights of the client.

#### IV. THE EMPIRE STRIKES BACK!

From a professional point of view there are certain responsibilities resting on solicitors and barristers in respect of Convention issues. It is clear that every case they come across will not always raise Convention issues. It is important, however, to see if any Convention issues do arise. Decisions will have to be taken as to whether it is appropriate or not to raise these in the various courts, bearing in mind the provisions of s. 4 of the ECHR 2003 Act that judicial notice must be taken of any judgments of the European Court of Human Rights. Having said this, if submissions are being made, it is important that they are clear, cogent, reasoned and above all relevant to the issues before the Court. For example there isn't much point in a delay case quoting from *Doran v. Ireland*<sup>33</sup> or *Barry v. Ireland*<sup>34</sup> in support of a delay point involving a couple of months.

If the submissions are not relevant one runs the risk of doing more damage than good for the client. Furthermore, classic clichés like “and of course my client's rights under the Convention were violated” should be avoided at all costs.

Indeed, recently at the hearing of a drink-driving prosecution involving a foreign national, the sole defence in the case was based on Article 5(2) of the Convention, which states that “everyone who is arrested shall be informed promptly in a

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<sup>33</sup> *Doran v. Ireland* [2003] E.C.H.R. 417 (31 July 2003), concerning a delay in civil proceedings, which took 9 years to litigate through the courts.

<sup>34</sup> *Barry v. Ireland* [2005] E.C.H.R. 865 (15 December 2005), concerning the length of criminal proceedings, which had not been finalised after 10 years. See also *McMullen v. Ireland* [2004] E.C.H.R. 404 (29 July 2004). See, however, *Sweetman v. D.P.P.*, High Court, unreported, de Valera J., 20 December 2005.

language which he understands of the reason for his arrest and of any charge against him.”

While there was an interpreter in court absolutely no case law was advanced in support of the purported defence. Matters also took a turn for the worse when the accused kept answering the questions put to him in perfect English!

The object of the exercise should be to help the Court in understanding the nature of the submission being made and the relevance of the Convention to the matters in issue before it.

As already stated, there is a tendency for practitioners to fight a case on its facts in the District Court and leave matters of law for the appeal in the Circuit Court. Taking it a step further, could it be possible that failure to raise a Convention point in the District Court, being a court of first instance, might be considered professional negligence?

It is also very important that practitioners have a clear understanding of how the European Court of Human Rights works. It is important to understand the concept of subsidiarity and that it is not a court of fourth instance, *i.e.* another court of appeal. Concepts such as “absolute” and “qualified rights”, the “margin of appreciation”, “proportionality”, “positive” and “negative” obligation are all essential ingredients in understanding how the Court works. It is also important to understand the manner in which the judgments of the European Court of Human Rights are structured.

In this regard there are many excellent books available which should be of great benefit in understanding the workings of the Court. There is also a wealth of articles currently available on the ECHR Act 2003 and how it works. The *Law Society Gazette* carries monthly articles on recent decisions of interest to practitioners and judges alike. Of particular interest is a recent publication which is a joint collaboration between the Dublin Bar Association, the Law Society and the Law Faculty of Galway University. This publication gives a substantial insight into the background of the ECHR Act 2003 and contains a very significant audit of cases involving the ECHR both recently and

currently before the High Court and the Supreme Court.<sup>35</sup> The website of the European Court is also very helpful.<sup>36</sup>

Mention should also be made of the Irish Human Rights Commission, who are and have been featuring as an *amicus curia* in many cases. Under s. 8(h) of the Human Rights Commission Act 2000, the Commission may at the discretion of the High Court and Supreme Court appear as *amicus curiae* in any proceedings that involve or concern the human rights of any person.<sup>37</sup>

### CONCLUSION

Despite the reservations expressed regarding the manner of incorporation, one thing is quite clear: that the Convention is now part and parcel of the domestic law. Convention jurisprudence is available and can be used as a very effective tool. Indeed, the Convention has the possibility of changing the legal landscape for the better.

From a personal point of view, I have utilised some of the jurisprudence particularly in the area of child care applications and family law matters and have found it very helpful in making decisions.<sup>38</sup>

In so far as the District Court is concerned, there may be many who are of the view that the Convention has little or no relevance in the lower courts. You might prefer to go the judicial review route if Convention issues do arise. There may be some of you that take the view that given the method of incorporation and

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<sup>35</sup> O'Connell, Cummiskey, Mornaghan, O'Connell, *ECHR Act 2003, A Preliminary Assessment of Impact* (Dublin: Dublin Bar Association and Law Society of Ireland, 2006).

<sup>36</sup> <http://www.echr.coe.int>.

<sup>37</sup> *Dublin City Council v. Fennell* [2005] 2 I.L.R.M. 228 (S.C.); *Carmody v. Minister for Justice Equality and Law Reform* [2005] 2 I.L.R.M. 1 (H.C.); *Lawrence v. Ballina Town Council* Ref. 2003/581 PJ; *The Legal Aid Board v. District Judge Brady and Others* Ref. 2005/474 JR and Ref. 2006/652 SS; *Bode and others v. The Minister for Justice Equality and Law Reform*, High Court, unreported, Finlay Geoghegan J., 14 November 2006.

<sup>38</sup> See for example *K. and T. v. Finland* [2001] E.C.H.R. 465 (12 July 2001); *Olsson v. Sweden (No.1)* (1989) 11 E.H.R.R. 259; *P., C. and S. v. United Kingdom* (2002) 35 E.H.R.R. 1075; *Kutzner v. Germany* (2002) E.H.R.R. 653.



what can be achieved really counts for very little return for the amount of hard work and effort required.

My own view is that to adopt this attitude would be very unfortunate. You now have access to a very fine body of jurisprudence which you are entitled to cite in any court. It would be a shame to let the opportunity pass.

In a rugby parlance my advice would be: “use it or lose it”.