Response of Ireland’s National Human Rights Institution
to the State’s Action Plan

McFarlane v Ireland (Application No. 31333/2006)

July 2011

Background
On 10 September 2010, the Grand Chamber of the European Court of Human Rights (the European Court), after hearing written and oral submissions from the parties, delivered its Judgment in the proceedings McFarlane v Ireland (Application No. 31333/2006). It found that there had been a violation of Article 13 (right to an effective remedy) and Article 6 § 1 (right to a fair trial within a reasonable time). The State has now submitted its Action Plan to the Department of Execution of Judgments. Rule 9 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements permits National Human Rights Institutions (“NHRIs”) to provide independent views to the Secretariat under Article 46, paragraph 2, of the Convention.¹ This affords NHRIs the opportunity to contribute to the execution of a judgment, highlighting once again the pivotal role of subsidiarity in the Convention system. The Irish Human Rights Commission (“IHRC”) is Ireland’s NHRI. It has pleasure in submitting its comments on the State’s Action Plan in this case.

The IHRC was established pursuant to the Human Rights Commission Act 2000 as Ireland’s NHRI. The IHRC has been accredited with “A” Status by the International Coordinating Committee of NHRIs, supported by the UN Office of the High Commissioner for Human Rights. This accreditation is made against the standards in

¹ Adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers’ Deputies.
the 1993 UN “Paris Principles” which set out the role of independent national institutions charged with promoting and protecting human rights.

NHRIs are fundamentally different from both States and NGOs, and as such represent a “third dimension”. NHRIs work to prevent violations at the domestic level; encouraging domestic remedies and monitoring implementation of European Court judgments. The areas of work of NHRIs range from legislative and policy review, follow-up of international obligations, monitoring, research, education and awareness-raising, to investigation and litigation functions. NHRIs thus play a key role in identifying and seeking to address structural and systemic deficiencies in their own countries and of the European system as a whole, thus contributing to national implementation of the Convention.

Pursuant to Rule 9 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements\(^2\), the IHRC, is pleased to present its views on the State’s Action Plan in *McFarlane v Ireland*.

**The Grand Chamber’s ruling**

As noted in paragraph 2 of the State’s Action Plan, in its Judgment the Grand Chamber determined there had been a violation of Articles 6 and 13 (when read with Article 6) of the Convention and awarded the applicant €5,500 in non-pecuniary damage and €10,000 in costs and expenses.

The structural issues identified in the Court’s determination focused on judicial delay in criminal proceedings (partly stemming from delay in judicial review) and the absence of effective remedies in light of its finding that theoretical Constitutional remedies advanced by the State did not satisfy Article 13. However the Grand Chamber’s analysis of Article 13 postulates a number of broad principles in relation to compliance with that Article that go beyond the immediate facts in *McFarlane* and have consequences for the whole system of remedies by which the State purports to vindicate the rights protected by the Convention. In commenting on the role of the European Court in relation to Article 13, the Court rejected the State’s argument that

under the principle of subsidiarity it could not examine the adequacy of remedies that remained untested in the domestic system:

“...Articles 13 and 35 § 1, which have a close affinity with each other, give direct expression to the subsidiary character of the Court's work (see Kudla v. Poland [GC], cited above, § 152; Yuriy Nikolayevich Ivanov v. Ukraine, no. 40450/04, § 63, ECHR 2009–... (extracts)). It follows that less than full application of the guarantees of Article 13 would undermine the operation of the subsidiary character of the Court in the Convention system and, more generally, weaken the effective functioning, on both the national and international level, of the scheme of human rights protection set up by the Convention (Kudla v. Poland [GC], cited above, § 155). Accordingly, less than full supervision of the existence and operation of domestic remedies would undermine and render illusory these guarantees of Article 13 and the Convention is intended to guarantee rights that are practical and effective and not theoretical or illusory (Scordino v. Italy (no. 1) [GC], cited above, § 192). Consequently, and contrary to the Government’s submission, the principle of subsidiarity does not mean renouncing supervision of domestic remedies (Prince Hans-Adam II of Liechtenstein v. Germany [GC], no. 42527/98, § 45, ECHR 2001–VIII; and Riccardi Pizzati v. Italy [GC], no. 62361/00, § 82, 29 March 2006).”

The Court went on to clarify the question that it was called on to address in the proceedings stating as follows:

“...the question to be determined by the Court in the present case is whether the way in which domestic law is interpreted and applied produces consequences that are consistent with the principles of the Convention as interpreted in the light of the Court's case-law (see Scordino v. Italy (no.1), cited above, § 191; Riccardi Pizzati v. Italy [GC], cited above; and Bur dov v. Russia (no. 2), no. 33509/04, § 99, ECHR 2009–...). In the context of Article 13, the Court’s role is to determine whether, in the light of the parties’ submissions, the proposed remedies constituted effective remedies which were available to the applicant in theory and in practice, that is to say, that they were accessible, capable of providing redress and offered reasonable prospects of success (see, among other authorities, Vernillo v. France, 20 February 1991, § 27, Series A no.

In the *McFarlane* Judgment, the European Court thus states that in assessing compliance with Article 13, its approach is to consider the system of remedies available in the State for a stated breach of Convention rights and whether they are accessible, capable of providing redress and offer reasonable prospects of success.

The IHRC welcomes the commitment by the State in its Action Plan to “ensuring that the judgment in this case is implemented expeditiously.” It agrees with the statement in the Action Plan that organisation of the court system will form a large part of this response, however the IHRC would submit that a broader response may also be necessary insofar as the Applicant in *McFarlane* was found not to have a remedy in the domestic legal system, *inter alia*, because the constitutional remedies advanced were found to be theoretical rather than evident and because the European Court of Human Rights Act 2003 could only be invoked as an alternative claim in a constitutional action for damages and “risked being lengthy” (see paragraph 125). The Grand Chamber also noted that the courts are excluded from the definition of “organs of State” under the 2003 Act. The manner in which Convention rights can be invoked and remedied in domestic law is thus a broad structural issue that goes beyond the specific judicial delay found in *McFarlane*. The IHRC will address both effective remedies and the court system in this response.

**The Constitutional position**

The first issue to be addressed is the effectiveness of remedies. As noted in the Judgment, Ireland’s Constitution, Bunreacht na hEireann, guarantees the protection of personal rights as set out in Articles 38 and 40-44 of the Constitution. Under Article 40.3.2°:

“The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.”

*Ibid* at para 114.
There exists, however, a tension in the identification and vindication of certain rights between the Oireachtas (Parliament) and the judiciary and this goes to the question of the provision of an effective remedy by the State where Convention rights are at issue.

Article 15.2.1° of the Constitution provides that:

“The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.”

Article 34.3.2° provides:

“Save as otherwise provided by this Article, the jurisdiction of the High Court shall extend to the question of the validity of any law having regard to the provisions of this Constitution, and no such question shall be raised (whether by pleading, argument or otherwise) in any Court established under this or any other Article of this Constitution other than the High Court or the Supreme Court. “

Where a personal right is enumerated under the Constitution (such as the “property rights of every citizen” under Article 40.3 which, along with the private property right recognised under Article 43, could be stated to correspond with the provisions of Article 1 of Protocol 1 of the Convention), the Courts can vindicate those rights “in the case of injustice done”.

However four issues arise in relation to: (a) the existence; and (b) the effectiveness, of domestic remedies for Convention rights.

First, where a Convention right is not expressly identified in the Constitution and has not been recognised by the Irish Courts as an “unenumerated right”, the right could be stated to remain in the theoretical field.\(^5\) So for example, the European Court has recognised the right of an adopted person to know of their origins\(^6\), however this right has not been recognised under the Constitution, and therefore it is not clear as to the

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\(^5\) Ibid at paras. 120 – 124.

circumstances in which an adopted person will be entitled to be given information about their origins. Further, no legislation has been introduced to deal with this lacuna.

Second, where a constitutional right is at variance with a Convention right, the constitutional right will be preferred. So for example in *McD v L & Anor* [2009] IESC 81, the Supreme Court found that a lesbian couple with child did not constitute a family unit for the purposes of Article 41 of the Constitution and accordingly the sperm donor/natural father could claim custodial or access rights to the infant.

Third, where the Oireachtas has legislated in an area impacting on the exercise of a particular Convention right, the judiciary will exercise “judicial restraint” and will not lightly overturn the legislation. Legislation can only be overturned if found to be unconstitutional, irrespective of whether it offends the Convention. (Legislation found to offend the Convention under the European Convention on Human Rights Act 2003 remains legally valid resulting in only a “Declaration of Incompatibility”.7) So for instance, the Courts will decline to consider a constitutional issue if it is not considered necessary to do so in determining the issues between the parties. Allied to this principle of “judicial restraint” are two other rules of law: the presumption of constitutionality; and the double construction rule. An example of such judicial restraint can be seen in the judgments of the Supreme Court in *Kavanagh v Government of Ireland* [1996]1 IR 321 and *East Donegal Co-operative Ltd v Attorney General* [1970] IR 317. If, however, an organ of the State exercises discretion pursuant to a vague statutory provision which impacts on civil rights, the Courts may strike down the legislation, for example see *E.D v Director of Public Prosecutions at the suit of Garda Thomas Morley*, High Court, Kearns P. (unreported, 25 March 2011), or may provide a remedy itself as in *Carmody v The Minister for Justice, Equality and law Reform & Ors*, the Supreme Court [2009] IESC 71.

Fourth, where the Oireachtas has not legislated in an area but where a litigant claims that positive rights are engaged, the Courts consider that their constitutional role is limited to impugning legislation rather than substituting its own remedy for any

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7 Section 5(2) of the European Convention on Human Rights Act, 2003 provides: “A declaration of incompatibility— (a) shall not affect the validity, continuing operation or enforcement of the statutory provision or rule of law in respect of which it is made....”
perceived lacunae in legislation (see Somjee v Minister for Justice [1981] ILRM 324). This restraint is particularly emphasised in relation to what may be termed socio-economic rights, the paradigm case being O’Reilly v Limerick Corporation [1989] ILRM 181.

The point which the IHRC wishes to raise here is that while McFarlane v Ireland addresses the issue of State delay in a prosecution and ineffective remedies arising therefrom, the structural issues identified above nonetheless apply in other situations where Convention rights are at issue before the domestic courts, including where the only material remedy provided for under the European Convention on Human Rights Act 2003 for a breach of a Convention right would appear to be damages.8

Addressing judicial delay
The second issue which the IHRC wishes to address is the independence of the Irish judiciary under the Constitution. McFarlane addressed the presence or absence of “a specifically introduced remedy for delay” in a constitutional system (at paragraphs 120-121). As noted in McFarlane Judges by virtue of their constitutional independence enjoy immunity of suit from any claim for damages for delay, this immunity being further extended to the State. A prosecutorial delay argument advanced by the Applicant was not considered by the Court, on the basis that the “17-month period required to approve the High Court judgment” was found to be blameworthy under Article 6 § 1.9 The manner in which prosecutorial delay is addressed by the Irish Courts is set out below.

The Grand Chamber Judgment also recognised the fact that not only was the Convention incorporated into domestic law on a sub-constitutional level in the form of the European Convention on Human Rights Act 2003, but that “[a]ny proceedings under the Act could not concern delay attributable to the courts since the courts were excluded from the Act's definition of organs of the State”10. To this could be added the

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8 The current law on this question is set out in Pullen v Dublin City Council (No. 2) [2009] IEHC 452 where the High Court (per Irvine J) awarded €20,000 to each of the Plaintiffs for the distress, anxiety, loss of reputation and damage suffered but found that it did not have the power to order an injunction under section 3(2) of the European Convention on Human Rights Act 2003. This judgment is currently under appeal and cross-appeal before the Supreme Court and the IHRC has again been granted liberty to appear as amicus curiae in the proceedings.
9 McFarlane v Ireland, op. cit., at para 121.
10 Ibid. at para. 106
fact that under the Constitution it is practically impossible for the Executive to address any delay in a Judge delivering a judgment. Under Article 35(2) of the Constitution, “[a]ll judges shall be independent in the exercise of their judicial functions and subject only to this Constitution and the law.” Under Article 35.4.1° “[a] judge of the Supreme Court or the High Court shall not be removed from office except for stated misbehaviour or incapacity, and then only upon resolutions passed by Dáil Éireann and by Seanad Éireann calling for his removal.” Any sanctioning of judges by either the Chief Justice or the relevant President of the High, Circuit or District Courts, or the Executive, is subject to these constitutional provisions.

Prosecutorial delay (which the Grand Chamber considered it was not called upon to address) may be addressed under Irish law by seeking prohibition of a criminal trial in the Superior Courts. The standard required of the Applicant is, however, high: in P.M. v DPP [2006] 3 IR 172, the Supreme Court stated that “… where blameworthy prosecutorial delay of significance has been established by the applicant, then that is not sufficient per se to prohibit the trial, but that one or more of the interests protected by the right to expeditious trial must also be shown to have been so interfered with such as would entitle the applicant to relief.”

Judicial delay, on the other hand, raises deeper structural issues. Such judicial delay in civil proceedings is touched on by Section 46 of the Courts and Court Officers Act 2002 which provides that a register of “postponed” Judgments be maintained, but otherwise the issue is not directly addressed. While the Minister for Justice, Equality and Law Reform may make regulations under Section 46 of that Act, such secondary legislation is again on a sub-constitutional basis. The 2002 Act does not address judicial delay in criminal proceedings. In the IHRC’s view, it is thus essential that the State demonstrate that an effective mechanism is in hand in which delays in the Courts system – recognised for many years now including by the Chief Justice – can be first be avoided, and if they arise, be swiftly identified and addressed. In terms of remedies it is to be recalled that the Grand Chamber, in its judgment, drew a

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distinction between a Judge’s personal immunity from suit and the liability of the State for delay attributable to such judicial delay. The Grand Chamber also noted that “where the organisation of a judicial system leads to delay, it may be reasonable to require litigants to have recourse to a compensatory remedy”, but that such a remedy must not be unduly burdensome.

The Expert Group

The IHRC welcomes the statement in paragraphs 11 and 12 of the State’s Action Plan that an expert group has been established (including the Department of Justice and Law Reform, the Courts Service, the Attorney General's Office, the Office of the Director of Public Prosecutions) to develop proposals. The IHRC was recently invited to attend part of a meeting held by this expert group and has welcomed this step. It has offered to provide further views on the measures being considered by the expert group once they are developed.

The IHRC will provide further views to the Department for the Execution of Judgments on whether it is satisfied with the measures being proposed by the State in due course.

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12 Ibid at para. 121.