Abstracts of papers for Irish Supreme Court Review 2022 Conference
To be hosted by the School of Law, Trinity College Dublin,
on Saturday 26 November 2022.

Prof Neville Cox (TCD)
Higgins v Irish Aviation Authority [2022] IESC 13 (07 March 2022)
In its decision in *Higgins v Irish Aviation Authority* [2022] IESC 13 (07 March 2022), the Supreme Court made a number of statements in relation to the concept of damages in defamation actions, and, especially the role of juries in determining the quantum of damages in High Court defamation trials that may represent the most significant developments in this area of the law in the last 25 years. The decision can be seen as doing three things. First, it emphatically endorsed the role of the jury in defamation cases and the existing practices of appellate courts in only overturning jury awards in extreme circumstances. Secondly, it can be seen as requiring trial judges to instruct juries that their function is to determine which of four categories of seriousness the case falls under and to tell them that there are maximum and minimum awards available for each such category. Such an approach, if adopted, will almost certainly reduce the risk of unpredictable and excessive awards of damages in defamation cases. Finally, in its approach to aggravated damages, the decision significantly reduces the circumstances in which the nature of the conduct of the defendant in the context and aftermath of the defamatory publication can be a relevant factor in assessing damages.

Dr Lauren Kierans (Maynooth)
It's nothing personal: The ineffective exclusion of personal grievances in the Protected Disclosures Act 2014: ***Baranya v Rosderra Irish Meats Group Ltd*** **[2021] IESC 77 (01 December 2021)**
The Protected Disclosures Act 2014 ("2014 Act") is Ireland's main workplace whistleblowing legislation. A significant concern arising under the 2014 Act for reporting persons, employers, and adjudication bodies has been when is a disclosure a personal grievance and when is it elevated to the status of a protected disclosure, and further whether the former is excluded in its entirety from the scope of the 2014 Act. This was the question faced by the Supreme Court in *Baranya v Rosderra Irish Meats Group Ltd* [2022] 33 ELR 73, [2021] IESC 77 (01 December 2021).

This paper explores the reasoning of the Supreme Court in determining that the 2014 Act is ineffective in its approach to excluding personal grievances from its ambit. This paper also addresses the Supreme Court's finding that the 2015 Code of Practice on Protected Disclosures [the Industrial Relations Act 1990 (Code of Practice on the Protected Disclosures Act 2014) (Declaration) Order 2021 (SI No 464 of 2015)] erroneously misstates the law by firstly, introducing a distinction between a personal grievance and a protected disclosure, where one does not exist in the 2014 Act, and secondly, by stating that complaints specific to a reporting person in relation to "duties, terms and conditions of employment, working procedures or working conditions" are personal grievances which cannot amount to protected disclosures. The issue of what needs to be considered when determining if the words communicated by a reporting person amounts to a protected disclosure is also subject to a critical analysis and the author welcomes the approach adopted by the

Supreme Court in requiring a consideration of the "general context" of the communication, as opposed to requiring a precise form of words.

This paper also examines the approach taken by the legislature to amend the 2014 Act by introducing a new exclusionary provision for both personal and interpersonal grievances in the Protected Disclosures (Amendment) Act 2022. The author argues that the Irish legislature should instead have introduced a public interest test into the amended legislation, similar to the one adopted in 2013 in the UK whistleblowing legislation [see section 17 of the Enterprise and Regulatory Reform Act 2013]. The author concludes that the amendment to the Irish legislation will not be the panacea it is intended to be and will be equally problematic as regards the challenge of dealing with personal grievances in the context of protected disclosures.

Prof Martin Hogg (University of Galway)

***Sobhy v Chief Appeals Officer* [2021] IESC 81 (16 December 2021)**

The case of *Sobhy v Chief Appeals Officer* [2021] IESC 81 (16 December 2021) is not a classic illegal contract case, as there was no attempt at *inter partes* enforcement of the terms of an illegal contract. Rather, the case raised a related third-party issue, namely whether statutory maternity benefit might be claimed from the state on the basis of an illegal contract of employment or whether only persons who were lawfully employed were entitled to make such a claim. The focus of the Supreme Court's analysis was the interpretation of interconnected statutory provisions of relevance to the plaintiff's employment, though there was some discussion of the common law's approach to illegality of contract, specifically the issue of whether an illegal contract can ever give rise to limited legal effects (even if not direct enforcement of the contract itself).

The Court considered whether public policy considerations warranted or excluded the limited legal effect of an entitlement to maternity benefit on the basis of the illegal contract. It concluded that such an effect was excluded, citing "the public policy of the regulation of immigration and employment of undocumented persons in the State".

Contract lawyers may find the Supreme Court's judgment somewhat unsatisfying, given that the court does not get to the meat of commenting on or further developing the common law doctrine of illegality. Indeed, there is no discussion of the leading modern English authority on illegality, *Patel v Mirza* [2017] AC 467, [2016] UKSC 42 (20 July 2016), albeit that in *Sobhy* the Supreme Court, without giving effect to the illegal contract, allowed the plaintiff restitution of her PRSI payments (which draws comparison with the restitutionary remedy permitted in *Patel*). Moreover, when considering the public policies in play, there was no express consideration by the Supreme Court of any potentially operative policy of the protection from exploitation of those with no right to work in the State, which is in marked contrast with the prominent consideration of that policy by Heslin J when the matter was before the High Court; nor was there any explicit consideration of the proportionality of denying Ms Sobhy the remedy she sought. Considerations of possibly countervailing policies and of the proportionality question usually form part of the modern "balancing exercise" which courts undertake when looking at legislation rendering certain

types of contract illegal. The omission of the court to expressly address either balancing issue is puzzling.

We must await another occasion for a fuller discussion by the Irish Supreme Court of the new tripartite analysis of illegality adopted in *Patel*, whether its deployment in Irish law might be thought beneficial, and how its reasoning relates to the most recent high-level treatment of illegality by the Irish courts, *Quinn v IBRC* [2015] IESC 29 (27 March 2015) (which predates *Patel*).

Dr Catherine O'Sullivan (UCC)
***People (DPP) v FN* [2022] IESC 22 (23 May 2022)**
People (DPP) v FN [2022] IESC 22 (23 May 2022) focused on the question of whether proof a sexual purpose is required in order to ground a sexual assault charge. The majority judgment determined that it was not. A focus in both majority and minority judgments was the case of *R v Court* [1987] 1 QB 156. It will be argued that the majority decision on the particulars of the offence is correct but that its application to the facts is questionable. Conversely it will be noted that the result arrived at by the minority is correct, even though the reasoning is not. It will also be suggested that there was scope for the Court to modify the parameters of the offence as the offence remains a common law one, albeit one whose punishment is governed by statute. Such a modification could usefully have taken place in the discussion around what constitutes indecency and shifted away from a standard grounded in moralistic language ("right-thinking people") to one focused on sexual integrity. The erasure of the non-contact form of sexual assault from the judgment will also be considered.

Author: Tony McGillicuddy SC (Law Library)
***People (Director of Public Prosecutions) v Behan* [2022] IESC 23 (30 May 2022)**
The continuing ramifications from two key criminal law judgments of the last decade, namely *Damache v Director of Public Prosecutions* [2012] 2 IR 266, [2012] IESC 11 (23 February 2012) and *Director of Public Prosecutions v JC* [2017] 1 IR 417, [2015] IESC 31 (15 April 2015), feature in the Supreme Court judgments delivered in *People (Director of Public Prosecutions) v Behan* [2022] IESC 23 (30 May 2022). This case offers another intriguing insight into the contrasting views of the Court on issues relating to criminal procedure, while there was agreement by all five judges on the application of the *JC* test to issues that might arise in criminal trials and on the use of the proviso contained in section 3 of the Criminal Procedure Act, 1993. That latter provision enables an appellate court to affirm a conviction notwithstanding that the appellant has raised an argument that could be determined in his favour if the Court is satisfied that there has been no miscarriage of justice. The proviso was applied in this case even though the majority judgment decided that there was a breach of the statute in the way the Search Warrant was granted in this case.

Central to the case itself was the challenge to a Search Warrant issued under section 29 of the Offences Against the State Act, 1939 (as inserted by section 1 of the Criminal Justice (Search Warrants) Act, 2012). The new section 29 of the OASA 1939, enacted in the aftermath of the Supreme Court holding in *Damache* that the previous provision was

unconstitutional, made provision for a Garda Superintendents to grant such warrants in circumstances of urgency, but only if he/she is "independent of the investigation of the offence in relation to which the search warrant is being sought."

At issue in the *Behan* case was whether the relevant Garda Superintendent who granted a Search Warrant, which led to the seizure of a glove containing the appellant's DNA from a house near the vicinity of the attempted robbery in the early hours of 1 January 2019, was "independent" in the manner required by the legislation. The Search Warrant was granted by the Division Detective Superintendent, who was described in evidence as having an "oversight" function, but not a "management" role, in relation to the Garda investigation. The Court divided, by three to two, on whether this meant that he was "independent" of the investigation such that the Search Warrant was granted in accordance with the legislation.

A majority, represented by the judgment of O'Malley J (Dunne and Baker JJ concurring), decided that he was not "independent", whereas the minority judgments (Charleton J and Woulfe J respectively) decided that he was "independent" at the time he issued the Search Warrant. Thus, the majority found that there was a breach of the statute in the granting of the Search Warrant in question. Hence, the judgment is of interest for the degree of latitude that may be afforded to investigative authorities to comply with statutory requirements in investigations, although it will be suggested that the continuing tension on the court in dealing with criminal law matters is evident again in the treatment of these matters by the Court. Issues of independence will arise in other circumstances where investigative powers are granted to authorities, including Gardaí, and the extent to which the Court had provided any guidance for such future cases is questionable.

The judgment is also of interest for the way in which the majority judgment, having decided that there was a breach of the statutory requirements, went on to decide that the proviso provision in section 3 of the Criminal Procedure Act, 1993 applied so that the appeal was dismissed. The minority judgments agreed with that ultimate conclusion. Of interest in this part of the judgment is the way in which the Court addressed the issues in *JC* and how the tests formulated in that case might be addressed at appellate level in the coming years. The willingness of the Court to carry out that analysis itself in preference to ordering a re-trial so that it could be teased out in evidence before a trial court is noteworthy, as are the considerations which were pivotal to the Court's determination that no miscarriage of justice existed so that the conviction was upheld. Furthermore, the Court made some comments on the application of the proviso provision in section 3 of the Criminal Procedure Act, 1993, which are of interest for future cases.

The paper grapples with these issues, while also making observations on possible controversies that which might have to be addressed in future cases.

Dr Lauren O'Connell (Griffith College Dublin)
The Taking of DNA Samples and Legal Advice in Ireland: *People (DPP) v McDonald* [2022] IESC 29 (30 June 2022)
In June 2022, the Irish Supreme Court decided an appeal from Christopher McDonald who, in July 2017, was convicted of murder by a jury in the Central Criminal Court. DNA evidence taken from McDonald following his arrest was central to the conviction. Following an unsuccessful appeal to the Court of Appeal, McDonald appealed to the Supreme Court. The issues on appeal were, firstly, whether an arrested person can validly consent to the taking of a forensic sample under the common law notwithstanding the statutory regime for the taking of same under section 2 of the Criminal Justice (Forensic Evidence) Act, 1990, and secondly, whether the presence of a solicitor is required for the consent to be valid. The prosecution argued that there is no constitutional right of access to legal advice prior to providing a forensic sample as the evidence is objective and therefore does not require the same rights protections as that of confessions or statements. The prosecution also relied on *The People (DPP) v Cash* [2008] 1 ILRM 443, [2007] IEHC 108 (28 March 2007), where it was held that the nature of fingerprint evidence does not change whether taken voluntarily or involuntarily.

Ultimately the Court ruled that the consensual taking of a blood sample from a person in custody who had been provided a notice of rights and who had availed of a telephone conversation with a solicitor was lawful. While this ruling is not inherently surprising, the legal landscape concerning the collection (and subsequent use) of forensic samples has changed following the launch of the Irish DNA database, which was provided for by the Criminal Justice (Forensic Evidence and DNA Database System) Act 2014.

This paper considers the implications of this ruling against not only the wider backdrop of legal uncertainty regarding the role of a solicitor in Ireland, but also alongside the new legal framework where DNA profiles are entered onto the DNA database, framing the ruling within a wider trajectory of diminishing due process protections at the pre-trial stage.

Dr Mark Coen (UCD)
***Dowdall v DPP* and *Hutch v DPP* [2022] IESC 36 (29 July 2022)**
Dowdall and *Hutch* is the latest in a long line of cases in which applicants have challenged various aspects of the Special Criminal Court regime. In contrast to previous litigation raising constitutional issues, the applicants in *Dowdall* argued that the Court was not operating in the manner required by the legislation establishing it, namely the Offences Against the State Act, 1939 as amended. Statutory interpretation was thus at the core of the applicants' arguments, which were ultimately rejected by the Supreme Court.

Prof Padraic Kenna (Director, Centre for Housing Law, Rights and Policy, **University of Galway)**
***Clare County Council v Bernard and Helen McDonagh and IHREC* [2022] IESC 2 (31 January 2022)**
The landmark case of *Clare CC v Bernard and Helen McDonagh and IHREC* [2022] IESC 2 (31 January 2022) signified a major development in the recognition of Traveller caravans as

"dwellings" enjoying Article 40.5. constitutional protection on inviolability. The case established that the Irish constitutional definition of dwelling, or *ionad cónaithe,* is wider than the ECHR Article 8 definition of "home". However, an ECHR "proportionality"-type assessment is still required, primarily to vindicate any property rights of the landowner. Different considerations apply, however, where the landowner is a local authority, which has failed in its duty to arrange suitable housing for the appellants.

The case illustrates the challenges identified by Hogan J when he stated ([2022] IESC 2 [1]):

> "… the fact remains that the [Irish] legal system has not found it altogether easy to accommodate the distinct cultural traditions of the travelling community – such as nomadism and living in large family groups – within its traditional ambit of protecting and enforcing property rights, enforcing laws restraining trespass and legislation designed to give effect to legitimate planning, zoning and environmental concerns."

The case marks a significant development in integrating ECHR jurisprudence into Irish constitutional law on the protection of home/dwelling, one element of the right to housing.

Prof Oran Doyle (TCD)
***Burke v Minister for Education* [2022] IESC 1 (24 January 2022)**
Burke v Minister for Education [2022] IESC 1 (24 January 2022) involves the intersection of one of the most contemplated institutions in Irish life – the annual Leaving Certificate examination – with one of the most understudied aspects of the Irish Constitution – executive power. While all court cases are important for the people involved, the non-provision of a scheme of calculated grades for home-schooled students during the pandemic scarcely seemed to raise issues of the greatest constitutional import. But the case generated the following fundamental questions: how to identify a derived constitutional right; what constitutes an exercise of executive power; how the courts should review the exercise of executive power, both when a right is engaged and when a right is not engaged; the relevance and application of the Meadows standard for administrative action that interferes with constitutional rights. The Supreme Court decision reconstructs how the courts review the exercise of executive power and has potential implications for all other separation of powers cases.

Prof Mark Poustie (UCC)
***Right to Know CLG v Commissioner for Environmental Information* [2022] IESC 19 (29 April 2022)**
This article considers the Supreme Court decision in *Right to Know CLG v Commissioner for Environmental Information* [2022] IESC 19 (29 April 2022) that the office of the President, the Office of the Secretary General to the President, and the Council of State, are not subject to the application of the European Communities (Access to Information on the Environment) Regulations 2007, 2011 and 2014, as amended by European Communities (Access to Information on the Environment) (Amendment) Regulations 2018, for two reasons. First, this is by virtue of the President's constitutional immunity from suit. Second,

as the President does not fall within the definition of “public authority” in the underlying Access to Information on the Environment Directive (Directive 2003/4/EC of 28 January 2003), the doctrine of Supremacy of EU Law does not override the President’s constitutional immunity in this case. The compatibility of the decision with Aarhus Convention obligations is also considered.

Dr Tom Hickey (DCU) & Davy Lalor (DCU)
***Donnelly v Minister for Social Protection* [2022] IESC 31 (04 July 2022) & *O’Doherty v Minister for Health* [2022] IESC 32 (05 July 2022)**
This paper analyses *Donnelly v Minister for Social Protection* and *O’Doherty & Waters v Minister for Health* – which make important contributions to the jurisprudence on standards of review in Irish constitutional law, and on related matters such as the burden of proof and the nature of the evidence which must be adduced in Irish constitutional litigation.

Regarding *Donnelly*, we focus primarily on the Court’s approach to the Article 40.1 equality guarantee as expressed in the judgment of O’Malley J. As for *O’Doherty*, we concentrate on O’Donnell CJ’s comments on the role of proportionality in constitutional review, as well as his views on the appropriateness of using comparator jurisdictions in the context of rights adjudication.

Hilary Hogan (Worcester College, Oxford & EUI, Florence)
***Fox v Minister for Justice* [2021] IESC 61 (14 September 2021)**
The judgment of the Supreme Court in *Fox v Minister for Justice* [2021] IESC 61 (14 September 2021) revisits the complex relationship between the Irish Constitution, the European Convention on Human Rights and the European Convention on Human Rights Act 2003. The appellant sought to compel the Minister to establish Commissions of Investigation on the basis of obligations under Article 2 of the European Convention on Human Rights and the Constitution. The Supreme Court considered whether the obligation to conduct an investigation can be derived from the constitutional right to life protected in Article 40.3.2 of the Constitution, and to what extent such a right could be considered to be co-extensive with the same obligation under Article 2 of the ECHR. In rejecting the suggestion that equivalent provisions of the Constitution should, where possible, be interpreted to mirror the jurisprudence of the European Convention, the Supreme Court gave a robust defence of the supremacy of the Constitution in the domestic legal hierarchy. While there may be overlap between the content of a substantive right protected by the ECHR and the Constitution, the judgment emphasises that there are distinct boundaries between these separate, if complementary, traditions.

Dr Rónán Condon (DCU)
Shadow Constitutionalism: *P McD v Governor of X Prison* [2021] IESC 65 (17 September 2021)
Do prison authorities owe prisoners a *general* and affirmative duty to take reasonable steps to ensure prisoners’ health and safety? If they do, what is the extent of the duty? The Supreme Court in *P McD v the Governor of the X Prison* [2021] IESC 65 (17 September 2021)

was preoccupied by these two questions. The "tort majority" of Charleton & McMenamin JJ considered that prison authorities do not owe a *general* affirmative duty of care in negligence to prisoners to take preventative steps to ensure their health and safety. A duty of care, in particular, cannot be based on prison policies aimed at conferring a benefit on prisoners. The "tort majority" in other words treated prisoner health and safety as raising issues of general "principle and policy" in negligence. The fact of imprisonment did not constitute a special relationship of care obliging prison authorities to take preventative steps. There are, of course, recognised circumstances in which a particular duty of care is owed to an individual prisoner, but there is no affirmative duty of care owed to prisoners "in the abstract". In O'Donnell J's "minority tort" judgment, he opined that the real issue is not whether a general affirmative duty of care is owed to prisoners, but the *extent* of that duty. Both majority and minority placed particular emphasis on personal autonomy, which negated any duty of care, and imported that the plaintiff was the sole cause of his purported injury. This principle was decisive on both approaches: it determined whether it was "fair, just and reasonable" to impose a duty of care based on general principles and, it determined the extent of the duty of care on the minority approach.

In addition to the duty of care issue, McMenamin J attempted to fashion a "private" law declaratory order that the prison authorities has failed to provide an effective complaints system. Both the duty of care issue (implicitly), and the declaratory issue (explicitly). reveal "shadow constitutionalist" tendencies in tort law. While judgments in recent years have sought to re-inforce the *Hanrahan* position that tort law is the appropriate channel for violations of private rights unless a claimant is left without a remedy for a breach of their constitutional rights, *P McD v the Governors of the X Prison* shows how, at least in respect of actions brought against the state, the constitution influences tort law in subtle ways. The majority's analysis also fits these issues within the parameters of the decision in *Glencar Exploration plc v Mayo County Council (No 2)* [2002] 1 IR 84, [2002] 1 ILRM 481, [2001] IESC 64 (19 July 2001), such that notwithstanding the Supreme Court recently emphasising incrementalism in *UCC v ESB* [2021] IESC 21 (24 March 2021), it continues to be the framework for analysing novel duty situations.

Dr Michael Foran (Glasgow)

***UM v Minister for Foreign Affairs and Trade* [2022] IESC 25 (02 June 2022)**

UM v Minister for Foreign Affairs and Trade [2022] IESC 25 (02 June 2022) addresses several important constitutional topics and themes while managing to avoid passing detailed judgment on any of them. In the inferior courts, principles of natural justice and substantive conceptions of residency were centred, resulting in the case turning on determinations relating to the character of one's presence and the impact that this has upon reciprocal duties owed by the community to the individual. In contrast, the Supreme Court focused on cannons of statutory construction, emphasising technical presumptions over those grounded in considerations of natural justice. The result is a decision which rests on a highly particular, somewhat artificial distinction between automatic voiding of refugee status triggered *ab initio* by virtue of fraud and a prospective revocation triggered by exercise of executive discretion. The possibility of discretionary revocation with automatic and retroactive legal effect is not discussed in any great depth.

In a case such as this, principles of natural justice may have pulled in both directions, forcing statutory construction to balance the principle that fraud unravels everything against the injustice of depriving a child of citizenship based on the sins of the father. Addressing these concerns head on would have required more engaged moral judgment from the Court, but it would have avoided sanitised construction which fails because it does not address in adequate detail an alternative possible construction, equally defensible on a plane reading of the statutes in question.

Dunne J correctly stressed that invalidity is a relative and not an absolute concept, rejecting “a hard and fast approach to the difficult issues in this case”. This being the case, the difficult substantive issues themselves deserved more direct engagement as means of resolving technical questions of construction.