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Recent Developments in Sentencing

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RECENT DEVELOPMENTS IN SENTENCING

Tom O'Malley

GENERAL OBSERVATIONS

For the vast majority of those charged with criminal offences in this country, sentence is all that matters, and that is because they plead guilty. In 2010, for example, 3,716 defendants appeared before the Circuit Criminal Court. Of these, 3,172 (85 per cent) pleaded guilty. As might be expected, the guilty plea rate is lower in the Central Criminal Court, but still quite significant. In 2010, that court disposed of 41 murder cases in which there were 12 guilty pleas and 28 jury trials. A total of 69 sex offence cases were disposed of, involving 35 guilty pleas and 38 jury trials.[1] We do not have equivalent figures for the District Court, but the guilty plea rate in that court has traditionally been very high also. A court with a complement of 64 judges could scarcely deal with a half-million offences a year unless most defendants opted to waive their right to trial.[2]

The most remarkable development of recent years has been the enormous increase in the prison population. The daily average number of prisoners rose from 3,321 in 2007 to 4,389 in 2011, representing an increase of 32 per cent.[3] This phenomenon has few parallels in recent history, whether in Ireland or elsewhere, though its impact is somewhat mitigated by the fact that the actual numbers involved (about 4,500 prisoners in a country with a general population in excess of 4.5 million) are still potentially manageable. However, in the present economic climate, we are unlikely to see major initiatives to increase prison space and to improve the quality of existing facilities, though some developments in both respects are planned. This state of affairs makes it all the more incumbent on both the courts and the executive to develop principles and strategies to ensure that imprisonment is used solely as a measure of last resort, that custodial sentences, when imposed, are no longer than are strictly necessary, and that there is a structured system in place for granting conditional release to prisoners who have served a defined portion of their sentence and who can be released without posing any appreciable risk to the community. In a jurisdiction such as this which, so far, has firmly eschewed any notion of formal guidelines, appeal courts bear responsibility for developing principles which will provide as much detailed guidance as possible for trial courts in the approach to be adopted in sentencing various categories of offence and offender.

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1 Courts Service, *Annual Report 2010*, Chapter 4.

2 The District Court dealt with 521, 058 offences (summary and indictable) in 2009, and with 498,672 in 2010.

3 Irish Prison Service, *Three Year Strategic Plan 2012-2015* (Dublin, 2012).

Many European countries are struggling with the problem of short prison sentences and with the difficulties posed by persistent minor offenders. Ireland is no exception in this regard, as a few statistics will reveal. The Irish Prison Service reports that in 2010, the number of committals under sentence of less than three months was 7,356 (a 28 per cent increase on the previous year). Yet, a snapshot survey of the prison population on November 30, 2010 shows that there were only 38 prisoners in custody under sentence for three months or less on that date. This suggests there is an enormous through-put of very short-term prisoners within the system and it poses the question as to whether there is any point in imposing short sentences if they are not going to be served to any meaningful extent. The Criminal Justice (Community Service) (Amendment) Act 2011 is a welcome initiative to the extent that it requires courts to consider community service as an alternative to prison sentences of 12 months or less. Unfortunately, in this country, we tend to be good at making formal provision of this kind but very bad at putting any systems in place to monitor compliance. Hopefully, steps will be taken to investigate the extent to which this legislation has influenced sentencing decision-making during its first year in force, and regularly thereafter. Research of this kind is essential in order to identify any implementation problems and, hopefully, to provide ideas for other strategies that might be developed to reduce reliance on short-term imprisonment.

At the other end of the system, we need to consider the introduction of more formal parole systems than are currently in place. The Three-Year Strategic Plan published by the Irish Prison Service a few weeks ago recommends the introduction of a Community Return Programme that would allow for the early release of some prisoners on a structured basis. However, I would strongly suggest, for two reasons, that a more formal and structured parole system is now needed. The first reason is legal in nature. The idea that decisions on the portion of a prison sentence to be served should be left entirely to the discretion of the executive branch of government is quickly becoming outmoded and unacceptable. Any decision to release a prisoner before the expiration of sentence is *de facto*, if not *de jure*, a sentencing decision and is progressively being seen as such internationally. It follows that all such decisions should be made by a fully independent body, though it does not have to be a court. There is much to be said for leaving such decisions to an administrative body, provided it is truly independent, because it can include the range of expertise required to make the necessary assessments based on risk and other relevant factors. The second reason is entirely pragmatic. Returning prisoners to the community under a system of supervised release can promote their reintegration and free up valuable prison space. Obviously, any decision to grant such release must be preceded by a risk assessment.[4]

IRISH SENTENCING INFORMATION SYSTEM

The Irish Sentencing Information System (ISIS) has the potential greatly to enhance the quality of sentencing decision-making and to assist lawyers in formulating submissions to both trial courts and appeal courts. The results of a pilot project which was completed in 2010 are available on a dedicated website: www.irishsentencing.ie. This was quite a

[4] The topics discussed in this section are addressed in more detail in O'Malley, *Sentencing: Towards a Coherent System* (Dublin, 2011), esp. Ch. 8 (the choice of penalty) and Ch. 9 (parole).

path-breaking initiative, even when judged on a worldwide basis, because it incorporates the best elements of more limited systems devised elsewhere. However, its utility and value depend crucially on its being constantly and regularly updated and replenished. The funds necessary to accomplish this are very modest indeed and I sincerely hope that they will be made available. After all, compared to other countries, we spend very little on judicial support systems of any kind. One of the more welcome initiatives over the past year has been the establishment of an interim Judicial Council. After the decision to establish it was announced, Chief Justice Denham was quoted as saying:

> "It is of critical importance that there is a formal institution to represent the judiciary, within which issues fundamental to the judiciary may be addressed, and from which there can be deliberations, study and .publications on relevant judicial matters… Ireland has not developed the institutions and systems which have been organised in other States to support the independence of the judiciary - to support the third branch of Government."[5]

This is certainly true, and I would suggest that further development of the Irish Sentencing Information System, which has enormous potential, could most appropriately take place within the framework of the Council. (I say this in a purely personal capacity and not on behalf of the Steering Committee for the Pilot Project of which I am a member). Meanwhile I would encourage all practising lawyers to make use of the existing website and to provide any feedback which they think may be helpful. One other important feature of the system is that, unlike some equivalent initiatives taken elsewhere, it is fully accessible and all information is freely and equally available to everyone. As such, it advances the transparency and public accountability of the sentencing system in general. Above all, it is to be hoped that, even in these difficult times, those responsible for funding the judicial system will see the value in continuing to provide the very modest funding necessary to maintain the information system which, over time, can contribute greatly to the evolution of a more coherent and effective system of sentencing decision-making.

SENTENCE ADJUSTMENT AS A CONSTITUTIONAL REMEDY

The judgment of Hogan J. in *G v Murphy*[6] represents one of the more important contributions to our constitutional jurisprudence in recent years. The applicant was charged with sexual assault which, according to s.2 of the Criminal Law (Rape) (Amendment) Act 1990 is an indictable offence only, although one might have expected it to be defined as a hybrid offence prosecutable summarily or on indictment. It may however be dealt with under s. 13 of the Criminal Procedure Act 1967 which permits the District Court to deal with most indictable offences, other than very serious ones, where the accused pleads guilty. As conditions precedent, the court must be satisfied that the accused understands the nature of the offence and the facts alleged, and the prosecutor must agree to summary disposal. Implicitly also, the court must be satisfied

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5 *Irish Times*, November 18, 2011.

6 [2011] IEHC 445, to be read in conjunction with his earlier judgment, *G v Murphy* [2011] IEHC 359.

that the offence is a minor one, because its sentencing powers are limited to the imposition of a prison sentence not exceeding 12 months, a Class D fine or both. In *G* there was medical evidence that the applicant was unfit to plead but, because of an apparent lacuna in s. 4 of the Criminal Law (Insanity) Act 2006, the question of his unfitness to plead could not be determined by the District Court. Instead, the applicant had to be sent forward to the Circuit Court for a finding on fitness to be made. If the Circuit Court found him fit to plead, it would then deal with him which meant that, in the event of a conviction, it could impose any sentence up to the statutory maximum which would be 10 years' imprisonment if the offence had been committed after the entry into force of the Sex Offenders Act 2001. However, the DPP had been willing for the offence to be dealt with in the District Court if the applicant was willing to plead guilty. In that event, the maximum to which the applicant could be sentenced was 12 months imprisonment. The problem was that the applicant could not plead either way until a decision was made as to fitness and that, as noted, could only be made by the Circuit Court in this case.

This, in turn, raised a serious equality issue. Should mental disability be a ground for denying to some an advantage that is generally available to all others charged with indictable offences that may be disposed of under s. 13 of the 1967 Act? The answer is clearly in the negative and, so, the question for the High Court in *G* was how the statutory omission which created this inequality should be addressed. As Hogan J. recognised, to strike down the relevant provisions of the Criminal Law (Insanity) Act 2006 would be counter-productive because the Act in its entirely was a beneficial measure which represented a considerable improvement on the pre-existing law relating to fitness to plead and findings of insanity. He therefore followed the precedent set by Laffoy J. in *S.M. v Ireland*[7] where the sentencing provision of s. 61 of the Offences Against the Person Act 1861 was found to be inconsistent with the Constitution. (This section provided for a maximum of 10 years' imprisonment for indecent assault upon a male, while the maximum for indecent assault upon a female was only two years' imprisonment). Laffoy J addressed the resulting gap in the law by granting a remedial declaration to the effect that if the applicant were convicted of an offence of indecent assault upon a male, it would be unconstitutional to impose upon him a sentence exceeding that for an indecent assault upon a female committed during the same era. Parenthetically, it may be asked what is the maximum sentence for an indecent assault upon a male committed between 1981 and the early 1991 (when ss. 2 and 3 of the Criminal Law (Rape) (Amendment) Act 1990 came into force. The answer, I suggest, is 10 years, because there was no longer any unconstitutional inequality between the maximum sentences based on the gender of the victim. Under s. 10 of the Criminal Law (Rape) Act 1981, the maximum sentence for indecent assault upon a female was raised to 10 years' imprisonment, irrespective of whether it was on a first or subsequent conviction.

In a similar vein, Hogan J. decided that the appropriate remedy in *G* was to grant a declaration that if the applicant were found fit to plead in the Circuit Court and thereafter pleaded guilty, it would be unconstitutional to apply a maximum sentence greater than that which would have applied (12 months) if the applicant had been dealt

[7] [2007] 4 I.R. 369.

with in the District Court under s. 13 of the Criminal Procedure Act 1967. There may not be many other situations in which an omission or a discriminatory sentencing provision in a criminal statute can be addressed in this way. But the judgment of Hogan J. has a much wider significance because of its detailed consideration of constitutional remedies and the capacity of the courts to fashion those remedies, as had happened in *S.M.* and also in *Carmody v Minister for Justice* [2010] 1 I.R. 635. Hogan J. said:

> "By granting this form of declaration, in the unusual cases where this relief seems appropriate, the courts may be further said to advance the dialogue between the three branches of government which is a healthy feature of the separation of powers. Questions of policy naturally remain the exclusive prerogative of the Oireachtas and the Government. The process of judicial review of legislation may, however, contribute to effective law-making in that – just as in the present case – it may throw up examples of anomalies or other instances of unconstitutional differentiation which any fair society would seek immediately to redress once these examples came to light."[8]

This approach to constitutional adjudication, which may be termed a Madisonian approach,[9] has much to commend it and is also reflected in other recent judgments by Hogan J., notably *Kinsella v Governor of Mountjoy Prison*[10] and *A.O. v Minister for Justice, Equality and Law Reform*.[11] The judicial power, where it exists, to strike down democratically-enacted legislation should be exercised sparingly, though courts should not shirk from using it when there is a clear and unavoidable conflict between the impugned statutory provision and either an express or clearly-implied constitutional provision. However, where possible, constitutional adjudication should promote dialogue and deliberation both within and between the various branches of government, and especially in circumstances where a categorical decision invalidating a law may have wide repercussions. I therefore merely ask these questions: could the Supreme Court have adopted a different approach in *Damache*?[12] The statutory provision at issue in that case was clearly undesirable as a matter of policy but was it so clearly *unconstitutional*?[13] Could the Supreme Court have said that this provision was undesirable, that it failed to conform with evolving standards of legality and constitutional fairness and that, consequently, a point would soon be reached where it would, in fact, be unconstitutional? This would put the Oireachtas on notice of the need for reform and, if it failed to act, it would then, quite justly, have to take the consequences of a later declaration of invalidity. The consequences of the actual decision in *Damache* are now becoming painfully obvious as we recently saw in *People (DPP) v Cunningham*.[14]

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8 [2011] IEHC 445 at [39].

9 See generally, Burt, *The Constitution in Conflict* (Harvard University Press, 1995).

10 [2011] IEHC 235.

11 [2012] IEHC 104.

12 *Damache v DPP* [2012] IESC 11. The Court struck down s. 29(1) of the Offences Against the State Act 1939 which permitted a Garda of Superintendent rank or higher to issue a search warrant.

13 I fully admit to have been among those who criticised the provision: *The Criminal Process* (Dublin, 2009), p. 367-368.

14 [2012] IECCA 64.

JUDICIAL REVIEW OF SENTENCE

As Keane C.J. remarked in *Orange Ltd v Director of Telecoms (No.2)*[15] judicial review as a source of legal remedy has travelled a long way from the time at which it was largely confined to questions of *vires.* The grounds on which it may be granted have increased quite significantly since then. Challenges to the fairness or legality of District Court proceedings have occupied a prominent place in the High Court judicial review list for quite some time. Recently, however, there seems to have been an increase in the number of challenges to sentencing decisions of the District Court and, indeed, the Circuit Court. This prompts the question of when exactly a grievance about sentence, or about the manner in which sentence was selected, should be addressed by way of judicial review as opposed to appeal. Unfortunately, the courts have never definitively clarified the circumstances in which a judicial review remedy may be granted when an alternative remedy, such as an appeal, is available. However, when the complaint centres on a procedural defect, it seems that review should be available only where the defect is of a grave nature which violates the defendant's right to natural and constitutional justice. Other defects can be remedied by way of appeal. The Court of Criminal Appeal is limited to entertaining appeals based on error of law, error of principle or want of jurisdiction, and the vast majority of appeals allege an error of principle. However, it is important to stress that lack of procedural fairness may amount to an error of principle. Otherwise, for example, it would never be possible to challenge a sentencing decision of the Central Criminal Court on this ground, because the High Court is not subject to judicial review. For instance, in *People (DPP) v Nelson*,[16] the Court of Criminal Appeal said:

> "Perhaps the starting point in this case is that the court is faced with a difficulty in that it is not possible to divine from the judgment with certainty how the learned trial judge arrived at the sentence and in particular how she dealt with the provisions of section 15A of the Misuse of Drugs Act 1977 as inserted by section 4 of the Criminal Justice Act 1999. It is in itself an error in principle when this court is not in a position to evaluate the thought processes which resulted in the particular sentence and in those circumstances it falls to this court to look at the circumstances of the case and determine for itself in the light of the information available in the transcript the appropriate sentence for this particular offence and this particular offender."

There are other, reported authorities such as *People (DPP) v Mulhall*[17] and *People (DPP) v Mc C*[18] (the latter a Supreme Court judgment) which also stress the need for due process at sentencing and which show that a want of due process may provide a ground of appeal. The same, *a fortiori*, holds true of District Court sentencing decisions which are appealable, by way of *de novo* hearing, to the Circuit Court. This is not to suggest that situations may not arise, such as that in *Nevin v Crowley,*[19]where there has been such a clear departure from basic principles of constitutional fairness that

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15 [2000] 4 I.R. 159 at 183.
16 *Ex tempore*, July 31, 2008.
17 [2008] 3 I.R. 724.
18 [2008] 2 I.R. 92.
19 [2001] 1 I.R. 113

intervention by way of judicial review is entirely appropriate. But there are many other cases where the essential complaint is that either the nature or the quantum of sentence was influenced by a factor which the trial judge should not have taken into account. This is the kind of issue which should be addressed on appeal having regard to the transcript in the case of the Court of Criminal Appeal, or by approaching the matter afresh in the case of the Circuit Court when dealing with a District Court appeal.

SENTENCING THE DANGEROUS OFFENDER

In the academic literature on sentencing, the term "dangerousness" often carries a variety of meanings. Sometimes, it means no more than a propensity to re-offend, irrespective of the nature of the predicted offending. More commonly, however, it refers to the likelihood that a person will continue to re-offend in ways that interfere with fundamental rights and interests of members of the community. Predicted crimes of personal violence are obviously of most concern. Offenders who fall into this general category pose an acute dilemma for the sentencing system, and all the more so when the perceived likelihood of reoffending derives from a mental disorder suffered by the offender. All offenders are entitled to proportionate sentences based on the gravity of their offending conduct and personal circumstances. Any condition, including a medical condition, which diminishes the offender's subjective culpability should logically provide a ground for reducing the otherwise deserved sentence. As against this, the need to protect the community to the greatest extent possible from future offending may point to an extended period of custody. So, we have the awkward situation where the same factor, such as mental disorder (a term used nowadays to encompass both mental illness and mental disability or learning difficulty), ends up being treated as both mitigating and aggravating.

That, however, is merely the moral difficulty presented by such cases. There is also the empirical problem of identifying those who are likely to re-offend and how they are likely to re-offend. Accurate predictions of dangerousness, whether based on clinical or actuarial assessments, are accepted to be impossible. A certain percentage, sometimes a high percentage, of false positives invariably occurs. (A false positive refers to a case in which a certain outcome is predicted, e.g. that a particular individual will re-offend, but which, in fact, does not).[20] Nevertheless, some countries have enacted laws which empower or require courts to pass longer sentences, or even indefinite sentences, on those predicted to commit serious offences in the future. Exactly 35 years ago, Professor Anthony Bottoms coined the term "bifurcation" to describe this policy.[21] Ordinary or "run-of-the mill" offenders would receive ordinary sentences while a special class of dangerous offenders would receive lengthier custodial terms. It was unambiguously implemented in England and Wales in the Criminal Justice Act 1991 which generally adopted a just deserts approach to sentencing by requiring that sentences should be commensurate to the gravity of the offence(s) of conviction. However, s. 2(2) of the Act provided:

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[20] Ashworth, *Sentencing and Criminal Justice* (5th ed., Cambridge University Press, 2010), 84-85.

[21] Bottoms, "Reflections on the Renaissance of Dangerousness" (1977) 16 *Howard Journal* 70. See also Henham, "The Policy and Practice of Protective Sentencing" (2003) 3:1 *Criminal Justice* 57.

"The custodial sentence shall be-

(a) for such term (not exceeding the permitted maximum) as in the opinion of the court is commensurate with the seriousness of the offence, or the combination of the offence and other offences associated with it; or

(b) where the offence is a violent or sexual offence, for such longer term (not exceeding that maximum) as in the opinion of the court is necessary to protect the public from serious harm from the offender."

This, then, was bifurcation writ large and, as might be expected, it caused its share of interpretive problems for the courts.

That society needs protection from certain offenders is beyond doubt. Consider, for example, one of the early decisions of the English Court of Appeal in relation to s. 2 of the 1991 Act, *R v Crow and Pennington*.[22] In the second of these unrelated appeals, Pennington was convicted of setting fire to the bed in his hotel room. He had numerous previous convictions dating back over 40 years, including one in 1990 for arson with intent to endanger life. When questioned by the police about the present offence, he said that he did it "because voices told me to". Medical evidence showed that he had various mental disorders and he indicated that he would probably do the same again. The trial judge was satisfied that this case called for an extended sentence and imposed eight years' imprisonment. The Court of Appeal agreed. Of course, this prompts the question as to what purpose the extended sentence really served. Suppose that the deserved sentence were five years' imprisonment. The sole purpose of imposing the additional three years would be to give the community some additional respite from further (possible) crimes by the offender.

This was the problem presented to the Court of Criminal Appeal in *People (DPP) v McMahon*,[23] the most significant Irish sentencing case of that past year and, indeed, of recent years. The accused pleaded guilty to serious assaults committed against two doctors at a psychiatric facility where he was being treated. One of charges to which he pleaded, a s. 4 assault, carried a maximum sentence of life imprisonment. The accused had a previous conviction for manslaughter for which he was sentenced to 10 years' imprisonment. The present offences were committed within eight months of his release from that sentence. Although there was medical evidence to suggest that, at the time of committing the offences, the accused was insane in the legal sense, he pleaded guilty and was sentenced to a total of 10 years' imprisonment, without credit for 56 weeks already spent in custody. The DPP referred the case to the Court of Criminal Appeal under s. 2 of the Criminal Justice Act 1993, arguing that in the circumstances of the case, the trial court was empowered, if not obliged, to impose a life sentence, presumably for public protection.

The Court of Criminal Appeal, per O'Donnell J., dismissed the application. The court noted, correctly, that many jurisdictions had struggled with this problem and some had sought to address it with legislation (e.g. s. 2 of the English Criminal Justice Act 1991

22 (1995) 16 Cr. App. R.(S.) 409.
23 [2011] IECCA 94.

mentioned above). It also noted that the application depended on the happenstance that the more serious offence to which the accused pleaded carried a discretionary life sentence. The argument could not have been made if the offence carried a determinate maximum sentence. This was a theoretically valid point, though it is noteworthy that most offences that may result in serious harm do, in fact, carry either mandatory or discretionary life sentences (e.g. murder, manslaughter, rape, aggravated sexual assault, defilement of a child under the age of 15 years, causing serious harm (the s. 4 offence in this case), robbery, arson, false imprisonment, human trafficking offences). More significantly, the Court said:

> "On the other hand, a sentence of imprisonment seems an inappropriately indirect and crude way of dealing with the offender suffering from a serious psychiatric illness. In this case, what the Respondent clearly requires is detention in a hospital setting where he can be treated, and all the more so because his current therapy requires medical supervision and monitoring. Furthermore it is plain that the detention of persons on the grounds that they pose a threat to the public raises issues of compatibility with the European Convention on Human Rights and Fundamental Freedoms, and even more clearly, the Constitution of Ireland. Indeed, it was the perceived inadequacy of the existing regime in this regard, which gave rise to the enactment of the Mental Health Act 2001." [24]

The Court adopted a well-known statement by the High Court of Australia in *R v Veen (No.2)*[25] to the effect that while public protection may be considered when determining an appropriate sentence, the principle of proportionality precludes the imposition of extended sentences for public protection. That, the Court said, seems to reflect Irish common law as well. While acknowledging that the matter could be addressed by legislation, the Court was careful to say that any legislative change would require a good deal of debate and research and would have to be in conformity with the Constitution and the European Convention on Human Rights. It is, of course, generally accepted that preventive detention as a penal measure is not constitutional in Ireland, following *People (Attorney General) v O'Callaghan*[26] and later authorities. However, as the Court in *McMahon* also recognised, the accused in that case clearly required care and treatment but this could probably be best provided by invoking the relevant provisions of the Mental Health Act 2001.

In the background to this case was a rather awkward issue which the Court did not address, probably because it felt bound by a Supreme Court decision on the matter. There was medical evidence that the accused was, at the time of the offence, insane within the meaning of the Criminal Law (Insanity) Act 2006. Indeed, it was part of the DPP's argument that if "the appropriate plea" of not guilty by reason of insanity had been entered and accepted, the accused would have been subject to the detention provisions of the 2006 Act. The accused had, of course, thwarted this possibility, by pleading guilty. Should a court be permitted to refuse to accept a guilty plea in these circumstances? This was the question in *People (DPP) v Redmond*[27] which had a

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24 [2011] IECCA 94 at [20].
25 (1988) 164 C.L.R. 465.
26 [1966] I.R. 501.
27 [2006] 3 I.R. 188.

background rather similar to *McMahon* and the charge, in fact, was the same. The sentencing judge (Haugh J, then on the Circuit Court) stated a case for the Supreme Court asking whether he could decline to accept a guilty plea "where there are substantial grounds for believing that the accused was insane at the time [of the alleged offence]". *Redmond* was complicated, however, by psychiatric reports indicating a possibility at least that the accused man's illness was induced by drug or alcohol consumption. By a majority of four to one, the Supreme Court held that in the particular circumstances, the sentencing judge had to accept the guilty plea. Geoghegan J. delivered the principal majority judgment and seems to have been strongly influenced by the possibility that the accused was not in fact insane according to the *M'Naghten* rules. Significantly, however, he did say:

> "If there was a case, where on a reading of the book of evidence it seemed certain that there would have to be a verdict of insanity, it might well be that a judge in similar circumstances to these could force a change of plea. I intend to leave that as an entirely open question because I do not believe it arises in this case and should not be decided in those circumstances."

Kearns J., while agreeing with the answer proposed by Geoghegan J., said that a judge should not intervene to set aside a plea "unless there are quite exceptional circumstances arising in the particular case." Fennelly J., also agreeing with the answer of Geoghegan J., appears to have taken the most categorical approach. He held that a person who is sane at the time of the plea is entitled to choose whether to raise the insanity defence. Macken J. agreed with all three. Denham J. dissented, holding that the trial judge in this case was entitled to decline to accept the plea of guilty. Her essential reasoning was that it was unjust that a person should be convicted and punished for a crime he did not commit, even if he pleaded guilty. Overall, therefore, *Redmond* cannot be interpreted as an outright rejection of the proposition that a trial judge must invariably accept a guilty plea even where there is strong evidence that the accused was insane within the meaning (nowadays) of the Criminal Law (Insanity) Act 2006.

To conclude, however, on *McMahon*: this is a very enlightened decision and a welcome contrast to the rather fudged reasoning found in many English and American decisions on the same topic which typically begin by paying lip service to the principle that mental disorder should be a mitigating factor, but then authorise the imposition of extended sentences in the interests of public protection. Nobody denies that public protection is a matter of vital importance – it is the most fundamental justification for the entire criminal law – but, as the Court in *McMahon* points out, the criminal law is not the only means of promoting it.

DEPORTATION AND EUROPEAN LAW

Radical changes in Ireland's demographic profile over the past 15 years or so are naturally reflected in the criminal justice system. Recently-published results of the 2011 census show that the number of non-Irish nationals stood at 544, 357, representing

about 12 per cent of the overall population.[28] The profile of the prison population has changed accordingly. European Union nationals, other than Irish nationals, accounted for 12.9 per cent of those committed to prison in 2010.[29] Deportation can arise in a variety of contexts and, in drug trafficking cases in particular, may involve non-EU citizens. A decision to suspend sentence on condition that a s. 15A offender left the country for good was upheld in *People (DPP) v Alexiou.*[30]The accused in that case was South African and the Court of Criminal Appeal, per Murray C.J. was careful to point out that "different considerations obviously arise in relation to citizens and EU nationals".[31]

The concept of European citizenship was introduced by the Maastricht Treaty of 1992, and is now governed by the Treaty on the Functioning of the European Union (TFEU) (Part Two). Every national of an EU member state is automatically a citizen of the European Union. Article 21(1) of the TFEU provides:

> "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect."

More detailed provision is made in Directive 2004/38/EC (April 29, 2004) which deals with the rights of citizens and their family members to move freely within the territory of the member states. Citizenship of any political entity has little meaning or value if its holders can readily be deprived of it because of some change of status which, for this purpose, could include being convicted of a criminal offence. Thus, in *Trop v Dulles*,[32] the United States Supreme Court held that it was unconstitutional to revoke citizenship as a criminal punishment. The EU Directive, which has been transposed into Irish law,[33] does, however, allow for expulsion of EU citizens and their family members from host states in certain limited circumstances. Most pertinent for present purposes is Article 28 (2) and (3) which reads:

> "(2) The host Member State may not take an expulsion decision against Union citizens or the family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.
>
> (3) An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they:
>
> (a) have resided in the host Member State for the previous ten years; or

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28 *This is Ireland – Highlights from Census 2011* (Dublin: CSO, 2012).

29 Irish Prison Service, *Annual Report 2010* (Dublin, 2011).

30 [2003] 3 I.R. 513.

31 [2003] 3 I.R. 513 at 525.

32 356 U.S. 86 (1958).

33 European Communities (Free Movement of Persons) (No.2) Regulations 2006, S.I. 656/2006 as further amended by S.I. 310/2008 and 146/2011.

(b) are a minor except if the expulsion is necessary for the best interests of the child, as provided for in the United Nations Convention on the Rights of the Chid of 20 November 1989."

Clearly, the policy is that long-term residence (for ten years or more) should provide enhanced protection against expulsion and the host state must be able to point to "imperative grounds of public security", as opposed to public policy, to justify the expulsion of such a person. This provision has recently been considered by the Grand Chamber of the European Court of Justice (ECJ) and has also been the subject of an advisory opinion by Advocate General Bot.

In *Tsakouridis*[34] the Court dealt with a reference for a preliminary ruling under Art. 234 EC from the Verwaltungerichtshof Baden Wűrttemberg (Germany) in which the principal question was:

> "Is the expression 'imperative grounds of public security' used in Article 28(3) of Directive 2004/38… to be interpreted as meaning that only irrefutable threats to the external or internal security of the Member State can justify an expulsion, that is, only to the existence of the State and its essential institutions, their ability to function, the survival of the population, external relations and the peaceful coexistence of nations."

The remaining questions dealt with the impact of absences from the State on the entitlement to the enhanced protected afforded by Art. 28(3). Mr Tsakouridis was a Greek citizen, although born in Germany in 1978, and since 2001 he had an unlimited residence permit in Germany. In 2007, he was convicted in Germany on eight counts of dealing in substantial quantities of narcotics as part of an organised group and was sentenced to six-and-a-half years' imprisonment. This was significant because, under German law, expulsion on imperative grounds of public policy if sentenced to five years imprisonment for one or more intentional offences.

The ECJ noted, first of all, that Directive 2004/38 "establishes a system of protection against expulsion measures which is based on the degree of integration of those persons in the host Member State, so that the greater the degree of integration of Union citizens and their family members in the host Member State, the greater the degree of protection against expulsion should be."[35] It also noted that "imperative grounds of public security" was "a concept which is considerably stricter than that of 'serious grounds' within the meaning of Art. 28(2).[36] Crucially, it then said:

> "Since drug addiction represents a serious evil for the individual and is fraught with social and economic danger to mankind…, trafficking in narcotics as part of an organised group could reach a level of intensity that might directly threaten the calm and physical security of the population as a whole or a large part of it". [37]

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34 Case C-145/09 *Tsakouridis* [2010] ECR 1-000.
35 Para. 25.
36 Para. 40.
37 Para. 47.

The court then proceeded to emphasise in some detail the need to consider the circumstances of each specific case and to ensure that the objective could not be attained by less strict means, having regard to various relevant factors.

The background to *P.I. v Oberbűrgermeisterin der Stadt Remsheid*[38] will be all too familiar to Irish readers. Mr I. was an Italian man, born in 1965, who had lived in Germany since 1987. In May 2006, he was sentenced to seven-and-a-half years' imprisonment for sexually abusing the daughter of his former partner. The victim was eight years old when the abuse, which included rape, began and it continued from 1990 until 2001. The German court found that he compelled her to have sexual intercourse with him on an almost weekly basis, often by threatening to kill her mother or brother. The German appeal court sought a preliminary ruling from the ECJ with a question couched in substantially the same terms as the first question in *Tsakouridis.* However, as the Advocate General noted, the essential question was whether sexual abuse of the kind committed by P.I. could constitute an imperative ground of public security to justify expulsion.

The Advocate General said that the concept of public security implied the commission of particularly serious criminal conduct, but it must also be conduct the effects of which go beyond the harm caused to individual victims. He therefore concluded:

> "Although Mr I is undoubtedly a threat in the family sphere, it has not been established, by the nature of the act committed, that he is a threat to the security of the citizens of the Union… However repellent it may be, the act of incest does not seem to me to involve, as regards public security, the same kind of threat as that defined by the Court in [*Tsakouridis*]."[39]

Then came the sting. The Advocate General, adopting, it seems, observations submitted by the Netherlands Government, held that Mr. I was not entitled to the enhanced protection afforded by Article 28(3) in the first place. He reasoned along the following lines. When Article 28(3) is read in conjunction with the Preamble (and recitals 23 and 24 in particular), it is clear that the enhanced protection accorded by that Article to those who have lived in the host country for ten years is based on the assumption that such a person will, at the end of that period, have become fully integrated into the society of the host country. Integration, in turn, is intended to promote social cohesion which is one of the fundamental objectives of the EU. Mr I had, in the opinion of the Advocate General, had not become integrated to this degree. The Advocate General said:

> "Although the integration of a Union citizen is, in fact, base on territorial and time factors, it is also based on qualitative elements. Now, it seems clear to me that Mr I's conduct, which constitutes a serious disturbance of public policy, shows a total lack of desire to integrate into the society in which he finds himself and some of whose fundamental values he so conscientiously disregarded for years. Today, he relies on the consequences of having completed a period of 10

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38 Case C-348/09. Opinion of Advocate General Bot delivered on March 6, 2012.

39 Para. 44.

> years which was not interrupted because his conduct remained hidden owing to the physical and moral violence horribly exercised on the victim for years."[40]

In the previous paragraph, the Advocate General had noted that Mr I, with effect from his third year of residence in Germany (1990), had begun to sexually abuse a child and that abuse continued until 2001, which was within the 10-year period preceding the expulsion measure. He therefore proposed that the essential question be answered as follows:

> "Article 28(2) and (3) is to be interpreted as meaning that a Union citizen cannot rely on the right to enhanced protection against expulsion under that provision where it is shown that that citizen is deriving that right from criminal conduct constituting a serious disturbance of the public policy of the host Member State."

The advice of the Advocate General is not, of course, binding on the Court but it will certainly be interesting to watch the Court's response to it. Defence as well as prosecution lawyers have good reason to pay attention to collateral consequences of conviction including the possibility of deportation. This is well illustrated by the majority decision of the United States Supreme Court in *Padilla v Kentucky*,[41] which dealt with the duties of defence counsel when advising a client who is contemplating a guilty plea. In that case, counsel failed to advise the petitioner, who had lived in the United States for 40 years, that he would almost certainly face deportation if convicted of the drug offences with which he was charged. In fact, counsel had told him that, because of the length of time he had lived in the United States, he "did not have to worry about his immigration status". This advice was seriously flawed because deportation was virtually mandatory for the offences in question and, once the Padilla pleaded guilty, deportation proceedings were initiated. He was denied relief by the Supreme Court of Kentucky, but the United States Supreme Court (with a predictable dissent by Justices Scalia and Thomas) reversed and remanded the case. The majority judgment is significant for its reaffirmation of the principle that before pleading guilty, a defendant is constitutionally entitled to "the effective assistance of competent counsel"[42] and also for stressing the importance of taking the collateral consequences of conviction into account. The Court did not in call into question the validity of those consequences but it dwelt at length on the harsh impact which deportation in particular may have on a convicted offender.

Cases have recently arisen in Ireland where judges have suspended prison sentences on the condition that the offender leave the country and not return for a specified period. In some instances, the specified period has been very long, up to ten years in one case that comes to mind. This clearly creates a legal problem when the offence is not particularly serious and when the offender is an EU citizen. Cases may arise where such a measure would be acceptable, but it is generally best avoided. Courts would be better advised to impose whatever sentence would be appropriate if the offender were an Irish citizen.

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40 Para. 60.

41 559 U.S. – (2010)

42 *McMann v Richardson* 397 U.S. 759. 771 (1970); *Strickland v Washington* 466 U.S. 668, 686 (1984).

A BRIEF ROUNDUP OF OTHER NEWS

- Aside from *McMahon*, the other major sentencing judgment of the Court of Criminal Appeal in recent times was that in *People (DPP) v Daly* [2011] IECCA 104 which upheld a 25-year sentence for a drug-dealing offence, though the amount of drugs involved could have had a street value of €440 million. The judgment, by McKechnie J. is very significant for its treatment of a number of issues, and especially the general principles governing the sentencing of co-defendants.

- The Criminal Procedure Act 2010 (s.4) amends s. 5 of the Criminal Justice Act 1993 to make formal provision for the receipt of victim and family impact statements. It expressly provides for statements from immediate family members of homicide victims and makes better provision for tendering impact evidence on behalf of surviving victims who are vulnerable on account of age or disability.

- There is currently in preparation a European Directive on the Rights of Victims of Crime. Ireland has opted into this proposal under the terms of the Lisbon Treaty and has undertaken to promote the proposed directive when it assumes the Presidency of the EU next year, if it has not been adopted by then. See http://ec.europa.eu/justice/policies/criminal/victims/docs/com_2011_275_en.pdf

- More bad news for Abu Hamza and some of his associates, this time from the European Court of Human Rights which has cleared the way for their extradition to the United States. The case is, however, significant in the context of extradition generally and, implicitly, European Arrest Warrant cases by specifying in some detail the circumstances (and they are now very limited) in which persons may resist extradition on the ground that are likely to suffer a breach of their rights under Article 3 of the European Convention on Human Rights if sent to the requesting state. The (very long) judgment of the Court is formally entitled *Babar Ahmad v United Kingdom* and was delivered on April 10, 2012.