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Recent Legislative Proposals and Case Law of Ireland

REPORT BY

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Introduction

The independence of the judiciary is a prerequisite to the rule of law and a core value for the foundation of public confidence in the administration of justice. As the Venice Commission stated in Part I of its Report on the Independence of the Judicial System:

> "[T]he independence of the judiciary is not an end in itself. It is not a personal privilege of the judges but justified by the need to enable judges to fulfil their role of guardians of the rights and freedoms of the people."[1]

The principle encompasses two aspects. The first requires judges be independent from the parties in a case and the subject matter of a dispute. The second is a manifestation of the separation of powers, which requires the judiciary as a collective to be independent and free from any pressures from other organs of government.

Judicial independence in Ireland is guaranteed by Article 35.2 of the Constitution of Ireland which provides that judges are to be:

> "independent in the exercise of their judicial functions and subject only to this Constitution and the law."

Following appointment to judicial office, all judges make a declaration as required by Article 34.6.1 of the Constitution that they will execute their judicial functions "without fear or favour, affection or ill-will", which illustrates the impartiality with which judges must adjudicate.

As commentators have noted:

> "The rule of law is that characteristic of a civilised society that is created by the application of the law to every individual in an equal manner. The rule of law is therefore a pillar of civilised society and an independent judiciary ensures the rule of law."[2]

To borrow another masonry term, it can be said that the judicial arm of government acts as the key stone that ensures that the rule of law is upheld. The Irish Courts have on numerous occasions referred to the separation of powers as being a fundamental principle of the Constitution. The Supreme Court in *Attorney General v. Hamilton (No. 1)*

> "The doctrine of the separation of powers under the Constitution has been identified by this Court as being both fundamental and far-reaching, and has been set out in various decisions of this Court in very considerable detail."[3]

Ireland tends to rank highly in international projects which measure the independence of the judiciary. For example, in the 2019 EU Justice Scoreboard, Ireland scored fifth highest among the EU member states in the category of 'perceived independence of courts and judges among members of the public', behind Denmark, Finland, Austria and Sweden. The World Economic Forum's 2018 *Global Competiveness Report* ranks Ireland 12th out of 140 countries.

Time does not permit a discussion of the Irish position in respect of all areas which are relevant to judicial independence. However, proposed legislation which is currently before the Oireachtas (Irish parliament) which would affect the processes relating to judicial appointments, judicial conduct, discipline and ethics are of particular interest and I will first briefly outline those

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[1] Council of Europe European Commission for Democracy through Law Report on the Independence of the Judicial System Part I: The Independence of Judges (March 2010) at 3.
[2] John O'Toole and Sean Dooney, Irish Government Today (3rd edn, Dublin) Gill & MacMillan, p. 200
[3] [1993] I.L.R.M. 81 at 96.

developments. Sarahrose will then provide an overview of a case which is currently before the Irish courts, *Minister for Justice and Equality v Celmer* (reported as *LM* by the Court of Justice of the European Union), in which a person, sought by Poland on foot of three European Arrest Warrants (EAW) for the purposes of conducting a criminal investigation in relation to drug trafficking, objected to his surrender primarily on the ground that legislative changes affecting the independence of the judiciary undermined the possibility of him having a fair trial.

1. Judicial appointments

The current framework

Pursuant to the Irish Constitution, judges are appointed by the President on the advice of the Government (the Executive arm of the State).[4] The sole discretion of the Executive in the process has given rise to a view that the system is overly politicised, although reports and studies have indicated that there is no evidence that judges have displayed favouritism to the parties which appointed them.[5]

In a recent High Court case, *Beades v. Ireland*, the Court found that the mere fact that a judge is appointed to judicial office on the nomination and advice of government does not mean that such a judge is not independent.[6]

The Courts and Court Officers Act 1995, as amended, sets out the eligibility criteria for persons seeking appointment to judicial office. To be eligible, a candidate must be a member of the legal profession, either a solicitor or a barrister who has practised for a minimum or ten or twelve years, depending on the court on which the vacancy arises. In practice, successful candidates will have practised for considerably longer.

In 1994, on foot of a political controversy concerning the appointment of the then Attorney General (the legal adviser to the Government and chief law officer of the State) as President of the High Court, an appointment which ultimately brought down the then Government, the Judicial Appointments Advisory Board was established.

The purpose of the Judicial Appointments Board is to identify persons and inform the Government of the suitability of those persons for appointment to judicial office. Section 16(6) of the Courts and Court Officers Act 1995 states that:

> "In advising the President in relation to the appointment of a person to judicial office the Government shall firstly consider those persons whose names have been recommended to the Minister pursuant to this section."

In effect the Board acts as a clearing-house ensuring that candidates satisfy the eligibility criteria and once satisfied the Board will forward the eligible applications received to the Government for its consideration.

The Board is comprised of the Presidents of the five court jurisdictions in Ireland, the Attorney General, a representative each of the barrister and solicitor professions and three nominees of the Minister for Justice and Equality. In practice, the Board meet as and when a judicial vacancy arises. Such vacancies are advertised in the national press and on the Board's website.[7] The legislation stipulates that the names of seven candidates per vacancy are to be

[4] See Articles 13.9, 34.1 and 35.1 of the Constitution of Ireland.
[5] All-Party Oireachtas Committee on the Constitution, *Fourth Progress Report – The Courts and the Judiciary*, p. 7; Bartholomew, *Irish Judiciary*, 1971
[6] *Beades v. Ireland* [2016] I.E.H.C. 302 at para. 62
[7] www.jaab.ie.

forwarded to the Government for consideration. There is no provision for the Board to rank candidates. In practice all applications received are forwarded to the Government. As the Government enjoys an exclusive constitutional discretion in such nominations, it is open to the Government to nominate a practising lawyer outside of the Board process. The Judicial Appointments Advisory Board process does not apply to the promotion of existing judges.

Review of the appointment process

In December 2013, the Government announced a public consultation process on examining the system of judicial appointments in Ireland. Submissions were invited in respect of issues such as the appointments process itself, the eligibility criteria, diversity and equality in judicial appointments. The Judiciary established an ad-hoc Judicial Appointments Review Committee (hereinafter, the 'Committee') of judges which made a detailed preliminary submission in January 2014. The Committee observed that:

> "the relative success of the administration of justice in Ireland has been achieved in spite of, rather than because of the appointment system. The system of judicial appointment in Ireland is by now demonstrably deficient, fails to meet international standards of best practice, and must be reformed if in more challenging times it is to achieve the objective of securing the selection of the very best candidates for appointment to the Irish judiciary and thus contributing to the administration of justice in a manner which will sustain and enhance public confidence."[8]

The Committee advocated for the establishment of a high level body to carry out research, receive submissions and, within a fixed timescale, develop comprehensive detailed proposals in a structured, principled and transparent way to make a radical improvement in the judicial appointments process.[9] The Committee recommended that the key to the reform of the appointments process rests in the reform of the Judicial Appointments Advisory Board. Among other recommendations, it indicated that: the number of candidates for a single judicial post submitted by the Judicial Appointments Board for Governmental decision should be reduced to three; the Board should be empowered to rank candidates and to designate any particular candidate as "outstanding"; should be specifically empowered to inform the Government when it considers that there are either no, or no sufficient candidates of sufficient quality; and that the Board requires adequate financial resources to enable it to carry out its functions.

Current legislative proposals

The review recommended by the Judicial Appointments Review Committee has not taken place, but the system of the appointment of judges is the subject of a Bill that is currently progressing through the Irish Parliament. The proposed legislation has attracted considerable controversy and has been the subject of intensive scrutiny in the Senate. At the core of the legislative proposal is the establishment on statutory footing of a Judicial Appointments Commission.

I wish to provide a brief background to the circumstances which gave rise to the current legislative proposal. A General Election was held in Ireland in February 2019 and the outcome of that election gave rise to no one political party achieving a basis on which to form a Government. The eventual result was that the party in office was able to form a minority Government with the support of a number of independent members of Parliament, with the abstention of the second largest political party.

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[8] Judicial Appointments Review Committee, Preliminary Submission to the Department of Justice and Equality's Public Consultation on the Judicial Appointments Process (2014), p. 9.
[9] *ibid.*

It was a requirement of one of those independent members of Parliament that a commitment be contained in the Programme for Government that legislation be enacted to replace the Judicial Appointments Advisory Board with a new Judicial Appointments Commission. In addition, a commitment was given to reforming the judicial appointments process to ensure that it is "transparent, fair and credible."[10] In fulfilling that commitment, in 2017, the Judicial Appointments Commission Bill was published. That Bill, if enacted, would replace the current Judicial Appointments Advisory Board with a Judicial Appointments Commission which would comprise of 13 members: the Presidents of the five Courts,[11] the Attorney General, a practising barrister and a practising solicitor nominated by their respective representative bodies; a lay person who is a member of the Irish Human Rights and Equality Commission, 6 lay members appointed by the Minister of Justice and Equality and a lay chairperson (in contract to the current Board, which is chaired by the Chief Justice). Thus, there would be a lay majority.

Commentary on the Judicial Appointments Commission Bill

The Bill has attracted considerable attention at both a national and European level. It has been considered by Council of Europe's Group of States against Corruption (GRECO). In respect of judicial appointments, GRECO had recommended in its Evaluation Report on Ireland 2014 that:

> "the current system for selection, recruitment, promotion and transfers of judges be reviewed with a view to target the appointments to the most qualified and suitable candidates in a transparent way, without improper influence from the executive/political powers."[12]

In its Interim Compliance Report on Ireland, GRECO questions whether the proposed composition of the Commission under the Judicial Appointments Commission Bill is in line with European standards which, in situations where final judicial appointments are taken by the executive, calls for an independent authority drawn in substantial part from the judiciary to be authorised to make recommendations or opinions prior to such appointments.[13] In concluding, GRECO stated that its recommendation concerning judicial appointments remains not implemented.

Also commenting on the Judicial Appointments Commission Bill, the European Commission recently stated that:

> "The envisaged composition of a new body for proposing judicial appointments raises concerns regarding the level of participation of the judiciary. The proposed composition of the Judicial Appointments Commission…, would not be in line with European standards (Council of Europe, 2010) and with the recommendation of the Council of Europe's Group of States against Corruption (Group of States against Corruption, 2018) which require that an independent and competent authority drawn in substantial part from the judiciary be authorised to make recommendations or express opinions which the relevant appointing authority follows in practice."[14]

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[10] Department of the Taoiseach, Programme for Partnership Government (2016) www.merrionstreet.ie/MerrionStreet/en/ImageLibrary/Programme_for_Partnership_Government.pdf

[11] Namely the Supreme Court, the Court of Appeal, the High Court, the Circuit Court and the District Court.

[12] Group of States Against Corruption (GRECO), Fourth Evaluation Round Report – Ireland, (2014) p. 46

[13] See Recommendation CM/Rec (2010) 12 adopted by the Committee of Ministers of the Council of Europe on 17 November 2002, para. 47

[14] European Commission Brussels, (27th February, 2019) SWD(2019) 1006 final Commission Staff Working Document Country Report Ireland 2019 https://ec.europa.eu/info/sites/info/files/file_import/2019-europeansemester-country-report-ireland_en.pdf., p. 57

Notwithstanding the introduction of a revised mechanism as envisaged in the Judicial Appointments Bill, i.e. a Judicial Appointments Commission, any legislative proposal cannot usurp the constitutionally enshrined power conferred on the Executive pursuant to the Constitution to nominate individuals for judicial office. Any attempt to do so would be unconstitutional inasmuch as it would entrench on the role of the Executive.[15]

2. Conduct, Discipline and Ethics

Article 35.2 of the Constitution of Ireland provides that:

> "All judges shall be independent in the exercise of their judicial functions and subject only to this Constitution and the law."

Whilst Judges are not answerable to the Executive, or indeed the Parliament, as an independent organ of state the judiciary must be held accountable to the People. However, under Article 35.4.1° of the Constitution a judge of any of the Superior Courts – that is a judge of either the Supreme Court, the Court of Appeal or the High Court – shall not be removed from office except for stated misbehaviour or incapacity, and then only upon resolutions passed by both Houses of Parliament. By law, the same mechanism applies to judges of the lower courts – the Circuit Court and the District Court.

No judge, since the foundation of the State, has been removed from office under this mechanism. There have been only two occasions where, faced with the commencement or threat of impeachment process, two judges have decided to resign voluntarily.

In relation to the manner in which Judges comport themselves more generally, Ireland is somewhat unique in that there is no formal mechanism in place for litigants or members of public to make complaints in relation to judges, either in respect of their judicial functions or their conduct outside of the court room.

As with judicial appointments, there have been calls for the establishment of a complaints mechanism applicable to the Judiciary. Ireland is somewhat out of step with other countries which share a similar legal system, background and tradition in not having a system to deal with judicial conduct which falls short of stated misbehaviour or incapacity.[16] As far back as 2000, a Committee on Judicial Conduct and Ethics, under the chairmanship of the then Chief Justice, Ronan Keane, recommended that a judicial council representing all members of the judiciary be established to deal with judicial conduct and ethics, judicial studies and the working conditions of judges. This body would be similar to the Judicial Commission in New South Wales and would share many common features with Judicial Councils in other countries. The Committee made detailed proposals as to how instances of judicial misconduct should be dealt with.

Draft legislation in the form of the Judicial Council Bill 2017 is currently before the Irish Parliament which, if enacted, would result in the establishment of an independent Judicial Council which would promote and maintain excellence and high standards of conduct by judges.[17] The Judiciary has largely been very much in favour of the establishment of such a body. The Council would also provide a means of investigating allegations of judicial misconduct. In this context, the Bill proposes the establishment of a Judicial Conduct Committee. In addition, , it would facilitate the ongoing support and education of judges through a Judicial Studies Committee and through the establishment of Judicial Support Committees.

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[15] Hogan, Kenny, Whyte and Walsh, Kelly: The Irish Constitution, (2018, Dublin) [6.4.17]; *Attorney General v. Hamilton (No. 1)* [1992] 2 I.R. 250

[16] Seanad Debates, 22 November 2017, Judicial Council, second stage debate, Minister Charles Flanagan.

[17] Explanatory Memorandum, Judicial Council Bill 2017 (Bill No. 70 of 2017)

In respect of judicial ethics, as previously stated, upon entering into judicial office, each Judge is required to make and subscribe, in the presence of the Chief Justice, a solemn and sincere promise and declaration that they will uphold the Constitution and the laws to the best of their knowledge and power, without fear or favour, affection or ill-will towards any man.[18] The jurisprudence that has emerged in relation to judicial conduct and ethics originates in the main from judicial recusal and the objective or perceived bias that may manifest itself in relation to a judge hearing a particular case. Recent decisions of the Supreme Court have sought to clarify and provide guidance on the test to be applied to determining whether a judges' continued involvement in hearing a particular matter may give rise to an actual or perceived bias.[19]

Minister for Justice and Equality v. Celmer/LM

It is widely accepted that the principle of judicial independence is under serious threat in a number of European countries. Given the globalised legal space in which national courts now operate and, in particular, the many instruments of cooperation used by courts in dealing with courts in other jurisdictions, it is perhaps unsurprising that national courts in one jurisdiction should find themselves adjudicating cases involving legal issues hinging on the independence of the Judiciary in another jurisdiction. This was at issue in the case of *Minister for Justice and Equality v Celmer*[20] (or *LM*[21] as it is referred to by the Court of Justice), which came before the Irish High Court in 2018.

Proceedings in the High Court of Ireland

In *Celmer*, the surrender of the respondent was sought by Poland on foot of three European Arrest Warrants (EAW) for the purposes of conducting a criminal investigation in relation to drug trafficking. The respondent objected to his surrender primarily on the ground that legislative changes to the judiciary, the courts and to the Public Prosecutor undermined the possibility of him having a fair trial.

Section 37 of the European Arrest Warrant Act 2003, which gives effect to the Council (EC) Framework Decision of 13th June 2002 on the European Arrest Warrant and the surrender procedure between EU Member States prohibits surrender where it would be incompatible with the State's obligations under the European Convention on Human Rights (ECHR). The respondent argued that, if surrendered, the recent and proposed legislative changes in Poland created a risk of a flagrant denial of justice so that his rights, including his right to a fair trial pursuant to Article 6 of the ECHR would be violated. He argued that these changes fundamentally undermined the basis of mutual trust between the issuing and executing judicial authorities such that the operation of the EAW system was called into question.

The Minister for Justice and Equality ('MJE') submitted that the surrender should not be prohibited as the respondent did not demonstrate a specific risk to him.

The test for determining whether surrender is prohibited on Article 6 ECHR grounds is well settled in Irish jurisprudence. The individual involved must be exposed to a real risk of a flagrant denial of justice. In *Minister for Justice, Equality and Law Reform v. Brennan*[22] the Supreme Court held that it would take egregious circumstances, "such as a clearly established and fundamental defect in the system of justice of a requesting state", for surrender under the Act of 2003 to be refused on the basis of a breach of Article 6 ECHR rights.

[18] Article 6.1° of the Constitution
[19] In this regard the decisions of the Supreme Court in *Bula Ltd v Tara Mines Ltd (No. 6)* [2000] 4 I.R. 412 ; *Goode Concrete v. CRH Plc & Ors.* [2015] 2 I.L.R.M. 289; O'Driscoll v. Hurley and the Health Service Executive [2016] IESC 32 are instructive.
[20] [2018] IEHC 119; [2018] IEHC 154; [2018] IEHC 153; [2018] IEHC 484.
[21] Case C-216/18 PPU.
[22] [2007] IESC 24.

In *Celmer*, the High Court considered a number of documents relied on by Mr. Celmer. These included the European Commission document of the 20th December 2017 entitled "Reasoned Proposal in accordance with Article 7(1) of the Treaty on European Union[23] which initiated the procedure under Article 7 TEU suggesting that the European Council find a clear risk of serious breach of the rule of law in Poland, and several Opinions of the Venice Commission on the situation in Poland.[24] Having found that these documents carried significant evidential weight, the High Court found that:

> "The Reasoned Proposal of the European Commission is, by any measure, a shocking indictment of the status of the rule of law in a European country in the second decade of the 21st Century. It sets out in stark terms what appears to be the deliberate, calculated and provocative legislative dismantling by Poland of the independence of the judiciary, a key component of the rule of law."[25]

In *Aranyosi and Cãldãraru*[26], the Court of Justice found, in the context of prohibiting surrender on Article 3 ECHR grounds, that if a finding of general or systemic deficiencies in the protections in the issuing state is made by the executing judicial authority, it is then necessary that the executing judicial authority makes a further assessment, specific and precise, of whether there are substantial grounds to believe that the individual concerned will be exposed to that risk. In *Celmer*, the High Court found it necessary to make a request to the Court of Justice for a preliminary ruling on the following question:

a) Notwithstanding the conclusions of the Court of Justice in Aranyosi and Cãldãraru, where a national court determines there is cogent evidence that conditions in the issuing Member State are incompatible with the fundamental right to a fair trial because the system of justice itself in the issuing Member State is no longer operating under the rule of law, is it necessary for the executing judicial authority to make any further assessment, specific and precise, as to the exposure of the individual concerned to the risk of unfair trial where his trial will take place within a system no longer operating within the rule of law?

b) If the test to be applied requires a specific assessment of the requested person's real risk of a flagrant denial of justice and where the national court has concluded that there is a systemic breach of the rule of law, is the national court as executing judicial authority obliged to revert to the issuing judicial authority for any further necessary information that could enable the national court discount the existence of the risk to an unfair trial and if so, what guarantees as to fair trial would be required?"

Decision of the Court of Justice

The Grand Chamber of the Court of Justice delivered judgment on the 25th July 2018. The Court of Justice reiterated its finding in *Aranyosi* that limitations may be placed on the principles of mutual recognition and mutual trust between Member States in exceptional circumstances. The CJEU held that:

> "… the existence of a real risk that the person in respect of whom a European arrest warrant has been issued will, if surrendered to the issuing judicial authority, suffer a breach of his fundamental right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial, a right guaranteed by the second paragraph of Article 47 of

[23] A procedure allows the EU to act in case of a serious breach of rule of law in a Member State.
[24] See 904/2017 adopted by the Venice Commission on 7th December 2017 (www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)031-e) accessed 20th May 2019
[25] *Minister for Justice and Equality v. Celmer (No. 1)* [2018] IEHC 119, para. 123
[26] (2016) C-404/15.

> the Charter, is capable of permitting the executing judicial authority to refrain, by way of exception, from giving effect to that European arrest warrant, on the basis of Article1(3) of Framework Decision 2002/584."[27]

The Court of Justice stated that the executing judicial authority:

> "must, as a first step, assess, on the basis of material that is objective, reliable and properly updated concerning the operation of the system of justice in the issuing Member State… whether there is a real risk connected with a lack of independence of the courts of that Member State on account of systemic or generalised deficiencies there, of the fundament right to a fair trial being breached. Information in a reasoned proposal recently addressed by the Commission to the Council on the basis of Article 7(1) TEU is particularly relevant for the purposes of that assessment."[28]

The Court went on to address the requirements of the principle of judicial independence and concluded that:

> "If having regard to [those requirements], the executing judicial authority finds that there is, in the issuing Member State, a real risk of breach of the essence of the fundamental right to a fair trial on account of systemic or generalise deficiencies concerning the judicial of that Member State, such as to compromise the independence of that State's courts, that authority must, as a second step assess specifically and precisely whether , in the particular circumstances of the case there are substantial grounds for believing that, following his surrender to the issuing Member State, the requested person will run that risk."[29]

The CJEU held that "[f]urthermore, the executing judicial authority must, pursuant to Article 15(2) of Framework Decision 2002/584, request from the issuing judicial authority any supplementary information that it considers necessary for assessing whether there is such a risk" and that if the information provided does not lead the executing judicial authority to discount the existence of a real risk that the individual concerned will suffer in the issuing member State a breach of his fundamental right to a fair trial, the executing judicial authority must refrain from giving effect to the EAW relating to him.[30]

Final Judgment of the High Court

When the case returned to the Irish High Court, the judge requested further information from the issuing judicial authorities in Poland and the respondent submitted his own expert report from lawyers in Poland. The Court found, having been addressed on the lack of significant change to position in Poland, having taken into account the Reasoned Proposal as per its judgment of the 12th March 2018 and, having considered the tests in relation to independence of courts as set out in the judgment of the CJEU, concluded on the evidence that "there [was] a real risk connected with a lack of independence of the courts of Poland on account of systemic or generalised deficiencies there, of the fundamental right to a fair trial being breached."[31] and that the deficiencies in the independence of the judiciary will affect the court level before which this respondent will be tried if he is surrendered.[32]

However, the High Court concluded that the systemic and generalised deficiencies in the independence of the judiciary in Poland of themselves do not reach the threshold of amounting to a real risk there will be a flagrant denial of this individual's right to a fair trial.

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[27] (2018) C-216/18 PPU ,para. 43
[28] (2018) C-216/18 PPU ,para. 61
[29] (2018) C-216/18 PPU ,para. 68
[30] (2018) C-216/18 PPU ,para. 76-78
[31] *Minister for Justice and Equality v. Celmer (No. 1)* [2018] IEHC 119, para. 93
[32] *Minister for Justice and Equality v. Celmer (No. 1)* [2018] IEHC 119, para. 97

Finally, the Court emphasised that it is the courts of Poland and, perhaps if he were to be convicted and have that conviction upheld on appeal, the European Court of Human Rights, that will have to decide whether any trial of this respondent actually meets the Polish and ECHR standards respectively of the right to a fair trial before an independent and impartial judiciary and that the Irish court had been concerned only with whether the relevant threshold preventing surrender has been reached, in accordance with the principles laid down by the Court of Justice of the European Union.[33]

Appeal to the Supreme Court

At the conclusion of her judgment, the High Court judge certified as a point of law of exceptional public importance to the Supreme Court, as provided for in s. 16(11) of the European Arrest Warrant Act 2003. The Supreme Court has granted leave to appeal directly from the High Court under a provision of the Irish Constitution which provides for what is known as a 'leapfrog appeal', which bypasses the Court of Appeal (which occupies a jurisdictional tier between the High Court and Supreme Court) where the Supreme Court is satisfied that there are exceptional circumstances warranting a direct appeal to it. As a precondition, the constitutional threshold to be met in order for an appeal from the Court of Appeal to be granted must also be met, *i.e.* the decision under appeal must involve a matter of general public importance or it is in the interests of justice necessary that there be an appeal.

The appeal centres on the interpretation of the judgment of the CJEU in *LM*. It stems from reference by the CJEU in *LM* in its answer to the questions posed by the Irish High Court to breach "of the essence of his fundamental right to a fair trial." In the High Court, an issue arose as to whether this was setting a standard that was different to that set down in the jurisprudence of the ECtHR which has set a test of "flagrant denial of justice" in respect of Article 6 ECHR cases.

The appellant argues that a breach of the right to an independent tribunal is, without more, a breach of the essence of the right to a fair trial under Article 47 of the Charter of Fundamental Rights of the European Union. He contends that the High Court, in relying on ECtHR case law, rejected this interpretation and concluded that, since other indices of a fair trial are present in the Polish system, the breach of the right to an independent tribunal was not of itself sufficient to amount to a flagrant denial of justice. The applicant argues that it may be necessary to seek clarification from the CJEU as to the correct understanding of its decision in *LM*, in particular as to the meaning of "flagrant denial of justice" under Article 47 of the Charter, and as to whether Article 47 of the Charter offers a higher level of protection to the right to an independent tribunal than the protection afforded under Article 6 ECHR.

The Supreme Court has granted leave to appeal and will be heard at the end of July, barring any unforeseen developments arising during the case management process.

Conclusion

A judicial commentator once observed:

> "How little the public realise how dependent they are for their happiness on an impartial administration of justice. I have often thought it is like oxygen in the air; they know and care nothing about it until it is withdrawn."[34]

Given the importance of the independence of the judiciary for constitutional democracies, it is vital that this principle be observed.

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[33] *Minister for Justice and Equality v. Celmer (No. 1)* [2018] IEHC 119, para. 124

[34] Lewis Lord Atkin (1983) at 176, cited in "Judicial Independence" by Justice CSC Sheller.