

Constitutional Interpretation and the Irish Supreme Court: some reflections on a neighbouring common law court's approaches to interpretation¹

Paul Brady²

The title of my talk refers to 'constitutional interpretation' but this is meant in two senses. First, there is the sense of interpretation carried out in a manner that is constitutional, for example, in the Irish case, in a manner respectful of the separation of powers under Articles 6, 15.2.1 and 34.1 of the Irish Constitution; or, in the UK, in a manner respectful of fundamental constitutional conventions or principles. Of course, in respecting the principles of constitutionality, Courts must engage in constitutional interpretation in a second sense, namely the interpretation of the Constitution itself in order to discern what it requires or permits.

What constitutes 'constitutional interpretation', in both these senses, has been affected in recent years in both Ireland and the UK by the incorporation of the European Convention on Human Rights into the domestic law of these two jurisdictions. In this paper I want to briefly compare and contrast the approaches taken by the UK and Irish Supreme Courts to their respective statutory duties to interpret all domestic legislation in a manner compatible with the Convention 'so far as possible'.

Statutory Interpretation in Ireland

To begin, let me summarise five basic influences on statutory interpretation by Irish courts.

The first is, of course, the common law with its traditional maxims, canons of construction and rules of interpretation.

The second is the Constitution itself. The High Court and Supreme Court are empowered to determine the constitutional validity of primary legislation. All legislation enacted under the 1937 Constitution, however, enjoys a presumption of constitutionality and thus, regardless of the violation of rights alleged the burden rests on the plaintiff to establish that a statute is unconstitutional. This presumption results in two rules of statutory interpretation. The first, established by the Supreme Court in *McDonald v Bord na gCon* (No. 2),³ is called the double

¹ Statute Law Society Conference 2010: 'Legislation and the Supreme Court', Supreme Court, London, 9th October 2010.

² Barrister-at-Law (King's Inns, Dublin), BA (University College Dublin), MA (University College London), LL.M (Harvard Law School), DPhil candidate (Balliol College, Oxford). Email: paul.brady@balliol.ox.ac.uk

³ [1965 IR 217.

construction rule: where an enactment is capable of bearing two interpretations one of which is compatible with the Constitution and the other incompatible, the Court must adopt the former rather than declare the enactment unconstitutional. A second related rule, confirmed by the Supreme Court in *East Donegal Co-Operative Livestock Mart Ltd. v AG*,⁴ is the presumption that any power conferred by legislation (such as in that case the granting of a licence by a Minister) is intended to be exercised in a manner compatible with the Constitution, such that legislation not expressly stipulating such restrictions should not, for that reason, be deemed unconstitutional.

The third influence on the interpretation of domestic legislation is EU law by virtue of the so called *Marleasing* doctrine,⁵ which I am sure you are all familiar with.

The fourth influence is international law. In *O'Domhnaill v Merrick*⁶ Henchy J held that 'one must assume that the statute was enacted (there being no indication in it of a contrary intention) subject to the postulate that it would be construed and applied in consonance with the State's obligations under international law, including any relevant treaty obligations.'⁷ Clearly, however, this presumption is weaker than the constitutional one and, given its rather general formulation may easily be rebutted. It has not, to my knowledge, played a major role in the Superior Courts since its judicial recognition in the mid 80s.

The fifth source of rules of interpretation is statute law. In this regard, there are two statutes of particular significance. The first is the Interpretation Act 2005, which not only consolidated most of the preceding Interpretation Acts but introduced some novel new provisions, of which Section 5 is perhaps the most significant. It was touched upon briefly in the talk given at the last Statute Law Society Conference by Mr Justice Hugh Geoghegan of the Irish Supreme Court (who retired in May).⁸ I do not intend to comment on Section 5 here, except to note that its ambitious attempt to regulate by statute the purposive interpretation of legislation seems to have had a negligible impact on judicial practice. The second and, undoubtedly, more important statute is of course the European Convention on Human Rights

⁴ [1970] IR 317.

⁵ Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentation SA* [1990] 1 ECR 4135. See also later remarks of ECJ in Case C-105/03 *Criminal Proceedings against Pupino* [2005] ECR I-5285. For recent discussion by Irish courts see *Eircom v ComReg* [2006] IEHC 138 and *Minister for Justice v Altaravictius* [2006] 3 IR 148. See generally D Dodd, *Statutory Interpretation in Ireland* (Tottel, Dublin 2008) 384-387.

⁶ [1984] IR 151.

⁷ A similar principle was affirmed by McCarthy J in his dissenting opinion.

⁸ Available on-line at <http://www.statutelawsociety.org/papers>

Act 2003 which incorporated the Convention rights into Irish law in a fashion not dissimilar to that of the Human Rights Act 1998 (HRA).

I will first briefly introduce the provisions of the ECHR Act and then I will consider two questions raised by it and the HRA and how these have been answered by the UK and Irish courts.

European Convention on Human Rights Act 2003

The ECHR Act 2003 came into force on 31st December 2003.

Section 2 requires the courts to 'interpret and apply' statutes and rules of law compatibly with the European Convention on Human Rights 'in so far as possible' and 'subject to the rules of law relating to such interpretation and application.' Section 4 requires that courts 'shall, when interpreting and applying the Convention provisions, take due account of the principles laid down by' the decisions and judgments of the European Court of Human Rights. I will say more about these provisions in a moment.

Section 3 requires 'organs of the State' to perform their functions in a manner compatible with the Convention - except where they are required by domestic law to do otherwise. Damages may be awarded for breach of this duty where it is shown that no other remedy in damages is available. An organ of State is defined as any body which is established by law or through which any of the legislative, executive or judicial powers of the State are exercised, other than President or the Oireachtas (Parliament) or a court.

Section 5 allows the Superior Courts, 'where no other legal remedy is adequate or available', to declare that a statutory provision or rule of law is incompatible with the Convention. However, this will not affect 'the validity, continuing operation, or enforcement' of the provision, but compensation may be paid on an ex gratia basis to anyone who has suffered as a result of legislation that is declared to be incompatible with the Convention. And the Taoiseach (Prime Minister) must lay a copy of the declaration of incompatibility before the Oireachtas. For Constitutional reasons it was not possible to confer on Ministers by ordinary legislation the sort of powers of amendment which appear in Section 10 of the UK Act.

In practice the requirement that no other legal remedy be available means that courts will consider the constitutionality of a challenged law first and only if it survives such scrutiny go

on to examine its compatibility with the Convention.⁹ For various reasons, not least a sense of pride in the national Constitution, many cases seem to be disposed of by a finding of unconstitutionality rather than a declaration of incompatibility. In other words, the sentiments expressed by many Irish politicians and jurists in 2003, that the Irish Constitution provides equal if not superior protection of individuals' rights than the Convention, has become a sort of self-fulfilling prophecy. In this way, although the Courts have only made 3 declarations of incompatibility¹⁰ (2 of which concern the same statutory provision¹¹), the Convention has had a significant indirect impact on Irish law as a sort of brooding presence in the courtroom whenever the constitutionality of a provision is being judicially considered.¹²

Response of Irish and UK Courts to interpretative requirements

I want to turn now to the substance of my paper and consider how the Irish and UK courts have responded to the interpretation requirement in their respective Acts. It is useful to have in mind two questions in particular. The first question was raised by Lord Justice Elias in the annual Statute Law Society Lord Renton Lecture last November.¹³ With respect to the 'Convention rights' outlined in the Human Rights Act, Lord Justice Elias asked: 'what is the precise nature of the human rights that are being enforced'? (Indeed this question was also expressly raised recently by Baroness Hale in the case of *In Re G*¹⁴, which I shall mention

⁹ This way of proceeding, originally subject to some doubt, was conclusively endorsed by the Supreme Court in *Carmody v Minister for Justice Equality and Law Reform & ors* 2009 [IESC 71] (Murray CJ) which held: 'Accordingly the Court is satisfied that when a party makes a claim that an Act or any of its provisions is invalid for being repugnant to the Constitution and at the same time makes an application for a declaration of incompatibility of such Act or some of its provisions with the State's obligations under the Convention, the issue of constitutionality must first be decided.'

¹⁰ *Foy v An t-Ard Chláraitheoir & Ors (Ireland & AG)* [2007] IEHC 470 (McKechnie J); *Donegan v Dublin City Council & Others* [2008] IEHC 288 (Laffoy J); *Dublin City Council v Liam Gallagher* [2008] IEHC 354 (O'Neill J).

¹¹ S. 62 of the Housing Act, 1966, as amended by s. 13 of the Housing Act, 1970.

¹² As one senior Irish lawyer put it: 'In conclusion, therefore, I believe that the Convention, now that it has been incorporated as part of our domestic law, will continue to play an immensely important role setting standards of fundamental rights. However, ..., I believe that the force of the Convention will not be immediately visible as Convention rights will fall and be determined by the courts as constitutional rights, even though they had never been identified as such previously or the right will be incorporated in legislation not primarily because of a concern over a declaration of incompatibility, but out of a residual concern on the part of government that the courts might very well strike down as repugnant to the Constitution legislation that does not reflect Strasbourg values.' J MacGuill, 'The Impact of Recent ECHR Changes on the Constitution' [2007] (2) *Judicial Studies Institute Journal* 50-75. See also U Kilkelly, *ECHR and Irish Law* (2nd edn, Jordan Publishing, Bristol 2009) 245, 275. And for an older discussion of the influence of the ECHR on Constitutional interpretation prior to the 2003 Act see C Gearty, *European Civil Liberties and the European Convention on Human Rights: A Comparative Study* (Martinus Nijhoff Publishers, The Hague 1997) 188-193.

¹³ Available on-line at <http://www.statutelawsociety.org/papers>

¹⁴ [2008] UKHL 38, [2009] 1 AC 173.

again in a moment.) He suggested that there are broadly two different answers. The first he termed the ‘autonomous rights model’ and the second the ‘mirror principle model’. In his view the ‘mirror model’ was the correct construction of the Human Rights Act and he pointed to the oft cited passage from the judgment of Lord Bingham in the case of *R v Special Adjudicator ex parte Ullah*¹⁵ which concludes simply that ‘The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.’

Justice Elias contrasted this with the ‘autonomous model’ manifested in the reasoning of the majority in the case of *In Re G*¹⁶ where Lord Hoffman sought to limit the application of *Ullah* so that it would not apply in margin of appreciation cases. On this view, *Ullah* was merely authority for the *desirability* of following Strasbourg rather than, as Justice Elias argued, for the *duty* of domestic courts to do so.

In short, it seems, at least to an outside observer, that the current dominant view seems to be in favour of the autonomous model. But this is not a debate which I have the knowledge or time to enter into in detail here, and instead I wish to briefly consider how this question has been answered by the Irish courts.

The question was expressly considered by the Supreme Court for the first time in 2009. The case, *McD v L*,¹⁷ concerned the rights of guardianship and access of the biological father of a child born as a result of sperm donation and artificial insemination to a woman in a long-term same-sex relationship, as well as the rights of the child. The father was known to the couple and had entered an agreement with them under which he would act as a ‘favourite uncle’ but otherwise have no involvement in the child’s upbringing. After the birth the father became dissatisfied with the arrangement and sought orders of guardianship and access. In the High Court, Hedigan J seemed to endorse the autonomous model and, refusing the orders, held as follows:

I am unaware of any case to date in which the European Court of Human Rights has found that a lesbian couple living together in a committed relationship enjoy the status of a de facto family relationship to which article 8 is applicable. However, [the case of] X, Y and Z cited above seem to demonstrate a substantial movement towards such a finding. As noted above, it is this Court which has the primary responsibility to

¹⁵ [2004] UKHL 26.

¹⁶ [2008] UKHL 38, [2009] 1 AC 173.

¹⁷ *McD v L* [2009] IESC 81.

interpret and apply Convention principles. To that end, I have come to the conclusion that where a lesbian couple live together in a long term committed relationship of mutual support involving close ties of a personal nature which, were it a heterosexual relationship, would be regarded as a de facto family, they must be regarded as themselves constituting a de facto family enjoying rights as such under article 8 of the E.C.H.R.

He continued that:

... because [the respondents and ... the child], enjoy rights as a de facto family, this is a factor which must come into play in determining the central question in this case which is whether [the father] should be granted guardianship rights such as would ensure he had access to the child.

On appeal the High Court's legal analysis was rejected unanimously by the Supreme Court¹⁸ which found a number of problems with the High Court judgment. The most fundamental was the absence of any legal basis for the Court's direct invocation of a Convention right. By virtue of Article 29 of the Constitution Ireland is a dualist legal order. International agreements do not have direct effect. The Convention may only be invoked in court proceedings in the circumstances expressly provided for by Sections 2, 3 and 5 of the 2003 Act.

As a result, strictly speaking, the further discussion in the Supreme Court judgments of the High Court's analysis of the Article 8 rights of same-sex couples was obiter. Nevertheless, these judgments contain some important observations on the question we are considering. In this respect the following comments of Fennelly J (with which Geoghegan and Hardiman JJ concurred, Murray CJ expressly reserving his position on the issue) are of particular relevance:

95. The form in which the matter arises on the appeal is whether, through the mechanism of the Act of 2003, an Irish court may anticipate further developments in the interpretation of the Convention by the European Court in a direction not yet taken by the Court....

96....The European Court has the primary task of interpreting the Convention. The national courts no not become Convention courts.

100. Lord Bingham correctly outlined the respective tasks of the European Court and the domestic courts in the following passage from his speech in *R. (Ullah) v. Special Adjudicator* [2004] 2 AC 323: ...

¹⁸ *McD v L* [2009] IESC 81.

101. Lord Bingham was, of course, speaking of the English legislation which corresponds, though with some important differences, to provisions of our Act of 2003.

102. ... It must, firstly, be recalled that Irish law is to be interpreted '*subject to the rules of law relating to such interpretation and application.*' For reasons already given, I believe that is clear that the claimed *de facto* family consisting of the mother, B.M. and the child does not exist in Irish law. A court can only depart from that national-law interpretation for the purpose of making any such national rule compatible with the State's obligations under the Convention. The existing case-law of the European Court seems clearly to be to the effect that a *de facto* family of the sort claimed does not come within the scope of Article 8. Thus, insofar as judicial notice is accorded, by virtue of section 4, to the case-law of the European Court, it tends to the opposite conclusion to that adopted by the High Court...

104. It is vital to point out that the European Court has the prime responsibility of interpreting the Convention. Its decisions are binding on the contracting states. It is important that the Convention be interpreted consistently. The courts of the individual states should not adopt interpretations of the Convention at variance with the current Strasbourg jurisprudence.

The fifth judge, Denham J, did not examine this issue expressly but did reject the High Court's analysis of the scope of Article 8 and based this rejection solely on ECHR case law, thereby, one could argue, implicitly applying the mirror rather than the autonomous model of rights analysis.

In short it would appear clear that the Irish Supreme Court, despite an almost identical legislative framework with respect to the relevant provisions, has chosen to adopt the mirror principle model with respect to the interpretation of Convention rights.

Interpretation 'so far as possible'

The second question which arises in respect of the interpretation sections of the UK and Irish Human Rights Acts is: What is the precise nature of the interpretative duty which has been given to the Courts under these Acts and, in particular, what are the limits of this duty?

In the UK the leading case on this issue appears to be *Ghaidan v. Godin Mendoza*¹⁹ in which the majority of the House of Lords confirmed what is widely considered an expansive model of the powers conferred on interpreting bodies under Section 3 of the HRA. Timothy Endicott summarises it as follows:

The *Ghaidan* approach has the same effect as a rule that the courts must amend legislation to make it compatible with the Convention, as long as they can do it

¹⁹ [2004] 3 All ER 411.

without amending any fundamental feature. According to *Ghaidan* it really does not matter whether a proposed ‘interpretation’ is patently incompatible with what Parliament enacted, as long as it does not go against something fundamental or important or cardinal in the legislation. And the courts are to judge what is fundamental.²⁰

That the majority position in *Ghaidan* radically alters the traditional understanding of the relationship between Parliament and the courts is undeniable. The real question, of course, is whether such inroads into parliamentary supremacy were in fact sanctioned by Parliament itself by virtue of the enactment of Section 3 of the HRA. But that is not a question which I propose to attempt to answer here.

In Ireland there is no leading Supreme Court case concerning the equivalent Section 2 of the ECHR Act, nor in any of the Irish courts has the matter received anything like the depth of consideration given to it by the majority and dissent in *Ghaidan*. By contrast, one must try to construct a position from several relatively brief dicta. Before considering these it is important to recall the main differences between Section 2 of the Irish Act and Section 3 of the HRA.

First, the interpretative obligation in the Irish Act is imposed on courts only. In practice, however, when taken in conjunction with the general duty in Section 3 to act in conformity with the Convention placed upon all organs of state (other than the courts), this achieves effectively the same result as the HRA. For the defence provided to organs of state by Section 3 is to argue that they were acting subject to a statutory provision or rule of law. But at hearing, it will be incumbent on the Courts to interpret the relevant act or rule according to Section 2,²¹ and so the ultimate effect will be the same as if the organ of state itself had been required to interpret its legal obligations in a manner so far as possible compatible with the Convention.

Second, the interpretative obligation applies to ‘any statutory provision or rule of law’ rather than simply to primary and subordinate legislation. Again, in practice, this may not amount to much of a difference since UK courts may use the Section 2 duty to take notice of Convention law as a means to developing common law rules.

²⁰ T Endicott, *Administrative Law* (Oxford University Press, Oxford 2009) 79-80.

²¹ See *Makumbi v The Minister for Justice, Equality and Law Reform* (unreported, High Court, Finlay Geoghegan J, 15 November 2005); *Foy v An t-Ard Chláraitheor* [2007] IEHC 470; and *S v Adoption Board* [2009] IEHC 429.

Third, the interpretative task is set out as: ‘in a manner compatible with the State’s obligations under the Convention provisions’. This departure from the UK wording was defended in the Dáil by the Minister for Justice on the grounds that it was intended to put beyond doubt the fact that the Convention rights were not intended to enjoy the horizontal application which Irish Constitutional rights do.²²

Fourth, the limitation found in the Irish Act (that the interpretation takes place ‘subject to the rules of law relating to such interpretation and application’) does not appear in the HRA. Indeed, as I have already noted, this fact was expressly referred to by Fennelly J in his judgment endorsing the mirror model in *McD v L*. It is the effects of this difference which I want to consider in looking at how the Irish courts have approached their interpretative duty under the Act.

There appear to be two Irish High Court cases which are directly relevant.²³ The first, and earlier of the two, adopted an expansive UK-like approach. By contrast, the second relied on the ‘subject to rules of interpretation’ limitation to distinguish the Irish Act from that in the UK and adopted a much more restrictive reading.

The first case, *Foy -v- An t-Ard Chláraitheoir & Ors*,²⁴ resulted in the first declaration of incompatibility under the Act when the Court held that the challenged provisions of the Civil Registration Act 2004 could not be interpreted in a manner compatible with the State’s obligations under the Convention. In making that determination, the Court reflected at paragraphs 55-56 on the wording of Section 2 (though noting that the point was ‘not heavily underpinned by submissions’):

In conducting this exercise it must be noted that s. 2 of the Act of 2003, is not free from doubt, in particular where it uses the expression “...in so far as possible...”. Less wide ranging phrases such as in so far as is “reasonable” or “practicable” or some other such similar wording is not used. Therefore, in my view, the Oireachtas intended the courts to go much further than simply applying traditional criteria, such as e.g., the purposeful rule or giving ambiguous words a meaning which accords with convention rights; something like the double construction test. This type of restrictive approach was rejected by the House of Lords in *R. v. A*. [2001] 3 All E.R., 1 when dealing with the identical phrase contained in s. 3 of the Human Rights Act, 1998...

²² Michael McDowell TD, *Dáil Debates*, Vol. 547, May 21, 2003.

²³ But see also brief discussion in *O’Donnell v South Dublin County Council* [2007] IEHC 204 (Laffoy J) and *Donegan v Dublin City Council* [2008] IEHC 288 (Laffoy J). In both cases the proposed interpretations were rejected by the Court on the grounds, respectively, that they would ‘cross the boundary between interpretation and amendment’ and constitute ‘re-writing the legislation’.

²⁴ [2007] IEHC 470.

Within these restrictions I think it is safe to say that the section cannot extend to producing a meaning which is fundamentally at variance with a key or core feature of the statutory provision or rule of law in question. It cannot be applied *contra legem* nor can it permit the destruction of a scheme or its replacement with a remodelled one. In addition, a given legal position may be so well established that it becomes virtually immutable in the landscape. It seems to me that to apply the section in any of these circumstances, which are but examples, would be to breach the threshold, even one set as expansively as this one is. When the court finds itself so restricted the only remedy is a declaration of incompatibility. See *Ghaidan v. Mendoza* [2004] 3 All E.R. 411; and in particular the speech of Lord Steyn (paras. 45-50, pp. 426-429) where he suggests that this phraseology (“in so far as is possible”) has its roots in community law. *Marleasing SA v. Lla Comercial Internacional de Alimentación SA*: [1990] ECR I-4135 (para. 8). This view is one which, respectfully, I fully agree with.

The decision was appealed to the Supreme Court but the appeal was dropped by the Government in June, possibly as a cost-saving measure to cut down on litigation, but also no doubt as a consequence of the Government’s decision to introduce a new legislative scheme to deal with the issues around civil registration of transsexual persons. This has left untested the following three important aspects of the High Court decision.

First, by drawing a distinction between ‘as far as possible’ and ‘so far as is reasonable or practical’ McKechnie J appears to be following the lead of Lord Steyn in *Ghaidan* who draws the same distinction (at para 44) when contrasting Section 3 of the HRA with the equivalent provision in the New Zealand Bill of Rights Act. In doing so, however, McKechnie J appears to overlook the second limitation imposed by the Irish Act: ‘subject to the rules of law relating to such interpretation and application’.

Second, although clearly favouring the expansive approach of the UK, McKechnie J appears to row back from it, whether deliberately or not, by acknowledging its limitation by a ‘given legal position’ which has become ‘so well established that it becomes virtually immutable in the landscape.’ Moreover it was precisely on this basis, that the practice and legal position concerning the refusal to change the records of transsexuals was ‘so well settled and so rigidly fixed,’²⁵ that the Court refused relief by means of a Section 2 interpretation. Since the Act in question was only a few years old, the decision, on its face, seems to set the bar

²⁵ ‘In my view, the practice and legal position in this case i.e. the use of consistent biological factors to determine the sex of a child for entry purposes, and the refusal to subsequently alter that entry in the case of a transsexual person, is so well settled and so rigidly fixed that the provisions of s. 2, in themselves, do not allow ss. 25, 63, 64 and 65 of the 2004 Act to be read as the applicant would suggest.’ *Foy v An t-Ard Chláraitheoir & Ors* [2007] IEHC 470 (para 57).

rather low for showing that a given reading of the law has become too settled to undo by a Section 2 guided interpretation.²⁶

Third, the Court seeks to buttress its expansive reading by a positive endorsement of Lord Steyn's invocation of *Marleasing*. While there are plausible reasons to support drawing such a parallel in UK law, there are, as commentators have noted,²⁷ several reasons why it does not seem appropriate to do so in the Irish context: (1) EU law is, by virtue of both ECJ jurisprudence and Article 29 of the Irish Constitution itself, supreme over constitutional law – which is not the case with the Convention; (2) while Irish courts are bound by the decisions of the ECJ they are only required by the ECHR Act to take 'due account' of Strasbourg jurisprudence; (3) the comparison overlooks the express limitation included in Section 2 which we are discussing ('subject to the rules of law relating to such interpretation and application').²⁸

More recently, another High Court judgment has expressly rejected the UK approach as incompatible with the Irish statutory provisions and has taken a much more restrictive view of Section 2.

*Dublin City Council v Liam Gallagher*²⁹

The case concerned a challenge to Section 62 of the Act of 1966. The purpose of the section is to provide for a summary procedure for the recovery of possession of dwellings let by a housing authority. Section 62 sets out the conditions that must be satisfied in order for the District Court to make an order for possession. Once these statutory requirements are proved to the satisfaction of the District Court, however, the District Judge *must* issue the warrant for possession. The defendant made the case that this summary procedure, and in particular its exclusion of judicial discretion, should be interpreted in a Convention compatible manner to allow (pursuant to Article 6) a hearing on the merits of his case before an independent and impartial tribunal, i.e. the District Court.

²⁶ See F de Londras and C Kelly, *European Convention on Human Rights Act: Operation, Impact and Analysis* (Roundhall Thomson Reuters, Dublin 2010) 87.

²⁷ *ibid* 94.

²⁸ 'These differences make it unlikely that the jurisprudence on the *Marleasing* principle will provide any substantive guidance for a court applying Section 2 of the ECHR Act.' *ibid*.

²⁹ [2008] IEHC 354 (O'Neill J).

Section 62 had survived several constitutional challenges in the past and this case was the third in a line of cases challenging its compatibility with the Convention, one of which had already resulted in a declaration of incompatibility.³⁰

The Court held that a Convention compatible interpretation was not possible under the terms of Section 2 and made a Section 5 declaration of incompatibility. In respect of the methodology required by Section 2, O'Neill J held as follows:

... it seems clear to me that the starting point in attempting to construe this section in a Convention compatible way is to first determine the correct construction without regard to the Convention and having done that to then see whether it is possible to impose or intertwine a different meaning where that is necessary to avoid incompatibility with the Convention. Where it is not possible to achieve this without breaching the rules of law relating to interpretation, and where there is an evident breach of a Convention right resulting from what is a correct interpretation of the law in question, the proper solution to that problem is a declaration of incompatibility under s.5 of the Act of 2003.

With respect to the scope of the duty O'Neill J departed radically from the position of McKechnie J in *Foy*. Rather than drawing comparisons with the UK approach, the learned judge, having cited passages from the speeches of Lords Hope and Steyn in *R v A*,³¹ emphasised what he considered 'the significant difference' between Section 2 of the Irish Act and Section 3 of the HRA. That difference he said:

'is the inclusion in s.2 of the Act of 2003 of the phrase "*subject to the rules of law relating to such interpretation*". A similar provision is not included in the s.3 (1) of the U.K. Act.

The consequences of this difference are important, because it means that in this jurisdiction a Court, when attempting to construe a law in a Convention compatible way, is still bound by the rules of law which heretofore have governed such interpretation, whereas in the U.K. no such restriction is imposed by Parliament. The range of manoeuvre available to a U.K. court, as illustrated in the above passages from the opinions of Lord Hope and Lord Steyn, is not available to an Irish Court. The practical consequence of this is that, whereas in the U.K. it would appear that a Court can impose a Convention compatible meaning unless that meaning clearly conflicts with the express terms, or the necessary implication of such terms of the law in question, in this jurisdiction, a Court is required by the Oireachtas to adhere to existing rules of interpretation which means that the dominant rule of statutory construction must still prevail i.e. that effect must be given to the will of Parliament, such intent being derived from the natural and ordinary meaning of the language used in the law concerned. Other rules of interpretation may have an equally or indeed more restrictive effect depending on the law under consideration. In effect, the kind of

³⁰ *Donegan v Dublin City Council & Others* [2008] IEHC 288 (Laffoy J).

³¹ [2001] 3 All ER 1 at 35 and 17.

creative interpretation permitted under s.3 (1) of the U.K. Act may not be permissible under s.2 of the Act of 2003 unless the creation envisage[d] could be said to have been intended by Parliament.’

In their comprehensive recent monograph on the 2003 Act, Dr Fiona de Londras and Dr Cliona Kelly criticise the approach of O’Neill J in *Gallagher*. They contend that it renders Section 2 ‘effectively redundant’ for ‘if an Irish court begins by setting out the “correct” construction of a statute, arguably *any* alternative construction will be contrary to the rules of law relating to such interpretation and application of s. 2.’³² There is clearly some force in this argument, but it depends on one’s understanding of ‘correct’ and, in particular, on the assumption that there can never be more than one correct construction under the pre-2003 Act rules of interpretation. However, if this assumption is justified, then not only Section 2 but the constitutional rule of double construction derived from *McDonald v Bord na gCon (No. 2)* [1965 IR 217 must also, contrary to its regular use by the Courts, be reckoned redundant since it too only applies where Courts are faced with more than one permissible interpretation of the will of the legislature. In other words, only if the reference to determining ‘the correct construction’ in *Gallagher* means ‘finding the solely permissible interpretation’ rather than ‘determining what is the boundary of the permissible’ does the Court’s approach render Section 2 redundant in the way suggested by de Londras and Kelly.

If the second meaning of ‘correct construction’ is adopted, then *Gallagher* can be taken to endorse a Section 2 interpretative duty that, contrary to the view in *Foy*, works essentially like the double construction rule. That is to say, it requires Courts, where the attempt to determine the ‘correct construction’ of a provision on the basis of existing domestic rules of interpretation results in two or more interpretations which could reasonably be deemed as being within the intention of the legislature, to choose the Convention compatible interpretation over the incompatible interpretation(s).

The refusal to re-interpret Section 62 of the Housing Act by the Court in both *Gallagher* and indeed in the earlier case of *Donegan v Dublin City Council & Others*³³ can be contrasted with the approach taken by the House of Lords in *R (Hammond) v Home Secretary*.³⁴ In that case, the Home Secretary interpreted a statutory provision that a life prisoner’s tariff ‘is to be

³² de Londras and Kelly 90.

³³ [2008] IEHC 288 (Laffoy J).

³⁴ [2005] UKHL 69, [2006] 1 AC 603.

determined by a single judge of the High Court without an oral hearing³⁵ as giving the judge a discretion to require an oral hearing where fairness required it so as to avoid an incompatibility with Article 6 of the ECHR.³⁶ Since this construction of the provision, which amounted to a direct contradiction of the clear intent and effect of the legislation, was not challenged by any of the parties to the appeal the House of Lords held that it did not have to consider its validity. The decision is notable for at least two reasons. First, in so far as this case and the two Section 62 Irish cases all deal with applications to interpret legislation expressly excluding judicial discretion as actually permitting judicial discretion the divergent outcomes reveal the stark contrast between the Irish and UK approaches. Second, *Hammond* shows that it is also the power of the executive and not just that of the judiciary which has been enlarged at the expense of parliamentary sovereignty through the expansive reading of Section 3 of the HRA. For, provided the other party does not challenge its interpretation, it appears that the UK executive may also deploy a broad power to amend the unambiguous meaning and effect of legislation for the purposes of convention compatibility without succumbing to judicial review.³⁷

As mentioned, the appeal against the High Court decision in *Foy* has been dropped, and so as of yet the Irish Supreme Court has not pronounced on this question of interpretation. That said, the Chief Justice recently used the case of *McD v L*³⁸ to sound a rather critical note concerning Section 2 and hinted at support for a restrictive reading of its interpretative duty as follows:

Section 2 would appear to be a rather fluid and imprecise mode of determining the manner in which the Convention should be used to interpret national law. ... It gives, inter alia, the ECtHR a unique role in the meaning of laws enacted by the Oireachtas...

It may mean...that the Oireachtas in providing, in the most general terms, that the laws which it passes are to be interpreted to the extent possible in accordance with the case-law of the ECtHR...that the Oireachtas itself will not always be in a position to perceive or even contemplate, by recourse to any objective considerations, the meaning, by reference to the Convention, which may subsequently be given to the provision of an Act which it is passing (and which it might have passed in altogether different terms if it could have).

³⁵ Criminal Justice Act 2003 Sch 22 para 11(1).

³⁶ Recall here that unlike the Irish Act, the HRA puts the onus of convention-compatible interpretation on all relevant bodies, not just courts.

³⁷ See Endicott 79.

³⁸ *McD v L* [2009] IESC 81.

This raises questions as to how the intent of the Oireachtas by reference to the text of a statute which it has adopted in accordance with the Constitution is to be determined and the relevance of that intent to its interpretation. These questions are relevant to the role of the Oireachtas in whom “the sole and exclusive power of making laws for the State” is vested by Article 15.2 of the Constitution. Perhaps the answers to such questions lie in whole or in part in the proviso in s. 2 by which the requirement to interpret a statute in a manner compatible with the Convention is “subject to the rules of law relating to such interpretation and application”.

The tentative and rather oblique concluding suggestion seems to be hinting that the proviso in Section 2 should be taken as restricting the Courts from acts of interpretation which would amount in practice either to (a) legislating or (b) ignoring the clear intent of the legislature. On such an approach (which would accord with my reading of *Gallagher*) Section 2 interpretation works similarly to the double construction rule and is only possible in cases where the language and intention of the legislature is sufficiently ambiguous or vague that a Court is presented with a legitimate choice between interpretations.³⁹

But at this point what might fairly be considered ‘interpretation’ of the authorities has come to an end and so it would seem wise that I should also, lest I too be found guilty of pronouncements *contra legem*!

F de Londras and C Kelly, *European Convention on Human Rights Act: Operation, Impact and Analysis* (Roundhall Thomson Reuters, Dublin 2010)

D Dodd, *Statutory Interpretation in Ireland* (Tottel, Dublin 2008)

T Endicott, *Administrative Law* (Oxford University Press, Oxford 2009)

C Gearty, *European Civil Liberties and the European Convention on Human Rights: A Comparative Study* (Martinus Nijhoff Publishers, The Hague 1997)

U Kilkelly, *ECHR and Irish Law* (2nd edn, Jordan Publishing, Bristol 2009)

J MacGuill, 'The Impact of Recent ECHR Changes on the Constitution' [2007] (2) *Judicial Studies Institute Journal* 50

³⁹ The invocation by the Chief Justice of the doctrine of the separation of powers as a factor to be considered in interpreting the scope of the duty created by Section 2 is also reminiscent of the point made by Lord Millet in his dissent in *Ghaidan* where (at para 57) he noted:

The question [of the duty of interpretation created by Section 3] is of great constitutional importance, for it goes to the relationship between the legislature and the judiciary, and hence ultimately to the supremacy of Parliament. Sections 3 and 4 of the Human Rights Act were carefully crafted to preserve the existing constitutional doctrine, and any application of the ambit of section 3 beyond its proper scope subverts it. This is not to say that the doctrine of Parliamentary supremacy is sacrosanct, but only that any change in a fundamental constitutional principle should be the consequence of deliberate legislative action and not judicial activism, however well meaning.

Of course, unlike in the UK, the Irish parliament is not permitted to radically alter by statute the division of labour between the legislature and the courts as provided for by the constitution itself.