USING THE ECHR IN IRISH COURTS: MORE WHISPER THAN BANG?

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The European Convention on Human Rights Act 2003 is a complex piece of legislation and one in which there is a clear structure to claims that might be made under the Act. However, before considering the different kinds of claims it is important to note that when we are speaking about the use of the ECHR in Irish law in the post-ECHR Act context, what we are really speaking about is the use of the Convention *through the prism of the Act*. In other words, the Convention itself remains international law that is not, *per se*, binding in domestic law. Instead of traditional incorporation of an international treaty, what was done in the 2003 Act was the creation of a scheme by which parts of the Convention were placed into legislation and therefore *became* domestic law; it is perhaps more accurately termed the transposition of the Convention than its incorporation. The Schedules of the ECHR Act 2003 makes clear that Irish law now contains provisions that are identical to Articles 1-59 of the Convention, Protocol No. 1, Protocol No. 4, Protocol No. 6, and Protocol No. 7 to the Convention. The fact that what we are actually dealing with here is *domestic law* is a significant one, and one that is often overlooked in commentary on the Act and on the Convention. It is significant because—as is considered further below—it means that Irish Courts will interpret the meaning of the domestic law by reference to the interpretation of the Convention in other legal systems, including in the European Court of Human Rights itself, but that *fundamentally* the meaning and operation of the Act is a matter of domestic law governed by Irish courts. Our focus, whenever we speak about the role and operation of the Convention in Irish law, must therefore be on the role and operation of the ECHR Act 2003.

The Scheme of the ECHR Act 2003

The basic structure of the ECHR Act 2003 has three parts, which build on one another. First is the interpretive obligation under s. 2:

> **2.**—(1) In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions.
>
> (2) This section applies to any statutory provision or rule of law in force immediately before the passing of this Act or any such provision coming into force thereafter.

Second is the performative obligation under s. 3:

3.—(1) Subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions.

(2) A person who has suffered injury, loss or damage as a result of a contravention of *subsection (1)*, may, if no other remedy in damages is available, institute proceedings to recover damages in respect of the contravention in the High Court (or, subject to *subsection (3)*, in the Circuit Court) and the Court may award to the person such damages (if any) as it considers appropriate.

(3) The damages recoverable under this section in the Circuit Court shall not exceed the amount standing prescribed, for the time being by law, as the limit of that Court's jurisdiction in tort.

(4) Nothing in this section shall be construed as creating a criminal offence.

(5) (*a*) Proceedings under this section shall not be brought in respect of any contravention of *subsection (1)* which arose more than 1 year before the commencement of the proceedings.

(*b*) The period referred to in *paragraph (a)* may be extended by order made by the Court if it considers it appropriate to do so in the interests of justice.

Third is the provision of a remedy of last resort in the form of a declaration of incompatibility under s. 5

5.—(1) In any proceedings, the High Court, or the Supreme Court when exercising its appellate jurisdiction, may, having regard to the provisions of *section 2* , on application to it in that behalf by a party, or of its own motion, and where no other legal remedy is adequate and available, make a declaration (referred to in this Act as "a declaration of incompatibility") that a statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions.

(2) A declaration of incompatibility—

(*a*) shall not affect the validity, continuing operation or enforcement of the statutory provision or rule of law in respect of which it is made, and

(*b*) shall not prevent a party to the proceedings concerned from making submissions or representations in relation to matters to which the declaration relates in any proceedings before the European Court of Human Rights.

(3) The Taoiseach shall cause a copy of any order containing a declaration of incompatibility to be laid before each House of the Oireachtas within the next 21 days on which that House has sat after the making of the order.

(4) Where—

(*a*) a declaration of incompatibility is made,

(*b*) a party to the proceedings concerned makes an application in writing to the Attorney General for compensation in respect of an injury or loss or damage suffered by him or her as a result of the incompatibility concerned, and

(*c*) the Government, in their discretion, consider that it may be appropriate to make an *ex gratia* payment of compensation to that party ("a payment"),

the Government may request an adviser appointed by them to advise them as to the amount of such compensation (if any) and may, in their discretion, make a payment of the amount aforesaid or of such other amount as they consider appropriate in the circumstances.

(5) In advising the Government on the amount of compensation for the purposes of *subsection (4)*, an adviser shall take appropriate account of the principles and practice applied by the European Court of Human Rights in relation to affording just satisfaction to an injured party under Article 41 of the Convention.

These provisions are all linked; their structure determines what we might say are the three discrete, although connected, claims that one might make under the ECHR Act 2003. The first claim is that a piece of legislation or a rule of law ought to be interpreted under s. 2 in a process that we might call 'interpreting up' the provision in a way that makes it align with the state's obligations under the Convention. This is a role that we clearly place in the hands of the courts, although as we will see below the extent to which the Irish courts are willing to embrace that role is not entirely clear. The second kind of claim that might be made the is that an organ of the state has failed to perform their functions in a manner compatible with the state's obligation under the Convention *where those functions* are determined by law *that has been interpreted* in accordance with s. 2. A section 3 claim, therefore, is preceded in practice by a s. 2 process of interpretation or, at least, by a consideration of *whether* the relevant law can be interpreted up under s. 2. Finally for our purposes, s.5 of the ECHR Act 2003 outlines the third kind of claim that can be made, namely that a law (statute or rule of law) is incompatible with the Convention, cannot be interpreted up in a manner that ensures its compatibility, and is therefore conclusively incompatible. This is, of course, the well known Declaration of Incompatibility with which we are so familiar.

The purpose of this paper is to go through the three different operative sections of the Act, identify the problems and potential with each of them, consider the role that the decisions of the European Court of Human Rights play in relation to each of them and, through that process of problematisation, to characterise our experience of the ECHR Act 2003 so far as more of a whisper than a bang. However, lest we should think that all is lost in relation to the transformational potential of the Act, I conclude with some suggestions drawn from the potentialities identified within the Act itself, for how this whisper can transform into a bang.

Interpretation of Law by reference to the ECHR

The interpretive obligation in s. 2 has enormous potential to transform the operation of Irish law. Understandably enough it was not feasible to do an audit of every law (common law, equity and statute) in operation in Ireland at the time of the coming into effect of the ECHR Act and amend them as required to comply with the state's Convention-based obligations. Instead, the interpretive provision in s. 2 was intended to ensure that courts would be able to interpret and apply law in a compatible manner

inasmuch as possible taking into account the limitations on judicial function laid down by our constitutional commitment to a separation of powers.

The scope of section 2 is quite clear; it applies to "any statutory provision or rule of law" which includes primary and delegated legislation, regulations and rules enacted under legislative authority, common law and equitable rules. This broad scope, of course, is sensible when one appreciates that the purpose of an act such as the ECHR Act 2003 is to ensure that in every context in which the operation of law touches the individual that should be compliant with the Convention. This is not, however, to take things too far; it is clear that a general state of affairs will not engage s. 2*even if that state of affairs* leaves someone in a situation where his or her rights under the Convention are not fully realised and enjoyable (*MvD v L* [2009] IESC 81).

The interpretive function under s. 2 is limited to the work of courts (in contrast with s. 3 of the Human Rights Act 1998), and in this respect it is clear that courts are limited in their interpretive function by what we might call 'possibility'. In this respect it is clear that, for example, a court could not interpret a law into an unconstitutional content, even if that unconstitutional content was in fact convention-compatible. Constitutionality and possibility might, then, be said to have a close relationship here. What is more problematic from the perspective of the limits of the interpretive obligation here is whether the perceived boundaries of the separation of powers operates as a limitation on s. 2. In *Pullen*, for example, the High Court refused to 'interpret up' provisions of the Housing Act 1966 into a Convention-compatible shape because of concern that so doing would constitute judicial legislating rather than interpretation.

Section 2, then, calls forth the long standing debates with which we are familiar in this jurisdiction on the thin line between judicial interpretation and so-called judicial law-making. We might say that this is presented as a tension between minimalist and maximalist approaches to s. 2. In *Foy v an tÁrd Chláraitheoir* [2007] IEHC 470, McKechnie J. gave a somewhat mixed view on whether minimalism or maximalism would be appropriate here. On the one hand he clearly endorsed the celebrated approach of the UK House of Lords in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 where a legislative provision was interpreted up to such an extent as to give it an essentially different meaning to that which it was previously understood to hold. In that case Lord Nicholls had held that "Section 3 [of the HRA] may require a court to depart from the unambiguous meaning the legislation would otherwise bear….Section 3 may require the court to…depart from the intention of the Parliament which enacted the legislation" ([30]).

However, having endorsed that approach McKechnie J. then went on to apply a minimalist approach to the Civil Registration Act 2004 and to declare it incompatible under s. 5 rather than to interpret it up in a way that compelled gender-related changes to birth certificates. This was certainly connected with the fact that counsel for Foy had not focused their submissions on s. 2 and had, in fact, perhaps not given quite as much attention to s. 2 as one might think would have been appropriate. McKechnie J. noted that he was "most reluctant to go further than what is absolutely required" where the point had not been heavily relied upon in submissions and therefore took a minimalist approach, noting that a court could not "produce a meaning which is

fundamentally at variance with a key or core feature of the statutory provision or rule of law in question" ([56]).

Whatever about hints at maximalism in *Foy*, however, the approach of O'Neill J. in *DCC v Gallagher* (Unreported, High Court, 11 November 2008) suggests an extremely restricted role for s. 2. In outlining how a s. 2 interpretive process would be undertaken, the Court held that

> …the starting point in attempting to construe this section in a Convention compliant way is to first determine the correct construction without regard to the Convention and having done that to then see whether it is possible to impose or intertwine a different meaning whether that is necessary to avoid incompatibility with the Convention. Where it is not possible to achieve this without breaching the rules of law relating to interpretation, and where there an evident breach of a Convention right…the proper solution is a declaration of incompatibility.

Cliona Kelly and I have previously suggested that approaching a s. 2 process with the pre-ECHR Act 2003 or 'ordinary meaning' as the point of departure leaves little opportunity for meaningful s. 2 interpretation.[1] Not only that, but it seems to undermine the relatively expansive role handed to the courts by the Oireachtas in s. 2. A turn to maximalism in relation to s. 2 would embrace the focus in the provision on Convention-compliant interpretation "in so far as possible" while respecting the role of constitutionality as a reasonable and important limitation. This is not a case of courts possibly usurping the legislative function for it was the legislature itself that handed that function to the Courts, especially in relation to provisions introduced before the passage of the ECHR Act 2003.

Performance of functions in a manner compatible with the ECHR

Section 3 of the ECHR Act 2003 contains what I consider to be the provision with the greatest transformative potential: the performative obligation. If we consider that the real purpose behind the ECHR Act 2003 and, indeed, the Convention itself is to change the behaviour of states and secure the enjoyment of individual rights *rather than* litigation, it must surely be the case that a provision such as s. 3 that is intended to introduce a cultural shift in "organs of the state" ought to be a real catalyst for positive change. That said, s. 3 is itself drafted in a way that almost invites litigation and certainly does not make entirely clear to organs of the state what it is that they are supposed to do to act in a more rights-compliant manner. Neither does it really empower those organs to change their behaviours to the extent that may be required, as much of their activity (including activity that violates Convention-based rights) may be mandated by legislation in relation to which they rely on the political branches of the state to act to amend that legislation. Section 3 therefore encapsulates, in my view, the promise and the short fallings of the ECHR Act 2003.

The provision applies only to organs of the state, defined in s. 1(1) as follows:

[1] de Londras & Kelly, *European Convention on Human Rights Act: Operation, Impact and Analysis*, (2010), Chapter 4.

> "organ of the State" includes a tribunal or any other body (other than the President or the Oireachtas or either House of the Oireachtas or a Committee of either such House or a Joint Committee of both such Houses or a court) which is established by law or through which any of the legislative, executive or judicial powers of the State are exercised;

So, section 3 can be applied to tribunals (but not courts) and any body "established by law" or exercising "any of the legislative, executive or judicial powers of the State" *and*, it seems, any other body that might be judicially included within the definition, s. 1(1) not being expressed in exhaustive terms. As a matter of certainty this provision means that any body created through legislation is under a s. 3 obligation *regardless* of whether or not that body is engaging in public functions. In this respect the ECHR Act 2003 at least escapes the difficult question of public, private and hybrid authorities encountered by those grappling with the Human Rights Act 1998. It is not, however, at all clear that the bodies seemingly included under s. 3 would be aware of their inclusion therein. Take, for example, the ESB. This was established by the Electricity Supply Board Act 1927 and so was established by law. Is the ESB therefore under an obligation to ensure that when, for example, it cuts off someone's electricity supply it is cognisant of the Convention-based rights of that individual? What if, for example, someone's heating supply including hot water was entirely dependent on electricity supplied by the ESB and because of outstanding arrears th supply was cut off, resulting in the person dying from hypothermia or the person's small child becoming severely ill? Has the ESB performed its functions in a Convention compliant manner there? What would it mean to perform functions in such a manner in any case? And, to highlight the under-inclusiveness of the provision, if the ESB is included in s. 3 why ought private suppliers not established by law like Airtricity also be subject to such performative obligations? At the very least some clarity is needed on which organisations have s. 3 obligations and how those obligations are to be fulfilled.

That second question brings into sharp relief the meaning of the limitation or savings clause in s. 3. Organs of the state are obliged to perform their functions in a Convention-compliant manner "[s]ubject to any statutory provision…or rule of law". What does this mean? There are, clearly, two possible interpretations. On the one hand is the literal interpretation that suggests that as long as the organ of state is acting under legal authority *as interpreted under s. 2* then there can be no breach of s. 3 *even if* individual rights are violated. We might call this the literal interpretation. The second option is more expansive and it is to suggest that what this savings clause really means is that organs of the state must perform their functions in the *least violatory manner possible*. This latter interpretation was favoured in *Pullen* [2009] IEHC 452 and certainly makes sense from a rights-protection perspective. It would impose an administrative burden on organs of the state to survey the possible avenues available to then, assess the Convention-compatibility of each of them, and select the least violatory one but such an administrative burden is quite consistent with bills of rights legislation in other jurisdictions. The difficulty with this—and the reason why Kelly & I have raised doubts about the correctness of the *Pullen* interpretation—is that, while favourable from a rights-protection perspective this is not what the Act requires on a literal reading. We do not know yet whether the *Pullen* approach will be favoured by the Supreme Court, which should address this matter in the *Gallagher* appeal, judgment for which is expected shortly. What we do know, however, is that

either way the first step must be an attempt to interpret up under s. 2 (reinforcing once more the role that maximalism might play there) and *then* a claim under s. 3. Certainly a 'least violatory' approach here would really catalyse substantial cultural shifts within the organs of the state, but what is vital is that some certainty is injected into s. 3—and quickly—so that we know what organs of the state are actually required to do.

It would also be very much welcome if we could also achieve some certainty about what a finding of s. 3 breach might give rise to. We know that damages are possible and, indeed, that they can be calculated along constitutional-damages lines and take into account anticipatory harm (*Pullen*) but what would surely be preferable would be the granting of injunctions. After all, what we are interested in here is *remedying violations* and especially *preventing violations*. Injunctive relief does this in a way that damages simply cannot. However, there has been some judicial caution here with Irvine J. in *Pullen*, for example, not granting an injunction because as she rightly noted the legislation in question remains in force and it would, therefore, be a strange situation for a court to prevent an organ of the state from acting under valid legislative authority. In the context of a case relating to a statutory provision that seems a defensible (although not inevitable) judicial position. However, section 3 is also clearly concerned with exercises of discretion and administrative functions and in such circumstances injunctive relief has been granted and should remain available as s.3 has a role in judicial review proceedings.[2]

Declarations of Incompatibility as a Remedy of Last Resort

The Irish Declaration of Incompatibility is like a cubic zirconia engagement ring: shiny, splendid looking and attractive but practically worthless apart from its sentimental value. It a remedy of last resort under the ECHR Act 2003, available in any proceedings where there is a rational connection between the statutory provision or rule of law in question and the breach complained of and established. It is available only where "no other legal remedy is adequate and available", meaning that one would generally have to establish that the provision or rule in question is not unconstitutional and therefore to be struck down (*Carmody v MJELR* [2009] IESC 71), that the legislation or rule of law cannot be interpreted up under s. 2, and that neither damages nor injunctions are available and adequate. The inclusion of a declaration of incompatibility in the Act was clearly influenced by its inclusion in the UK's Human Rights Act. In that jurisdiction a DOI is really an innovative and particularly useful remedy, especially since a political culture of responding to such Declarations by changing the law in relatively short order has now developed. In Ireland, however, I am coming increasingly to the view that DOIs are utterly ineffective as remedies on their own. First the law in question remains in force and, indeed, there can be multiple DOIs in relation to the same piece of law and every time someone is having that law applied to them they must go through the process of acquiring a DOI again. Furthermore even if someone succeeds in achieving a DOI in their case the law in question can still be applied to them; a situation that we would consider frankly farcical in any other situation but one which arises not from the decisions of the courts but from the design of the Act itself. DOIs are dependent for

[2] *Meadows v MJELR* [2010] IESC 3; *O'Donnell v South Dublin County Council* [2007] IEHC 204; *Bode v MJELR* [2006] IEHC 341 and [2008] 3 IR 663.

their success on one factor alone that has so far been in extremely short supply: political will. Certainly moves are afoot to introduce gender identity legislation as a result of *Foy*, but time is ticking and change is slow. Furthermore in the Housing Act cases, relating to a provision that is now the subject of multiple DOIs, the government has insisted on costly Supreme Court litigation where it is beyond obvious that should this case get as far as the European Court of Human Rights a violation of Article 8 would be found.[3] Surely the real sign of political will would have been to amend the Housing Act 1966 instead of leaving local authorities and courts in an effectively impossible position of having to apply and enforce law that breaches individual rights.

Furthermore the European Court of Human Rights is itself unlikely to consider the DOI an effective remedy that one is required to exhaust before applying to Strasbourg. In the context of the UK's version of the DOI this may not be the case; certainly *Burden v United Kingdom* (2008) 47 EHRR 38 suggests that "at some time in the future the practice of giving effect to the national courts' declarations of incompatibility by amendment of the legislation [may become] so certain as to indicate that s. 4 of the Human Rights Act is to be interpreted as imposing a binding obligation". That has, arguably, happened in the UK especially since DOIs there are leading to legislative change even in hyper sensitive areas such as national security (Belmarsh, control orders, TPIMs). The same cannot, I would argue, be said for Ireland. Indeed, in *A, B & C v Ireland* ([2010] ECHR 3032) the Grand Chamber of the European Court of Human Rights addressed the question of whether a failure to seek a DOI under the ECHR Act 2003 would constitute a failure to exhaust domestic remedies. The Irish government argued that "While a declaration of incompatibility was not obligatory on the State, it would be formally put to the houses of the Oireachtas (parliament) and Ireland's record of solemn compliance with its international obligations entitled it to a presumption that it would comply with those obligations and give effect to declarations of incompatibility" ([134]). In response, the Court held

> [T]he Court does not consider that an application under the 2003 Act for a declaration of incompatibility of the relevant provisions of the 1861 Act, and for an associated *ex gratia* award of damages, could be considered an effective remedy which had to be exhausted. The rights guaranteed by the 2003 Act would not prevail over the provisions of the Constitution (paragraphs 92-94 above). In any event, a declaration of incompatibility would place no legal obligation on the State to amend domestic law and, since it would not be binding on the parties to the relevant proceedings, it could not form the basis of an obligatory award of monetary compensation. In such circumstances, and given the relatively small number of declarations to date (paragraph 139 above) only one of which has recently become final, a request for such a declaration and for an *ex gratia* award of damages would not have provided an effective remedy to the first and second applicants. ([150])

The 'Bindingness' of ECtHR Jurisprudence

It should come as no surprise, given the preceding paragraphs, that in my view all of the realisable transformative potential of the ECHR Act 2003 lies in s.s. 2 and 3 of the Act. In both cases the interpretive guide referred to by the Act itself is the Convention, and s. 4 elaborates on this by outlining the foreseen relationship between

[3] *McCann v United Kingdom, Kay v United Kingdom, Doherty v Birmingham City Council*

the jurisprudence of the European Court of Human Rights and the Irish courts' interpretation of the Convention and what it requires in the following terms:

> **4.**—Judicial notice shall be taken of the Convention provisions and of—
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> (*a*) any declaration, decision, advisory opinion or judgment of the European Court of Human Rights established under the Convention on any question in respect of which that Court has jurisdiction,
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> (*b*) any decision or opinion of the European Commission of Human Rights so established on any question in respect of which it had jurisdiction,
>
> (*c*) any decision of the Committee of Ministers established under the Statute of the Council of Europe on any question in respect of which it has jurisdiction,
>
> and a court shall, when interpreting and applying the Convention provisions, take due account of the principles laid down by those declarations, decisions, advisory opinions, opinions and judgments.

The first question to consider is whether the decisions of the European Court of Human Rights are binding on Irish courts and the answer, I think, is unequivocally 'no'. Neither, by the way, ought they to be. There are three simple reasons. First of all to make the decisions of the ECtHR binding on the Irish courts would be clearly unconstitutional without a constitutional amendment to that effect. Second it would be illogical within the scheme of the Convention itself, which makes the decisions of the Court binding only on states that are respondents in the case at hand itself. Thirdly, and finally, section 4 of the ECHR Act 2003 quite simply does not make that jurisprudence binding. What it does instead is to say that *in all cases* judicial notice of such decisions should be taken, and that *when interpreting and applying the provisions of the Convention*, due account must be taken of the "principles laid down" in such decisions.

This means that when interpreting the content of Irish law and the requirements of the Convention Irish courts are to be guided by the principles laid down in the Convention jurisprudence. In an analogous approach in the UK it is now pretty well established that courts might be said to be presumptively bound by ECtHR jurisprudence but divergence from that jurisprudence might be permissible where (again drawing on UK jurisprudence) the Strasbourg jurisprudence is not clear or consistent, giving effect to the jurisprudence of the ECtHR would cause extreme difficulties from the perspective of practicality, or that the decision of the Court (usually relating to the state itself) was not "carefully considered". This appears to me to be a perfectly sensible approach to the role that European case law should play in the interpretation of Irish law that draws on that European law.

To say that the Irish courts are not bound by the decisions of the European Court of Human Rights should translate into a sensible approach to situations where litigants ask the Irish courts not only to grant an equivalent protection to that available under the Convention but also to *go further* than the Strasbourg court has done. The idea that Irish courts could go further—could give greater protection than the Convention—is perfectly compatible with the sentiments expressed by government in

Oireachtas debates, with the construction of the Convention as an instrument that lays down minimum standards, with the approach in the UK (albeit rarely) to situations where there is a clear trajectory in the jurisprudence of the ECtHR (*Re P* [2008] UKHL 38), *and*—fundamentally—with the fact that the ECHR Act 2003 is Irish law to be interpreted and applied by Irish courts. Perhaps the most disappointing aspect of the Supreme Court's decision in *McD v L* is its failure to acknowledge and fully embrace the court's proper role under the ECHR Act 2003.

Conclusions: From a Whisper to a Bang

Looking at the provisions of the ECHR Act 2003 and how they have been working and are drafted could be a particularly pessimistic exercise. However, from the foregoing there are, I think, five points of opportunity that we might pick up on to finish on a more optimistic note:

1. If approached from a maximalist perspective s. 2 has enormous transformative potential and should be given more attention in ECHR Act-based initiatives and litigation
2. If the Supreme Court takes an expansive, *Pullen*-like approach to the savings clause of s. 3, although not literally required by the Act, it could usher in a seriously-taken cultural change in how organs of the state plan and carry out their work
3. The granting of injunctions as a s. 3 remedy would enable the effective enjoyment of Convention-based rights
4. DOIs have sentimental and communicative value that should be recognised but they are not effective remedies and have not been politically embraced to date, therefore they should not be the main focus of litigation
5. The ECHR Act 2003 is Irish law, to be interpreted by Irish courts which are at liberty to protect Convention-based rights to a greater extent than the ECtHR, bound as it is by the realities of a 47-state organisation, the margin of appreciation, cultural and legal diversity, and the purpose and role of the Convention as an instrument laying down minimum standards. Irish Courts and advocates can and should develop an Irish understanding of the Convention-based rights as protected by the ECHR Act, that can be subject to adjustment in response to relevant ECtHR decision if there is a misinterpretation in Irish courts.