Slow Progress in a Cold Climate

Defending Human Rights in Contemporary Ireland

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High Expectations

If, as former British Prime Minster Harold Macmillan said, a week can be a long time in politics, a decade can seem like a lifetime and can see major shifts in attitudes and expectations.

Twelve years ago the Good Friday Agreement was signed, ending the long-running conflict in Northern Ireland. There was a new mood of hope and excitement throughout the island. The Agreement contained major commitments on human rights which affected the Republic as well as Northern Ireland, including the establishment of Human Rights Commissions North and South, a pledge to ensure an equivalent level of human rights protection in the Republic as in the North, a commitment to further consider incorporation of the European Convention on Huamn Rights in this jurisdiction and new equal status legislation here as well.

Anything seemed possible in the field of human rights and since we were on the brink of an economic boom, money seemed no obstacle.

Quite a lot was done. The next few years saw a raft of new legislation and new institutions to protect human rights: the Equal Status Act, 2000, the European Convention on Human Rights Act, 2003 (the ECHR Act), the establishment of the Irish Human Rights Commission, a new Equality Authority, the Garda Ombudsman Commission, the Ombudsman for Children, the National Consultative Committee on Racism and Interculturalism (NCCRI), the National Disability Authority, the National Action Plan Against Racism.

Not all of these were directly due to the Good Friday Agreement but it gave a major impetus to the establishment of new institutions to create a fairer and more inclusive society.

Not everything moved as quickly as some of us would have liked and not all the changes were as far reaching as we would have liked. For instance, the ECHR Act was not passed until five years after the Agreement and when it was enacted, the form of incorporation of the ECHR was weak

and in some ways less effective than its UK counterpart, the Human Rights Act, 1998, upon which it was modelled. But there was still a sense that things were moving, that change was in the air.

Harsh Realities

It is very different today.

In the name of dealing with the recession, the Equality Authority, which had been at the cutting edge of combating discrimination and promoting inclusion and integration, has been reduced to a shadow of its former self. Its budget has been almost halved, its headquarters decentralised so that it is inaccessible to those who need it most, and its highly regarded Chief Executive, Niall Crowley, was effectively forced out of his position.

The NCCRI has been closed down. So has the National Action Plan Against Racism, and the Combat Poverty Agency has been silenced as an independent watchdog on the effect of Government policies on the poor. The Irish Human Rights Commission has had its budget slashed as well and is clinging to the edge of viability. And the latest development is that the Government is threatening to axe or drastically reduce support for independent community development bodies around the country.

It is not, of course, as if poverty has been eradicated, the danger of racism eliminated and human rights established across the land.

The official explanation is that all these agencies must share in the general burden of paying for the years of profligacy; but that does not explain why some of the human rights and equality bodies have been closed down and the others have been subjected to cuts that are far more swingeing than the national average.

The most charitable explanation is that the Government views human rights and equality as luxuries or optional extras that are all very well when we have money to throw around but that we cannot afford when times are tougher. Another view is that the commitment of some of our rulers to human rights and equality was only skin deep and that some of the post 1998 reforms would not have happened had they not been seen as part of the price that had to be paid for inserting human rights protections into the settlement in Northern Ireland.

And a third view is that there are elements in some government departments that are still deeply suspicious of human rights organisations that criticise Government policies in sensitive areas like rendition, immigration, and anti-crime measures, or that take cases against public bodies under the Equal Status Acts. It does seem as if not everyone in the public administration – or the

Government – has accepted the concept that in a modern democracy the State should fund independent bodies to act as watchdogs for the public interest.

The systematic dismantling of the equality and human rights infrastructure has been a painful and disillusioning process but it has at least had the effect of galvanising the still fairly vigorous NGO community into setting up the Equality and Rights Alliance to combat this rights and equality vandalism and to think about how to build stronger and less vulnerable human rights institutions for the future.

It has also helped to win support and solidarity among the human rights institutions in Europe and at the UN and to develop contacts that should be helpful in trying to raise the standard of human rights compliance here in better times.

Incorporating the European Convention on Human Rights

In the more strictly legal field there was from the beginning significant resistance to the incorporation of the ECHR into domestic law – we were the last state in the European Union to do so. Some argued that there was no need for it as all the rights protected by the Convention were also protected and, some thought, better protected by the Constitution. Others were resistant to any outside scrutiny of the decisions of our courts.

And even when the ECHR Act was passed, the Government made no provision for training the public service in the requirements of the European Convention before it came into force, as had been done in the UK between the enactment of the Human Rights Act, 1998 and its coming into force in October 2000.

In the UK the judiciary and the legal profession as a whole have, to the surprise of some commentators and of some of us who recall the pre-1998 judiciary, embraced the European Convention. Nearly every judicial review application made in the UK courts today involves Convention points and British jurisprudence is increasingly informed and suffused by the jurisprudence of the Strasbourg Court.

The British judiciary, which a generation ago was widely seen as deeply conservative and out of touch with modern society, has recently been seen as protecting human rights against the increasingly authoritarian tendencies of the Blair/Brown Labour Government and defending the European Convention against Conservative Party threats to repeal the Human Rights Act.

How have the courts here responded to the ECHR Act and the Equal Status Act, 2000? Has there been the same enthusiasm here as was shown in the UK? Have the hopes sparked by the Good Friday Agreement been reflected in the jurisprudence of the courts in this jurisdiction?

The first thing to say is that cases involving the ECHR Act have been very slow to come before the courts, and particularly the Supreme Court, given the unacceptable delays in getting a hearing in that court. And the record in the Supreme Court has not been very encouraging, following on from an earlier series of decisions which had set out a very narrow and restrictive view of the scope of judicial review, notably in ***State (Keegan) v. Stardust Victims Compensation Tribunal [1986] IR 642*** and ***O'Keeffe v. An Bord Pleanala [1993] 1 IR 39***; and which took an equally restrictive view of the role of the courts in relation to social and economic rights and the separation of powers in ***T. D. v. Minister for Education [2001] IESC 101 (December 2001)*** and ***Sinnott v. Minister for Education [2001] 2 IR 505 (July 2001).***

Looking at some recent decisions which raised human rights and equality issues, the Supreme Court's attitude has appeared very negative.

In ***Bode v. Minister for Justice, Equality and Law Reform & Others [2007] IESC 62*** in December 2007, Ms Justice Denham, giving the judgment of the Supreme Court, rejected a High Court decision that the Minister had breached the rights of an Irish citizen child under the Constitution and under Article 8 of the European Convention when he failed to consider the child's rights when deciding whether to grant residency to his/her parents under the IBC/05 scheme. This scheme dealt with the position of unsuccessful asylum applicants who were the parents of children who had been born here before the citizenship law was changed in 2004 and accordingly were Irish citizens.

Judge Denham held that the scheme was an exercise of executive power by the Minister and ECHR rights were not relevant. She did say, however, that the child's Convention rights could be considered where the Minister was considering whether to deport the child's parents.

In November 2009 the Supreme Court gave judgment in the case of ***Equality Authority v. Portmarnock Golf Club [2009] IESC 73***, where the Equality Authority had sought to have the Portmarnock club's liquor licence withdrawn on the basis that it was a discriminating club under Section 8 of the Equal Status Act, 2000. Portmarnock refuses to allow women to become full members of the club.

Section 9 of the Act exempts clubs from the penalty under Section 8 if their principal purpose is to cater for the needs of a particular gender or other category. The Supreme Court, by a majority of three to two, accepted what appears to be the distinctly specious argument that the Portmarnock club's principal purpose was to cater for the needs of *men* to play golf. The effect appears to be to seriously undermine the intention of Section 8 of the 2000 Act and make it permissible for all sorts of clubs to discriminate on spurious grounds.

In December 2009, in ***McD v. L and Another [2009] IESC 81***, the Supreme Court overturned a High Court decision involving a lesbian couple and a sperm donor who had helped them to have a child. The High Court had rejected the sperm donor, or biological father's, application for guardianship of the child, taking into account *inter alia* the couple's rights as a 'de facto family'.

The High Court Judge (Mr Justice Hedigan) had noted that the European Court of Human Rights (*of which he had been a member*) recognised the concept of a 'de facto family' and accorded it rights. It had not so far recognised same sex couples as constituting 'de facto families', but he indicated that he saw no reason why it should not do so.

The Supreme Court judgments were unusually trenchant in their language. They referred to the 40-year old decision in ***State (Nicolau) v. An Bord Uchtala [1966] IR 567*** to say that to award the same rights to a "family" based on "an extra-marital union" as to a family "founded on marriage" would be to disregard the Constitutional obligation to "guard with special care the institution of marriage". They denied that 'de facto families' had any legal status or rights in Irish law. And the Chief Justice said the role of the ECHR Act was quite limited and the High Court judge had no jurisdiction to consider Article 8 of the European Convention in the case in question.

The Supreme Court decision seemed to downgrade the effectiveness of the European convention and undermine a developing recognition of 'de facto families' which reflects the reality of Irish life today. Many social welfare provisions and regular practice in the administration of social welfare benefits recognise 'de facto families' and it would cause a great deal of hardship and lead to chaos in the social welfare system if the court's attitude was to be taken literally.

The *McD* decision has already shown its effect in another case in the High Court. In ***J. McB v. L. E. [2010] IEHC 123*** in April last, the High Court rejected an application for guardianship of his children by an unmarried father who had lived together with the children's mother for some time. The father relied in part on the concept of the 'de facto family' but Mr Justice MacMenamin said, referring to the Supreme Court's decision in the *McD* case: "*This court is precluded as a matter of national law from giving recognition to the concept of a de facto family*".

This is not a picture of our higher courts brimming with enthusiasm to embrace the opportunities for change and development presented by the ECHR Act or new Equality legislation, or eager to apply the law to changing situations in the spirit of the Constitution as a living instrument.

More Positive Developments

But this is not the entire picture, even of the Supreme Court. Tucked away between the *Bode* and Portmarnock decisions were two cases linked to *Bode*: ***Oguekwe v. Minister for Justice, Equality and Law Reform [2008] IESC 25*** and ***Dimbo v. Minister for Justice, Equality and Law Reform [2008] IESC 26***. These cases involved the proposed deportation of parents of Irish citizen children and in those circumstances, Ms Justice Denham held in the Supreme Court that "*the Minister is required in this process to consider the Constitutional and Convention rights of the applicants*".

There was also an important freedom of information case in July 2009. In proceedings taken by the Mahon Tribunal into planning irregularities, the High Court had ordered the Irish Times and Colm Keena, one of its journalists, to answer a number of questions aimed at identifying who had leaked a confidential Tribunal document to that paper. The Supreme Court held in ***Mahon v. Keena and Kennedy [2009] IESC 64*** that the order was in breach of the rights of the journalist, Colm Keena, and the newspaper, under Article 10 of the ECHR, which protects freedom of speech.

But perhaps the most interesting and case is ***Meadows v. Minister for Justice, Equality and Law Reform [2010] IESC 3.*** The applicant was a Nigerian woman who had unsuccessfully sought asylum on the grounds that if returned to Nigeria, she would be subjected to female genital mutilation (FGM). She then applied for leave to remain on humanitarian grounds and when this was rejected as well she applied for judicial review of that decision.

The High Court refused her application but certified a question for the Supreme Court as to whether the *O'Keeffe v. An Bord Pleanala* standard for granting judicial review (referred to above) was appropriate when dealing with a case that raised issues of fundamental rights under the Constitution or the European Convention.

The *O'Keeff**e*** standard essentially said that judicial review dealt only with the procedure by which administrative decisions were taken and not with the substance or merits of the decision, except where the decision in question "*plainly and unambiguously flies in the face of fundamental reason and common sense*" (a quotation from the earlier case of *State (Keegan) v. Stardust Victims Compensation Tribunal*, also referred to above), or "*the decision-making authority had before it no relevant material which would support its decision".* This made it extremely difficult to challenge decisions of public bodies for anything except procedural irregularities.

The UK courts had been struggling for some years to escape from the confines of the equivalent doctrine, namely that, aside from procedural etc. irregularities, administrative decisions could be

overturned only for egregious unreasonableness (***Associated Provincial Picture Houses v. Wednesbury Corporation [1948] 1KB 223***). The UK courts had developed the practice of applying a higher level scrutiny, known as "anxious scrutiny" to decisions where fundamental rights were at stake.

The Supreme Court here had repeatedly resisted attempts to relax the rigid constraints of *O'Keeffe***,** to the increasing frustration of many practitioners, especially in areas where the legislation provided that the only form of appeal available was by way of judicial review.

In the *Meadows* decision, given in January 2010, the Supreme Court, by a majority of three (the Chief Justice, Judge Denham and Judge Fennelly) to two (Judge Hardiman and Judge Kearns) held that the appropriate standard to apply in judicial review applications where fundamental rights were at risk, was the proportionality of any interference with the Constitutional or Convention rights of the applicant. In other words, even if the procedure by which the decision was taken was correct and there was some material upon which to ground the decision, it could still be overturned if the effect on the applicant's fundamental rights was out of proportion to the purpose sought to be achieved by the decision-maker.

The majority distinguished this from the UK doctrine of 'anxious scrutiny' and argued, not very convincingly, that the proportionality test could be applied within the boundaries of the *O'Keeffe* decision. Judge Hardiman, on the other hand, in a long and passionate dissenting opinion, described the majority's decision as "*a massive change from the previous dispensation*", "*an epochal change*", and "*a revolution in the law of judicial review*". He also argued that the new standard was effectively the same as 'anxious scrutiny' in the UK courts.

Only time will tell how fundamental this change actually is, but it has undoubtedly opened the door a little to review of the merits of the decisions under review and should make it easier to plead European Convention and other human rights issues in the courts.

Other ECHR Cases

And in the meantime, the ECHR Act is beginning to have an effect in the High Court. I am aware, on a rough count, of another 10 or so cases where the ECHR Act has been used successfully by plaintiffs or applicants. Four of them have concerned Section 62 of the Housing Act, 1966, which allows local authorities to evict tenants after an administrative procedure with no effective appeal to the courts. In two cases, ***Donegan v. Dublin County Council [2008] IEHC 288*** and ***Dublin County Council v. Gallagher [2008] IEHC 354***, the High Court granted declarations that this procedure was incompatible with Article 6 (fair trial) or Article 8 (protection of private and family life) of the European Convention on Human Rights.

In another case, ***Pullen v Dublin City Council [2008] IEHC 379,*** the court held that the procedure adopted was in breach of the plaintiff's rights under Article 6 and 8 of the ECHR and therefore in breach of the Council's obligation under Section 3 (1) of the ECHR Act to carry out its duties in compliance with the Convention. And in a fourth case, ***Byrne v. Dublin City Council [2009] IEHC 122,*** the court granted an injunction to prevent an eviction on the basis that there was a significant chance that the Council's action would be found to be in breach of the Convention when the case came to full hearing.

Section 62 of the Housing Act had been challenged before but without effect, so it was clear that it was the 'incorporation' of the European Convention and the necessity for the courts to consider the Convention rights to due process and the protection of private and family life, which had led to the change in the Courts' attitude.

Two other cases, both called ***O'Donnell v. South Dublin County Council*** (***[2008] IEHC 454*** and ***[2007] IEHC 204***), involved separate Traveller families with severely disabled members and living in grossly inadequate accommodation. The Council was found to have breached the families' rights under Article 8 of the Convention by its failure to provide suitable accommodation. Once again it was the ability to rely upon Convention rights that enabled these families to succeed where many other Traveller cases had failed in the past.

And the effect of the European Convention was most clearly seen in the ***Lydia Foy*** transgender rights case (***Foy v. An t-Ard Chlaraitheoir & Others (No. 2) [2007] IEHC 470***), where Free Legal Advice Centres (FLAC) had represented Dr Lydia Foy throughout her 13-year long legal battle. In that case the High Court in 2002 had rejected Lydia Foy's application for a new birth certificate and recognition in her acquired gender. However, in 2007 the same High Court Judge, Mr Justice McKechnie, while still rejecting her claim under domestic law, held for her by granting a declaration under the ECHR Act that Irish law was incompatible with the Convention because of its failure to provide for recognition of transgender persons. Lydia Foy would not have won her case had it not been for the 'incorporation' of the European Convention through the ECHR Act, 2003.

(*Since this paper was originally drafted, the Government has withdrawn its appeal against the declaration of incompatibility in the Foy case and is now preparing to change the law. Meanwhile Judge McKechnie has been appointed to the Supreme Court*).

Other cases included one in 2009 involving bail conditions resembling house arrest, which the High Court held to be an excessive restriction on the applicant's right to liberty under Article 5 of the ECHR (***John Brennan v. District Judge Brennan & another [2009] IEHC 303***). And two other cases involved the rights of unmarried fathers (***T v. O [2007] IEHC 326*** and ***S v. The***

Adoption Board [2009] IEHC 429), although these have been undermined by the Supreme Court decision in ***McD v. L,*** the case of the lesbian couple referred to above.

The heady human rights expectations of the post-Good Friday Agreement days have taken a battering in recent years – from the inertia and lack of any real enthusiasm for radical change on the part of the Government and the administration, and from the economic crisis which provided an excuse to those who never really accepted the need for human rights or equality watchdogs in the first place, to try to dismantle some of the institutions which had been set up in that spring tide of hope.

And in the courts, as we have seen, there was nothing like the enthusiasm to embrace new ideas and new ways of doing things that had greeted the Human Rights Act in the UK.

No Easy Struggle

It has been a sobering and somewhat disillusioning process over the last 12 years, but this is not the time to give up. Progress has been made. New institutions have been set up and some, like the Human Rights Commission and the Garda Ombudsman Commission, have survived, battered but basically intact. Others, like the Equality Authority, have been seriously damaged but can be rebuilt and even strengthened if the will is there.

And the enthusiasm in the early days gave rise to a new array of vibrant, vocal and well-organised NGOs, most of whom are still there, while the more recent attack on the human rights and equality sector has spurred a fight-back led by the Equality and Rights Alliance.

Meanwhile, the economic crisis with its spiralling numbers of people facing eviction or repossession of their homes, discrimination at work, unfair or discriminatory dismissal, difficulty accessing social welfare, especially for migrants, and difficulty accessing urgently needed medical treatment or educational provision for autistic children, has generated a huge amount of unmet legal need which the state-funded Legal Aid Board cannot cater for.

But that has also generated a response, with more lawyers volunteering to work in FLAC advice centres and with the legal profession and law firms here for the first time taking a serious interest in the development of a pro bono law scheme. And solicitors, barristers, law firms and university law schools have been getting involved with a new Public Interest Law Alliance which FLAC has been developing with other independent law centres.

The ECHR Act is still there and slowly, and with hard work, lawyers are bringing cases to the courts using the Act and judges are beginning to respond. The Supreme Court has been seen as the stumbling block to any major legal reforms but that too seems to be changing a little if the

Meadows decision is any indication of things to come. The *Meadows* decision itself seems to have opened the way to the possibility of a more lively and innovative era of judicial review. And the robust debate and division in the Supreme Court in the *Meadows* case suggests that the Supreme Court may not be as firmly fixed in its resistance to change as some of the more frustrated reforming lawyers had thought.

Nothing is going to be as easy in the struggle for human rights as it might have seemed in the spring of 1998 or for some years afterwards. But that struggle must go on, especially in the current climate when the rights of the poorest and most vulnerable have been sacrificed to pay for the criminal extravagance of the very rich.

This will be a tough, hard, uphill struggle in what are still difficult times, but with the potential for making significant change as practical domestic demands and international trends intermesh to break down some of the archaic practices and deep ingrained conservatism of the legal system, which may help to make that system and the legal profession generally the servants of the people and the protectors of their rights in the 21st century.

With hard work, commitment, building on the gains that have been made since 1998 and with innovative use of the law and the new legal tools that we have been given, we can begin to build a new, inclusive and rights-based society. For those who welcome a challenge and who want to make a difference, this may be a good time to be a lawyer.

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