THE HIGH COURT

2010 Record No: 1290/ JR

JUDICIAL REVIEW

Between:

B.G.

Applicant

-and-

DISTRICT JUDGE CATHERINE MURPHY

DIRECTOR OF PUBLIC PROSECUTIONS

JUDGES OF THE DUBLIN CIRCUIT COURT

Respondents

-and-

ATTORNEY GENERAL

IRELAND

Notice Party

-and-

HUMAN RIGHTS COMMISSION

Amicus Curiae

OUTLINE WRITTEN SUBMISSIONS OF THE HUMAN RIGHTS COMMISSION (Amicus Curiae)

The Role of the Human Rights Commission.

1. This submission is filed by the Human Rights Commission as *amicus curiae*, pursuant to the Order made on the 2 November 2011, which Order granted the Commission leave to appear in these proceedings in accordance with section 8(h) of the *Human Rights Commission Act 2000*. Section 8(h) empowers the Commission to apply to the High Court and to the Supreme Court to be joined as *amicus curiae* in proceedings that pertain to the human rights of any person and to appear as such on foot of an Order of the Court. The term "human rights" is defined in the Act of 2000 as meaning:

   (a) the rights, liberties and freedoms conferred on, or guaranteed to, persons by the Constitution, and
   (b) the rights, liberties or freedoms conferred on or guaranteed to, persons by any agreement, treaty or convention to which the State is a party.'

Introduction

2. The submissions herein are made in circumstances where the *Amicus Curiae* has had sight of the submissions made on behalf of the Applicant and of the submissions made on behalf of Ireland and the Attorney General. The submissions on behalf of the Director of Public Prosecutions were received just prior to the completion of the submissions herein and it was not possible to consider them at that juncture. Accordingly the submissions herein are not informed by the Director's submissions.

3. The *Amicus Curiae* notes that there does not appear to be, in respect of any matter relevant to the Constitutional and Convention issues, any material dispute as to the facts. Accordingly, the *Amicus Curiae* proposes to adopt the summary of facts as set out in the submissions of

the Applicant herein and will simply refer to them as and when the need arises.

4. In its submissions the *Amicus Curiae* will focus on whether the difference in the treatment of a person with a mental disability, where fitness for trial is in issue (as in the instant case), compared to the treatment of a person without a mental disability, might constitute discrimination under generally accepted human rights standards, as established by the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention on the Rights of Persons with a Disabilities. The *Amicus Curiae* will submit that these standards should inform the interpretation and application of Article 40.1 of the Constitution.

5. By way of general introduction it is the *Amicus Curiae*'s understanding that it is constitutionally impermissible for criminal proceedings to be maintained against an accused who has a mental disability rendering him incapable of understanding and/or following the proceedings and/or giving real and valid instructions to his legal representatives, for as long as he remains incapable.[1]To put it another way, that it is fundamental to the fairness of criminal proceedings that an accused is entitled to be present and to participate effectively at the hearing of the charge against him which requires not merely his physical presence but his having the capacity to understand the evidence and the argument which will arise, to instruct lawyers and, if necessary, to give evidence. If, in the course of criminal proceedings, there is a real possibility that the accused has such a disability the issue must be resolved before the criminal proceedings can be further progressed. It is arguable that this must be done before any further steps are taken in the criminal proceedings which could expose him to,any prejudice not suffered by an accused in respect of whom no question of mental disability arises.

[1] *O'C v Judges of the Metropolitan District* [1994] 3 IR 246.

6. It would appear to follow from the above that there must be a differentiation between those accused of a criminal offence who are fit for trial and those who, by virtue of a mental disability, are not. The criminal process (in this and arguably all jurisdiction(s)) requires an accused to make choices at many stages of the process. The fundamental fairness of the process is arguably predicated on an accused, who has been given adequate information and adequate advice, having the capacity to make these choices rationally. If an accused who has a mental disability, making him incapable of so doing, was to be treated by the criminal process in the same manner as an accused without such disabilities, this would arguably constitute an unlawful discrimination against him.

7. Those provisions of the Criminal Law (Insanity) Act, 2006 which deal with an accused's fitness to be tried set out the criteria by which this is to be assessed, the procedures to be followed in the course of this assessment and the consequences of a finding of unfitness. This was, or was intended to be, the statutory implementation of what is arguably in any event a mandatory constitutional requirement. The primary issue in the case herein, as the *Amicus Curiae* understands it, is whether the Act in seeking to implement this requirement does so in a manner (in the procedures provided for) which itself strays into unconstitutionality and/or incompatibility with the Convention. As the *Amicus Curiae* understands it, the Applicant contends that it does so, in that the provisions of Section 4 of the Act require that, where an issue arises as to the accused's fitness for trial in circumstances where the accused is charged with an indictable offence triable summarily, or triable summarily on a plea of guilty, this issue cannot be addressed immediately by the District Court, but must be sent to the Circuit Court for that issue to be decided and where there is no provision for the matter to be remitted to the District Court if the accused is found fit for trial either then or at any time in the future. It is contended that it follows from this that the Applicant, being a person before the District Court on an indictable charge triable summarily and in respect of whom an issue of fitness arises, is being treated in a discriminatory manner relative to an accused in respect of whom no such

issue arises. The discrimination stems from the fact that if he is found to be fit for trial either when first considered or at all, he will have lost the option of seeking to have the charge against him dealt with by the District Court. One of the choices which a person in the Applicant's position can make in the course of criminal proceedings,, absent a fitness issue, is to seek to forego their constitutional entitlement to trial by jury and to have the charge against them disposed of in the District Court, in order to limit the range of adverse consequences they will be exposed to by way of sanction.

Article 14 of the ECHR

8. Article 14 of the ECHR provides that:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The European Court of Human Rights often considers it sufficient, where an Applicant claims a breach of a substantive right under the Convention and a breach of Article 14 and the Court finds a breach of the substantive article, not to proceed to consider Article 14. Subject to this it is to be noted that issues concerning the treatment of persons with disabilities *qua* their disability have been considered under the substantive provisions of the Convention such as Article 3 (*Price v UK*[2]) or Article 8 (*Pretty v UK*[3]) , rather than being considered under Article 14.

9. With respect to alleged breaches of Article 14 the European Court of Human Rights has essentially adopted a four-fold test in relation to Article 14 claims, although this may be expressed somewhat differently

[2] *Price v UK*, [2002] 34 EHRR 1285
[3] *Pretty v UK* [2002] 35 EHRR 1.

from case to case.[4] At paragraph 53 of her submissions, the Attorney General sets out the test adopted by the English Court of Appeal in the case of *Wandsworth London Borough Council v. Michalak*. The *Amicus Curiae* agrees that the formulation of the test in that case accurately summarises the case law of the European Court of Human Rights in relation to Article 14. The test provides for a sequential consideration of the issue as follows:

i) whether the matter falls within the ambit of a substantive Convention right;
ii) whether a difference of treatment on the basis of status can be demonstrated;
iii) whether any difference of treatment pursues a legitimate aim; and if so,
iv) whether the measure in question is proportionate to the aim

The test at iii) and iv) includes an examination of whether the difference of treatment extends beyond the State's margin of appreciation.

(i) <u>Does the matter fall within the ambit of a substantive Convention right?</u>

10. Article 14 prohibits discrimination *only* in the enjoyment of the rights set forth in the ECHR and its Protocols.[5] It is not a free-standing guarantee of non-discrimination and therefore must be considered in conjunction with another substantive right or rights under the Convention.[6] However, the European Court of Human Rights has held in *Marckx v Belgium,* [7] that even where there was no breach of a substantive article, in that case Article 8 of the ECHR, there could still be discrimination contrary to Article 14:

[4] See White and Ovey, *The European Convention on Human Rights*, 5th Ed., at p. 547
[5] See *Rasmussen v Denmark*, Judgment 28 November 1984, at para 29.
[6] Protocol 12 of the Convention enshrines a free standing right to protection from discrimination, but has not come into force, and Ireland has not ratified same.
[7] (1979) 2 EHRR 330 at 343

> *"The Court's case law shows that, although Article 14 has no independent existence, it may play an important autonomous role by complementing the other normative provisions of the Convention and the Protocols: Article 14 safeguards individuals, placed in similar situations, from any discrimination in the enjoyment of the rights and freedoms set forth in those other provisions. A measure which, although in itself in conformity with the requirements of the Article of the Convention or the Protocols enshrining a given right or freedom, is of a discriminatory nature incompatible with Article 14, therefore violates those two articles taken in conjunction. It is as though Article 14 formed an integral part of each of the provisions laying down rights and freedoms."*

11. The Applicant contends that there has been a breach of his Article 6 rights. As below mentioned there has arguably also been a breach of his Article 5 rights. The *Amicus Curiae* notes that for Article 14 to be engaged it is sufficient that a substantive right is engaged, not necessarily that it has been breached. It is sufficient for an applicant to show that the subject matter of the disadvantage "constitutes one of the modalities" of the exercise of the right, or that the treatment complained of is "linked" to the exercise of a Convention right: *Abdulaziz, Cabales & Balkandali v United Kingdom* (1985) 7 EHRR 471; *Petrovic v Austria* (1998) 33 EHRR 307 at [22] and [28].

12. It appears to the *Amicus Curiae* that the case law of the European Court of Human Rights in relation to the interpretation of Article 14 where Article 5 is engaged is instructive. It is submitted that Article 5 is engaged (although it may not be breached) in the Applicant's case, insofar as the ultimate damage apprehended by the Applicant is the risk of having a longer sentence imposed in the Circuit Court than could be imposed in the District Court, thereby raising an issue concerning not only fair trial rights under Article 6 but also deprivation of liberty rights under Article 5.

13. It is notable that in the recent case of *Clift v UK*[8], the difference in treatment of prisoners between those serving determinate sentences of in excess of fifteen years, and those serving indeterminate sentences or

[8] *Clift v UK*, Judgment 13 July 2010.

sentences of less than fifteen years, was regarded as coming within the provisions of Article 14. The Court stated:

> *"Where an early release scheme applies differently to prisoners depending on the length of their sentences, there is a risk that, unless the difference in treatment is objectively justified, it will run counter to the very purpose of Article 5, namely to protect the individual from arbitrary detention. Accordingly there is a need for careful scrutiny of differences of treatment in this field."*[9]

14. Even if Article 6 rather than Article 5 is contended to be the only Article in issue in the present case, the apprehended wrong that may be occasioned on the Applicant is an exposure to the risk of a longer custodial sentence than would be the case if he did not have a disability, albeit that he has not reached conviction or sentencing stage, and so the rationale in *Clift* may apply.[10]

15. In any event apart from Article 5, it is clear that Article 6 is engaged in that the Applicant's right to a fair trial (i.e. prosecution, adjudication and sentencing), with the consequential procedural safeguards due a person with mental disability, is at the heart of the case. In this regard the principles set down in *T v UK,*[11] which concerned the trial of a minor are of relevance, insofar as the Court determined that the inability of the accused to fully understand and participate in the criminal proceedings against him, on the basis that the criminal process was not sufficiently modified to address his situation as a minor, constituted a breach of Article 6. The Applicant in the present case is also clearly at a disadvantage in terms of understanding and participating in the criminal justice process, and so his Article 6 rights are clearly engaged. In *T v UK*, the Court determined that it was not necessary to consider discrimination

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[9] *Ibid* at para. 62
[10] See also *Kafkaris v Cyprus*, [2009] 49 EHRR 877.
[11] *T. v UK* (Application No. 24724/94) Judgment 16 December, 1999 in which the Court stated: "*The Court does, however, agree with the Commission that it is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings*"; at para 84.

on the basis of age, as the matter had been substantively addressed under Article 6.

(ii) *Is there a difference in treatment based on status?*

16. Article 14 prohibits discrimination on certain non-exhaustive grounds such as race, language, religion or birth.[12] The words "on any ground such as…" in Article 14 clarify that the enumerated grounds for discrimination set out in Article 14 are not exhaustive. In *Glor v Switzerland*, a difference of treatment on the ground of disability was found to come within the ambit of Article 14 of the ECHR.[13]

17. In the present proceedings it appears to be uncontested that the Applicant has a mental disability, although it may of course ultimately be determined that, notwithstanding his mental disability, the Applicant is fit to be tried. It is on the basis of that disability that the question of his fitness to be tried arises. As a consequence, it is submitted the Applicant has a "status" which falls within Article 14.

18. Turning to the question of whether there is a difference of treatment, the Applicant asserts that there is and the Attorney General submits that there is not. Notwithstanding this it is the *Amicus Curiae*'s understanding that the Applicant's contention that he has now lost the possibility of having his case disposed of summarily in the District Court is not in serious dispute. What does appear to be in issue is whether this gives rise to a real rather than a perceived disadvantage. The Applicant emphasises (at paragraphs 32 and 38 of his submission) that he has already been returned for trial to the Circuit Court and that there is no

[12] *See Abdulaziz, Cabales and Balkandali v United Kingdom,* at paras 87–89.
[13] In *Glor*, the Court stated: "*La Cour estime que l'on se trouve, à un double titre, en présence d'une différence de traitement entre personnes placées dans des situations analogues. La liste des motifs de distinction énumérés à l'article 14 n'étant pas exhaustive (« ou toute autre situation » ; voir Stec et autres, précitée, § 50), il n'est pas douteux que le champ d'application de cette disposition englobe l'interdiction de la discrimination fondée sur un handicap"*; at para 80. In *Botta v Italy,* although the Court did not consider that Article 14 arose to be considered in detail as Article 8, the substantive right relied on, was not engaged, the Court appeared to accept "disability", in that case a physical disability as a status under the Article.

way back. In her submissions the Attorney General postulates (at paragraph 3) a number of possible outcomes as to what may happen in the Circuit Court. While it is ultimately for the Court to determine which scenario in fact applies, and whether there is the material difference in treatment, as contended for by the Applicant, the *Amicus Curiae* makes the following observations. With respect to the scenario at paragraph 3(i) of the Attorney's submission it appears to the *Amicus Curiae* that this postulation may not be correct given the terms of sections 4(4)(d), 4(5) and 4(4)(e) of the 2006 Act. It appears therefrom that if the Applicant were to be found by the Circuit Court not fit to be tried, the court would then adjourn the proceedings and if at any time subsequently, the proceedings having been re-entered in the Circuit Court, he was found fit to be tried the proceedings would recommence in the Circuit Court. Accordingly even if the Applicant were to be found unfit to be tried it would not necessarily be the end of the matter and the issue of where the Applicant was to be sentenced would not necessarily be moot. Accordingly it appears to the *Amicus Curiae* that arguments as to unfairness of discrimination could arise with respect to the scenarios at 3 (i) and 3 (iii).

19. The distinction between direct and indirect discrimination in the context of Article 14 is dealt with in some detail in Appendix 2. Suffice to say that the discrimination in the instant case appears to be direct discrimination. However, it is submitted that irrespective of the distinction between direct and indirect discrimination, the determinative test of discrimination for the purpose of the ECHR is the impact of the treatment impugned. So for instance in *The Belgian Linguistic Case (No.2)* the European Court of Human Rights considered the "aim and effects" of the measure impugned to determine whether there was a breach of Article 14 in that case.

20. The question is whether the Applicant is at an apparent disadvantage compared to another accused, without his disability, by virtue of the operation of section 4 of the 2006 Act. Even if the Applicant is currently

found unfit to be tried, and therefore does not currently face the range of custodial sentences open to the Circuit Court to impose, he has already been treated differently in that his case has already been sent forward to the Circuit Court with, as it might be said, no way back. He has already lost any opportunity to have his case heard and determined in the District Court. It is hard to see how the Applicant can be held to be premature in bringing these proceedings insofar as he is challenging a difference in treatment which has already occurred.

(iii) *Does the difference in treatment pursue a legitimate aim?*

21. In considering whether a difference in treatment pursues a legitimate aim, it is instructive to examine where the European Court of Human Rights places the burden of proof. In *Timishev v Russia*[14], the Court stated: "*A differential treatment of persons in relevantly similar situations, without an objective justification, constitutes discrimination*."[15] The Court then went on to consider where the burden of proof should fall in such a case and stated: "*Once the applicant has shown that there has been a difference of treatment, it is then for the respondent Government to show that the difference in treatment could be justified*."[16]

22. This shifting of the burden of proof is a significant principle in discrimination law and is reflected in both domestic equality legislation,[17] and also EU Equality Directives,[18] and has further been endorsed by the European Court of Human Rights as the appropriate approach in discrimination cases. In *DH v The Czech Republic*[19], which concerned indirect discrimination against Roma pupils in Czech schools, the Grand

[14] *Timishev v Russia*, Judgment 13 December 2005.
[15] At para 56
[16] At para 57
[17] See section 38 of the Equality Act 2004.
[18] Article 8 of Directive 2000/43 EC (the Race Directive) provides: "Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment 1."

Chamber of the Court referred with approval to the approach of the EU directives and stated:

> *"178. … As regards the question of what constitutes prima facie evidence capable of shifting the burden of proof on to the respondent State, the Court stated in Nachova and Others that in proceedings before it there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. The Court adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties' submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake.*
> *179. The Court has also recognised that Convention proceedings do not in all cases lend themselves to a rigorous application of the principle affirmanti incumbit probatio (he who alleges something must prove that allegation). In certain circumstances, where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation. In the case of Nachova and Others, the Court did not rule out requiring a respondent Government to disprove an arguable allegation of discrimination in certain cases, even though it considered that it would be difficult to do so in that particular case in which the allegation was that an act of violence had been motivated by racial prejudice. It noted in that connection that in the legal systems of many countries proof of the discriminatory effect of a policy, decision or practice would dispense with the need to prove intent in respect of alleged discrimination in employment or in the provision of services."*

23. It is not necessary for an individual to show any intention to discriminate. All that the individual must show, and this Court must decide at first instance, is whether the circumstances show a difference of treatment on the basis of the individual's status. In such circumstances it is not for an Applicant to demonstrate that the legislation is neither objectively justified nor pursues a legitimate aim as the burden of proof has shifted to the Respondent. If a *prima facie* case of discrimination is made out, it falls on the State to provide the objective justification for the treatment, i.e. that

[19] *DH v The Czech Republic*, Grand Chamber, 13 November 2007.

the legislative provision being impugned has a legitimate aim, and the measure adopted to further that the aim is proportionate to the objective to be achieved.

24. It has also been established by the European Court of Human Rights that legislation may result in prohibited discrimination, and the fact that that difference in treatment follows from the mandatory application of legislation does not absolve the State from its responsibilities.[20] Whilst this may appear obvious, it is noted that the Attorney General in her submissions (at paragraph 18) refers to section 3 of the European Convention on Human Rights Act 2003 and that this provision, at subsection (2), refers to the fact that the person would have to show that he "has suffered" injury loss or damage as a result of a breach of that section. It is respectfully submitted however that section 3 would appear not to have relevance, as it is the operation of legislation which is mandatory (rather then discretionary) in its provisions that is being impugned, the consideration of which is specifically excluded from the ambit of section 3.

25. It is noted that at paragraph 39 of her submissions the Attorney General contends that there is no difference in treatment of the Applicant if he is found fit to be tried in so far as "[*he] is not being treated differently to any other accused coming before the courts for sentencing*." This appears to be based on a conflation of the authorities cited (in paragraph 38) holding that a prima facie presumption must always exist that a judge will perform his duties in a just and fair manner and with due regard to the principles of constitutional and natural justice and the presumption, also made in paragraph 38, that a Judge of the Circuit Court sentencing the Applicant, if he were ever to be found fit for trial and pleaded guilty, would impose a sentence in line with those which could have been imposed by the District Court had the Applicant been able to plead guilty there. It is noted however that the Attorney General's submissions do not appear to go so far as to suggest that the imposition of the sentence on the Applicant

which, whilst within the jurisdiction of the Circuit Court judge, exceeded that which could be imposed by the District Court, would be legally invalid *per se* such as would inevitably have to be reduced by the Court of Criminal Appeal on an appeal or quashed by the High Court by way of Judicial Review.

26. It is also to be noted on the other hand that it is submitted by the Attorney at paragraph 48 that "…*section 4 of the 2006 Act serves a legitimate purpose, the classification of persons set out in the 2006 Act represents an attempt to modernize an area of law which was outdated and based upon old statutes and common law principles*." It is submitted, that the question of a legitimate aim or objective justification only arises if the Court is in fact considering some form of difference of treatment, which must then be objectively justified.

27. It is accepted by the *Amicus Curiae* that the Criminal law (Insanity) Act 2006 was intended as a form of remedial legislation and that the State was not pursuing a deliberately discriminatory policy in this regard. However the *Amicus Curiae* submits that a broad assertion in general terms, such as is contained in paragraph 48 of the Attorney's submissions, that the legislation is a modernising measure and that it seeks to provide certainty and consistency is not sufficient to address the allegation of discrimination raised by the Applicant in his specific circumstances.[21] While it seems clear that, in the broadest terms, the 2006 Act may have had a legitimate aim, the question is whether section 4 of the Act furthers that legitimate aim or not, or whether it may indeed be inconsistent with that aim.

28. It is noted that in the present case the Director of Public Prosecutions was satisfied that the charge in the particular circumstances of this case was one which could properly be disposed of summarily in the District

[20] *Thlimmenos v Greece*, Judgment 6 April 2000, at para. 48.
[21] In *DH v The Czech Republic* the Grand Chamber accepted that the Government's decision to retain special schools was benign insofar as it was motivated by the desire to meet the needs of children with

Court, subject to a plea of guilty and that the District Judge was satisfied to hold that it was a minor offence. However as matters now stand it appears that the matter cannot come back before the District Court to be disposed of on a plea of guilty, and it appears to the *Amicus Curiae* that nowhere in the submissions of the Attorney General, save as below mentioned, is it stated what the legitimate purpose pursued by the operation of section 4(4) could be. The fact that the 2006 Act is reforming in nature, does not exclude it from being discriminatory in practice. This point is brought into greater focus when we consider what the applicant is actually asserting. In the applicant's submissions it is stated:

> *"It follows from this that the Oireachtas has imposed a condition for summary trial which one class of persons (the mentally well) can meet, but which another class of persons (the mentally disordered) cannot meet. Rather than being respectful of the needs of the mentally ill (which one might have expected would be the case in a statute supposed to be catering for the needs of persons suffering with mental disorders) the impugned section operates to exclude from its ambit the very persons whom it is supposed to be protecting."*[22]

29. It appears from the Attorney General's submissions that it may be contended that the legitimate aim being pursued by section 4(4) is to ensure that it is the court of trial which deals with both the fitness to be tried and, should the matter proceed further, its ultimate hearing, The *Amicus Curiae* notes however that the procedure in respect of trials of indictable offences is premised on the *prima facie* assumption that the trial process will move from the District Court to a higher Court. While the range of matters to be dealt with by the District Court in the course of this procedure has been significantly reduced by the amendments to the Criminal Procedure Act, 1967 effected by the Criminal Justice Act, 1999 it remains the situation that matters of potentially determinative significance (for example the jurisdiction of the District Court to dismiss a charge pursuant to section 4E of the 1967 Act, as amended) are left to the District Court. It appears to the *Amicus Curiae* in those circumstances

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special needs, however this did not prevent the Court finding a breach of Article 14 insofar as the operation of the special schools was to the detriment of Roma pupils.

[22] At para 26

that the legitimate aim to have all matters dealt with in the trial court in respect of the issue of fitness could only be one peculiar to that issue and not one based on a general aim to consolidate criminal procedures in one court. If that is so it is unclear to the *Amicus Curiae* what that legitimate aim is.

30. The *Amicus Curiae* also notes that a legitimate aim expressed in terms of having the court of trial deal with both the initial fitness and, should the matter proceed further, the hearing of the trial, begs the question to a considerable extent. If another accused was in the same position as the Applicant, save that no issue of fitness arose, the court of trial would be the District Court if he pleaded guilty and the Circuit Court if he pleaded not guilty.

31. While the impact of the Applicant's assertion, above mentioned, at paragraph 28, would of course be tempered if the Applicant is currently found unfit to be tried, this does not diminish the fact that if he is subjected to the jurisdiction of the Circuit Court to determine the issue of fitness to be tried under the 2006 Act and, the charges against him merely being suspended, he will have foregone the possibility of those charges ever being disposed of summarily in the District Court.

32. When looking at the objective justification put forward, the European Court of Human Rights will allow a "margin of appreciation" to the State in determining what measures should be put in place to achieve the objective sought.[23] However that "margin of appreciation" may be narrower or wider depending on the ground involved. It has been commented that the "scope and intensity" of the European Court of Human Rights' review may vary according to the prohibited ground of differentiation. The State's "margin of appreciation" is thus arguably reduced where a difference of treatment on the basis of disability

[23] See *Lithgow and Others v The United Kingdom*, Judgment 8 July 1986 at para 177.

occurs.[24] In this regard it appears to the *Amicus Curiae* that a person with a mental disability is particularly at risk in the context of the criminal justice system without adjustments being made to take account of his or her disability. The position is of course that the State did seek to make adjustments to take account of the possibility that somebody before the criminal justice system might have a mental disability which rendered them unfit for trial. The issue in the case herein is whether in the process of so doing the State imported yet another layer of discrimination into the criminal process against people who have a mental disability and, more particularly, against people with a mental disability who may be found, at any time in the future, to be fit for trial. Therefore it is submitted that any allegation of discrimination in this context, where the right to a fair trial and the right to liberty are in issue, requires particularly detailed examination to uphold the rights enshrined under the Convention.[25]

33. The *Amicus Curiae* notes that in considering whether a difference of treatment had occurred in *Glor*, which concerned exemption from military service on the grounds of disability, the European Court of Human Rights considered that the Swiss authorities had treated persons in similar situations differently in two respects: firstly, the applicant was liable to a tax, unlike persons with more severe disabilities, and secondly, he was also liable for the tax unlike conscientious objectors to military service who were not.[26]

34. One final matter in relation to Article 14, which it may be necessary for this Court to address is that the Applicant seeks to strike down a positive legislative provision on the basis that it fails to address his particular circumstances, and negatively impacts on him. In this regard, what is alleged is that there is a lacuna in the law. If this interpretation is correct,

[24] *See Glor v Switzerland,* at para 84.
[25] In this regard it is noted in *Magee v UK*, Judgment 6 June 2000, the Court was willing to accept a difference in treatment of accused in the criminal justice system on the basis of their geographical location did not offend Article 14, but indicated that if such a difference of treatment was based on personal characteristics, such as national origin or association with a national minority, the outcome would not be the same (at para 50).
[26] *Glor v Switzerland, a*t paras 81-90 generally.

then the legitimate aim put forward by the State becomes immediately more suspect, as the submission of the Attorney posits that a positive objective is being pursued by section 4 of the 2006 Act, rather than seeking to justify the lacuna on the basis that there is no necessity to legislate for the Applicant's circumstances.

(iv) *Is the aim proportionate?*

35. If it is accepted that the Attorney General's submissions disclose a legitimate aim being pursued by section 4(4), i.e. to ensure that it is the court of trial which deals with both the fitness to be tried and, should the matter proceed further, its ultimate hearing, this does not address the question of whether in the present circumstances it is a proportionate measure.

36. Article 14 is violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.[27] The Attorney General in her submission states " … *it would not be to the benefit of accused to (sic) suffering from a mental disorder (or any accused) to be sent back or forth between the District Court and the Circuit Court*". However, this assertion arguably does not address the real disadvantage which the Applicant asserts, which is that the jurisdiction of the District Court to deal with the matter summarily on a plea of guilty is permanently ousted, and this only so because he has a mental disability. There is little doubt that being moved between courts repeatedly would be an inefficient way for the criminal justice system to operate and not desirable for any accused, bearing in mind the right of the accused to a timely trial,[28] but it is submitted this aim may not address the discrimination that the Applicant alleges.

[27] *Belgian Linguistics* case, Judgment of 23 July 1968, (1968) 1 EHRR 252, para. 10.
[28] *McFarlane v Ireland*, Grand Chamber, Judgment 10 September 2010.

37. The Attorney General's submission on this point also begs the question as to why it is appropriate that an accused, who could have been dealt with summarily in the District Court, cannot have the matter of his fitness to be tried also considered by the District Court, and if found fit to be tried, then have that Court consider the matter of sentencing if a plea is entered.

38. In conclusion when the Court comes to consider the application of Article 14 to the present proceedings, if it is accepted as uncontroversial that the matter comes within the scope of a substantive Convention right (Articles 6 and 5), and that there is a difference of treatment in terms of impact on the Applicant on the basis of his status, the Court must then consider a) whether the State has shown "by convincing evidence that there is a link between the legitimate aim pursued and the differential treatment challenged by the applicant"[29] and if so, b) whether the provision in question is proportionate, that is, whether it is sufficiently well tailored to advance the legitimate objective put forward and does not unduly interfere with the rights of the Applicant in doing so.

Article 26 of the ICCPR

39. In contrast to Article 14 of the ECHR, Article 26 of the International Covenant on Civil and Political Rights ('ICCPR') contains a guarantee of equality that is not limited to the enjoyment of the rights covered by the ICCPR. Article 26 guarantees equality and prohibits discrimination in any area of the law.[30] To the extent that a matter is regulated by the law, that law must not discriminate between persons. It applies to any law, whether or not the law in question relates to a right protected under an international agreement.[31]

[29] See White and Ovey, *The European Convention on Human Rights*, 5th Ed., at p.560,
[30] *See Zwaan-de Vries v. The Netherlands*, 9 April 1987, twenty-ninth session of the HRC UN Doc. Supp. No.40 (A/42/40) ("*Zwaan-de Vries v. The Netherlands*") and the HRC, General Comment No. 18, *Non-discrimination*, thirty-seventh session (1989) 10 November 1989, at para. 12.
[31] *Ibid*.

40. Article 26 provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

41. In its General Comment No.18 on Non-discrimination ('General Comment No.18')[32], the Human Rights Committee ('HRC') clarified the scope of "discrimination" under Article 26 of the ICCPR, in that it prohibits discrimination in law or in fact in any field regulated and protected by public authorities. When legislation is adopted by a State Party, its content should not be discriminatory. Nor should the application of the legislation be discriminatory. Difference of treatment is assessed by reference not merely to the purpose of the law in question, but also to the impact or effect of the law. As with the ECHR, both direct and indirect discrimination are prohibited.

42. General Comment No. 18 also recognises that not all differences of treatment constitute discrimination, provided that the criteria for such differentiation are reasonable and objective and the aim is to achieve a purpose which is legitimate under the ICCPR.[33]

43. The HRC applies a three-fold test in considering Article 26 complaints similar to the test of the European Court of Human Rights:

    (i) whether there was any difference of treatment between categories of person based on the ground of a person's status; if so,

[32] *Ibid*.
[33] General Comment 18, op. cit., at para.13. *See also Zwaan-de Vries v. The Netherlands* , op cit, where the HRC observed "… not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant"; op cit., at para. 13.

(ii) whether the criteria for such differentiation were reasonable and objective and

(iii) whether the aim was justified to achieve a purpose legitimate under the ICCPR.

44. The HRC will consider, first, whether there has been a difference in treatment quite broadly, including, for example, distinctions based on disability and most other grounds, such as age or health status. This was confirmed in the HRC's Concluding Observations on Ireland's Second Periodic Report in 2000.[34]

45. As to whether the difference of treatment was reasonably and objectively justified, the test employed by the HRC is similar to that employed by the European Court of Human Rights in relation to Article 14 of the ECHR. A difference of treatment may be justified if the measure in question has an aim which is legitimate.[35] There must also be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. Where a barrier exists in law which prevents or inhibits an individual from equal protection of the law, the HRC will find that the application of the law violates an individual's rights under Article 26. Thus in *Lange v The Czech Republic*[36], it held that Article 26 had been violated

[34] In its Concluding Observations on Ireland's Second Periodic Report in 2000, the HRC recommended that further action be taken to ensure full implementation of the ICCPR in a number of matters including in "*Ensuring the full and equal enjoyment of Covenant rights by disabled persons, without discrimination, in accordance with article 26*"; *Concluding observations of the Human Rights Committee : Ireland. 24/07/2000 A/55/40, paras.422-451;* Sixty-ninth session at para. 29(e). *See* description of "other status" cases in A. Lester and S. Joseph, "Obligations of Non-Discrimination", in *The International Covenant on Civil and Political Rights and United Kingdom Law*, ed. by D. Harris and S. Joseph, Oxford, 1995, chapter 17, p. 568. See also Althammer v Austria, 8 August 2003, seventy-eighth session of the HRC UN Doc.. CCPR/C/78/D/998/2001 where the Committee found that discrimination based on age could not be demonstrated in circumstances where "… *an increase of children's benefits is not only detrimental for retirees but also for active employees not (yet or no longer) having children in the relevant age bracket*...*"*; at para 10.2.

[35] *See* Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* N.P. Engel, Kehl/Strasbourg/Arlington, 1993, at p. 473, cited by Lester and Joseph, p. 586. in *Obligation of Non Discrimination* A. Lester and S. Joseph, in I*nternational Covenant on Civil and Political Rights and United Kingdom Law* (1995) ed. By D. Harris and S. Joseph, Oxford, 1995, pp. 563-596.

[36] 13 July 2011, one hundred and second session of the HRC, Communication No. 1586/2007 at para 7.3.

where a Czech law required the authors to obtain Czech citizenship as a prerequisite for the restitution of their property or, alternatively, for the payment of appropriate compensation.[37]

46. This analysis of Article 26 of the ICCPR demonstrates that there is a commonality of approach in vindicating the right to equality across regional and international treaty systems and therefore may be considered as helpful in the domestic context when considering the analogous right under the Constitution. While the right may be phrased somewhat differently and the emphasis may also vary, the approach to determining whether or not discrimination has occurred, it is submitted, remains relatively uniform.

The Convention on the Rights of Persons with Disabilities ('the CPRD')

47. In *R.T. v. The Director of the Central Mental Hospital* [1995] 2 IR 65 the President of the High Court, Mr Justice Costello, had regard to international conventions and recommendations in considering the constitutionality of the Mental Treatment Act 1945. He stated (at 79) (underlining added):

> *"The reasons why the Act of 1945 deprives persons suffering from mental disorder of their liberty are perfectly clear. It does so for a number of different and perhaps overlapping reasons — in order to provide for their care and treatment, for their own safety, and for the safety of others. Its object is essentially benign. But this objective does not justify any restriction designed to further it. On the contrary, the State's duty to protect the citizens rights becomes more exacting in the case of weak and vulnerable citizens, such as those suffering from mental disorder. So, it seems to me that the constitutional imperative to which I have referred requires the Oireachtas to be particularly astute when depriving persons suffering from mental disorder of their liberty*

[37] See also *Zwaan-de Vries v. The Netherlands*, where the HRC considered that a subsequent change to the law in the Netherlands was an acknowledgement that the difference of treatment in that case could not be said to be based upon reasonable grounds: *see* para. 14. Also, in *Kavanagh* v. *Ireland*, 28 November 2002, sixty sixth session of the HRC, Communication No. 819/1999 the HRC found that the refusal of the relevant authority to give reasons for a certain practice meant that a decision to try the person by a certain procedure could not be said to be based upon reasonable and objective grounds; at para. 10.3. In contrast, in *Blom v. Sweden*, 4 April 1988, thirty second session of the HRC, Communication No. 191/1985, a distinction between State subsidies for students at private and students at public schools was found to be reasonable and objective. At para. 10.3.

and that it should ensure that such legislation should contain adequate safeguards against abuse and error in the interests of those whose welfare the legislation is designed to support. And in considering such safeguards regard should be had to the standards set by the Recommendations and Conventions of International Organisations of which this country is a member."

48. In *H.S.E. v. X*., High Court, 29th July, 2011, MacMenamin J. referred to the passage of Costello P. set out above and stated that *"the extent and depth of the rights which may be engaged have been identified in the United Nations Convention on the Rights of Persons with Disabilities and in Council of Europe instruments"*, and made specific reference to Article 12 of the CPRD which recognises "*the right to equal recognition before the law for persons with disabilities*" (see paragraphs 79-82 of the judgment of MacMenamin J.)

49. In line with *H.S.E. v. X*, the *Amicus Curiae* submits that in considering international conventions when determining the scope of the Applicant's rights under the Constitution and the ECHR, this Court should have particular regard to the CRPD which has been heralded as a progressive human rights instrument which enshrines a change from 'paternalism' to a rights-based respect for disabled people as persons who must be treated equally to others.

50. Ireland signed the Convention on 30th March, 2007, and intends to ratify it. The Government's recognition of the Convention is reflected in its statement that the reforms proposed in the 2008 Scheme for the Mental Capacity Bill will enable the State to meet its obligations under the CRPD, insofar as it relates to legal capacity issues.[38] The EU was an active participant in the drafting of the Convention and indeed it is the first such Convention that has been ratified by the EU.

[38] Press Release of the Department of Justice, Equality and Law Reform, "Minister Ahern Announces Proposals for a Mental Capacity Bill", (15 September 2008), available at www.justice.ie.

51. It is also crucial to recall that the CRPD does not in fact create new "disability specific" rights. In fact all the rights referred to in the CRPD have been drawn from other international Conventions to which Ireland is a party, such as the ICCPR already referred to. However the usefulness of the CRPD, and it is respectfully submitted, its relevance in the context of the present proceedings, is that it expresses those rights in a new way, and allows us to gain an appreciation of how those rights, such as the right to bodily integrity, privacy and equality may be given meaning and substance when invoked by persons with disabilities.

52. Commenting on the CRPD, in 'Legal Capacity Law Reform in Europe: An Urgent Challenge', European Yearbook of Disability Law, Volume 1, 2009, pages 59-88, Mary Keys (founding member of the Centre for Disability Law and Policy Research at the School of Law in NUI Galway) states:

> *Attitudinal change is a central element of progress recognising the paradigm shift from the paternalistic system to one where persons with disabilities have rights on an equal basis with others as provided for in the Convention on the Rights of Persons with Disabilities, and particularly Article 12 on legal capacity. One commentator says that Article 12 '... lies at the very heart of the revolution in disability – treating people as "subjects" and not as "objects" (at page 61).*

53. The principles of respect for dignity and autonomy and for the freedom to make one's own choices, and the principles of equal treatment and of non-discrimination, are at the core of the CRPD.

54. Article 2 of the CRPD provides:

> *Discrimination on the basis of disability" means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation*

55. Article 3 provides:

The principles of the present Convention shall be:

(a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;

(b) Non-discrimination;

(c) Full and effective participation and inclusion in society;

(d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;

(e) Equality of opportunity;

(f) Accessibility;

(g) Equality between men and women;

(h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

56. Article 5 is entitled "Equality and non-discrimination" and provides:

1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.
4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

57. The references to "the equal protection and equal benefit of the law" and to "equal and effective legal protection against discrimination on all grounds" should be interpreted in light of the guarantee to equal recognition before the law (Article 12) and the right of access to justice under Article 13(1) which guarantees equal and effective access to justice "*including at investigative and other preliminary stages"*.

58. Article 12 is headed 'Equal recognition before the law' and provides:

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

59. Article 13 is entitled 'Access to justice' and provides:

> *1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.*
>
> 2. *In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.*

60. It is submitted that the combined effect of Articles 5, 12 and 13 of the CRPD is that discrimination in the criminal process between persons with disabilities and those without, including in the preliminary stages of such process, is unlawful unless aimed at ensuring equal access to justice for such persons.

Article 40.1 of the Constitution

61. Article 40.1 of the Constitution provides:

> *All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.*

62. In *de Búrca v Attorney General*[39] Walsh J stated that Article 40.1 imports an Aristotelian or natural law understanding of equality:

> *Article 40 does not require identical treatment of all persons without recognition of differences in relevant circumstances but it forbids invidious or arbitrary discrimination. It imports the Aristotelian concept that justice demands that we treat equals equally and unequals unequally.*[40]

63. Under this formulation, Article 40.1 thus protects both formal equality (an equal application of rules to those covered by the rules) and part of Aristotelian equality (requiring that legislative differentiation should reflect real differences between persons or classes of persons). "Invidious or arbitrary discrimination" is prohibited.

64. The Supreme Court has held that it is permissible for the Oireachtas, in enacting legislation, to have regard to the difference between the mentally firm and infirm.[41] A fair statutory classification must be "for a legitimate legislative purpose … it must be relevant to that purpose, and … each class must be treated fairly."[42] Article 40.1 of the Constitution is not a guarantee "that all citizens shall be treated by the law as equal for all purposes".[43] Where there are special considerations regarding abilities or need, this may justify a difference in treatment.[44]

65. The second limb of the test in *Brennan*[45] - that the statutory classification should be relevant to a legitimate legislative purpose - seems to require the courts to evaluate whether the quality of the difference of legislative

[39] [1976] IR 38.
[40] *Ibid*., at 68.
[41] *In re Philip Clarke* [1950] IR 235, 247-248.
[42] Mr. Justice Barrington, *Brennan v Attorney General* [1983] ILRM 449.
[43] *The State (Nicolaou) v An Bord Uchtála* [1966] IR 567, at 639.
[44] *Ibid*.
[45] *Op. Cit.*

treatment is reasonably related to the quality of the difference between the classes of person concerned. While the *Amicus Curiae* notes that the courts have upheld legislative classifications on occasion even though the quality of the classification may not have borne any reasonable relation to the quality of the difference between the situations which it was sought to regulate,[46] it also notes that it has been suggested by commentators that this falls foul of that test.

66. In relation to court procedures, Mr. Justice Henchy held in *The State (Keegan) v Stardust Victims Compensation Tribunal* that Article 40.1 "requires that people who appear before the Courts in essentially the same circumstances should be dealt with in essentially the same manner."[47]

67. In *State (Hunt) v O'Donovan*, the defendant had signed a plea of guilty to a charge that he had committed an indictable offence and was sent forward for trial to the Circuit Court. He did not withdraw his plea before the Circuit Court. He was sentenced to a term of imprisonment and failed in his attempt to appeal against the sentence under s. 13 of the Criminal Procedure Act 1967, as he could not show that he had been "tried on indictment".[48] Finlay J. rejected the argument that this potential for differential treatment amounted to invidious discrimination between the defendant and a person who withdrew their plea in the Circuit Court and then pleaded guilty to the indictment, on the basis that in such a case the accused chose into which category they fell.[49] He also rejected it on the

[46] Thus, in *O'Brien v Manufacturing Engineering Co*.[1973] IR 334, (1974) 108 ILTR, 105, the Supreme Court upheld, in the context of limitation periods for common law actions for personal injuries caused by an employer's fault, a distinction between those employees who had accepted a statutory weekly payment in respect of the injury, for whom a limitation period of, at most, two years applied, and those who had not claimed this payment, for whom a three year limitation period applied. Hogan and Whyte note that in upholding this classification, the Court did not ask whether the quality of the difference between the two categories of injured workmen bore a rational relation to the quality of the difference in how they were treated for limitation purposes.
[47] *The State (Keegan) v Stardust Victims Compensation Tribunal* [1986] IR 642, at 658.
[48] Oran Doyle, *Constitutional Equality Law* (Round Hall, Dublin, 2004), at 180-181.
[49] Finlay J. in *State (Hunt) v O'Donovan* [1975] I.R. 39, at 50.

basis that any sentence would be imposed by a constitutional court following prescribed procedures.[50]

> *"The person who has been sent forward for sentence on his plea has the opportunity to withdraw that plea up to the very last moment; in addition such person is sentenced, after due submission and evidence, by a constitutional court with an independent judge subject to legal maximum standards as to the penalty he may impose. In these circumstances I do not consider that these provisions are repugnant to either s. 1 of Article 40 or s. 3 of that Article of the Constitution.*[51]

It is submitted that in the Applicant's case herein is different in that the sentencing regime to which the Applicant is now potentially exposed is one over which he had no choice. He did not choose into which category he fell.[52] Furthermore, the legal maximum standards as to the penalty which may be imposed are significantly greater

68. In *Tormey v Attorney General*, a claim that s. 31(1) of the Courts Act 1981 allowed an accused person returned for trial to the Circuit Court sitting in Dublin, but not vice versa, was rejected. Costello J. held that the distinction drawn was not based on individual characteristics or qualities of accused persons in the different venues, but on the perceived need by the Oireachtas to allow either the prosecution or the accused to obtain a transfer of a trial to Dublin to obviate any possible prejudice to the trial, as there is available a larger number of persons qualified to act as jurors in Dublin.[53]

69. In *Molyneux v Ireland*,[54] Costello P. rejected an argument against the constitutionality of differential powers of arrest depending on whether the police officer operated in Dublin or not.

> *In this case it would be quite irrational to suggest that the basis for the difference of treatment between suspects in the Dublin area and those outside it was some basic human attribute or quality which differentiated suspects in the Dublin area from those outside it. Rather*

[50] *Ibid*.
[51] *Ibid*. Doyle has questioned the logic of Finlay J's second reason for rejecting the claim – that the sentence was handed down by a constitutional court – since it suggests that an ability to appeal may never be important. The Supreme Court dismissed the appeal in two sentences without offering any reasons.

[53] *Tormey v Attorney General* [1984] ILRM 657, at 662.
[54] *Molyneux v Ireland* [1997] IEHC 206.

it is a reasonable inference that the difference of treatment was based on considerations of public policy relating to the incidence of crime in the Dublin area, the difficulty of apprehending suspects in that area and the need to do so speedily. This being the case the difference of treatment in no way infringes the guarantee of equality contained in Article 40(1). There is therefore no need to consider whether it is justified by the provisions of its second paragraph.[55]

70. In these cases, it will be observed that the locus of a trial or a police officer's stationing was at issue and not a difference of treatment on the basis of the accused's status or human attributes.

71. In *Director of Public Prosecutions (Stratford) v O'Neill*, the court had to consider the compatibility with Article 40.1 of a statutory provision requiring the District Court to consider, *inter alia*, the character and antecedents of a young person before deciding whether to deal summarily with the offence where no comparable requirements existed in relation to the summary trial of other defendants. Smyth J rejected the claim:

The purpose of the Section, in my opinion, is to afford an opportunity to the District Judge prior to embarking on the hearing of the charge (but knowing the nature of the offence) to be in a position to assess the capacity of the young person to appreciate and give an informed consent concerning any decision by such young person, when given the choice to be tried summarily or to be tried by a jury.

The exercise is in the nature of a preliminary investigation. It is clearly not the trial of the offence. It ensures that if given the choice the young person has an appreciation of the possible legal course and consequences of making such choice. The exercise far from infringing the principle of equality before the law has inbuilt in it constitutional concern to ensure that due regard to differences of capacity are observed. The exercise is consonant with the concept of "in due course of law" […]. The freedom of the individual to make an informed decision as to which mode of trial he should elect for, is accorded by the Section.[56]

72. It is significant that in the above case, weight was given to the fact that the accused was permitted to make an informed decision as to mode of

[55] *Ibid*., at 3358.
[56] *Director of Public Prosecutions (Stratford) v O'Neil*l [1998] 2 IR 383, 386-387.

trial, and that the difference in treatment did not relate to the actual mode of trial itself, but to a preliminary investigation.

73. In *Callan v. Ireland and the Attorney General*,[57] the plaintiff challenged Section 5(2) of the Criminal Justice Act 1990 in that it introduced a distinction with respect to remission between the plaintiff and persons who had been convicted of capital murder after the coming into operation of the Act. However, this was dismissed since the court held that the plaintiff should compare himself not with persons sentenced under the 1990 Act, but with those sentenced under previous legislation. The plaintiff had not identified any person who was convicted of capital punishment prior to 1990 who had had his/ her sentence commuted and had subsequently been given the benefit of remission. In relation to fair procedures, it was held that the power of commutation does not attract the right to constitutional justice, since it is a privilege afforded to the prisoner at the discretion of the President. The plaintiff had not been subjected to discrimination simply by virtue of the legal landscape changing in 1990.

74. It is submitted that such a situation is different from the herein Applicant's case because both a potential judicial sentence is at issue and the Applicant may be treated differently to other defendants under the same legislation and in the same time period on the basis of his disability status.

75. The principle set out in *McMahon v Leahy*[58] by Mr. Justice Henchy that persons coming before the Court who cannot be differentiated on the basis of relevant criteria should, broadly speaking, be treated equally was recently mentioned in the context of comparing sentences in the High Court case of *DPP v. Duffy*.[59] In that case, it was held that there should be no inequality of treatment in sentencing, unless justified.[60] In the case

[57] [2011] IEHC 190, Judgment of 15 April 2011 (HC).
[58] [1984] IR 525.
[59] [2009] IEHC 208; Judgment of 23 March 2009 (HC).
[60] Two defendants had pleaded guilty to a single corporate and individual count of "entering" and authorising the company to enter into a price fixing agreement. Mr. Duffy and his company also

of *The People (DPP) v Shinnors*, Section 2 of the Criminal Justice Act 1993 was challenged under Article 40.1, as it gave the DPP a right to apply to the Court of Criminal Appeal in relation to sentence, since had the trial taken place in the District Court the DPP would have no right to apply. It was held that Article 40.1 had no application. Citing Quinn's Supermarket, the court held that Article 40.1:

> *is a guarantee related to the dignity of persons as human beings and a guarantee against any inequalities grounded upon an assumption, or indeed a belief, that some individual or individuals or classes of individuals, by reason of their human attributes whether ethnic or racial, social or religious background, are to be treated as the inferior or superior of other individuals in the community. The difference in treatment here is not related to human attributes: it is related to the different court of trial.*[61]

76. Finally, in *S.M. v. Ireland (No. 2)*,[62] Section 62 of the Offences against the Person Act 1861 was challenged on the basis that the maximum penalty for the offence of indecent assault when committed against a male person was substantially different to the maximum penalty mandated by law when the same offence was committed against a female. This was held to violate Article 40.1 of the Constitution:

> *I can find nothing in the Act of 1861 or in an objective consideration of the differences of physical capacity, moral capacity and social function of men and women which points to a legitimate legislative purpose for imposing a more severe maximum penalty for indecent assault on a male person than for the same offence against a female person. Therefore, I have come to the conclusion that the relevant provision is inconsistent with Article 40.1.*
>
> *I have come to that conclusion on the basis of the case as presented without having to reach any conclusion on whether the burden of establishing justification lies with the defendants or with the plaintiff. It is also unnecessary to express any view on whether gender-based discrimination warrants a strict scrutiny approach. In my view, no rational justification for the different maximum penalties which statute law prescribes where the offence of indecent assault is committed, whether by a man or a woman, against a male and a female can be divined even on the basis of the most deferential form of scrutiny. That discrimination is the legacy of Victorian mores and social attitudes. It is*

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pleaded guilty to an additional charge of implementing the agreement. Hanna J. held that some alignment must be kept between their respective sentences. See paras 70 and 71 of the judgment.

[61] The People (DPP) v Shinnors, Judgment of 24 May 2007 (CCA).

[62] [2007] 4 IR 369.

an anomaly which just over a quarter of a century ago the Oireachtas eliminated prospectively.[63]

77. On one level, the 2006 Act sought to achieve the principles espoused in Article 5(3) of the CRPD, namely: "*In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided".* The Attorney argues that this is so at paragraphs 48 of her submissions, stating that the Act has a "legitimate legislative purpose" as an "Act represent[ing] an attempt to modernize an area of law". The 2006 Act is generally accepted as being an enlightened piece of legislation. This however has not meant that all of the Act's provisions were satisfactory, or have always applied satisfactorily to individuals. The Criminal Law (Insanity) Amendment Act 2010 amended Section 13 of the 2006 Act and, as a consequence, settled the proceedings *Byrne v Mental Health (Review Board) & Others* (in which the Commission appeared as *amicus curiae*). Further, the 2006 Act is currently the subject of a formal review by the Department of Justice and Equality (including the issue of fitness to plead), as is the Mental Health Act 2001 (by the Department of Health). It is also perhaps worthy of note that a mental capacity bill is expected to be produced in 2012.

78. Whilst the 2006 Act has an undoubted legitimate legislative purpose, this does not necessarily translate to all its provisions, which continue to be tested and reviewed in light of developing standards, including those under the CRPD.

79. As Oran Doyle notes in *Constitutional Law: Text, Cases and Materials (Clarus Press 2008, p.67*), [64] the Courts have been quicker to strike down antiquated common law rules, but more recently there is an increasing requirement for the State to justify a difference in treatment between classes of person. This of course is the standard required under the

[63] *Ibid*., at 397.

ECHR and ICCPR which, in the *Amicus Curiae's* respectful submission, should inform Constitutional interpretation.

80. The courts have constructed constitutional remedies to allow for equality on the ground of sex. Thus in *McKinley v Minister for Defence*[65] the Supreme Court developed the common law rule of action for loss of consortium so as to allow a right of action to wife as well as to husband. Thus a difference in treatment on the basis of sex inherent in the rule was addressed.

81. Similarly, administrative acts may violate the guarantee in Article 40.1 if they do not faithfully follow the purpose of the legislative scheme which gave rise to them. Thus where the legislation evinces no intention to differentiate between persons affected by a scheme, the administration of the legislation must not import any such differentiation. In *McMahon v Leahy*[66] O'Higgins CJ held that an escaped prisoner should be treated similarly to others in the same class as otherwise "*it would mean contradictory declarations in relation to the same incident … from the Courts*."[67]. It is suggested that such an approach should also apply to the application of primary legislation.

82. Commentators have argued that the human personality doctrine in *Quinn's Supermarket v Attorney General*[68] as expounded by Kenny J relating to "*the characteristics inherent in the idea of human personality*"[69] should yield to Walsh J's exposition of the "*basis of discrimination*" test under Article 40.1.[70]

83. In that case, Walsh J stated:

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[64] O. Doyle, *Constitutional Equality Law* (2004), Thompson Round Hall at 148-151.
[65] [1992] 2 IR 333.
[66] [1984] IR 525.
[67] Op. cit., at 537-538. The Court was clearly exercised by the perception of the administration of justice in the Courts which in the view of the Chief Justice "would surely suffer".
[68] [1972] IR 1.
[69] Op. cit., at 31.
[70] Doyle, op. cit.

> *[Article 40.1] is not a guarantee of absolute equality for all citizens in all circumstances but it is a guarantee of equality as human persons and ... is a guarantee related to their dignity as human beings and a guarantee against any inequalities grounded upon an assumption, or indeed a belief, that some individual or individuals or classes of individuals, by reason of their human attributes or their ethnic or racial, social or religious background, are to be treated as the inferior or superior of other individuals in the community*.[71]

84. Walsh J's statement that discrimination on the basis of human attributes, or ethnic, racial, social or religious background, is prohibited is consistent with the approach of the European Court of Human Rights and the Human Rights Committee, which will focus on both the intention and effect of the impugned measure.

85. Walsh J's formulation was invoked in *Re Article 26 of the Constitution and the Employment Equality Bill 1996* [1997] 2 IR 321 where Hamilton CJ, stated that under Article 40.1 a number of forms of discrimination were prima facie invalid. Although "*not particularised*", the Chief Justice considered that "*classifications based on sex, race, language, religious or political opinions were presumptively at least, proscribed by Article 40.1*".[72]

86. *Re Article 26 of the Constitution and the Employment Equality Bill 1996* represents a significant advance in interpreting Article 40.1 on a number of levels. Building on Walsh J's formulation in *Quinn's Supermarket*, the Court extended the grounds in which presumptive discrimination would occur to include the grounds of sex, language and political opinions – all proscribed grounds under Article 26 of the ICCPR and Article 14 of the ECHR. Second, the Court adopted reasoning redolent of the Strasbourg Court where it has demanded particularly "weighty" reasons in order to justify discrimination on the grounds of sex or race. Thus the Supreme Court considered that discrimination on the grounds of age "falls into a

[71] [1972] IR 1, at 13-14.
[72] [1997] 2 IR 321 at 347.

different constitutional category from distinction on grounds such as sex, or race". This allowed the legislative difference to "*become more understandable*" and hence permissible.[73]

87. Doyle suggests that the court applied Marshall J's formulation in the US case of *Massachusetts Board of Retirement v Murgia*[74]. Marshall J's test required the State to show a "*reasonably substantial interest*" and a scheme "*reasonably closely tailored to achieving that interest*" – a higher standard than Barrington J's legitimate legislative purpose test.[75] Thus if this is the standard applying to presumptive age discrimination, the standard demanded in difference of treatment cases based on sex or race (and arguably disability) must be higher.[76]

88. At paragraphs 40-41 of the Attorney's submissions, it is argued that there has been no difference in treatment between the Applicant and other persons without a mental disability. In the alternative the Attorney argues at paragraph 48 of her submission that any difference in treatment comes within Barrington J's formulation in *Brennan* as being justified. In order to examine this question, it is suggested that the Court should examine whether, if a difference in treatment is demonstrated (between the Applicant and a person without a mental disability), the difference was for a legitimate aim and if (assuming that can be so demonstrated), it is proportionate. It will be recalled that in *Glor* the European Court of Human Rights held that the "*margin of appreciation*" available to States will depend on the facts of the particular case but is likely to be narrower when particularly suspect grounds of discrimination are in issue, such as race, sex or disability. [77]

[73] Op. cit., at 349.
[74] 427 US 307 (1976).
[75] Doyle, op. cit, at 78.
[76] Op.cit., at 79.
[77] *Glor v Switzerland at para 84.*

89. The Judgment of the Supreme Court in *An Blascaod Mór Teoranta v Commissioners of Public Works*[78] saw Barrington J again cite Walsh J's basis of discrimination test as well as his own legitimate purpose test from *Brennan*. Barrington J did not employ the "presumptively ... proscribed" test but one of "suspect" legislative criteria which would attract closer scrutiny by the court. The Applicants at paragraph 46 of their submission cite Herbert J's focus in *Redmond v Minister for the Environment*[79] on the "*dignity of the individual*" and this concept of dignity is arguably at the heart of Article 40.1 as it is indeed central to the CRPD.

90. According to Doyle "*the doctrinal and rhetorical underpinning*" for the development of the equality guarantee "*has arguably been the basis of discrimination interpretation of the human personality phrase*"... [thus] *[t]he justification for legislation which appears to be based on such assumptions must therefore be evaluated more closely, through the expedient of reversing the onus of justification and possibly, through raising the standard of justification*".[80]

91. The *Employment Equality Bill* case and the *Great Blasket* case may thus suggest a deepening standard of review akin to the European Court of Human Rights's consideration of Article 14 in that the onus of justification is arguably reversed; while the proportionality test is intensified. The Court may look at both the intention and effect of the impugned measure. The State can have no concern with such a proposition: if the legislation is for a legitimate public policy aim, the onus of proof will only be reversed where the Plaintiff/ Applicant can demonstrate that suspect grounds of discrimination are in issue. Even then, it is suggested, the Court should examine the justifications advanced against the State's "margin of appreciation" which equates to the "common good" as reflected in paragraph 48 of the Respondent's submissions.

[78] [2000] 1 IR 6.
[79] 2001 4 [IR] 61.
[80] Op. cit., at 80.

92. In this case, the "common good" also implies clarity in the law and how it is applied which includes an accused's rights to a fair and speedy trial – *McFarlane v Ireland,*[81] particularly where the person suffers from mental disabilities.

93. A final matter the *Amicus Curiae* would advert to very briefly is the sequencing of the issues in this case. While the *Amicus Curiae* accepts that determination of the constitutional challenge should precede any consideration of incompatibility under the ECHR, it is submitted that the case law of the European Court of Human Rights is informative not only in considering whether the legislation impugned is compatible with the ECHR, but should also inform the approach to the interpretation of the Constitution and how the equality guarantee must evolve in light of modern day conditions, and in particular our present understanding of how the rights of persons with disabilities should be properly vindicated (See further Appendix 1)

Michael Lynn BL

Colman FitzGerald S.C.

Thursday, 17th November, 2011

[81] Application no. 31333/06) Grand Chamber Judgment 10 September 2010.

APPENDIX 1

INTERPRETATION OF THE CONSTITUTION IN LIGHT OF INTERNATIONAL STANDARDS

1. The *Amicus Curiae* submits that, when considering the constitutionality of statutory provisions or executive acts, analysis should be informed by the provisions of international Conventions ratified by the State.

2. In the event of any conflict between the provisions of an international convention and any provision within the domestic legal framework, effect must of course be given to the domestic provisions.[82] Nonetheless the Courts have on a number of occasions shown a willingness to *consider* the terms of international human rights instruments with a view to informing their understanding of the applicable constitutional standards. For example, in *State (Healy) v Donoghue*,[83] the Supreme Court had regard to the terms of Article 6 of the ECHR when considering the scope of the right to legal aid under Irish law and was willing to have regard to an unincorporated international instrument in the context of its interpretation of the constitutional guarantee of the right to a trial in due course of law as protected in Article 38 and of the guarantees set out in 40.3 of the Constitution. The Court saw the acknowledgement of the right to legal aid under the ECHR as significant in its confirmation of the generally recognised existence of such a right.

3. In *O'Leary v Attorney General*,[84] Costello J considered the constitutional status of the presumption of innocence in the context of the guarantee of a trial in due course of law pursuant to Article 38 of the Constitution, by reference to Article 6(2) of the ECHR, Article 11 of the UN Universal

[82] To do otherwise would be to ignore the rule embodied in Article 29(6) of the Constitution that no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas and would also amount to disregard of Article 15.2.1º which confers the sole and exclusive law making power in the State upon the Oireachtas - per in *Re Ó Laighléis* [1960] IR 93.
[83] [1976] IR 325.
[84] *Ibid*.

Declaration on Human Rights, Article 8(2) of the American Convention on Human Rights and Article 7 of the African Charter of Human Rights. In *Rock v Ireland*[85] and *Murphy v I.R.T.C.*[86] the principle of proportionality (and the parameters of that principle), as expounded in the jurisprudence of the ECtHR, was adopted and employed in a domestic context prior to the incorporation of the ECHR. The principle of proportionality was referred to in the judgments in *Heaney v Ireland* [87] and *In re the Employment Equality Bill 1996.*[88]

4. Indeed, unincorporated international law provisions may have indirect effect through the operation of a presumption of compatibility of domestic law with international obligations. In *State (DPP) v Walsh*,[89] Henchy J expressed the view that our domestic laws are generally presumed to be in conformity with the then unincorporated ECHR. The notion of such a presumption was endorsed by O'Hanlon J, in support of his view that the provisions of the ECHR, then unincorporated, ought to be considered by Irish judges when determining public policy: *Desmond v Glackin (No.1).*[90] Reference was made to the Convention on the Rights of the Child in *Nwole v Minister for Justice*,[91] when considering aspects of the asylum application process as it applied to minors. [92]

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[85] *Rock v Ireland* [1997] 3 IR 484.
[86] *Murphy v IRTC* [1999] 1 IR 12. In both cases, the Supreme Court adopted Costello J's formula regarding the principle of proportionality in *Heaney v Ireland* [1994] 3 IR 593 in which he referred to the test frequently adopted by the ECtHR as set out, for example, in *Times Newspapers Ltd v UK* (1979) 2 EHRR 245.
[87] *Heaney v. Ireland* [1994] 3 IR 593.
[88] *In re Employment Equality Bill* [1997] 2 IR 321.
[89] *DPP v. Walsh* [1981] IR 412 to the effect that our laws are generally presumed to be in conformity with the then unincorporated European Convention on Human Rights.
[90] *Desmond v Glackin* [1992] 2 ILRM 490. In *O Domhnaill v Merrick* [1984] IR 151, Henchy J noted the submission that the Statute of Limitations 1957, enacted after the State ratified the European Convention on Human Rights, should be deemed to be in conformity with the Convention in the absence of any contrary intention, and should be construed and applied accordingly. However, Henchy J did not express a concluded opinion on the point as the application of the Convention had not been argued. McCarthy J in his judgment stated (at p.166) "I accept, as a general principle, that a statute must be construed, so far as possible, so as not to be inconsistent with established rules of international law and that one should avoid a construction which will lead to a conflict between domestic and international law".
[91] *Nwole v Minister of Justice* High Court (Finlay Geoghegan J) 31st October 2003, at p.12.
[92] *Ibid,* Finlay Geoghegan J went on to consider the terms of Article 12 of the Convention on the Rights of the Child, which entitles children capable of forming their own views "the

5. In *Bourke v Attorney General*,[93] the Supreme Court, when interpreting the meaning of the term "political offence" in section 50 of the Extradition Act 1965, placed reliance upon the meaning attributed to same in the European Convention on Extradition, and also upon the *travaux preparatoires* thereof.[94] In *McCann v The Judge of Monaghan District Court & Ors*[95] Laffoy J took into account both provisions of the ECHR and International Covenant on Civil and Political Rights in declaring the legislation governing enforcement of civil debt as being unconstitutional.

6. In *A.Bu. v. J.Be*.,[96] Denham J. (as she then was) decided not to interfere with the decision of Finlay Geoghegan J. that it was inappropriate for a five year old child to be heard. Finlay Geogheagan J in the High Court had relied on the child's age and maturity, and to her previous consideration in *N v. N*, that it was prima facie inappropriate for a court to hear a child under the age of six (although this was not a rigid rule). Denham J. did not take issue with the following statement from *N v N* [2008] IEHC 382:

> *How should the Court determine the age or degree of maturity at which it is not appropriate to give the child an opportunity to be heard? Counsel for the mother may, I believe, strictly speaking be overstating the legal status of Article 12 of the UN Convention on the Rights of the Child in submitting that Article 11(2) should be construed so as to give effect to the rights given to the child by that Article. The recitals to Regulation 2201/2003 do not refer expressly to the UN Convention on the Rights of the Child. Further, whilst Ireland has ratified the Convention, by reason of Article 29.6 of the Constitution, it does not form part of the domestic law as it has not been given the force of law in Ireland by the Oireachtas.*
>
> *Nevertheless, it appears to me that it is permissible to have regard to Article 12 of the UN Convention on the Rights of the Child and that it is of assistance*

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right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child". It also contained provision for the child having an opportunity to be heard in any judicial and administrative proceedings affecting the child. Finlay Geoghegan J concluded that (at p.13) "this would appear to require, at a minimum, an inquiry by or on behalf of the respondent in respect of any minor applicant for a declaration of refugee status as to the capacity of the minor and the appropriateness of conducting an interview with him or her".

[93] *Bourke v Attorney General* [1972] IR 36.

[94] This may be seen as an example of the principle of statutory construction referred to by the House of Lords in *Garland v British Rail* [1983] 2 AC 751 at 771 "that the words of a statute passed after a treaty has been signed and dealing with the subject matter of the international obligation of the State are to be construed, if they are reasonably capable of bearing such a meaning, as intended to carry out the obligation and not to be inconsistent with it."

[95] HR unreported, 18 June 2009.

[96] Judgment of 20 May 2010 (SC).

in answering the question I have put, for the following reasons. Recital (33) of Regulation 2201/2003 refers expressly to the Regulation seeking to ensure respect for the fundamental rights of the child as set out in Article 24 of the EU Charter of Fundamental Rights. Article 11(2) should be construed so as to give effect to the rights in Article 24. This refers to what appears to be a right of all children to "express their views freely" and then to have those views taken into account "in accordance with their age and maturity". The right to "express views freely" is the right also referred to in Article 12 of the UN Convention on the Rights of the Child. The UN Convention on the Rights of the Child has been acceded to by many (if not all) of the EU Member States and it appears to me probable, having regard to the wording of Article 24 of the EU Charter of Fundamental Rights and Article 12 of the UN Convention on the Rights of the Child, that they intend to guarantee a similar (if not the same) right to children. …

7. The approach advocated by the *Amicus Curiae* corresponds with the practice often adopted by the ECtHR wherein the Court has considered the provisions of relevant international law provisions when considering the meaning and parameters of rights protected under the ECHR. One clear example is *Chapman v United Kingdom*[97] where, in considering the relevance of Article 8 of the ECHR to the circumstances of a woman, a gypsy, who argued that the actions of the relevant public authorities interfered with her pursuit of her right to pursue a nomadic lifestyle, the Court considered the Council of Europe Framework Convention on the Protection of National Minorities and also certain measures adopted by the institutions of the European Union. In *Glor v. Switzerland,*[98] the ECtHR found that discrimination based on disability status came within the scope of Article 14 of the ECHR, considering inter alia, the principles espoused in the UN Convention on the Rights of Persons with Disabilities.

8. It is submitted that the Courts have shown a willingness to use non-binding instruments to inform the understanding of specific and consistent constitutional provisions. The international instrument may be seen both as a buttress and a guide to existing constitutional guarantees. The *Amicus Curiae* is of the opinion that it is entirely appropriate that the Constitution and the guarantees thereunder should be informed by international treaties

[97] *Chapman v. the United Kingdom* (2001) 33 EHRR 399.
[98] Judgment 30 April 2009. Judgment only available in French at time of writing.

ratified by the State, where possible, and endorses the above approach in the herein appellant's case. In this regard, it is noted that the State's submissions herein appear to state that the right to personal liberty under the Constitution and ECHR are consonant (see paragraph.18 of the State's submissions) with which the *Amicus Curiae* would respectfully agree.

APPENDIX 2.

ANCILLARY POINTS IN RESPECT OF ARTICLE 14 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS.

(i) Scope of Article 14

1. In *Westminster City Council v Morriss*, English Court of Appeal, 14th October, 2005, Sedley J. stated:

   "The word 'ambit', which attempts to encapsulate the jurisprudence of the European Court of Human Rights of Human Rights on the operation of art.14, is an inevitably imprecise term. It recognises that a measure does not have to violate a substantive right in order to affect the enjoyment of it: Convention rights have a penumbra within which unjustifiable discrimination is forbidden even in the absence of a violation of the right."

2. The prohibition of discrimination also extends beyond the enjoyment of the rights which the Convention requires each state to guarantee. In *Stec v United Kingdom*, July, 2005, the European Court of Human Rights of Human Rights held that Article 14 applies also to "those additional rights, falling within the scope of any Convention article, for which the state has voluntarily decided to provide (paragraph 40)". In *Abdulaziz, Cabales & Balkandali v United Kingdom* (1985) 7 EHRR 471, the European Court of Human Rights of Human Rights stated:

   "82. There remains a more general argument advanced by the Government, namely that the United Kingdom was not in violation of Article 14 by reason of the fact that it acted more generously in some respects - that is, as regards the admission of non-national wives and fiancées of men settled in the country - than the Convention required.
   The Court cannot accept this argument. It would point out that Article 14 is concerned with the avoidance of discrimination in the enjoyment of the Convention rights in so far as the requirements of the Convention as to those rights can be complied with in different ways. The notion of discrimination within the meaning of Article 14 includes in general cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention."

(ii) Direct and Indirect discrimination

3. It is important to understand that Article 14 addresses both direct and indirect discrimination. Direct discrimination occurs where two persons

in a relevantly comparable situation are treated differently. In contrast indirect discrimination occurs where a facially neutral provision has a disproportionate impact on one group when compared with another. Indeed, the European Court of Human Rights of Human Rights has acknowledged that "indirect discrimination" is covered by Article 14 in the sense that it prohibits measures which, although neutral on their face between two groups, produces effects that fall disproportionately on one of the two groups. The Court accepted this relevance of effects in the *Belgian Linguistic Case (No.2)*:[99]

"[T]he Court, following the principles which may be extracted from the legal practice of a large number of democratic States, holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the ECHR must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised."
(underlining added)

4. Similarly, in *Shanaghan v United Kingdom,*[100] the Court stated that:

"where a general policy or measure had disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group."

5. This distinction between direct and indirect discrimination has been further refined by the Court in the case of *DH v Czech Republic*[101] :

"The Court has established in its case-law that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations. However, Article 14 does not prohibit a member State from treating groups differently in order to correct "factual inequalities" between them; indeed in certain circumstances a failure to attempt to correct inequality through different

[99] (1979-80) 1 EHRR 252.
[100] JudgmentEuropean Court of Human Rights, , May 4, 2001.
[101] *DH and others v. Czech Republic*, Judgment of 7 February 2006 (2006) 43 EHRR 923 at para. *46.*

treatment may in itself give rise to a breach of the Article. The Court has also accepted that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group, and that discrimination potentially contrary to the Convention may result from a de facto situation."[102]

6. This approach which clearly reflects the difference between "direct discrimination" and "indirect discrimination" has been adopted by the European Court of Human Rights as it reflects the approach of most European States and indeed is the model expressly adopted in European Union Law.

[102] At para 175.