THE SUPREME COURT

Record No: 2008/411 JR

Between/

[redacted]

Appellant/Applicant

AND

THE MENTAL HEALTH (CRIMINAL LAW) REVIEW BOARD
THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM
IRELAND
THE ATTORNEY GENERAL

Respondents/Respondents

AND

THE CLINICAL DIRECTOR OF THE CENTRAL MENTAL HOSPITAL
THE HUMAN RIGHTS COMMISSION

Amicus Curiae/Notice Parties

SUBMISSIONS ON BEHALF OF THE AMICUS CURIAE

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Introduction

1. This submission is filed by the Human Rights Commission ('the Commission') as *amicus curiae* pursuant to the Order of this Honourable Court made on 9th October, 2009, granting the Commission leave to appear in these proceedings in accordance with section 8(h) of the Human Rights Commission Act 2000.

2. The Commission has undertaken to ensure that its submissions are as brief as possible and to endeavour to avoid duplication of the arguments of the parties. Unfortunately, the Commission has not had sight of the submissions of the Clinical Director of the Central Mental Hospital as they have not been filed as of Wednesday 18th November, 2009.

3. The appellant's case revolves around section 13(9) of the Criminal Law (Insanity) Act 2006 (hereafter 'the 2006 Act'). In the Commission's view, this section provides (as material to the case) that:

    (i) where a person has been detained under section 5 of the 2006 Act, ie s/he is suffering from a mental disorder, and
    (ii) where that person's detention is reviewed by the Mental Health (Criminal Law) Review Board (the first named respondent and hereafter 'the Review Board'), the Review Board shall
        (a) "determine the question of whether or not the patient is still in need of in-patient treatment in a designated centre", and
        (b) "shall make such order as it thinks proper in relation to the patient whether:
            I. for further detention, care or treatment in a designated centre, or
            II. for his or her discharge whether unconditionally or subject to conditions for out-patient treatment or supervision or both".

4. The Commission's submissions focus in particular on Article 5 of the European Convention on Human Rights (hereafter 'the ECHR') and whether the Review Board's decision to refuse to discharge the appellant is compliant with that Article. The Commission's submissions can be summarised as follows:

    (i) that section 13 of the Act is compatible with the Constitution and the ECHR if read in the manner advocated by the second, third and fourth named respondents (hereafter 'the State'), which is that it permits

deprivation of liberty only where a person is suffering from a mental disorder and requires 'in-patient treatment';

(ii) that the only justification that could apply to the appellant's deprivation of liberty under Article 5 of the ECHR is that provided for in subparagraph 1(e) of the said Article;

(iii) that the appellant's continued detention raises serious issues under the principles established by the European Court of Human Rights and, in particular, with those set out in *Johnson v. United Kingdom* (1997) where the applicant had recovered from a previous mental disorder;

(iv) further, that the Review Board's decision not to exercise its statutory power to order discharge on conditions, due to perceived unenforceability of any such conditions, raises the issue as to whether it has carried out a review that satisfies the requirements of Article 5(4) of the ECHR;

(v) that, on the facts of the appellant's case, the exercise of the rights to liberty and fair procedures under the Constitution mirror those provided for under Articles 5 and 6 of the ECHR;

(vi) that the statutory interpretation of an Act concerning mentally ill persons should be informed by the overriding importance that an individual's fundamental rights and freedoms (in the appellant's case, freedom from arbitrary detention) are protected and vindicated, and that all persons are treated equally before the law.

Article 5(1) of the European Convention on Human Rights

5. Article 5(1) of the ECHR provides:

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) 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;

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

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants;

(f) 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.

6. It appears that a preliminary issue between the parties might be the nature of the appellant's detention. The appellant in his submissions suggests that the learned High Court trial judge made a distinction between deprivation and curtailment of liberty. The appellant relies in his submissions on *JE v. DE (an adult patient)*[1] in order to assert that he is being deprived of his liberty for the purpose of Article 5 of the ECHR. The Commission agrees that the principles set out in *JE v DE (an adult patient)* summarise the principles established by the European Court of Human Rights. The submissions of the Review Board appear to accept that the Appellant is deprived of his liberty (see paragraph 4.4 thereof), such that the issue does not appear in dispute but, if it is of assistance to this Honourable Court, the Commission can refer to the European Court of Human Rights' jurisprudence on the issue of what constitutes detention for the purpose of Article 5.

7. A core issue for consideration is whether the Appellant's deprivation of liberty is justified by one of the exceptions set out in the subparagraphs to Article 5(1).[2] In

[1] [2006] EWHC 3459 (Fam).

[2] The list of exceptions to the right to liberty secured in Article 5(1) is an exhaustive one. Further, the European Court has indicated that only a narrow interpretation of those exceptions is consistent with the aim of the Article, namely, to prevent arbitrary deprivation of liberty. If a form of detention does not come within the exceptions listed under Article 5 there will, *a fortiori*, be a breach of the ECHR:

the Commission's view, the only subparagraph that could apply is subparagraph (e). Subparagraph (a) requires a conviction by a court of law. In *In re Gallagher*, [3] the Supreme Court held that the special verdict of guilty but insane amounted in law to an acquittal. Further the European Court of Human Rights has distinguished between a person detained on grounds of criminal responsibility and one detained on grounds of "unsound mind" (see the Court's judgments in *Aerts v Belgium*[4] and *Bizzotto v Greece*[5]). In *Aerts*, because the applicant was mentally ill such as to lack criminal capacity, his detention was held to fall within Article 5(1)(e) only. The ECtHR stated (at paragraph 45):

> *"The Court considers that only Article 5 § 1 (e) is applicable to the applicant's detention. Although the Committals Chamber of the Liège Court of First Instance found that Mr Aerts had committed acts of violence, it ordered his detention on the ground that at the material time and when he appeared in court he had been severely mentally disturbed, to the point where he was incapable of controlling his actions (see paragraph 8 above). As he was not criminally responsible, there could be no "conviction" within the meaning of paragraph 1 (a) of Article 5 (see the X v. the United Kingdom judgment of 5 November 1981, Series A no. 46, p. 17, § 39), and in any case the Committals Chamber could not give such a ruling."*

8. Following the enactment of the 2006 Act, the Appellant's on-going detention is on foot of his being "not guilty by reason of insanity". His continuing detention could only fall under Article 5(1)(e).

9. For detention to be lawful under Article 5(1)(e), three minimum conditions must be met:[6]

Guzzardi v. Italy, Judgment of 6 November 1980, 3 EHRR 333; *H.M. v. Switzerland*, Judgment of 26 February 2002, ECHR 157; *Nielson v. Denmark,* Judgment of 28 November 1988, 11 EHRR 175.

[3] [1991] 1 IR 31.

[4] (1998) 29 EHRR 50.

[5] 15th November 1996 (Reports of Judments and Decisions 1996-V.

[6] *See Winterwerp v. The Netherlands* Judgment of 24 October 1979, 2 EHRR 387. See also *Recommendation Rec (2004) 10 of the Committee of Ministers to Member States concerning the protection of human rights and dignity of persons with mental disorder which at* Article 17 states:

1. A person may be subject to involuntary placement only if all the following conditions are met:

(i) the person has a mental disorder

(i) the presence of a true mental disorder must be determined by objective medical evidence;

(ii) the mental disorder must warrant compulsory confinement;

(iii) the detention must be justified on a continuing basis due to the persistence of the mental disorder, established upon objective medical expertise.

The parties' common position appears to be that the Appellant does not continue to suffer from a "mental disorder" as defined in the Mental Health Act 2001. The Review Board has grounded its concerns in respect of conditional release rather than the need for compulsory confinement, and the justification advanced by the Review Board is that of the non-enforceability of conditions under section 13(9) of the 2006 Act.

10. The Commission agrees with the Review Board that where a person in detention recovers from a mental disorder that release may be delayed: see *Johnson v. United Kingdom*[7], paragraphs 61-63 (cited in the Review Board's submissions at paragraph 3.1 (xi)). However, the Commission draws this Honourable Court's attention to the fact that the European Court of Human Rights went on to state that any deferral of discharge must be "consonant with the purpose of Article 5(1) and with the aim of the restriction in sub-paragraph (e) and, in particular, that discharge is not unreasonably delayed". This consideration must also be added to the points set out in the State's submissions (at paragraph 24 thereof).

11. In the appellant's case, despite the fact that he no longer suffers from a mental disorder, there appears to be no prospect of discharge because of the Review Board's opinion that it cannot enforce any conditions that it might attach to discharge and that it has a duty under section 11(12) of the 2006 Act to the person "and to the public interest" (see paragraph 2.7 of Review Board's submissions). If the Review Board considers that no discharge may occur without enforceability of

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(ii) the person's condition represents a significant risk of serious harm to his or her health or to other persons;
(iii) the placement includes a therapeutic purpose;
(iv) no less restrictive means of providing appropriate care are available;
(v) the opinion of the person concerned has been taken into consideration.

[7] Judgment of 24 October 1997 27 EHRR 296.

conditions, this raises the possibility of indeterminate detention for a person not guilty of an offence originally by reason of insanity, where the "insanity" has now passed.

12. Although the Commission agrees with much of the State's submissions as to what constitutes detention and the circumstances in which conditions can be attached to release, citing the case of *Johnson*, attention should also be drawn to the fact that the European Court of Human Rights in *Johnson* went on to address the issues arising from a tribunal's lack of jurisdiction to compel discharge on conditions. The Court stated:

> *66. However, while imposing the hostel residence requirement on the applicant and deferring his release until the arrangements had been made to its satisfaction, the Tribunal lacked the power to guarantee that the applicant would be relocated to a suitable post-discharge hostel within a reasonable period of time. ….*
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> *67. In these circumstances, it must be concluded that the imposition of the hostel residence condition by the June 1989 Tribunal led to the indefinite deferral of the applicant's release from Rampton Hospital, especially since the applicant was unwilling after October 1990 to cooperate further with the authorities in their efforts to secure a hostel, thereby excluding any possibility that the condition could be satisfied. While the 1990 and 1991 Tribunals considered the applicant's case afresh, they were obliged to order his continued detention since he had not yet fulfilled the terms of the conditional discharge imposed by the June 1989 Tribunal.*
>
> *Having regard to the situation which resulted from the decision taken by the latter Tribunal and to the lack of adequate safeguards, including provision for judicial review to ensure that the applicant's release from detention would not be unreasonably delayed, it must be considered that his continued confinement after 15 June 1989 cannot be justified on the basis of Article 5 § 1 (e) of the Convention (see paragraph 63 above).*
>
> *For these reasons, the Court concludes that the applicant's continued detention after 15 June 1989 constituted a violation of Article 5 § 1 of the Convention.*

13. In the appellant's case, the imposition of conditions on release by the Review Board, together with the Board's view that it cannot enforce such conditions with the consequence that release should not be permitted, has led to "the indefinite deferral" of the appellant's release, such that serious issues arise under Article 5(1) of the EHCR.

Article 5(4) of the European Convention on Human Rights

14. Article 5(4) of the ECHR provides:

> *Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.*

15. Article 5(4) requires that detention must be subject to a speedy review by a "court" which can properly review the legality of the detention. In the case of persons detained on grounds of mental ill-health, the reviewing "court" must examine the legality of the detention in the light of the *Winterwerp* criteria as outlined above.[8] Article 5(4) provides a crucial guarantee against arbitrariness of detention.[9] The European Court of Human Rights has held that in order to constitute a "court", an authority must be independent from the executive and the parties, and it must provide the fundamental guarantees of judicial procedure applied in matters of deprivation of liberty.[10] A body such as the Mental Health Review Board can constitute such a "court" provided it meets the necessary independence, offers sufficient procedural safeguards[11], and crucially, can make binding decisions. In cases involving mental health, it is essential that the body reviewing detention has the power to investigate the applicant's mental state.[12]

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[8] *See* para. 9 above, outlining the *Winterwerp* criteria.
[9] *Van Der Leer v. The Netherlands*, Judgment of 21 February 1990, 12 EHRR 567 at para. 35.
[10] *De Wilde, Ooms and Versyp v. Belgium*, Judgment of 18 June 1971, 1 EHRR 373 at para. 76, and more recently *Varbanvov v. Bulgaria,* Judgment of 5 October 2000, ECHR 2000-X at para. 58.
[11] *De Wilde, Ooms and Versyp v. Belgium*, Judgment of 18 June 1971, 1 EHRR 373 at para. 76, *X v. The United Kingdom* (1982) 4 EHRR 188 at pp. 53-54, and more recently *Varbanvov v. Bulgaria,* Judgment of 5 October 2000, ECHR 2000-X at para. 58.
[12] *X v. The United Kingdom*, 1982, 4 EHRR 188 at para. 58.

16. The European Court has further held that the speed of review of detention must be assessed in the light of the circumstances of the case, although in principle, the State must organise its procedures with the minimum of delay.[13] In the case of *Kolanis v. United Kingdom*[14] the European Court of Human Rights held that if a Mental Health Review Tribunal finds that detention is no longer necessary and that a patient is eligible for release on conditions then "new issues of lawfulness may arise where detention nonetheless continues, due, for example, to difficulties in fulfilling the conditions".[15] The Court held that such patients are entitled under Article 5(4) to have the "lawfulness of that *continued* detention determined by a court with requisite promptness" (emphasis added).[16]

17. It is submitted that where the Appellant's continued detention can only be justified under Article 5(1)(e), the Board cannot authorise what appears to be indefinite, on-going detention, in light of the Appellant's recovery. The State's submissions (at paragraphs 18 to 37) are central to the Court's consideration of the issues, insofar as they recognise that the 2006 Act changed the appellant's status to "not guilty"; that the appellant is suffering an interference with his right to liberty under both the Constitution and the ECHR; and that the 2006 Act is compatible with the Constitution and the Convention because, in the absence of the need for in-patient treatment for a mental disorder, a person should be released in accordance with section 13(9) of the 2006 Act. There does not appear to be a power to insist upon the enforceability of conditions for this to occur, although the difficult position facing the Board is acknowledged.

18. If the State's submissions are accepted and the 2006 Act is compatible with the ECHR, the questions arise as to whether the Appellant's detention (or continued detention) is compatible with Article 5(1)(e) and whether the review or reviews of that detention are compatible with Article 5(4) and in this latter regard, both whether "new issues of lawfulness may arise where detention nonetheless continues"; and whether the "lawfulness of that *continued* detention determined by

[13] *Zamir v. the United Kingdom*, no. 9174/80, Commission's report of 11 October 1983, DR 40, p. 42, pp. 107–108, and more recently *Mayzit v. Russia*, Judgment of 20 January 2005 at para. 49.
[14] *Kolanis v. The United Kingdom*, Judgment of 4 May 2004, ECHR 2005.
[15] *Ibid,* at para. 80.
[16] *Ibid.*

a court with requisite promptness" has occurred. If on the other hand, the 2006 Act is not compatible with the ECHR, the Appellant may, as the State submits, face *"ongoing and indefinite detention*" which would likely fall foul of the ECHR. It is within this rubric that it is respectfully suggested that the acts/omissions of the Review Board fall to be considered. The State's submissions on this point at paragraph 20 are most relevant.

Article 6 of the European Convention on Human Rights

19. Article 6(1) of the ECHR provides:

> *In the determination of his [or her] civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…*

20. The object and purpose of Article 6 is to protect the right to fair proceedings in both the civil and criminal sphere, with the more onerous obligations on the State deriving from criminal proceedings.[17] The first issue for consideration is whether an application for release will fall within the ambit of Article 6(1).[18] According to the case of *Aerts v. Belgium*[19], where the right to liberty is at stake (as it is in this case), the ambit of Article 6 is met as the right to liberty is a civil right.

21. Although there is a close link between Article 5(4) and Article 6(1) in the sphere of criminal proceedings, the criminal head of Article 6 does not apply to proceedings for the review of the lawfulness of detention falling within the scope of Article 5(4) which is the *lex specialis* in relation to the former: *Reinprecht v. Austria*.[20]

22. The European Court of Human Rights has held that procedural guarantees under Article 5(1) and (4) are broadly similar to those relating to the right to a fair trial

[17] *Engel and Others v. The Netherlands*, Judgment of 8 June 1976, 1 EHRR 647.
[18] The Article requires that there must be a determination of civil rights and obligations or of a criminal charge, with both concepts bearing an "autonomous" meaning. *See* generally *X v. Austria,* Decision of 19 September 1961, 4 *Yearbook* 340.
[19] *Aerts v. Belgium*, Judgment of 30 July 1998, 29 EHRR 50.
[20] Judgment of 15th November, 2005.

under Article 6: *Shtukaturov v. Russia*.[21] Although the domestic courts enjoy a certain margin of appreciation in cases involving a mentally ill person to ensure, inter alia, the good administration of justice and protection of the health of the person concerned, such measures should not affect the very essence of the right to a fair trial as guaranteed by Article 6. In assessing whether a particular measure was necessary, the European Court of Human Rights will take account of all relevant factors.[22]

23. In the appellant's case, where the Review Board is charged with the task of determining if he requires "in-patient treatment", and has the express statutory power, pursuant to section 13(9) of the 2006 Act, to "make such order as it thinks proper in relation to the patient whether for further detention, care of treatment in a designated centre or for his or her discharge whether unconditionally or subject to conditions for out-patient treatment or supervision or both", the question arises as to whether the appellant has had a fair review in circumstances where the Review Board has decided that it will not exercise its power to discharge subject to conditions because it is of the opinion that it cannot enforce any conditions. In particular, if the Board is correct in its opinion, it may not be capable of making a proper determination on civil rights/responsibilities as required by Article 6 or Article 5(4).

The Constitution

24. Article 40(4)(1) of the Constitution provides:

> *No citizen shall be deprived of his personal liberty save in accordance with law.*

25. Article 40(3) of the Constitution grants the right to fair and just procedures to every citizen whose rights may be affected by decisions taken by others, meaning that powers cannot be exercised unjustly or unfairly.[23]

[21] Shtukaturov v. Russia, Judgment of 27 March 2008, at para. 66. *See* also *Winterwerp*, op,cit., at para. 60.
[22] *Shtukaturov*, op. cit., para. 68.
[23] *See Garvey v. Ireland* [1981] IR 75.

26. It is submitted that the rights to liberty and fair procedures under the Constitution are as strong as those that derive from Article 5 of the ECHR in respect of the safeguards that are required where a person is detained on the ground of mental illness. The Commission has previously submitted to the Superior Courts that the ECHR, and other international legal instruments, are of assistance in interpreting and applying the Constitution and attaches, by way of appendix, submissions in this regard.

Interpretative approach

27. At page 23 of his judgment, Hanna J states: "A particular spirit drives the interpretation of statutes such as this which legislate in the area of mental health. This legislation is viewed as being paternalistic in nature." If canons of statutory interpretation are relevant in the appellant's case, the Commission refers to the principle of *ut res magis valeat quam pereat* and urges caution in respect of any such 'paternalistic' approach to statutory provisions concerning mentally ill persons for the reasons set out below.

28. *Ut res magis valeat quam pereat* translates as 'it is better for a thing to have effect than to be void'. Thus, a statutory provision should be construed so that it can take effect or be operative rather than be left ineffectual, provided such construction is reasonably open. In the appellant's case, the Review Board has the statutory power to discharge on conditions, but has failed to exercise this power.

29. It is respectfully submitted that as evident from the jurisprudence of the European Court of Human Rights, the notion of 'paternalism' must be applied very cautiously where the right to liberty is involved. An individual has a right to have his or her fundamental rights protected and vindicated. This includes the right to one's liberty. Furthermore, all persons must be treated equally before the law. A person, who previously suffered, or presently suffers, from a mental disorder, must have his or her legal rights fully respected. The right to recognition before the law for persons suffering from a mental disability is provided for in the UN Convention on the Rights of Persons with Disabilities, which the State has signed and intends to

ratify. Article 12 of that Convention is entitled “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…

Colman FitzGerald SC
Michael Lynn BL

Human Rights Commission

18th November 2009

APPENDIX

INTERPRETATION OF THE CONSTITUTION IN LIGHT OF INTERNATIONAL STANDARDS

1. The Commission 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.[24] 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*,[25] 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*,[26] 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, Article 8(2) of the American Convention on Human Rights and Article 7 of the

[24] 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.
[25] [1976] IR 325.
[26] *Ibid*.

African Charter of Human Rights. In *Rock v Ireland*[27] and *Murphy v I.R.T.C.*[28] the principle of proportionality (and the parameters of that principle), as expounded in the jurisprudence of the European Court of Human Rights, 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* [29] and *In re the Employment Equality Bill 1996.*[30]

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*,[31] 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).*[32] Reference was made to the Convention on the Rights of the Child in *Nwole v Minister for Justice*,[33] when considering aspects of the asylum application process as it applied to minors. [34]

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[27] *Rock v Ireland* [1997] 3 IR 484.

[28] *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.

[29] *Heaney v. Ireland* [1994] 3 IR 593.

[30] *In re Employment Equality Bill* [1997] 2 IR 321.

[31] *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.

[32] *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".

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

[34] *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 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".

5. In *Bourke v Attorney General*,[35] 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.[36] In *McCann v The Judge of Monaghan District Court & Ors*[37] 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. The approach advocated by the Commission corresponds with the practice often adopted by the European Court of Human Rights 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*[38] 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,*[39] the European Court of Human Rights 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.

7. 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 Commission is of the opinion

[35] *Bourke v Attorney General* [1972] IR 36.
[36] 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."
[37] HR unreported, 18 June 2009.
[38] *Chapman v. the United Kingdom* (2001) 33 EHRR 399.
[39] Judgment 30 April 2009. Judgment only available in French at time of writing.

that it is entirely appropriate that the Constitution and the guarantees thereunder should be informed by international treaties 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 Commission would respectfully agree.