THE HIGH COURT

JUDICIAL REVIEW

Record No. 2008/792JR

Between:

E.D.

Applicant

and

THE DIRECTOR OF PUBLIC PROSECUTIONS AT THE SUIT OF GARDA THOMAS MORLEY

Respondent

and

THE HUMAN RIGHTS COMMISSION, IRELAND AND THE ATTORNEY GENERAL

Notice Parties

SUBMISSIONS ON BEHALF OF THE *AMICUS CURIAE*

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I. Preliminary

1. This submission is filed by the *amicus curiae* pursuant to the Order of this Honourable Court made on the 20th July 2009, which granted the *amicus curiae* leave to appear in these proceedings pursuant to s. 8(h) of the *Human Rights Commission Act 2000*. Section 8(h) empowers the *amicus curiae* to apply to the High Court and to the Supreme Court to be joined as *amicus curiae* in proceedings before the Court 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.'

2. The *amicus curiae* seeks in this submission to draw the attention of this Honourable Court to certain human rights standards and interpretative principles that may assist this Honourable Court's determination of the substantive matters before it in respect of two key areas:

   (a) The question of fair procedures and natural justice as protected by Bunreacht na hEireann, including trial in due course of law and the right to liberty as also protected by Articles 5, 6 and 7 of the European Convention on Human Rights and Fundamental Freedoms ("ECHR"), particularly having regard to the nature of the offence, the requirement for legal certainty and of the proportionality of the offence to the legitimate aim of the State sought to be achieved.

   (b) Arising from the above, specific considerations and protections which may apply to non nationals and asylum seekers, especially undocumented asylum seekers, under the provisions of the Constitution, the ECHR and under Articles 27 and 31 of the 1951 Convention relating to the Status of Refugees ("Refugee Convention"). Article 27 and 31 of the Refugee Convention require States to safeguard the rights of refugees in terms of

issuing refugees with identity documents and prohibits the imposition of penalties on those asylum seekers who enter a State without authorisation.

3. The *amicus curiae* fully recognises the legitimate right of the State to regulate the entry, stay and residence of non nationals within the territory as recognised in international and national law. The *amicus curiae*, consistent with its role under the Human Rights Commission Act 2000, merely directs the Court's attention to the human rights implications for persons falling within the ambit of the legislation and the questions raised thereunder.

4. The *amicus curiae* has undertaken to ensure that its submissions are as brief as possible consistent with its role and duty to the Court and that it endeavours not to duplicate the arguments of the parties unnecessarily or to entrench upon matters of factual dispute.

II. Introduction

5. We refer the Court to the applicant's and the respondent's positions as set out in their respective submissions to the Court and without rehearsing the accepted principles of law set out therein.

6. In summary the applicant submits that s. 12 of the Immigration Act 2004 fails to meet the constitutional and ECHR requirements of the principles of legality and quality of law in its vagueness and arbitrariness, its criminalisation of the applicant as an undocumented asylum seeker, its discriminatory effect on her in breach of her personal rights, and the failure to provide adequate legal safeguards against abuse.

7. The Respondent submits that s. 12 of the Act does not violate the applicant's rights to equality, privacy, her privilege against self incrimination, right to liberty or her right to a trial in due course of law. In addition the Respondent contends that the said section is not void by reasons of vagueness, legal uncertainty or a failure to provide safeguards to protect against arbitrariness. Finally the Respondent submits that section 12 does not provide for an abuse of process.

8. The focus of the *amicus curiae* is two-fold. First, the general human rights considerations raised by s. 12 in light of the Constitution and EHCR as informed by other international legal instruments and principles. Secondly, the specific human rights issues raised by the application of s. 12 to undocumented asylum seekers.

9. Although the *amicus curiae* does not propose to comment on the right to equality/ non-discrimination arguments canvassed in these proceedings (paragraphs 29-61 of the Applicant's submissions and paragraphs 50 to 77 of the Respondents' submissions), in line with its undertakings to the Court, it wishes to address briefly the argument advanced by the Respondents that the Constitutional protection of Article 40.1 does not apply to non-citizens. In this respect, the *amicus curiae* draws to the Court's attention that if this position were to be accepted *simpliciter*, the effect of a Constitutional provision on equality not extending to non-nationals may place the State in an invidious situation vis-à-vis its international obligations.

10. The *amicus curiae* also wishes to draw the Court's attention at the preliminary stage to the possible import of arguments advanced by the State focusing on procedural obstacles to exercising rights. In the *amicus curiae*'s respectful opinion, notwithstanding these arguments, the Court may wish to consider whether the impugned provision and/ or its effect is proportionate under the relevant Constitutional/ ECHR provisions, taking note of the recent *McFarlane v Ireland* Judgment of the Grand Chamber of the European Court of Human Rights (13 September 2010).

11. This arises insofar as the Respondent argues variously that s.12 benefits from the presumption of constitutionality (see Respondent's submission paragraphs 23-26) and that the doctrine of Separation of Powers permits the Legislature to control and regulate the activities of non-nationals entry and stay in the State (see paragraphs 67-68). While the *amicus curiae* respectfully agrees that States have the power to regulate and control immigration (a principle also recognised under international law), it cautions first that this is not an unqualified right insofar as persons have the right to seek and enjoy asylum from persecution (Article 14 of the Universal Declaration of Human Rights and a principle of customary international law) and second that the recent *McFarlane* judgment needs to be considered. In that case, the European Court was not satisfied that the arguments advanced by the State of

effective domestic remedy rights (a requirement of Article 13 of the ECHR) were available in circumstances where an aspect of the doctrine of separation of powers "the important and established principle of judicial immunity" contributed to a "legally and procedurally complex" constitutional remedy for criminal delay (see paragraphs 116-129). Thus procedural obstacles to securing ECHR rights in domestic law may not satisfy the requirement of available and effective remedies where ECHR rights are raised. As the Respondents note, Fennelly J in *McD v L* [2010] 1 ILRM 46 stressed the importance of consistent interpretation of the Convention across Member States.

III. Comments on general issues raised by section 12

Constitution

a. Article 38.1

(i) Issues of vagueness and arbitrariness

12. The Commission refers the Court to the principles of law on the prohibition on vagueness and arbitrariness set out in *The State (Healy) v Donoghue*, *Attorney General v Cunningham*, *DPP v Tivoli Cinema*, *King v Attorney General*, and *Heaney v Ireland*.

13. Costello J. in *Heaney v. Ireland* [1994] 3 IR 593 at pp. 605-606 stated that Article 38.1 is an Article couched in peremptory language and has been construed as a constitutional guarantee that criminal trials will be conducted in accordance with basic concepts of justice. He referred to those basic principles as a requirement of a fair trial which includes the principle that an accused is entitled to the presumption of innocence, cannot be tried for an offence unknown to the law and that those are all principles which are so basic to the concept of a fair trial that they obtain constitutional protection.

14. It appears from s. 12 that the offence is constituted by the

- the failure to produce, on demand, a valid passport or equivalent document establishing his or her identity and nationality, when requested to by an immigration officer or Garda, as well as a registration certificate (if registered or deemed to be registered) and

- the failure to provide a "satisfactory explanation" for the lack of such documents.

15. In construing the section 12 offence and its operation, this Honourable Court should have regard to the offence charged. It is submitted that a consideration of the offence charged may run counter to the Respondent's submissions to the effect that Section 12 is an enabling section which imposes no requirement on the accused. In this regard, it is noted that in the offence alleged on the 29th of May, 2008 the Applicant is charged with:-

> *"Failure to produce on demand a valid passport or equivalent document and Failed to give a satisfactory explanation of the circumstances which prevented her from doing so."*

16. The *amicus curiae* has concerns in relation to the potential vagueness of s. 12 in its failure to define what is a "satisfactory explanation". That potential vagueness is compounded by the fact that the failure to provide a satisfactory explanation appears to constitute a part of the *actus reus* of the offence as well as purporting to be a potential defence.

17. It is also vague in the sense that it does not stipulate who has to be satisfied as to any explanation provided, whether Garda/ immigration officer or the court. It appears to the *amicus curiae* that on a literal reading of the section it is the Garda who is to be satisfied of the explanation.

18. This raises the question as to the possible divergences in practice between one immigration officer or Garda and another in respect of what he or she considers is a "satisfactory explanation". No guidance is given either to asylum seekers, immigration officers or members of the Garda Síochána as to what may be a "satisfactory explanation" particularly in situations concerning undocumented asylum seekers. This presents difficulties for immigration officers and the Garda carrying out their functions under the legislation. It could also potentially give rise to an element of arbitrariness or the perception of such.

19. These issues may also arise in respect of proceedings before District Courts depending on the view of District Judges as to the essential ingredients of the offence, when it is considered to be constituted, and whether an explanation furnished may be considered by the Court to be or to have been "satisfactory". The potential for ambiguity, imprecision and lack of clarity give rise to concern as to the potential for arbitrariness in the interpretation and application of s. 12 in practice. These questions do not assist asylum seekers in regulating their behaviour to comply with the criminal law, nor does it assist immigration officers, the Garda or the courts in applying the law.

20. The Respondent indicates that the phrase "satisfactory explanation" can be interpreted *"with enormous latitude in terms of the range of explanations which can be offered, reflecting, no doubt, a recognition on the part of the legislature that there could be many and varied reasons as to why a non national may not be able to produce the said documents."* While the Respondent argues that this is a safeguard for non-nationals, it is submitted that it may suggest the contrary, that the term is vague and imprecise.

21. The Respondent refers this Honourable Court to the *Employment Equality Bill 1996* [1997] 2 I.R. 321) and in particular a quote at page 376. That quote was dealing with the provisions of Section 16(4). That section did not create a criminal offence but merely provided that nothing in the legislation should be construed as requiring an employer to hire an employee in the circumstances set out in Section 16(4). The quote set out at pp. 39-40 of the Respondent's submissions must be seen in the light of the previous sentence which entirely distinguished the provisions of Section 16(4) from the vagueness of the crime of vagrancy referred to in *King v. The Attorney General*. Hamilton C.J. stated that what was at issue in *King v. The Attorney General "was totally different from what is in debate in this reference"* (page 376). It is submitted in this case that the King decision is the more appropriate decision to consider as both that decision and the instant case are dealing with the vagueness of the crime provided for by statute.

22. Moreover, the Commission queries whether the question of what is *"satisfactory"* within the meaning of Section 12 will in fact fall for resolution by the relevant Court.

23. In this regard, it is instructive to note that the offence created is not one which makes it an offence not to have the relevant documentation. It does not provide that it shall be *"a defence"* for the accused to show that his production of the documentation was satisfactory or reasonable in the circumstances. Such an offence could mean that the Court could examine the reasonableness of the failure to produce and could examine whether at the date of the trial a satisfactory explanation was forthcoming from the accused, however, this is not clear.

24. As pointed out by the Respondents in their submissions, it should also be noted that s. 12(4) provides a "carve out" for two specific classes of non nationals: (a) non nationals under the age of 16 years; and (b) non nationals who were born in Ireland. However, it is difficult to envisage an immigration officer or Garda being able to ascertain whether the exclusion in s. 12(4) applies without having already demanded a valid passport or equivalent document from such an individual. Immigration officers and the Garda are given no guidance as to the manner in which they may apply s. 12 in those circumstances.

25. It is submitted that s. 12, in order to meet constitutional requirements, must be read in a manner which respects those constitutional principles and keeps within their boundaries (East Donegal). The section may be vulnerable if it is not possible to read it in a constitutionally permissible manner.

(ii) Privilege against self incrimination

26. This privilege is constitutionally protected and any abridgement must pass a proportionality test. A statutory provision requiring information to be given under penalty for refusal over-rides the common law privilege but it is worthwhile noting the view of O Dálaigh CJ in *The State (O'Connor) v Larkin* [1968] IR 255 at 258 that the right of an accused person "not to offer any evidence in his defence is basic to an accusatorial system of criminal justice." The right not to incriminate oneself is a universally respected principle as protected under Article 6 ECHR (see below) and Article 14 UN International Covenant on Civil and Political Rights (ICCPR).

27. In *Heaney v. Ireland* [1994] 3 IR 593 Costello J. referred to the immunity of an accused at trial "as a result of which he is not obliged to give evidence or be

required to adduce evidence on his own behalf, and cannot be questioned against his will." In this regard Costello J. also referred to Article 14 of the UN International Covenant on Civil and Political Rights and Article 6 of the European Convention on Human Rights.

28. In the instant case, it is noted that s. 12 appears to make failure by a person to produce his or her passport when a Garda demands it, and at the same time if the person fails to give a "satisfactory explanation" to the Garda for the absence of same, a constituent part of the offence.

29. In this respect it would appear to be difficult for a person of whom such request is made, and who has no passport, to be able to avoid having to give an "explanation" to the Garda as by remaining silent the offence would appear to have been committed. Further, if the person gives what appears to the Garda to be an unsatisfactory explanation, the offence is also committed. This contrasts with the interpretation at paragraphs 13-22 of the Respondents' submission which suggests that a non national has a choice in this regard. However, it is difficult to reconcile this assertion with the circumstances of an undocumented asylum seeker where they do not in fact have a choice to produce the required documentation but rather must decide whether to remain silent and thus commit an offence or provide an explanation, risking committing an offence if the explanation is not deemed satisfactory by the officer.

30. The matter was also considered in *Rock v Ireland* in relation to ss. 18 and 19 of the Criminal Justice Act 1984 permitting the drawing of inferences from silence. It is submitted that the position under s. 12 is different insofar as the provisions in *Rock* related to offences the elements of which were constituted by other than information provided by the accused, unlike in the present instance where the failure to give a "satisfactory explanation" appears to be part of the offence itself and the silence of the person concerned, coupled with the failure to produce a passport, is sufficient to constitute the offence. Also in *Rock* the drawing of inferences was evidential in nature and could only go to corroboration, and in addition, could not form the sole basis of the conviction.

31. The *amicus curiae* highlights that s. 12 appears to compel a person to give a "satisfactory explanation" and this compelled response, if unsatisfactory, appears to constitute the offence itself. Furthermore it appears that the offence is also constituted if the person fails to give any response, as he or she would be entitled under the privilege against self incrimination.

32. This appears to go further than what was deemed to be permissible under constitutional and ECHR jurisprudence in relation to adverse inferences.

(iii) Presumption of innocence

33. Following on from the concerns raised by the *amicus curiae* in relation to the potential compulsion of evidence from a person to whom s. 12 is applied, set out above, this may also have an impact on the question of the presumption of the person's innocence when that matter comes before a court in relation to that offence.

34. This is partly a reflection of the ambiguity of the trial court's role in relation to s. 12 and the ingredients of the offence, and whether a subjective view of the failure to give a "satisfactory explanation" forms an integral part of both the *actus reus* and *mens rea* and to what extent, if at all, such a subjective view by a Garda permits of a defence to a charge under s. 12.

(iv) Onus of Proof

35. In the criminal context the burden of proof lies on the prosecution to prove all the elements of the offence beyond reasonable doubt at all times, unless the Oireachtas decides that as to a particular element of an offence an evidential burden should be cast on the accused person.

36. The Commission refers the Court to *McCann v. The Judge of Monaghan District Court* [2009] IEHC 276 (unreported, High Court, Laffoy J., 18th June, 2009).

37. In *McCann* s. 6 of the Enforcement of Court Orders Act 1940 was found to be in breach of the plaintiff's constitutional rights under Article 34, 40.3 and 40.4.1. Laffoy

J. held that there were fundamental deficiencies in s. 6 which render it invalid having regard to the provisions of the Constitution because it violates the debtor's constitutional guarantee of fair procedures. Of particular relevance to this issue was her finding that

> "s. 6 is also invalid in that, while it recognises that an order for arrest and imprisonment should only issue if the default on the part of the debtor is attributable to wilful refusal or culpable neglect, it expressly puts the onus on the debtor to disprove such conduct on his part. If, instead of leaving it to the creditor to pursue the committal of a defaulting debtor for non-compliance with an instalment order, the Oireachtas had made it an offence punishable on three months' imprisonment to wilfully or culpably negligently fail to comply with the instalment order, the hypothetical provision would be invalid having regard to the provisions of the Constitution if it purported to put the onus of disproving the offence on the debtor. As was recognised by the Supreme Court in *Hardy v. Ireland [1994] 2 I.R. 551*, the "well-established criminal law jurisprudence in regard to having trials in due course of law" applies to a statutory offence with the following consequences (*per* Hederman J. at p. 565):
>
> "It protects the presumption of innocence; it requires that the prosecution should prove its case beyond all reasonable doubt; but it does not prohibit that, in the course of the case, once certain facts are established, inferences may not be drawn from those facts and I include in that the entitlement to do this by way even of documentary evidence. What is kept in place, however, is the essential requirement that at the end of the trial and before a verdict can be entered the prosecution must show that it has proved its case beyond all reasonable doubt.""

38. Under s. 12 it is unclear as to whether or not the failure to give a "satisfactory explanation" forms part of the *actus reus* of the offence or whether a person charged with the offence may be able to offer a "satisfactory explanation" in his or her defence at trial. In these circumstances it may leave open the possibility that s. 12 might be regarded as placing the onus of disproving the offence on the accused person.

b. Article 40.4

(i) Liberty

39. Article 40.3 of the Constitution grants the right to fair and just procedures to every person whose rights may be affected by decisions taken by others, meaning that the powers cannot be exercised unjustly or unfairly (*Garvey v. Ireland* [1981] IR 75).

40. It is submitted that the rights to liberty and fair procedures under the Constitution reflect those set out Article 5 of the ECHR (see below) in respect of the safeguards that are required when a person is detained. The *amicus curiae* has, in the past, submitted to the Superior Courts that the ECHR and other international legal instruments are of assistance in interpreting and applying the Constitution. The *amicus curiae* submits that this approach should also be taken in this instance.

41. Article 40.4. implicitly includes the guarantees in Article 38.1 to trial in due course of law. Henchy J in *Re Royle* [1974] IR 259 stated "The expression 'in accordance with law' is a compendious one and is designed to cover these basic principles and procedures which are so essential for the preservation of personal liberty under our Constitution that departure from them renders a detention unjustifiable in the eyes of the law. To enumerate them in advance would not be feasible and, in any case, an attempt to do so would only tend to diminish the constitutional guarantee." In *King v AG* Henchy J stated that the words mean "without stooping to methods which ignore the fundamental norms of the legal order postulated by the Constitution."

42. Arising out of the Commission's concerns in relation to the issues raised above, there would be serious issues as to whether the detention of a person on foot of s. 12 would be lawful within the meaning of *Royle* and Article 40.4 of the Constitution.

43. There would also be an issue as to the potential for repeated arrest and/or charges under s. 12, irrespective of the outcome of any charges related thereto, and the associated implications for a person's liberty in that context. This would also be an issue in the context of repeat charges under s. 12 with pre and post conviction detention. Thus the person could be at risk of exposure to indefinite periods of deprivation of liberty.

44. There is also a question as to the availability of bail in the context of s. 12. In any situation of the deprivation of liberty there must also be the possibility of bail, except in clearly defined circumstances, as set out in *O'Callaghan* and the Bail Act 1997 as amended. Any consideration of bail must take into account the personal circumstances of a defendant. In the present proceedings, it appears that the personal circumstances of the applicant as an undocumented asylum seeker impacted on her ability to access bail.

45. If s.12 is found to be unconstitutional under Art.38.1 then the detention will not be "in accordance with law" as required under Art.40.4.

c. The Constitutional principle of Proportionality

46. In *Meadows v. Minister for Justice, Equality and Law Reform*, [2010] IESC 3 Murray CJ stated that

> "Judicial review is concerned with the Courts exercising their constitutional duty to ensure that powers, governmental and administrative, are exercised within the law and the Constitution and, inter alia, in a manner consistent with the rights of individuals affected by them." He stated that "in examining the compatibility of a statutory provision with the provisions of the Constitution the Court may subject it to a proportionality test. Judicial review of legislation by reference to the principle of proportionality has been exercised by this Court without trespassing on a core constitutional function of the Oireachtas to decide policy and to legislate accordingly. See for example: *Heaney v. Ireland* [1994] 3 I.R. 593, *In Re Article 26 and the Employment Equality Bill* 1997 2 I.R. 321 and *In Re Article 26 and the Health (Amendment)(No. 2) Bill 2004.*" Denham J. in *Meadows* endorsed an approach similar to that set out by Costello J. in *Heaney v. Ireland*.

47. The guarantee of fair procedures as it applies to a criminal trial under Article 38.1 and 40.3 is not an absolute guarantee. In *The Criminal Justice (Jurisdiction) Bill, 1975* [1977] IR 129 O'Higgins CJ stated that "The phrase 'due course of law'

requires a fair and just balance between the exercise of individual freedoms and the requirements of an ordered society."

48. Any legislative infringement on the rights contained in Article 38.1 must satisfy the proportionality test first set down by Costello J in *Heaney v Ireland* ([1994] 3 IR 593. The Supreme Court in *In Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321 restated the test in the context of Article 38.1 as follows: "(a) Is it [the section] rationally designed to meet the objective of the legislation? (b) Does it intrude into constitutional rights as little as is reasonably possible? (c) Is there a proportionality between the section and the right to trial in due course of law and the objective of the legislation?"

49. *Enright v Ireland* [2003] 2 IR 321 was a challenge to Part 2 and s. 7(2) of the Sexual Offenders Act 2001. Finlay Geoghegan J. considered that the Oireachtas in enacting the 2001 Act was engaged in balancing the constitutional rights of other citizens who might be at risk of attack from convicted persons following their release, and held that it was not so contrary to reason and common sense as to constitute an unjust attack on the plaintiff's right to fair procedures. She applied the test in *Heaney v Ireland* and concluded that s. 7(2) passed the proportionality test. The imposition of the registration requirements on persons already convicted of sexual offences was rationally connected to the objective of the legislation (protection of society), registration was a minimal burden, and it impaired the plaintiff's rights to fair procedures as little as possible and was proportionate to the objectives to be achieved. She considered it permissible, in considering the rights protected by Article 38.1, to have regard to Article 7 of the ECHR.

50. In *McCann v. Judge of Monaghan District Court*, Laffoy J. held at p. 86 that "by analogy to the decision of the ECtHR in the *Saadi* case, the principle of proportionality under the Constitution dictates that a balance must be struck between fulfilment of the legitimate objective which permits the restriction of the right to liberty guaranteed by Article 40.4.1 and the importance of the right to liberty and the duration of the detention is a relevant factor in striking such balance."

d. Presumption of constitutionality

51. Principles in relation to the presumption of constitutionality are set out by the Respondents as noted and will accordingly not be rehearsed here. The *amicus curiae* largely accepts those submissions subject to its comments below and its comments on the availability of effective remedies as set out above.

52. The interpretation contended for by the Respondent may slightly over-extend the principle in the context of s.12. it is submitted that Walsh J in *East Donegal Co-Operative Ltd. v. Attorney General* [1970] I.R. 317 was referring to the duty of organs of the State to act in a constitutionally compliant manner, however, compliance with constitutional norms such as fair procedures by an organ of the State cannot in effect cure any constitutional frailty contained within the legislation itself. In the present case, while the applicant has sought to challenge the manner in which s.12 was applied to her, the *amicus curiae* is concerned with the nature of s.12 itself and whether it can be interpreted to comply with the Constitution. It is the *amicus curiae's* submission that in light of the requirements of Article 38.1 and Article 40.4, it is unclear whether such an interpretation is open to the Court.

53. In this regard, Laffoy J. in *McCann v Judge of Monaghan District Court* considered these principles and the impact of the European Convention on Human Rights Act 2003 in the context of the interpretation of statutes under ss. 2 and 3 of the Act and although cognisant of the duty of District Judges to act constitutionally under the impugned legislation, found that this did not save the legislation itself from unconstitutionality where the interpretation urged by the State was unsustainable on the face of the legislation.

The European Convention on Human Rights

a. Applicability

54. Since the implementation of the European Convention on Human Rights Act 2003 (the "ECHR Act") the European Convention on Human Rights (ECHR) may be relied upon in a domestic context. The Convention may also inform the interpretation of Constitutional rights and has been used in this manner by Irish courts prior to its incorporation into Irish law *via* the European Convention on

Human Rights Act 2003, and relied upon in a number of significant cases since then.

55. The provisions of the ECHR Act are set out in general terms in the Respondents' submissions (paragraphs 42-46). The *amicus curiae* respectfully refers to section 2 under which the courts are, required to interpret and apply statutory provisions in a manner which is compatible with the State's obligations under the ECHR, although this is subject to the rules of law on interpretation and such application.

56. It is submitted that section 3(1) empowers the Court to grant the reliefs available under Order 84 of the Rules of the Superior Courts where the Court finds a breach of statutory duty under that section. Regard should also be had to ss. 2(1) and 4 of the ECHR Act and to Article 13 of the ECHR, which requires that "everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority…". Section 3(2) provides for a possible remedy in damages where public bodies act incompatibly with Convention provisions under s. 3(1) of the Act.

57. Under section 5 of the ECHR Act 2003, the Court may "having regard to the provisions of section 2, on application to it in that behalf by a party, or of its own motion" make a declaration of incompatibility as defined *"where no other legal remedy is adequate and available*". It is submitted that any such exercise by this Honourable Court requires a consideration of a declaration of unconstitutionality of the legislative provision impugned by a litigant before considering section 5 of the ECHR Act, as was confirmed by the Supreme Court in *Carmody v Minister for Justice* [2009] IESC 71.

58. A declaration of unconstitutionality would also provide a more effective form of remedy than that afforded by a declaration of incompatibility under section 5 of the ECHR Act insofar as a litigant obtaining such a declaration has no right to compensation, while the legislation in question continues to have legal force and effect unless and until it is amended by the Oireachtas. Further, some of the shortcomings of the ECHR Act are set out at paragraph 125 of the recent European Court judgment in *McFarlane*.

b. Article 5

59. There is considerable overlap between arguments under Article 5 and Article 40.4 so it is useful to consider the former as a guide to interpretation of the latter. The principles of legality and lawfulness underpinning the Convention including principles of foreseeability, protection from arbitrariness and the availability of substantive and procedural safeguards form part of the considerations under Article 5. The *amicus curiae* notes that the Respondents submissions do not address the principles set out in Article 5 of the ECHR to the extent to which Article 14 is considered.

60. Article 5(1) of the ECHR protects the right to liberty and security of the person. This general right is subject to a number of exceptions which are listed exhaustively. If a form of detention does not fall within the exceptions listed under Article 5 there will be a breach of the ECHR.

61. In *McCann*, Laffoy J. referred to the decision of the Grand Chamber of the ECtHR in *Saadi v United Kingdom* (p. 33) where the court considered the notion of arbitrary detention in the context of Article 5, as follows:

> " '67. It is well established in the Court's case-law under the sub-paragraphs of Article 5.1 that any deprivation of liberty must, in addition to falling within one of the exceptions set out in sub-paragraphs (a) - (f) be 'lawful'. Where the 'lawfulness' of detention is in issue, including the question whether 'a procedure prescribed by law' has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. Compliance with national law is not, however, sufficient: Article 5.1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness .... It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5.1 and the notion of 'arbitrariness' in Article 5.1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention….

70 The notion of arbitrariness in the context of sub-paragraphs (b), (d) and (e) also includes assessment whether detention was necessary to achieve the stated aim. The detention of an individual is such a serious measure that it is justified only as a last resort where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained .... The principle of proportionality further dictates that where detention is to secure the fulfilment of an obligation provided by law, a balance must be struck between the importance in a democratic society of securing the immediate fulfilment of the obligation in question, and the importance of the right to liberty .... The duration of the detention is a relevant factor in striking such a balance ....' "

62. If a law is too vague or imprecise to protect the individual from arbitrariness then it will not have the quality of law required under Article 5(1) (*Wloch v Poland* (2002) 34 EHRR 229). Its consequences and application must be reasonably foreseeable (*Amuur v France* (1992) 22 EHRR 533 para 50). In dealing with Article 5(1) in the context of an application for leave to apply for judicial review and interlocutory relief to restrain deportation Herbert J *in BO v Minister for Justice* [2006] 3 IR 218 considered that the clause requires that any arrest or detention have a legal basis and refers not only to the wording of the domestic legal basis but also its quality. He cited *Dougoz v. Greece* [2001] E.C.H.R. 213 where the European Court of Human Rights held that "Quality in this sense implies that where a national law authorises deprivation of liberty, it must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness."

63. For the purposes of these submissions the relevant exceptions appear to be those set out in either Article 5(1) (b), (c) or (f). It is settled law that the list of circumstances in Article 5(1) (a) to (f) when detention is permitted are exhaustive and must be strictly interpreted. Detention not falling within one of those exceptions will always be unjustified and a breach of the Article (*Ciulla v. Italy,* 22 February 1989). Accordingly it is important that the Respondent in these proceedings specify the sub-paragraph of Article 5(1) under which S.12 comes.

64. Article 5(1)(b) relates to

"the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law".

65. Under Article 5(1)(b) a period of detention will in principle be lawful if it is authorised by court order. However, it is submitted that the lawfulness of the detention under subparagraph (b) not only depends on whether it is in compliance with the procedure prescribed by national law, but the deprivation should at the same time be consistent with the purpose of Article 5 namely to protect the individual from arbitrariness (*Quinn v. France*, 22 March 1995). A relevant consideration, therefore, will be whether the law was formulated with sufficient precision to reasonably allow an individual to foresee the consequences of his or her acts (*Steel and others v. United Kingdom*, 23 September 1998).

66. The second limb of subparagraph (b) provides that detention may be lawful where it seeks to "secure the fulfilment" of an obligation. To this end, at least, there must be an unfulfilled obligation incumbent on the person concerned and the arrest and detention must be for the purpose of securing its fulfilment and not only of a punitive character (*Valeliva v. Denmark*, 25 December 2003).

67. The Court in *Engel v Netherlands* (1976) 1 EHRR 647 at para 69 stated "The Court considers that the words "secure the fulfilment of any obligation prescribed by law" concern only cases where the law permits the detention of a person to compel him to fulfil a specific and concrete obligation which he has until then failed to satisfy. A wide interpretation would entail consequences incompatible with the notion of the rule of law from which the whole Convention draws its inspiration."

68. When considering the lawfulness of a detention under subparagraph (b) the proportionality of the deprivation of liberty must be considered, so as to ensure a balance is drawn between the importance in a democratic society of the fulfilment of an obligation to comply with s. 12 as against the individual's right to liberty. The relevant considerations as to whether a State has acted proportionately will be the duration of the detention, the nature of the obligation to be fulfilled, the person being detained and the particular circumstances leading to the detention (*Nowicka v. Poland*, 3 December 2002).

69. Article 5(1)(c) concerns

"the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so".

70. This subparagraph may be relevant insofar as the arrest and detention is only lawful if it is effected for the purpose of bringing the person before the competent legal authority on reasonable suspicion of having committed an offence. Employing this subparagraph as an authorisation for the s.12 power will require the offence under s. 12 to meet the principles of legality as set out in *Saadi* (see above).

71. Article 5(1)(f) deals with

"the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition".

72. This is the ECHR principle under which asylum seekers are usually detained for brief periods. However, it should be noted that such detention is administrative rather than criminal in nature. In *Saadi* the Grand Chamber considered the question of arbitrariness and the position of asylum seekers seeking to enter a State. It considered that while "the first limb of Article 5(1)(f) permits the detention of an asylum seeker or other immigrant prior to the State's grant of authorisation to enter, the Court emphasises that such detention must be compatible with the overall purpose of Article 5, which is to safeguard the right to liberty and ensure that no-one should be dispossessed of his or her liberty in an arbitrary fashion."

73. The Court also stated that a "general principle established in the case-law is that detention will be "arbitrary" where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities (see, for example, *Bozano v. France*… *Čonka v. Belgium*…. The condition that there be no arbitrariness further demands that both the order to detain and the execution of the detention must genuinely conform with the purpose of the

restrictions permitted by the relevant sub-paragraph of Article 5 § 1 (*Winterwerp*)…."

74. With specific reference to subparagraph (f) the Court considered at para. 74 that "to avoid being branded as arbitrary, therefore, such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that "the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country" (see *Amuur*, § 43); and the length of the detention should not exceed that reasonably required for the purpose pursued."

75. It is accepted that detention for the purpose of preventing unauthorised entry into a State is legitimate under Convention jurisprudence. However, it must be attended by certain minimum safeguards and meet the qualitative requirements as set out in *Saadi*.

76. Section 12 permits the arrest, detention and charge of a person at any time for failure to comply with the requirements of the section. The effect of the section is to expose a person who seeks to enter the State to criminal liability where she or he does not have a valid passport or equivalent document.

77. Section 11 of the Immigration Act 2004 states that a person entering the State shall be in possession of a valid passport or equivalent document establishing his or her identity and nationality. It is an offence to contravene this requirement.

78. There appears to be overlap in the sections in that s. 12 appears to include the offence which is contained in s. 11, as noted by the respondents in their submissions. However, the overlap may give rise to confusion and ambiguity which is a fundamental matter for this Honourable Court to resolve.

79. The Grand Chamber in *Saadi*, referring to detention under Article 5(1)(b), (d) or (e) relating to the fulfilment of a particular obligation, stated "The principle of proportionality further dictates that where detention is to secure the fulfilment of an obligation provided by law, a balance must be struck between the importance in a

democratic society of securing the immediate fulfilment of the obligation in question, and the importance of the right to liberty." The duration of the detention is a relevant factor in striking such a balance.

c. Article 6

80. The object and purpose of Article 6 is to protect the right to fair proceedings in the civil and criminal sphere, with the more onerous obligations on the State deriving from criminal proceedings.

81. In *Salabiaku* the Court was asked to consider the compatibility with Article 6(2) of a law reversing the burden of proof in respect of certain elements of an offence. The Court rejected the Commission's opinion that Article 6(2) merely provided a procedural guarantee to be observed by the courts, and held that the provision also placed a duty on legislatures to respect the rights of the accused when framing offences. It observed that "presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law."

82. In regard to s. 12 it appears, as referred to previously, that the section does not fully respect the presumption of innocence. If this is the case, it would appear to fall outside the ambit of the principle set out in *Salabiaku* and potentially go beyond the limits referred to by the Court as being required of the criminal law in order to comply with the Convention.

Article 6(2)

83. Article 6 must be given a broad and purposive interpretation and the defence must be able to exercise the rights in Article 6 adequately and effectively (*Artico v Italy*, para 33). The rights in Article 6 are not absolute but in *Tolstoy Miloslavsky v. the United Kingdom,* 13 July 1995, para. 59) the Court stated that "a restriction must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved."

84. This sub-paragraph encompasses not just the presumption of innocence but also the right to silence and the privilege against self-incrimination. They are also part of the general prohibition on an unfair trial contained in Article 6(1). The right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 and provide the accused with protection against improper compulsion by the authorities (*Murray v UK* (1996) 22 EHRR 29).

85. In *Saunders v. UK* the admission of evidence obtained pursuant to statutory demand in a subsequent criminal trial constituted a breach of Article 6(1) ECHR. The ECtHR in *Murray v. UK, Condron v UK, Averrill v UK* and *Beckles v UK* made it clear that legislative provisions which permit the drawing of inference from silence will only be compatible with the ECHR where the prosecution have presented a *prima facie* case which calls for an explanation from the accused.

86. It should be recalled that in relation to s. 12 it appears that the failure to provide any explanation or indeed the provision of an explanation which a Garda does not consider "satisfactory" will amount to the commission of an offence, since it appears that that forms a constituent part of the offence under s. 12.

87. The Irish courts followed the approach taken by the ECtHR in *Saunders* in *Re National Irish Bank Ltd*. [1999] 3 IR 145. This case concerned s. 18 of the Companies Act 1990 which provided that statements made by any officer or agent of a company to inspectors appointed by the High Court "may be used in evidence against him." The issue thus arose as to whether any statements made by such persons was admissible in any subsequent criminal prosecution. Barrington J in the Supreme Court held that the use of compelled answers in a criminal prosecution violated Article 38.1. He stated at p. 188 "it is proper, therefore, to make clear that what is objectionable under Article 38 of the Constitution is compelling a person to confess and then convicting him on the basis of his compelled confession." The Court concluded that it was possible to read s. 18 in a constitutionally permissible fashion i.e. that it simply required the person questioned to answer the questions in the knowledge that any such answers were inadmissible in a subsequent criminal prosecution, save where the judge was satisfied that such answers were given voluntarily and not in answer to any statutory demand.

88. The presumption of innocence in ECtHR case law is largely synonymous with the case law of the Irish courts, particularly as cited by Costello J in *O'Leary v Attorney General* [1991] ILRM 454.

89. *Jalloh v Germany* (July 11, 2006, ECHR 721) establishes that the court will consider the nature and degree of the compulsion, the existence of any relevant safeguards in the procedures and the use to which any material so obtained may be put as well as the weight of the public interest in the investigation and the punishment of the offence at issue.

90. Article 6(2) does not prohibit the transfer of the evidential burden of proof to the accused provided the overall burden of establishing guilt remains with the prosecution (*Lingens and Leitgens v Austria* (1981) 4 EHRR 373). Any such transfer however must be confined within reasonable limits (*Salabiaku v France* (1991) 13 EHRR 379 para 28).

91. In *Telfner v Austria* (2002) 34 EHRR 207 the Court found a violation of Article 6(2) on the basis that the accused had been required to provide an explanation for his conduct without the prosecution having established a convincing prima facie case against him and held that this constituted an impermissible shifting of the burden of proof. In that case, a breach of the presumption of innocence was found where an Austrian court proceeded to convict the owner of a car for causing injury by negligence on the basis of assumptions that it was mainly the applicant who drove the car even though other family members drove the car on occasion and there was no evidence to identify him as the driver. The way in which the courts approached the evidence asserting that it was for the applicant to put forward a contrary version of events to the prosecution case was perceived as going too far and giving the impression of a preconceived view of the applicant's guilt.

92. These principles are also relevant to the Court's consideration of s. 12 where it may be suggested that it potentially compels an accused to provide a "satisfactory explanation" for the lack of a passport or equivalent document, insofar as failure to provide such an explanation appears to constitute the offence itself in

circumstances where a person cannot produce the relevant documentation under the section and maintains their right to silence.

Article 6(3)

93. Article 6(3) provides additional safeguards to defendants in criminal proceedings. In particular the Commission wishes to draw the Court's attention to subparagraphs (a) and (b).

94. Article 6(3) provides

"Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence".

95. In *Imbrioscia v Switzerland* (1994) 17 EHRR 441 at para 36 the Court made it clear that the guarantees in Article 6(3) must be complied with not just during the trial but equally "before a case is sent for trial if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them." Article 6(3)(a) requires not just that, once charged with an offence, the applicant be informed of the material facts forming the basis of the accusation but also the nature of the accusation and the information provided must be detailed (*Pelissier and Sassi v France* (2000) 30 EHRR 715, para 51; *Gea Catalan v Spain* 20 EHRR 266). Compliance with Article 6(3) is further hampered with the vagueness of the term "satisfactory explanation" thus rendering it difficult for a member of An Garda Síochána or an immigration officer to inform an accused "in detail of the nature and cause of the accusation against him".

96. In the context of s. 12 there is no express obligation to warn a person of the consequences of his or her failure to comply with the demand and/or provide a "satisfactory explanation".

97. If there is no available defence under section 12 then Article 6(3) may be engaged.

IV. Comments on the Application of section 12 to undocumented asylum seekers

98. The Refugee Act 1996 as amended gives effect in Irish law to the provisions of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol ("Refugee Convention") to which the State is a Party. The Refugee Convention and the Act define those who are refugees and enable the State to identify and provide protection to such persons in conformity with its international legal obligations, and under national law. The Immigration Acts 1999, 2003 and 2004 create a statutory framework for the control of immigration and the entry, stay and residence of non nationals in the State.

99. These Acts form a legislative code and should be read *in pari materia* with each other, such that internally the provisions are read consistently with each other within the same Act and also as between them and the provisions of the Refugee Act. In *Director of Public Prosecutions v. Power* [2007] 2 IR 509 Finnegan J. delivering the judgment of the Supreme Court stated that "acts *in pari materia* 'are to be taken together as forming one system and as interpreting and enforcing each other.' …They are to be construed as one, whether or not the relevant enactment expressly requires this."

100. The *amicus curiae* has concerns in relation to section 12 as it applies, in particular, to undocumented asylum seekers in the State, and the manner in which it affects asylum seekers as a particular group of non nationals whose situation may require specific consideration. In the present case it appears that there is no dispute between the parties as to the fact that the applicant is an asylum seeker in the State, and this is the context in which the *amicus curiae* is making its submissions to this Honourable Court.

101. The position of an asylum seeker, it is submitted, is different to a non national present in the State under other permissions given by the Minister or persons authorised in that behalf by him. The Refugee Act is specifically designed to give effect to the Refugee Convention and the Act specifically provides for a system of registration and the issuing of a temporary registration certificate for the purposes of that Act, recognising as it does the international principle that not all asylum seekers can present at a national frontier with correct documentation.

102. Section 9(3)(c) of the Refugee Act specifically provides that the Refugee Applications Commissioner shall give or cause to be given a “temporary residence certificate” to an asylum seeker (an applicant for refugee status). This is deemed to be a “registration certificate” for the purposes of s. 12 of the Immigration Act 2004. Section 9(2)(a) of the Immigration Act 2004 requires non nationals to register with the registration officer for that district. A refugee applicant who holds such registration certificate is also deemed to have complied with s. 9 of the Immigration Act 2004. Under s. 9(2)(a) of the Immigration Act 2004, in order to comply with the registration requirements under that section, the non national must produce to the registration officer a valid passport or other equivalent document which establishes his or her identity unless he or she gives a satisfactory explanation of the circumstances which prevent him or her from doing so.

103. It appears from these provisions that on registration a non national provides such information to a registration officer for the purpose of entry into the register including as to his or her passport or equivalent document. Where the non national fails to furnish a passport he or she must provide a “satisfactory explanation” to the registration officer for failing to so do. Pursuant to s. 9(2)(f) of the Immigration Act the non national shall on registration, (and on payment of the appropriate fee (s. 19(3)), obtain a registration certificate from the registration officer.

104. Compliance under s. 9 of the Immigration Act 2004 includes a requirement to give a “satisfactory explanation” to a registration officer as to why a refugee applicant (as a member of a particular class of non nationals) does not have a passport or equivalent document. Having provided such “satisfactory explanation” within the meaning of that section the refugee applicant is issued with the temporary residence card under s. 9 of the Refugee Act.

105. This raises questions as to the difference between ss. 9 and 12 of the Immigration Act 2004 and the interaction between them. The meaning of “satisfactory explanation” appears to be open to interpretation. It is submitted that the sections are to be read consistently with each other, and consistently with s. 9 of the Refugee Act with which they interlink.

106. The *amicus curiae* raises the question as to whether the meaning of the term, and further the conduct required to avoid criminal sanctions under section 12, is sufficiently clear and precise in circumstances where an explanation provided under s. 9 of the Immigration Act 2004 results in permission to remain in the State for the purpose of the application for refugee status but the same explanation under a different section of the same Act may result in detention and prosecution for a criminal offence. It is respectfully submitted by the *amicus curiae* that this matter may fall within the scope of the judgment in the *King* case quoted above insofar as 'the ingredients of the offence' are at issue. It also raises issues in relation to the Applicant's right to fair procedures as set out above as it is unclear why the same explanation is not sufficient for section 12 whereas it may be for section 9. It is similarly unclear what additional information may be required.

107. The Commission submits that the status of an undocumented asylum seeker and all that that entails, including language difficulties and possibly trauma and/or mistrust of State authorities, must be taken into account. If the status of the individuals the subject of the provision is to be taken into account as required under ECtHR case law, it would seem that there is a higher duty on a State to ensure that laws which apply to such individuals are particularly clear and unambiguous in their delimitation of duties which may give rise to criminal prosecution.

a. Proportionality

108. It is submitted on behalf of the *amicus curiae* that the wording of section 12 raises questions as to whether a proportionate interference with the rights protected by the Constitution and the ECHR is involved. The question arises as to whether the intrusion can be described as 'as little as is reasonably possible' for the reasons outlined above, in particular in relation to undocumented asylum seekers.

109. It is also necessary to examine the objectives of s. 12, the purpose for which it is used and the means used to achieve that purpose. The means used must be proportionate to the aim sought to be achieved. In this instance, it seems clear that there are other provisions which appear to achieve those objectives at which s. 12 appears to be aimed (proper immigration control) and which may be as effective and interfere less with the rights of undocumented asylum seekers, as a particular

class of non nationals. In particular use of those provisions would avoid the criminalisation of this vulnerable group, in contravention of international standards (see below).

110. While the 'objective and reasonable justification' behind section 12 is clearly the legitimate aim of exercising a certain measure of control over non-nationals within the State's territory, the question is whether there is a reasonable relationship of proportionality between that aim and the means chosen in section 12 to realise it, as it specifically impacts upon undocumented asylum seekers for whom it may be difficult if not impossible to comply with a requirement unknown to them prior to entry to the State.

111. There may be a further difficulty with s. 12 in that it appears to give rise to the potential for repeated prosecutions and convictions for failure by an undocumented asylum seeker to produce a valid passport or equivalent document on demand and failing to provide a "satisfactory explanation" for not having the document. It could be seen as being of the nature of a "continuing offence". This could potentially infringe constitutional and the Convention values to protect against arbitrariness, which principle is given concrete expression in Articles 38 and 40, and 5 and 6 ECHR guaranteeing the right to a fair trial and right to liberty.

112. It would appear to be disproportionate to impose imprisonment in circumstances where the individual in question may have no way of avoiding committing the offence, and can repeatedly be re-arrested without the possibility of complying in the future with the section.

113. It is noted by the *amicus curiae* in this regard that the Respondent's submissions refer generally to immigration control, and do not address the situation of asylum seekers and the specific legal protections that apply to that discrete group of non nationals; legal protections which may, it is submitted, be eroded to some degree by s.12 insofar as it relates to undocumented asylum seekers in the State.

114. The Commission refers the Court to the instructive jurisprudence of the English High Court (Divisional Court) in *Thet v. Director of Public Prosecution* [2007] 1 WLR 2022. The Court considered whether an asylum seeker had

committed an offence under s. 2 of the Asylum and Immigration (Treatment of Claimants) Act 2004 of failing to produce a passport or immigration document on arrival or at interview, which satisfactorily established his identity and nationality. The Court in allowing the appeal, held that the defendant had satisfied the District Judge that it was impossible for him to obtain a passport in his country of origin and, in those circumstances, he clearly had a reaosnable excuse for not providing an immigration document within three days of his asylum interview; and that, accordingly, the defendant had a valid defence to the offence with which he was charged.

V. Other relevant law

a. UN Convention relating to the Status of Refugees and other International Instruments

115. Article 27 of the Refugee Convention states:

"The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document".

116. Article 31 provides:

"The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

117. The House of Lords in *R v Asfaw* [2008] 1 AC 1062 (HL) commented on the purpose of Article 31: "The third aim [of the Convention], broadly expressed, was to protect refugees from the imposition of criminal penalties for breaches of the law reasonably or necessarily committed in the course of flight from persecution or threatened persecution. It was recognised in 1950, and has since become even clearer, that those fleeing from persecution or threatened persecution in countries where persecution of minorities is practised may have to resort to deceptions of various kinds (possession and use of false papers, forgery, misrepresentation, etc) in order to make good their escape. Effect was given to this third aim in article 31..."

118. The *travaux preparatoire* of the Convention make it clear that every refugee was intended to benefit from Article 27 provision (Ad hoc Committee on Refugees and Stateless Persons, UN doc. E/AC.32/SR.38, 26 September 1950, 23-5). It was noted during Committee meetings that "It is a general principle to issue identity papers, under various designations, which serve both as identity cards and as residence permits" (Ad hoc Committee, Draft Report, UN doc. E/AC.32/L.38, 15 February 1950).

119. Notwithstanding the aspirations and commitment of the State to the application of the Refugee Convention it should be noted that the effect of Article 27 and 31 in national law has so far in this jurisdiction been limited.

120. O'Higgins J in *N.S. v Judge Anderson* [2008] 3 IR IEHC 417 stated at para. 31 "I am prepared to assume that the State may, by entering into an international agreement, create a legitimate expectation that its agencies will respect its terms. However, it could not accept such an obligation so as to affect either the provisions of a statute or the judgment of a court without coming into conflict with the Constitution." And at para. 35 "It is thus clear from the terms of the Constitution itself, that international agreements are not part of domestic law unless they are made so by the Oireachtas. It follows from that, that if Article 31 of the Geneva Convention 1951 is not part of domestic law there can be no legitimate expectation that its provisions can be successfully invoked to oust the right of the Director of Public Prosecutions to perform his duty." And at para. 40 "Similarly, in default of legislation enacting the provisions of Article 31 of the Geneva Convention 1951 into Irish law, the ratification of the Convention does not confer rights on the applicants which may be invoked before the courts, at least to deprive the Director of Public Prosecutions of his functions as laid down by law.'"

121. O'Higgins J did, however, preface that statement with the acknowledgement at p. 427 that, "I accept that the courts must interpret a statute in light of a convention which the State has ratified as Finlay Geoghegan J. did in *N. v. Minister for Justice [Nwole]*...".

122. Dunne J. in *Siritanu v. Director of Public Prosecutions* (High Court, Dunne J., 2 February 2006) cited the judgment of O'Higgins J. in that case and this reasoning was followed by Gilligan J. in *R.G.G. v. Director of Public Prosecutions* [2008] 3 IR 732.

123. It is submitted that notwithstanding its non-binding character on the Irish Courts Article 31 can be relevant in guiding the Court's decision. As will be set out below, the Irish courts have shown their openness to using international law as an interpretive guide to the national and international legal principles under consideration, without it amounting to the accrual of rights to individuals directly from international law, which the *amicus curiae* is not advancing. As will be set out, the European Court of Human Rights has itself drawn on international conventions and principles, as well as the reports of relevant international bodies such as the UNHCR in its analysis of Convention rights (see for example *Saadi*).

124. It is noted that Article 78 of the Treaty on the Functioning of the European Union (TFEU) provides that the Union shall adopt a common policy on, *inter alia*, asylum, "with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties." The Qualification Directive and the Procedures Directive form part of the EU asylum policy measure to which Ireland has signed up. Article 4 of the Qualification Directive deals with the assessment of facts and circumstances of applications for protection including the duty on applicants to submit as soon as possible all elements needed to substantiate the application for international protection. These include "the applicant's statements and all documentation at the applicant's disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, identity and travel documents and the reason for applying for international protection."

125. The United Nations High Commissioner for Refugees (UNHCR) is the specialised UN body charged with interpretation and supervision of the Refugee

Convention under Article 35 of that Convention. UNHCR has commented on the EU Procedures Directive which provides for minimum standards for procedures in Member States for granting and withdrawing refugee status. In its Provisional Comments on the Proposal for the Procedures Directive (10 February 2005) UNHCR stated in relation to Article 11(2)(b) that "It is recognised by Article 31(1) of the 1951 Convention that applicants may not be able to provide documentation on all matters, due to the circumstances of their flight. UNHCR therefore welcomes that the duty to hand over documentation is restricted to documents asylum-seekers actually have in their possession."

126. UNHCR also commented in relation to detention that it welcomed "the reaffirmation of the general principle that asylum-seekers should not be detained. However, this principle needs further elaboration to circumscribe the use of detention by Member States, in line with Article 31 of the 1951 Convention, the relevant Conclusions of UNHCR's Executive Committee, as well as international and regional human rights law. UNHCR further hopes that best practice by States can be taken into consideration.

127. UNHCR also stated that

"Consistent with international and regional human rights law, detention of asylum-seekers is exceptional and should only be resorted to where provided for by law and where necessary to achieve a legitimate purpose, proportionate to the objectives to be achieved and applied in a nondiscriminatory manner, for a minimal period. The necessity of detention should be established in each individual case, following consideration of alternative options, such as reporting requirements.

UNHCR believes that the guidance provided by its Executive Committee in its Conclusion No. 44 (XXXVII) of 1986, which outlines permissible exceptions to the general rule that detention of asylum-seekers should normally be avoided, addresses States' concerns to control immigration and still allow for identification and recognition of asylum seekers. Conclusion No. 44 provides that detention of asylum seekers may only be resorted to, if necessary:

• to verify identity;

• to determine the elements on which the claim to refugee status or asylum is based;

• to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or
• to protect national security or public order.

UNHCR suggests that States provide for an exhaustive enumeration of the grounds for detention of asylum-seekers in national legislation. Furthermore, UNHCR recommends that the requirements developed by the ECHR for the lawfulness of a detention order be incorporated into national law. Apart from speedy judicial review, which has been stipulated in Article 17 (2) of the Directive, they include unimpeded access to the asylum procedure, legal and social assistance, interpretation facilities and information."

128. In relation to Article 35 of the Directive on border controls UNHCR's view was that "there is no reason for requirements of due process of law in asylum cases submitted at the border to be less than for those submitted within the territory. Rather, the principle of non-discrimination requires that all asylum-seekers, irrespective of whether they apply at the border (including air and sea ports), or inside the country, benefit from the same basic principles and guarantees. Such differences in safeguards may compel asylum-seekers and refugees to enter and stay illegally, in order to be assured of higher standards in the asylum procedure. The Office therefore acknowledges that Article 35 (1) requires Member States to adhere to the basic principles and guarantees in procedures undertaken at the border or in transit zones, as set out, in particular, in Chapter II."

VI. Interpretation of the Constitution in light of International Standards

129. The *amicus curiae* submits that, when considering the constitutionality of the impugned provisions, the interpretation and understanding of the relevant Constitutional and Convention provisions ought to be informed by the provisions of international Conventions ratified by the State.

130. The *amicus curiae* accepts that 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. 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.[1] This remains the Constitutional provision, notwithstanding the significant ECtHR judgment in *McFarlane* which does not accept theoretical constitutional remedies as being capable of satisfying the State's ECHR obligations.

131. Thus, any attempt to use the provisions of unincorporated international law, whether on the assertion that the provisions ought to be regarded as "generally recognized principles of international law" referred to in Article 29.3 of the Constitution or otherwise, as a basis for challenging the validity of any rule of domestic law is doomed to failure.[2] Nonetheless the Courts have on a number of occasions shown a willingness, in the absence of conflict between domestic and international provisions, to *consider* the terms of such international instruments with a view to informing their understanding of the applicable constitutional standards

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[1] As the Supreme Court noted in *Re Ó Laighléis* [1960] IR 93 wherein the Applicant sought to challenge the validity of the Offences against the State (Amendment) Act 1990, having regard to the terms of Articles 5 and 6 of the European Convention of Human Rights:

> "Where there is an irreconcilable conflict between a domestic statute and the principles of international law or the provisions of an international convention, the courts administering 'the domestic law must give effect to the statute … if this principle were not to be observed it would follow that the Executive Government by means of an international agreement might, in certain circumstances, be able to exercise powers of legislation contrary to the letter and the spirit of the Constitution".

[2] In *Murphy v GM* [2001] 4 IR 113 the Applicant argued that the provisions of the Proceeds of Crime Act 1996 infringed the European Convention on Human Rights, that the Convention ought to be regarded as part of the generally recognised principles of international law referred to in Article 29.3 and that accordingly, the Act must be considered unconstitutional. This argument was rejected by the Supreme Court, which held (at p. 158):

> "this case concerns the application of domestic legislation to persons within the jurisdiction of the State. In these circumstances it is not relevant or necessary to consider the application of the 'principles of international law' in the case and in particular whether the provisions of the European Convention on Human Rights ought to be treated as included in those 'principles', as Article 29.3 of the Constitution makes clear that these general principles, whatever their content, govern relations with other sovereign states at an international level".

Similarly, in *Kavanagh v Governor of Mountjoy Prison* [2002] 3 IR 97 an attempt was made to invoke Article 29.3 in support of the argument that certain principles of international law should be afforded constitutional status. In particular, the applicant sought to rely on Article 26 of the UN Covenant on Civil and Political Rights (principle of equal treatment) in support of his claim that his trial before the Special Criminal Court was not in conformity with law. The Supreme Court rejected this contention, with Fennelly J stating (at p.90):

> "The obligation of Ireland to respect the invoked principles [of international law] is expressed only in the sense that it is to be 'its rule of conduct in relation to other nations'. It is patent that this provision confers no rights on individuals. No single word in [Article 29.3] even arguably expresses an intention to confer rights capable of being invoked by individuals".

and the *amicus curiae* submits that this approach by the Courts has some considerable implications for the proceedings herein.

132. Thus, for example, in *State (Healy) v Donoghue*,[3] the Supreme Court had regard to the terms of Article 6 of the ECHR prior to incorporation of the Convention into domestic law when considering the scope of the right to legal aid under Irish law. The Supreme Court was therefore 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.

133. Reference is also made to the case of *O'Leary v Attorney General*, wherein 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 Declaration on Human Rights 1948, Article 8(2) of the American Convention on Human Rights and Article 7 of the African Charter of Human Rights. He stated that he was entitled to construe the Constitution "in the light of contemporary concepts of fundamental rights".

134. Further examples of such judicial willingness can be found in the judgments of the Supreme Court in *Rock v Ireland*[4] and *Murphy v I.R.T.C.*[5] in which 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. In a similar vein reference is made to the international standard of proportionality referred to in the judgments in *Heaney v Ireland* [6] and *In re the Employment Equality Bill 1996*[7].

135. Indeed, unincorporated international law provisions may have indirect effect through the operation of a presumption of compatibility of domestic law with

[3] [1976] IR 325
[4] *Rock v Ireland* [1997] 3 IR 484.
[5] *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 European Court of Human Rights as set out, for example, in *Times Newspapers Ltd v UK* (1979) 2 EHRR 245.
[6] *Heaney v. Ireland* [1994] 3 IR 593.
[7] *In re Employment Equality Bill* [1997] 2 IR 321.

international obligations. In *State (DPP) v Walsh*,[8] 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 what public policy was: *Desmond v Glackin (No.1).*[9] Reference is also made to the judgment of Finlay Geoghegan J in *Nwole v Minister for Justice*,[10] when considering aspects of the asylum application process as it applied to minors. The learned judge stated that: "The provisions of the Refugee Act of 1996 [regarding the processing of applications for asylum] must be construed, and its operation applied by the authorities, in accordance with the Convention on the Rights of the Child which has been ratified by Ireland." It is thus clear that Finlay Geoghegan J was willing to have regard to the terms of an international agreement in her consideration of the rights of minors in the asylum process in this jurisdiction. Likewise, in *Bourke v Attorney General*,[11] 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.[12] In *McCann,* 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.

136. It is also of interest to note that 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

[8] State(*DPP) v. Walsh* [1981] IR 412

[9] *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".

[10] *Nwole v Minister of Justice* (Unreported, High Court, Finlay Geoghegan J, 31st October 2003), at p.12.

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

[12] 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."

example is to found in the judgment of the Court in *Chapman v United Kingdom*[13]. In the course of 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 had considered the Council of Europe Framework Convention on the Protection of National Minorities and also to certain measures adopted by the institutions of the European Union before reaching its conclusions as to the applicability of Article 8 to claims based upon the right "to pursue a gypsy way of life". Another example is found in the case of *Glor v. Switzerland*[14]wherein the ECtHR found that discrimination based on disability status came within the scope of Article 14 of the Convention, considering inter alia, the principles espoused in the UN Convention on the Rights of Persons with Disabilities. The ECHR must also be interpreted in harmony with other rules of international law, particularly where those rules are contained in treaties which have been ratified by State Parties to the ECHR (*Al-Adsani v. United Kingdom* , (2002) 34 EHRR 273; *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland* [GC] ECHR 2005-III;).

137. Thus, it is submitted that the Courts have shown a willingness to use international instruments which bind the State in international law but are non-binding in domestic law, to inform the understanding of specific and consistent constitutional provisions to which the international provision may be "pinned". The international instrument may be seen both as a buttress and a guide to existing constitutional guarantees, as far as the interpretation of the impugned provisions before the Court are concerned. The *amicus curiae* is of the opinion that it is entirely appropriate that the Constitution and the guarantees there under should be informed by international treaties ratified by the State, where such a state of affairs is possible, and thus endorses the above approach in the context of the proceedings herein. It also notes that such an approach has the benefit of demonstrating to the European Court of Human Rights that Convention rights are capable of effective domestic remedies in Irish law.

Sunniva McDonagh SC
Sinéad Costello BL
Imelda Kelly BL
22 November 2010

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