ECBA Conference Autumn 2010

Ireland

National delegate report:

The political situation in Ireland is dominated by our economic difficulties. Accordingly there is a major practical impact on the operation of the criminal justice system by the withdrawal of public funds from a number of essential services, including payments to defence lawyers and Garda overtime.

Naturally however Governments that have difficultly on the economic front attempt to shore up their popularity by bringing in repressive measures on the criminal justice side.

In Ireland during the last 12 months there have been some four major concluded pieces of such legislation and further legislation is proposed.

Legal Aid:

Prior to the present economic difficulties a 2.5% increase in legal aid fees had been proposed, in line with other wage increases to public service employees. Although legislated for this increase was rescinded.

Subsequently there have been two separate 8% cuts imposed on the fees payable to legal aid practitioners. This is having major repercussions in terms of the viability of practices. However it has to be said that there is a view abroad, even among the practising profession, that criminal lawyers are to a certain extent less badly affected by the recession than other sectors.

It is expected that Government will seek a further reduction in public service contract payments in the next Budget in December 2010 with some speculation as to a 20% cut.

Government had considered in the past changing the provision of legal services from private practitioner to public defender. Such a proposal had obvious constitutional drawbacks, but it was the economic argument that ultimately convinced government not to change from the existing highly flexible model. However as a minimum government are using the possibility of introducing public defender once again as a negotiating tool.

Legislation:

Since 2009 Government has introduced the following major pieces of legislation:

Criminal Justice (Surveillance) Act, 2009

Prior to the introduction of this Act there was of course a substantial amount of surveillance carried out by the Irish police authorities. However it was not regulated and probably would fall vulnerable to Strasburg tests. This caused no real difficulty for the police previously because they were inclined to use surveillance purely for the purposes of information gathering rather than relying on the surveillance itself as evidence. This is partly to do with a reluctance to disclose their surveillance methods and in all probability was also reflective of a desire to keep their police activities from undue supervision by for instance courts.

However the hysteria around "organised" crime is such that the authorities are being provided with further powers in this regard.

Criminal Justice (Miscellaneous Provisions) Act 2009 further reduced the limited circumstances in which licensed firearms can be held. It also introduced a substantial number of amendments of a technical nature to the European Arrest Warrant Act 2003 which had of course also been substantially amended in the 2005 Act.

The Act also further restricted the availability of bail and introduced a requirement for the first time that accused persons relying on expert evidence had to give notice to the State in advance. While the State obviously disclosed their case as part of the book of evidence procedure there is nothing to prevent them adducing additional evidence late in the day even after the commencement of the trial. To that extent this provision which applies to the defence is less advantageous. It is the subject of a pending judicial review on equality of arms grounds.

Criminal Justice (Miscellaneous Provisions) Act, 2009

Criminal Justice (amendment) Act, 2009

Criminal Justice Money Laundering and Terrorist Financing Act) 2010

Criminal Justice (Psychotrophic Substances) Act, 2010

Criminal Procedure Act, 2010

Controversially this has a provision which will remove the double jeopardy principle and will provide that a person can be retried in serious cases on the basis of new evidence where they had previously been acquitted. Needless to remark it is unwelcome .

European Arrest Warrant:

Ireland has been the subject of much international criticism about the delays in requests to Ireland being complied with. This has lead to a number technical changes to the Law relating to the arrest warrant, specifically removing the right of automatic appeal from a person whose surrender has been ordered by the High Court to the Supreme Court. An appeal can now only be brought on a certified point of law. As an administrative measure arrest warrant cases are now fast tracked both through the High Court and where it arises

through the Supreme Court on appeal. However it remains the situation that it easily takes an average of 12 – 18 months to conclude a contested arrest warrant case.

Initially the public were not greatly concerned with the implications of the arrest warrant system, given that it was essentially presented by Government as a method by which fugitives from other European Countries were simply returned there to face trial. Indeed such concern as there was about the arrest warrant system was on the part of the Government who became increasingly uncomfortable with the substantial cost of complying with requests, estimated by one Irish High Court Judge at something of the order to 20,000 – 30,000 euro each. In cases where the offences sought were trivial (but still within the framework decision) the State was concerned about proportionality. It is understood the Ireland will support a proposed amendment to the framework decision to give states leeway in that regard.

However there are a number of cases now pending before the Irish courts where the requesting State is relying on the extraterritorial provisions of their law. Even though Irish Law contains many such extraterritorial provisions, particularly in the field of terrorism, the general public have become increasingly alarmed at the prospect that "Irish Offences" could be tried abroad. The most controversial and perhaps best known of these cases is the case of Bailey V Minister for Justice Equality and Law Reform. In that case Ian Bailey is being sought for surrender to France where it is proposed to "try" him for the murder of a French national Sophie Toscan du Plantier in west Cork in December 1996.

Ian Bailey was the self confessed prime suspect for the murder and his prosecution was considered by the Irish authorities. They however decided not to prosecute, a decision made many years ago. However a French request for his surrender has been received, and while it was once a bar to surrender that the Irish authorities had determined not to prosecute, that is no longer the case.

The general public are now very interested in the possibility that a person might be tried in a foreign country for an offence alleged to have been committed in Ireland. Lawyers previously unfamiliar with the arrest warrant system are intrigued that a person might find themselves on trial in a country where they might never have been for an offence allegedly committed in their home State, but tried according to the laws of evidence of the requesting State.

The application before the High Court is likely to be a controversial one and will be a test of Ireland's "commitment" to the arrest warrant system.

In another case where the Supreme Court have heard the arguments and have reserved their judgement. Olsson –v- The Minister for Justice, Equality and Law Reform, one of the issues is whether or not Mr. Olsson should be returned to the Kingdom of Sweden for "trial". A controversy within the case is whether or not upon his return he will be submitted to further investigation before being placed on trial. The State downplay the significance of the procedural steps pre-trial and suggest that they are simply a mechanism of confronting the suspect with the allegation and giving him an opportunity to comment before a trial proceeds. Mr. Olsson of course argues that the Swedish

procedure is not a trial simpliciter and that there remains potential for evidence gathering, and holding him incommunicado prior to trial.

Interestingly during the legal argument one of the more recent appointments to the Supreme Court openly speculated as to whether or not Irish decisions in the past, which had been to the effect that we would not surrender to third countries where their process was partly investigative and partly trial was correct. The particular judge may be preparing the ground to say that the framework decision obliges Ireland to respect the civil law trial system, including its, often lengthy, investigative remit. Previously Ireland had sought undertakings from requesting States that there would be a trial and no more. The decision in Olsson may dramatically change this position.

European Court of Human Rights

2010 has been a busy year for Ireland before the European Court of Human Rights. There have been two Irish cases heard before the Grand Chamber. One of those McFarlane –v- Ireland application number 31333/06 decided on the 10th September found against Ireland on the basis that Irish law provides no effective remedy for unjustified delays in criminal proceedings. They found a violation of Articles 13 (right to an effective remedy) and Article 6(1) (right to a fair trial within a reasonable time). The facts are complex summarised in the attached press release. The full judgment is of course available on the court website.