

In what follows, I provide an update to the second edition of my book, **Social Inclusion and the Legal System: Public Interest Law in Ireland**, covering available Irish material up to 1 September 2016.

Gerry Whyte,  
14 September 2016

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### ***Introduction***

*Page 2, insert in line 15:*

**In contrast, in the Irish case of *NN v Minister for Justice and Equality* [2016] IEHC 470, (29 July 2016). Humphreys J held that in light of ss.192 and 246(7)(f) of the Social Welfare (Consolidation) Act 2005, a person subject to a deportation order did not have any right to social provision, commenting, at para.43, that “[t]hose who fall outside [the limits of social provision] simply do not benefit. Their fate must therefore be left to private initiative or indeed to their own efforts...”**

### ***Ch.1 – The Legitimacy of Judicial Activism on behalf of the disadvantaged***

[TOPIC] ***(a) Doctrine of separation of powers***

*Page 16, add to first paragraph:*

**In *PC v Minister for Social Protection* [2016] IEHC 315, (29 April 2016), Binchy J indicated, at para.85, that to accede to the plaintiff’s claim that his statutory right to the State (Contributory) Pension was a constitutionally protected property right would amount to determining an issue of distributive justice contrary to the decision in *O’Reilly*. He also stated, at para.97, that a prisoner’s right to personal autonomy is not a socio-economic right “to have the judicial branch ensure a minimum level of economic provision by the other branches of government”.**

*Page 28, add to n.62*

**Note, however, that in *A v Minister for Justice and Equality* [2014] IEHC 532, (14 November 2014) HC, MacEochaidh J, having cited Murphy J’s quotation above, said, *obiter*, at para.12.6, “It seems to me that the high point of the jurisprudence in the area confirms that courts should not trespass on the role of the executive or the legislature when deciding how a particular problem might be addressed. How public money is used is a matter exclusively for the Oireachtas working in co-operation**

with the executive. Nonetheless, where State action results in a breach of human rights and where the only remedy is the expenditure of additional money, the Court, in my opinion, must be entitled to make an appropriate order, even if the consequence is that the State must spend money to meet the terms of the order.” MacEochaidh J differentiates here between a situation in which the executive or legislature has yet to decide how to address a problem (where the courts should not intervene) and a situation in which the State has taken some action that affects human rights adversely. In that latter situation, the judge envisages that a judicial order could be made requiring the State to spend public monies to remedy the situation. On a broadly related though, at the same time, different point, in *O’Donnell v South Dublin Co. Co.* [2015] IESC 28, (13 March 2015) SC, the Supreme Court (*per* MacMenamin J.) indicated that the Constitution could affect socio-economic rights protected by legislation when it stated, at para.65, that statutory powers vindicating constitutional rights or values could give rise to a statutory duty if there were no reasons why the powers could not be exercised. MacMenamin J. cited *O’Brien v Wicklow UDC, ex tempore*, High Court, 10 June 1994 in support of this proposition.

*Page 40, insert at beginning of n.111:*

Though in *Minister for Justice and Equality v O’Connor* [2015] IECA 227, (23 October 2015) CA, Irvine J expressed the view, *obiter*, at para.9 of her judgment that in exceptional cases, there might be grounds for striking down an Act of the Oireachtas because of the absence therefrom of a vital provision.

*Page 40, insert new footnote at the end of the first sentence in para.2:*

In *Minister for Justice and Equality v O’Connor* [2015] IECA 227, (23 October 2015) CA, Hogan J was prepared to grant a declaration that the European Arrest Warrant Act 2003 was unconstitutional insofar as it failed to provide for a statutory right to legal aid for persons facing surrender under the Act. On this point, though, Hogan J was in a minority on the Court of Appeal.

*Page 41, add to n.114:*

On appeal, the Court of Appeal that an appeal did, in fact, lie against a decision of the Circuit Court in these circumstances – *McCabe v Ireland* [2015] IECA 156 (22 July 2015).

*Page 87, add to n.297:*

In *Lowry v Mr. Justice Moriarty* [2016] IEHC 29, (27 January 2016) HC, Hedigan J stated, at para.7.4, that the rationality standard applied to challenges to a decision “made with special competence in an area of special knowledge”.

Page 88, add to n.304:

See also the comments of Hedigan J in *Lowry v Mr. Justice Moriarty* [2016] IEHC 29, (27 January 2016) HC where, at para.7.4 of his decision, he indicates that where an administrative decision affects rights, the standard of judicial review shifts from rationality review to proportionality review. In *Kivlehan v Raidió Telefís Éireann* [2016] IEHC 88, (15 February 2016) HC, Baker J held that given RTE's obligation to protect freedom of expression in the context of the democratic process, its decisions should be subject to proportionality review.

## ***Ch.2 – European Law and Domestic Litigation on Socio-Economic Rights***

Page 108, add to n.3:

For a comprehensive review of the application of the European Convention on Human Rights Act 2003 and of the Charter of Fundamental Rights of the European Union by the Irish courts, see Egan and Thornton, A Report on the Application of the European Convention on Human Rights Act 2003 and the European Charter of Fundamental Rights: Evaluation and Review (Dublin, July 2015), accessible here - <https://www.lawsociety.ie/Documents/committees/hr/ECHRReport30July2015.pdf>

### **[TOPIC] 1. European Convention on Human Rights Act 2003**

Page 109 amend lines 9-13 to read:

In *O'Donnell v. South Dublin Co. Co.* [2011] 3 IR 417, Laffoy held that the failure of the State to provide appropriate caravan accommodation to Travellers with severe physical disabilities amounted to an infringement of Art.8 of the Convention giving rise to an entitlement to damages. However the decision of the Supreme Court in a more recent case, also called *O'Donnell v South Dublin Co. Co.*, [2015] IESC 28, (13 March 2015) SC, now precludes the Irish judiciary from reaching a similar conclusion in any future case in the absence of a decision of the European Court of Human Rights on the point.

Page 109, replace text in n.13 with:

**Part 2 of the 2014 Act was commenced by S.I. No.121 of 2015.**

Page 110, insert at end of first paragraph:

**in *C.A. v Minister for Justice and Equality* [2014] IEHC 532, (14 November 2014) HC, MacEochaidh J rejected the argument that the Direct Provision Scheme for asylum seekers and persons seeking**

subsidiary protection violated Art.3 of the Convention. This Scheme is a largely cashless scheme of support, through the provision of accommodation and meals, for persons seeking asylum or subsidiary protection. People covered by the Direct Provision Scheme cannot seek employment and must comply with detailed rules in the accommodation centres in which they live. They cannot claim any mainstream social welfare payments (other than discretionary payments made pursuant to ss.201 or 202 of the Social Welfare (Consolidation) Act 2005) by virtue of the operation of the habitual residence requirement in relation to social assistance payments and by virtue of the fact that they cannot establish a social insurance record that would enable them to claim social insurance payments. He distinguished the decision of the European Court of Human Rights in *M.S.S. v Belgium*, Application No. 30696/09, 21 January 2011, which concerned the treatment of asylum seekers in Greece on the ground that the circumstances said by the applicants to constitute inhuman and degrading treatment were not “startling or alarming examples of physical or mental abuse.” (Para.7.2.1). Moreover in the instant case the applicants had also failed to establish the negative effects they claimed constituted inhuman and degrading treatment. For the same reason, the judge held that the applicants had failed to establish that the Direct Provision Scheme unlawfully interfered with their family life as protected by Art.8 of the Convention, though he did hold that certain rules applied by the accommodation centres under the Scheme did infringe privacy rights under the Convention and the Constitution. While this case was largely unsuccessful, it does raise the possibility that if State treatment of vulnerable groups is particularly severe, this may amount to a breach of Art.3 of the Convention.

## [TOPIC] 2. Charter of Fundamental Rights of the European Union

*Page 113, add to n.34:*

In *Minister for Justice and Equality v O'Connor* [2014] IEHC 640, (4 December 2014) HC, Edwards J indicated that the requirement in Art.47 to provide effective access to justice did not necessarily mean that such access had to be by means of a statutory scheme of legal aid, a position endorsed by Ryan P on appeal in the subsequent decision of the Court of Appeal – [2015] IECA 227 (23 October 2015), at para.20 – though not addressed by the other members of the Court.

*Page 114, add to n.36:*

In *AIB Ltd. v Aqua Fresh Fish Ltd.* [2015] IEHC 184, (27 March 2015) HC, Keane J. held that the Charter was inapplicable to proceedings for possession of lands in which the managing partner of a company sought to legally represent the company in court while in *N.H.V. v Minister for Justice and Equality* [2016] IECA 86 (14 March 2016) the Court of Appeal held, inter alia, that as Ireland had opted out of Council

Directive 2013/33/EU (the Reception Directive), which addressed the right of asylum seekers to enter the labour market, a decision refusing the applicant the right to work was not implementing EU law with the result that the Charter was inapplicable.

### ***Ch. 3 – The Implications of Public Interest Litigation for Civil Procedures and Remedies***

[TOPIC] Taking account of the interests of those affected by litigation

*Page 159, add to n.193:*

In *Attorney General v Damache* [2015] IEHC 339, (21 May 2015) HC, where submissions were heard during the proceedings at first instance from the Irish Human Rights and Equality Commission acting as an *amicus curiae*, the State complained that the Commission had overstepped its role by commenting on the evidence. However in Part 5 of her judgment, Donnelly J rejected criticism about the Commission’s commentary on facts that were either agreed between the parties or that might be so found. She also commented that it was necessary for all parties, including an *amicus*, when dealing with a contentious issue, to focus their points of law on the facts of the case and that it was unrealistic to suggest that submissions of law could take place in a factual vacuum. Finally, she indicated that objections to submissions made by an *amicus* should be made in open court during the course of the proceedings rather than, as here, by way of written submissions filed with the leave of the court towards the end of the hearing.

*Page 162, add to n.218:*

This decision of Hogan J led Keane J to comment, in *Data Protection Commissioner v Facebook Ireland Ltd.* [2016] IEHC 414 (19 July 2016), at para.13, that “the reluctance of a court to admit a party as an *amicus curiae* if they have a strong view or vested interest seems to have diminished somewhat in recent times.”

*Page 163, add to n.220*

But note the views of Donnelly J in *Attorney General v Damache* [2015] IEHC 339, (21 May 2015) HC relation to the right of the Irish Human Rights and Equality Commission to comment on the facts of a case when acting as an *amicus curiae*. In *Data Protection Commissioner v Facebook Ireland Ltd.* [2016] IEHC 414 (19 July 2016) HC, Keane J was influenced by the fact that there was no factual dispute between the parties and also by the fact that parties wishing to be heard by the CJEU in the context of a reference to that court must have participated in the relevant proceedings before the national court in holding that certain parties could act as *amici curiae* at trial stage.

[TOPIC] ***(a) Exercise of judicial discretion to award costs to unsuccessful litigant***

Page 171, insert before last para:

In *R.A. v Refugee Appeals Tribunal* [2015] IEHC 830, (21 December 2015) HC, Humphreys J exercised his discretion to depart from the rule that costs follow the event in a case that, *inter alia*, raised a point of law of exceptional public importance, where there was a need to resolve a conflict between two High Court decisions and where the issues raised were of great practical significance. See also his decision in *B.W. v Refugee Appeals Tribunal* [2015] IEHC 833, (21 December 2015) HC where he also departed from the general rule that costs follow the event because, *inter alia*, a resolution of the case would bring clarity and certainty for both the State and all applicants for asylum under the Refugee Act 1996 and the legal issues raised in the case could have been addressed more explicitly by the Oireachtas. In a third case, *K.R.A. v Minister for Justice and Equality (No.2)* [2016] IEHC 421, (24 June 2016), Humphrey J took account of, *inter alia*, the opacity of the legislation at issue in the case and the conduct of the respondent in attempting unilaterally to resile from representations made to the court at the hearing in departing from the general rule.

In *C.A. v Minister for Justice and Equality* [2015] IEHC 432, (10 June 2015) HC, MacEochaidh J refused to award costs against an unsuccessful litigant who had challenged the system of direct provision for asylum seekers and whose lawyers had acted on a *pro bono* basis, on the ground that to do so would cause significant injury to the interests of justice generally as it would mean her lawyers would not be paid for the work that they had done. He continued:

If this were ordinary private litigation the court would have no reason to be concerned by the possibility of the applicant's lawyers not being paid. However, the court acknowledges that the only manner in which a person in the circumstances of the applicant can exercise a right of access to court is if her lawyers are willing to act on a conditional fee basis. That a vulnerable group of people have been living in the challenging circumstances of direct provision for extremely lengthy periods of time, well beyond the six months for which the scheme was intended, is exclusively attributable to inefficiencies on the State side. The sorry saga of direct provision cannot be described as the State's finest hour. A legal challenge of some sort was surely inevitable - as inevitable as the public campaign addressed to the Government. To award the respondent the

costs of the issues which it won would have a chilling effect on litigation of this sort and might have the effect of denying vulnerable and marginalised people their constitutional right of access to the courts. Therefore, I refuse to make an order in favour of the respondents.<sup>1</sup>

This approach, if adopted by other judges, may offer some protection to unsuccessful public interest litigants against the risk of having to pay the costs of their successful opponents. However whether a judge is willing to take this approach will only become clear after the conclusion of the litigation and so an unsuccessful plaintiff in *pro bono* litigation remains at some risk that she will have to pay her opponent's costs.

*Page 171, add to n.255:*

Note, however, that the fact that the unsuccessful plaintiff in *P.C. v Minister for Social Protection* [2016] IEHC 343, (14 June 2016) HC had a personal interest in his litigation did not prevent Binchy J awarding him two thirds of his costs where a number of other parties would have had an interest in the outcome of the litigation.

[TOPIC] *(b) Protective costs order*

*Page 176, add to n.274:*

In *Callaghan v An Bord Pleanála* [2015] IEHC 235, (20 February 2015) HC, McGovern J held that s.50B did not apply to a decision of the Board that a proposed development was a strategic infrastructure development.

[TOPIC] *Doctrine of mootness*

*Page 183, replace last 5 lines in n.302 with:*

On appeal, this was one of the factors that led the Supreme Court to hear the appeal, though the matter was moot – see [2014] 2 ILMR 341 at pp.348-9. See also *Dundon v. Governor of Cloverhill Prison* [2013] IEHC 608, (3 December 2013) HC, *Whelan v Governor of Mountjoy Prison* [2015] IEHC 273, (1 May 2015) HC and *McDonagh v Governor of*

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<sup>1</sup> At para.26 of his judgment. However he also indicated, at para.29, that special care is required to ensure that *pro bono* litigation is conducted efficiently and in a manner that does not unreasonably inflate expense for the defendant. In *B.A. v Minister for Justice and Equality* [2015] IEHC 861, (16 November 2015) HC, MacEochaidh J, in an *ex tempore* decision, refused to follow his own decision in *C.A.* on the ground that the instant case did not share sufficient qualities of public interest to warrant applying that approach. He noted, *inter alia*, that the plaintiff did not represent a class of persons making the same complaint.

***Mountjoy Prison* [2015] IECA 71, (20 March 2015) CA for further applications of this principle.**

#### ***Ch.4 – Practical issues relating to the use of litigation strategy***

[TOPIC] ***(a) Doctrines of champerty and maintenance***

*Page 201-2*

**Section 18(2) of the Legal Services Regulation Act 2015 authorises the Legal Services Regulatory Authority to make regulations in relation to the advertising of legal services but this section has not yet been commenced.**

*Page 202, add to n.20:*

**See the Law Reform Commission’s Issues Paper on Contempt of Court and other Offences and Torts involving the Administration of Justice (2016), pp.66-76.**

*Page 202, add to n.23:*

**In *SPV Osus Ltd v HBSC Institutional Trust Services (Ireland) Ltd.* [2015] IEHC 602, (5 October 2015) HC, where it was common case between the parties that the assignment of a bare cause of action was champertous, Costello J held that the assignment, for no legitimate reason recognized by Irish law, of the right to litigate third party claims was contrary to public policy, void and unenforceable. For a case in which a third party had a legitimate interest in taking over litigation, see *Waldron v Herring* [2013] IEHC 294, (28 June 2013) HC.**

*Page 204, add to n.33:*

**On appeal, the Court of Appeal held that in the absence of the no-win no-fee agreement and its compliance with s.68 of the Solicitors (Amendment) Act 1994, there was not sufficient evidence before the High Court to demonstrate the existence of an effective After the Event (ATE) insurance policy. In addition the policy here was so conditional that it did not provide a sufficient security to the defendant to warrant refusal of an order for security for costs and so the appeal against the High Court decision was allowed. However the Court did not address the question of whether such policies might amount to either maintenance or champerty – see *Greenclean Waste Management Ltd. v Leahy* [2015] IECA 97, (8 May 2015) CA. This issue was directly addressed by Donnelly J in *Persona Digital Telephony Ltd v Minister for Public Enterprise* [2016] IEHC 187, (20 April 2016) HC wherein she held that professional third party funding of litigation in return for a share of the proceeds contravened the rules on maintenance and champerty and that**

she did not have the jurisdiction to develop the statutory offences of maintenance and champerty even where the constitutional right of access to the courts featured, albeit indirectly, in the case before her. (She did point out, however, at para.86, that the court had not been asked to examine the constitutionality of the offences and torts of maintenance and champerty.) However *Persona* would not appear to be applicable to lawyers who offer their services gratuitously or perhaps even on a “no foal, no fee” basis where they are motivated by the desire to ensure that an indigent litigant has access to justice.

[TOPIC] ***b) Liability for costs***

*Page 208, insert after line 9:*

**In *He v Governor of Castlerea Prison* [2015] IEHC 854, (20 October 2015) HC, McDermott J held that a wasted costs order was appropriate in circumstances in which two solicitors failed to take the minimal steps to inform themselves of the facts of their clients’ cases. However he refrained from making such an order in light of the full apology made to the court by each of the solicitors and in light of the fact that the proceedings were discontinued at an early stage.**

*Page 209, add to second para:*

**In *C.A. (Costs) v Minister for Justice* [2015] IEHC 432, (10 June 2015) HC MacEochaidh J explicitly rejected the suggestion that a “no foal, no fee” arrangement disentitles a litigant from securing costs from his or her opponent because the litigant has no liability to his or her own lawyers, saying that such a view was not consonant with modern reality. He also refused to award costs against the unsuccessful plaintiff in this *pro bono* litigation on the ground that this would cause significant injury to the interests of justice as it would mean that her lawyers would not be paid for the work they had done and that to award costs against an unsuccessful plaintiff in such a case “would have a chilling effect on litigation of this sort and might have the effect of denying vulnerable and marginalized people their constitutional right of access to the courts.” (Para.26).**

## **Ch.5 – Judicial Treatment of Social Welfare Issues**

### **[TOPIC] (a) Independence of appeals system**

*Page 216, add to note 14:*

However, Barrett J’s decision was overturned by the Court of Appeal which held that s.186C(3) of the 2005 Act required the deciding officer to “have regard” to the opinion of the medical assessor in such cases – ***CSB v Minister for Social Protection* [2016] IECA 116, (20 April 2016) CA.** This did not mean that the deciding officer was bound by the opinion of the medical assessor but she was required to inform herself in respect of the matter to which she was obliged by statute to have regard and to give reasonable consideration as to whether this should inform her decision-making. Hogan J said, at para.32, that if the deciding officer discounted the medical assessment provided by an applicant and “simply unthinkingly endorsed the contrary views expressed by the medical assessor”, the applicant could appeal the decision or seek a statutory review pursuant to s.301 of the 2005 Act. If the original decision was upheld, its reasonableness could ultimately be challenged by way of judicial review. In the instant case, there was no evidence that the deciding officer had adopted a “fixed policy” position as statistics alone did not prove the existence of such a position.

### **[TOPIC] (b) Appellant’s right to be heard**

*Page 217, add to note 20:*

In ***National Museum of Ireland v Minister for Social Protection* [2016] IEHC 135, (7 March 2016) HC,** the failure of an Appeals Officer to give the applicant an opportunity to comment on an e-mail on which the Appeals Officer subsequently placed some reliance rendered the hearing and subsequent decision unsatisfactory.

*Page 217, insert new section at the end of the page:*

#### **- and duty to give reasons**

The duty on deciding officers (and appeals officers) to give reasons for a decision has been considered on three occasions, with conflicting outcomes. In ***A.M. v. Minister for Social Protection***,<sup>2</sup> Hanna J dismissed an application seeking to quash a refusal to grant the applicant Domiciliary Care Allowance in respect of the applicant’s son who suffered from autism. The ground for the refusal, reflecting the language of s.186C of the Social Welfare (Consolidation) Act 2005 as amended, was that the extra care and attention required by the child was not

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<sup>2</sup> [2013] IEHC 524, (25 October 2013) HC.

substantially in excess of that required by a child of the same age who did not have the particular disability in question. Hanna J held that, contrary to the applicant's submissions, adequate reasons had been given by the deciding officer for his decision to refuse payment. The deciding officer's decision reflected the language of the legislation setting out the criteria for qualifying for the payment and did not prejudice the applicant's right to seek a revision of the decision or to appeal against it to an appeals officer. According to the judge, the Department did not have to give detailed reasons for its decision but was only obliged to notify claimants of the grounds for the decision so that the right of appeal was not impaired. Hanna J also accepted the Department's contention that, as there was no conflict of medical evidence as between the applicant's GP and the Department's medical assessors, the deciding officer did not have to give a detailed explanation of his decision in this regard and neither was the Department obliged to have the applicant's son medically examined. He also indicated that the applicant should have taken an appeal under the 2005 Act against the decision to refuse payment rather than seeking to have it quashed by way of judicial review.<sup>3</sup>

*A.M.* was subsequently followed by Baker J in *M.D. v Minister for Social Protection* [2016] IEHC 70, (9 February 2016) HC, which also concerned an application for Domiciliary Care Allowance, in relation to the applicant's duty to pursue a statutory appeal in preference to seeking judicial review where the appeal is capable of remedying the identified defect in the decision being challenged. However in relation to the duty to give reasons, she said that this duty was based on more than the proposition that the giving of reasons was necessary to enable an applicant to make an informed decision on whether to appeal, or seek judicial review of, the decision. Citing remarks of Kelly J in *Mulholland v. An Bord Pleanála* [2006] 1 IR 153, she indicated that the duty to give reasons is also necessary in order to enable an applicant to know whether the decision maker had directed its mind adequately to the issues before it, a point not addressed by Hanna J in *A.M.* In the instant case, she characterised the reports from the Departmental medical assessors as devoid of factual content or analysis and following almost exactly the statutory formula when expressing the view that the legislative test was not met. These reports did not provide the deciding officer with a factual basis on which the officer "could engage the full decision making process, and compare or weigh the factors supportive of each position." (Para.54). Accordingly the applicant had made out an argument that the deciding officer had failed properly to consider all of the evidence furnished by her and therefore the officer had erred in law and was in breach of fair procedures.

In a third case, *National Museum of Ireland v Minister for Social Protection* [2016] IEHC 135, (7 March 2016) HC, Murphy J also took a

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<sup>3</sup> In fact, the applicant subsequently pursued a successful appeal against the decision to refuse payment – see *Malone v. Minister for Social Protection* [2014] IECA 4, (12 October 2014) CA, at para.8.

more demanding approach than that of Hanna J to the duty to give reasons when she held that deciding and appeals officers must set out the facts upon which the decision is based. She went on to cite with approval the comments of Kelly J. in *Mulholland v. An Bord Pleanála* [2006] 1 IR 153, that a decision making body:

*“...must give its reasons and considerations in a way which not only explains why it has taken a different course but must do so in a cogent way so that an interested party can assess in a meaningful fashion whether or not the respondent’s decision is reasonably capable of challenge”.*

In the instant case, Murphy J said that the failure of the appeals officer to set out clearly the facts on which his decision was based meant that it appeared, on the face of his determination, that he had, to some extent, engaged in the cherry picking of evidence.

[TOPIC] (e) *Miscellaneous*

*Page 223 – insert after first paragraph:*

While s.10 of the Social Welfare (Miscellaneous Provisions) Act 2015 allows a deciding officer to seek the opinion of a medical assessor in relation to a claimant’s entitlement to social welfare, this provision does not appear to apply to social welfare appeals, thereby leaving unaffected the ruling of the Supreme Court in *Kiely* on the more limited role of medical assessors in that context.

*Page 225, insert before last paragraph:*

Finally in this context, in *M.D. v Minister for Social Protection* [2016] IEHC 70, (9 February 2016) HC, the same judge held that, having regard to the terms of s.186G of the Social Welfare (Consolidation) Act 2005, an applicant for domiciliary care allowance could not insist on a medical examination of her child as a deciding officer had no statutory power to call for a medical assessment of a child in respect of whom an application for domiciliary care allowance had been made (as distinct from a child in respect of whom the allowance was already payable).<sup>4</sup>

[TOPIC] (b) *Cases unsuccessful in court*

*Page 253, replace the second paragraph with the following:*

The Supreme Court decision in *Meagher v. Minister for Social Protection* [2015] IESC 4, (29 January 2015) SC, like Kingham, turned on whether

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<sup>4</sup> The applicant did, however, succeed on other grounds in challenging the deciding officer’s decision to refuse to pay this allowance – see above, page 11.

the claimant had satisfied one element of the contribution conditions relating to the Old Age (Contributory) Pension (now called the State Contributory Pension). In this case, the plaintiff had to show that he had paid at least 260 social insurance contributions in order to be eligible for a half rate of the SCP. The background to the case was that on 6 April 1988, compulsory social insurance was extended to the self-employed. However those self-employed persons over the age of 56 and entering insurance for the first time on 6 April 1988 were ineligible to claim the SPC as a condition of eligibility was that a claimant had to have entered insurance before attaining the age of 56. In 1999, the law was amended for this group to enable them to claim a half-rate of SPC if they entered insurance before the age of 62 provided they paid 260 weekly social insurance contributions. The applicant was under 62 on 6 April 1988 and paid PRSI as a self-employed person from that date until 4 July 1992 and as an employed person from 1991 until 4 July 1992 when he reached pensionable age. A social welfare Appeals Officer held that in the applicant's retirement tax year, 6 April 1992 to 5 April 1993, the applicant had made 13 self-employment contributions and 13 contributions as an employee in respect of the 13 contribution weeks from 6 April to 4 July, when the applicant reached pensionable age. Critically, however, this left him short of having paid 260 social insurance contributions since entry into insurance in April 1988. The claimant argued that for self-employed persons aged 61 before 6 April 1988 who were concurrently employed contributors, the effect of s.21(1)(d) of the Social Welfare (Consolidation) Act 2005 and art.23 of the Social Welfare (Consolidated Contributions and Insurability) Regulations 1996 [S.I. No.321 of 1996] was that they were deemed to have paid self-employed contributions for the number of weeks in the contribution year 6 April 1992 to 5 April 1993 in respect of which employment contributions were not paid. This section provided, in relevant part, and with emphasis added:

Subject to regulations under section 22, where a self-employment contribution has been paid by a self-employed contributor of not less than the amount that he or she is liable to pay under paragraph (a) or the amount specified in paragraph (b), whichever is appropriate, the self-employed contributor *shall be regarded as having paid contributions for each contribution week in that contribution year*

This would have enabled the applicant to claim that he had paid 52 contributions for the contribution year 1992/1993 and, therefore, that he had paid 260 contributions since entry into insurance in April 1988, thereby qualifying for the half-rate of SPC.

This argument was opposed by the Minister who contended, inter alia, that s.21(1)(d) could not apply to any person who ceased to be a self-employed contributor on reaching pensionable age which, in the applicant's case, was 4 July 1992.

Categorising the case as a question of statutory interpretation, the Supreme Court, per McKechnie J, said, at para.34 that principles of justice or fairness do not enter the exercise. As both parties agreed that s.21(1)(d) had to be given a literal interpretation, that was the approach taken by the Supreme Court, though McKechnie J noted that this was without deciding that such an approach was necessarily correct. Reading the provision in the context of other provisions of the Social Welfare Acts, the Supreme Court noted, at para.42, that once pensionable age was reached, a person ceased to be within the social insurance scheme and that any provision of the legislation that would have the effect of continuing beyond pensionable age the accrual of rights that otherwise can only occur before that date would have to be clear, precise and definite to that end. The Court indicated that s.21(1)(d) was designed as a conversion mechanism whereby the once off yearly payments made by self-employed contributors could be adapted to fit within a scheme of weekly insurance contributions and that it was not intended to confer substantive benefits. The Court also held that art.23 of the 1996 Regulations applied only to those persons who, at the date of its operation, remained under pensionable age with the result that it could not apply to the applicant after 4 July 1992 and therefore he could not rely on the formula contained therein for calculating the number of self-employed contributions payable in a contribution year by a person who was concurrently a self-employed and employed contributor. Neither did Art.22 of the 1996 Regulations apply to the applicant as that provision dealt with self-employed contributors ceasing to be self-employed but who might at some future time become PRSI contributors, something that was not possible in the applicant's case given that he had reached pensionable age.

The Supreme Court considered that this outcome was very unsatisfactory, inasmuch as any self-employed person entering insurance for the first time and attaining the age of 61 before 5 April 1988 could not qualify for the SCP even though they had to pay self-employed contributions and yet no understandable reason had been given by the Minister for this state of affairs. However the applicant's contention would equally have involved some measure of anomaly or inconvenience in that it would mean giving a substantive meaning to s.21(1)(d) of the 2005 Act when this was not, in fact, intended by the Oireachtas. Balancing the competing interpretations of the law, McKechnie J said that the balance rested in upholding the submission fo the Minister so as to keep intact the integrity of the underlying scheme. He added, at para.56, that he could not find a "legally valid justification for judicially compounding a statutory mishap by adopting the alternative interpretive version which, when the Act is considered as a whole, is not open." McKechnie J concluded, however, by regretting that the Minister had not acted on a recommendation on this matter made by the Human Rights Commission.<sup>5</sup>

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<sup>5</sup> In *The Self-Employed and the Old Age Contributory Pension: Report of an Enquiry into the Impact of Certain Provisions of Social Welfare Legislation on the Self-*

**Both *Kingham* and *Meagher* involved very specific, technical provisions and although in both cases the provisions gave rise to issues of unfairness, neither court could resolve these issues, arguably because of the very determinate nature of the statutory provisions.**

*Page 254, insert after the Douglas case*

**In *G v Department of Social Protection* [2015] IEHC 419, (7 July 2015) HC, O'Malley J held that a commissioning mother in a surrogacy situation could not rely on the Equal Status Acts to argue that the social welfare code discriminated unlawfully against her by not providing her with maternity benefit when such benefit is provided to birth and adoptive mothers. The judge reasoned that it was not open to her to make a finding of unlawfulness in relation to one corpus of legislation, the Social Welfare Acts, on the basis of the policy set out in another piece of legislation, the Equal Status Acts and that the contrary view would have the effect of elevating the Equal Status Acts to all-but constitutional level. An alternative argument leading to the same conclusion would be to say that s.14(a)(i) of the Equal Status Act 2000, which provides that the Equal Status Act does not prohibit the taking of any action required by or under, inter alia, any enactment, protects decisions on welfare entitlements made in accordance with the provisions of the statutory social welfare code. In the instant case, it could be argued that the Social Welfare Acts required the welfare authorities to pay maternity benefit to birth and adoptive mothers only and therefore to discriminate against a commissioning mother in a surrogacy situation. O'Malley J considered that s.14 was irrelevant to the Department's contention that it would be ultra vires the Minister to provide for a non-statutory payment to the commissioning mother as the Social Welfare Acts do not prohibit the payment of non-statutory payments. It is respectfully submitted, however, that this aspect of s.14 requires the focus to be on what is *required* under a piece of legislation, not on what might be *prohibited* by such legislation. The current provisions of the Social Welfare Acts require the authorities to exclude commissioning mothers in surrogacy situations from the payment of statutory maternity benefit and therefore that would appear to be protected by s.14 against any challenge taken under the Equal Status Acts.**

*Page 262, insert before last paragraph*

**Finally, in *Tarola v Minister for Social Protection* [2016] IEHC 206, (18 March 2016) HC White J held that an applicant who had not worked for more than a year had not established a right of residence under Directive 2004/38/EC. However Cousins argues – see here [https://works.bepress.com/mel\\_cousins/98/](https://works.bepress.com/mel_cousins/98/) - that this is based on a**

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***Employed* (2006), the former Human Rights Commission had recommended that persons in this situation be provided with a reduced pension.**

misreading of Art.7(3) of the Directive and that applicants who have worked for less than one year are still entitled to remain on for at least six months after losing employment. Moreover such persons may also be able to rely on Art.14(4)(b) of the Directive, which prohibits the expulsion of Union citizens for as long as they provide evidence that they continue to seek employment and have a genuine chance of being engaged, even after the expiry of the six months referred to in Art.7(3).

### ***Ch.6 – Litigation and Children’s Rights***

*Page 304, add to n.102:*

In *Child and Family Agency v Q* [2016] IEHC 335 (16 June 2016) HC, O’Hanlon J accepted, at para.99 of her judgment, the legal submissions of a guardian *ad litem* that the greater the level of deprivation of constitutional rights of a child in care, the more rigorous must be the application of the relevant procedures put in place by the authorities. She also held that the protective detention of a child must be subject to the safeguards of fair procedures and regular intensive welfare review – para.115.

*Page 305, insert after quotation:*

More recently, in *Child and Family Agency v Q* [2016] IEHC 335 (16 June 2016) HC, O’Hanlon J noted, at para.130, that the High Court could not exercise its inherent jurisdiction to order the protective detention of a minor if the therapeutic purpose of the detention is undermined by a lack of resources.

### ***Ch.8 - Litigation and access to legal services***

*Page 424, insert after last paragraph*

In *Ward v Judge Reynolds* [2015] IEHC 783, (11 December 2015) HC, O’Malley J inferred from the reasoning in *Carmody* that a Circuit Court judge had the jurisdiction to grant a legal aid certificate for counsel in the case of an appeal from the District Court where this was, in the judge’s view, essential in the interests of justice (though in the instant case, she held that the applicant had not sufficient standing to maintain his action).

Page 427, insert new section after section (c):

**(d) Miscellaneous decisions**

Finally, the superior courts have handed down a number of miscellaneous decisions on other aspects of the criminal legal aid scheme. In *Horvath v District Judge Bryan Smyth* [2015] IEHC 16, (16 January 2015) HC, Kearns P. held that where a defendant was charged with two different offences arising from two different sets of circumstances, a District Judge did not have the authority to extend a legal aid certificate granted in respect of the first offence to cover the second offence. Instead, two certificates would have to be granted, though the State could then ask the court, pursuant to regulations 7(4) of the Criminal Justice (Legal Aid) Regulations 1965, to deem that only one certificate was granted to the defendant. This decision enables a defending solicitor in such a situation to make the case to court that she should be paid for both cases whereas if the original certificate was simply extended to cover the second offence this would have the result, as Kearns P. put it, “that the solicitor on record remains unpaid for the additional work done in respect of the second case, which can be quite substantial, even in the context of a seemingly uncomplicated set of proceedings.”

In *O’Brien v District Judge Coughlan* [2015] IECA 245 (10 November 2015) CA, the Court of Appeal, *per* Ryan P, indicated, *inter alia*, that a District Judge may rule on an application for criminal legal aid at the conclusion of the case while in *King v Coughlan* [2015] IEHC 300 (14 May 2015) HC Hanna J held, on the facts, that a District Judge had properly dealt with an application for legal aid on the basis of the evidence before him.

Page 427, add to n.124:

In *Minister for Justice and Equality v O’Connor* [2015] IECA 227, (23 October 2015), the Court of Appeal held, following *Olsson*, that Art.11(2) of the Framework Directive provided only for a right to legal representation and not for a right to legal aid (though Hogan J also held that the Legal Aid (Custody Issues) Scheme did not comply with this requirement of Art.11(2) as it was not based on legislation. Hogan J was also of the view that the European Arrest Warrant Act 2003 was unconstitutional insofar as it failed to provide for a statutory right to legal aid for persons facing surrender under the Act. On this point, however, he was in a minority on the Court of Appeal.)

## **Ch. 10 – Access to Legal Services**

### **[TOPIC] 1. Introduction**

*Page 447, add to n.1:*

***AIB Ltd. v Aqua Fresh Fish Ltd.* [2015] IEHC 184, (27 March 2015) HC, *Pablo Star Media Ltd v EW Scripps Co.* [2015] IEHC 828, (21 December 2015) HC, *Knowles v Governor of Limerick Prison* [2016] IEHC 33, (25 January 2016) HC and *Walsh v Minister for Justice and Equality* [2016] IEHC 323 (13 June 2016) HC.**

### **[TOPIC] 2. Salient features of the Scheme of Civil Legal Aid and Advice**

*Page 510, add to n.247:*

**On 22 January 2016, the government introduced a new extra-statutory scheme of financial advice and legal aid and advice for insolvent borrowers and for people with home mortgage arrears.**

### **[TOPIC] 4. Evaluation of State provision of civil legal aid**

*Page 514, add:*

**For an evaluation of the impact of the recession on the statutory scheme of civil legal aid and advice, see FLAC, *Accessing Justice in Hard Times* (February 2016). This report notes, inter alia, a growing demand since the start of the recession for FLAC's services in relation to housing, debt, employment and social welfare issues, areas of the law that generally fall outside the scope of the State scheme. It also points out that though there was an increase of more than 70% in the demand for the services of the Legal Aid Board between 2006 and 2012, the Board's funding was reduced between 2008 and 2011 and as of 2013 was still below 2008 levels. It is also critical of the low level of allowable deductions in respect of accommodation costs and spousal maintenance used in calculating an applicant's disposable income for the purpose of the statutory scheme's means test and concludes that the Board's triage system for dealing with waiting lists cannot be implemented effectively because of a lack of resources.**