

RECONCILING SOVEREIGNTY CLAIMS WITH INDIVIDUAL RIGHTS? ACCESS TO CITIZENSHIP AFTER MALLAK AND SULAIMON

INTRODUCTION

Citizenship regimes are among the clearest expressions of the “public philosophy” of States,¹ with national identity, sovereignty and historical experience shaping the legal rules for attribution of citizenship.² From the perspective of the individual, despite developments in universal human rights law, citizenship also remains the key to full security of legal status and residence in modern States as well as access to the “tangible benefits”³ arising from the range of social, economic and political rights held by citizens. The significance of citizenship in Irish legal and political discourse became clear in the course of the debates on the 2004 referendum, which removed the automatic right to citizenship for all children born on the island of Ireland—a right that had been constitutionalised (on foot of the Belfast Agreement) only six years previously.⁴ More recently, the establishment of “citizenship ceremonies” for newly naturalised citizens marks the legal and social significance of joining the Irish polity.⁵

Since 2004, most likely reflecting the decline in inward migration in recent years, relatively little public attention has been focused on citizenship law in Ireland. However, questions around the application of the naturalisation rules in individual cases have consistently come before the High Court in the form of judicial review proceedings. The most striking feature of Ireland’s naturalisation regime is the extent to which it is characterised by ministerial discretion. As will be seen below, most of the High Court jurisprudence has recognised and reinforced this extensive discretion, the courts seemingly

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1. This phrase is borrowed from Adrian Favell, *Philosophies of Integration: Immigration and the Idea of Citizenship in France and Britain*, 2nd edn (Basingstoke: Palgrave Macmillan, 2001).
 2. See Rogers Brubaker’s seminal work, *Citizenship and Nationhood in France and Germany* (Cambridge Mass.: Harvard University Press, 1994).
 3. *R. v Secretary of State ex parte Fayed* [1998] 1 W.L.R. 763 at 773.
 4. By way of the Nineteenth Amendment to the Constitution Act 1998. For commentary on these issues, see, for example, Siobhan Mullally, “Citizenship and Family Life in Ireland: asking the Question ‘Who Belongs?’” (2005) 25 *Legal Studies* 578; Steve Garner, “Babies, Bodies and Entitlement: Gendered Aspects of Access to Citizenship in the Republic of Ireland” (2007) 60(3) *Parliamentary Affairs* 437; Donncha O’Connell and Ciara Smyth, “The Constitution and Family Rights” in Ursula Fraser and Colin Harvey (eds), *Sanctuary in Ireland? Perspectives on Asylum Law and Policy* (Dublin: IPA, 2003); Bryan Fanning and Fidele Mustawaribo, “The Citizenship Referendum” in Bryan Fanning (ed.), *New Guests of the Irish Nation* (Dublin: Irish Academic Press, 2009).
 5. The citizenship ceremony was enshrined in primary legislation by the Civil Law (Miscellaneous Provisions) Act 2011. See also, comments of Minister for Justice and Equality Alan Shatter in written answer to Parliamentary Question of Deputy Mac Lochlainn, Questions 470 and 471, 773 *Dáil Éireann* 12, October 9, 2012.

constrained by the statutory preservation of “absolute” discretion in this sphere and endorsing a state-centred citizenship paradigm which effectively eliminates the perspective of the migrant seeking Irish nationality. The space for the contestation of decisions by individual applicants is consequently very narrow, reflecting what Mullally has described as “a pattern of exclusion that has permeated official discourse on immigration for many years”.⁶

Two cases decided by the Supreme Court in December 2012, however, may signal a move away from this paradigm. In *Mallak v Minister for Justice, Equality and Law Reform*,⁷ the court found that the Minister for Justice had a general duty to provide reasons for refusing to grant a certificate of naturalisation. While the *Mallak* case thus deals with classic issues of administrative law, this article focuses on its impact on the citizenship regime. Two weeks later, in *Sulaimon v Minister for Justice, Equality and Law Reform*,⁸ the court severely criticised the “contrived” nature of ministerial and departmental attempts to deny a young boy birthright citizenship on the basis of their calculation of the residence of his father.

These cases (*Mallak*, in particular) provide much-needed protection for individual applicants engaging with the sovereign power of the State. Here, it is argued that their significance lies in the broad implications of the move away from a purely State-centred, sovereignty-based approach to citizenship. While it will be seen that the decisions themselves focus on a traditional rule of law rationale, common to much administrative law jurisprudence, it is suggested that this shift has been, and will continue to be, influenced by developments in EU law and under the ECHR, and provides a way forward for a more human rights-oriented approach to the attribution of citizenship in Irish law. This article will outline the decisions in *Mallak* and *Sulaimon*, drawing particular attention to the Supreme Court’s criticisms of the administration of the citizenship process. It will then explore the erosion of national discretion in the sphere of citizenship by EU law and recent ECHR case law. Before this, it will briefly set out the law relating to birthright citizenship and naturalisation.

BIRTHRIGHT CITIZENSHIP AND NATURALISATION IN IRISH LAW

The two main ways by which citizenship is acquired in Ireland are at birth or by way of naturalisation. In respect of birthright citizenship, the legislative provisions enshrine a mixture of a *jus sanguinis* and a *jus soli* approach. Broadly speaking, citizenship is acquired by descent by those with an Irish citizen parent.⁹ A more complex picture emerges for children born in Ireland to

6. Siobhán Mullally, “Defining the Limits to Citizenship: Family Life, Immigration and Non-Nationals in Irish Law” (2004) 37 *Irish Jurist* 334. See also, Bryan Fanning and Fidele Mustawaribo, “Nationals/Non-Nationals: Immigration, Citizenship and Politics in the Republic of Ireland” (2007) 30(3) *Ethnic and Racial Studies* 439.

7. [2012] IESC 59.

8. [2012] IESC 63.

9. Sections 6, 7 and 11 of the Irish Nationality and Citizenship Act 1956 (as amended) (the “1956 Act”).

non-citizen parents. Pursuant to s.6A of the Irish Nationality and Citizenship Act 1956 (as inserted by the Irish Nationality and Citizenship Act 2004), such a person is not entitled to citizenship unless one of his or her parents has, “during the period of 4 years immediately preceding the person’s birth, been resident in the island of Ireland for a period of not less than 3 years or periods the aggregate of which is not less than 3 years”. Thus, following the 2004 referendum, citizenship for such persons born in Ireland is not automatic and the *jus soli* element of the regime has been significantly diluted. The result of this, Steve Garner argues, is that an entitlement to “Irishness” is primarily an essence that can be transmitted genetically.¹⁰

While the acquisition of citizenship at birth is often seen as symbolic of attitudes to political and social membership, “first-generation” migrants will generally acquire citizenship through naturalisation. Part III of the 1956 Act, as amended, governs the acquisition of citizenship by naturalisation in Ireland. Citizenship is conferred by means of a certificate of naturalisation granted by the Minister¹¹ and the conditions for the issue of this certificate are set out in s.15. These are that the applicant is of full age, of good character, has had a period of one year’s continuous residence in the State immediately before the application and four years’ residence out of the previous eight years,¹² intends to reside in the State after naturalisation and has made an oath of fidelity to the nation and loyalty to the State. Section 15 provides for the “absolute discretion” of the Minister in deciding whether to grant the application for naturalisation on satisfaction of these conditions—one of the few instances in Irish law where a Minister is granted the sole power of deciding the outcome of an application in his absolute discretion.¹³

THE NATURALISATION CASES: VULNERABILITY OF THE INDIVIDUAL IN THE FACE OF STATE SOVEREIGNTY

Research conducted by the Immigrant Council of Ireland suggests that applicants have very varied experiences of processing times and customer service in the course of the naturalisation process, and many have expressed serious concerns in relation to the lack of transparency in decision-making within the system.¹⁴ The level of ministerial discretion permeating the naturalisation rules stems from the principle that the granting of a certificate of naturalisation under Irish law is not a right to which a person who appears

10. Steve Garner, “Babies, Bodies and Entitlement: Gendered Aspects of Access to Citizenship in the Republic of Ireland” (2007) 60(3) *Parliamentary Affairs* 437 at 443.

11. Section 14 of the 1956 Act.

12. “Reckonable residence” is an important concept here as in the context of birthright citizenship, and is detailed in s.6B of the 1956 Act.

13. The unusual nature of the power was pointed out by Clark J. in *Abuissa v Minister for Justice, Equality and Law Reform* [2010] IEHC 366.

14. Immigrant Council of Ireland, “Living in Limbo: Migrants’ Experiences of Applying for Naturalisation in Ireland” (Immigration Council of Ireland and NASC, 2011), pp.69–70.

to satisfy all the conditions is entitled, but rather a “privilege”,¹⁵ reflecting assumptions regarding the extensive powers of the State to deal with non-citizens on which citizenship frameworks are based. This logic of “privilege” underpins many of the High Court judgments in this domain, which have emphasised that there is no “legitimate expectation” of a grant of citizenship consequent upon fulfilling all of the statutory criteria.¹⁶ So, for example, the courts have accepted that, in exercising this absolute discretion, the Minister is entitled to take into account public policy considerations, including in relation to immigration policy, which may have little to do with the facts in the individual case.¹⁷ It also seems that the courts will decline to review a decision in a situation where the applicant may have an opportunity to make a fresh application to the Minister.¹⁸ The courts will not interfere with the primary role of the Minister in assessing international law considerations relating to citizenship applications, even where key human rights issues such as Statelessness are involved.¹⁹ Moreover, the approach of the High Court in numerous cases was that the Minister is not obliged to give reasons for his decision due to the absolute nature of his discretion.²⁰

Despite the general thrust of the judgments, there have been cases in which the Minister’s decision to refuse to grant a certificate of naturalisation has been quashed, a number of these involving refusals on the basis of the “good character” requirement. The wide margin of appreciation given to the State and the subjective nature of the concept of “good character” offers to the State, via the Minister, a means of flexing its sovereignty and highlights the vulnerability of the migrant individual in the face of the State.²¹ Reflecting this vulnerability, the lack of information given to applicants on the requirement has been identified as a serious deficiency of the naturalisation process.²² Some limits to the powers of the Minister in considering the good character of the applicant have, however, been identified. In *Hussain v Minister for Justice, Equality and Law Reform*,²³ for example, Hogan J. made some strong statements on the importance of fairness in the naturalisation procedure. He found that an applicant cannot be disqualified from naturalisation merely because he

15. This was emphasised by the High Court in, inter alia, *Robert and Muresan v Minister for Justice, Equality and Law Reform*, unreported, High Court, Peart J., February 11, 2004, and by the Supreme Court in *Mallak v Minister for Justice, Equality and Law Reform* [2012] IESC 59.

16. *Robert and Muresan v Minister for Justice, Equality and Law Reform*, unreported, High Court, Peart J., February 11, 2004.

17. In *Mishra v Minister for Justice* [1996] 1 I.R. 189, Kelly J. observed that the Minister was entitled to adopt a general policy not to naturalise people who would be unemployable in their chosen profession and would therefore emigrate after naturalisation (although the application of the policy gave rise to a legitimate complaint, in this case).

18. *Spila v Minister for Justice, Law Reform and Equality* [2012] IEHC 366 at paras 19, 20, 19. Fn.18, paras 15, 16.

20. See, inter alia, *Abuissa v Minister for Justice, Equality and Law Reform* [2010] IEHC 366.

21. Sergio Carrera, *In Search of the Perfect Citizen? The Intersection between Integration, Immigration and Nationality in the EU* (Leiden: Martinus Nijhoff, 2009), p.443.

22. ICI, fn.14, at 71.

23. [2011] IEHC 171.

or she has come to adverse Garda attention, and that (in the circumstances) the Minister had erred in failing to disclose the Garda report to the applicant for his comment as a matter of fair procedures before reaching an adverse decision on his application. Hogan J. made it quite clear that the “absolute discretion” conferred on the Minister did not mean that the Minister was freed from adherence to the obligations of the rule of law, as “this would not only be inconsistent with the rule of law, but it would be at odds with the guarantee of democratic government contained in Article 5 of the Constitution”.²⁴ While the court’s insistence on the importance of fair procedures in *Hussain* suggested a more rights-based approach, the applicant in *Mallak* met with little success in the High Court in trying to challenge the view that the Minister had no duty to give reasons in these cases.²⁵ The applicant, Mr Mallak, was a Syrian national who had been awarded refugee status in 2002. When he and his wife applied for citizenship in 2005, his wife’s application was accepted while his was rejected. The Minister relied on his absolute discretion and refused to give reasons for this decision. Cooke J. in the High Court dismissed the application for judicial review, following the well-worn argument that the absolute discretion of the Minister meant that he was not obliged to give reasons. He rejected arguments based on art.13 of the ECHR and the right to an effective remedy, grounding his reasoning on the view that that the refusal of the certificate in no way alters the position or status of the applicant, meaning that there was no wrong to remedy.²⁶ Cooke J. also explicitly rejected the idea that a decision under s.15 would engage EU law on the basis that the denial of Irish citizenship entailed the denial of EU citizenship.²⁷

THE DECISION IN *MALLAK*

Mr Mallak appealed to the Supreme Court, arguing that s.15, in so far as it provides that the Minister may refuse to grant a certificate of naturalisation in his absolute discretion (i.e. without giving reasons), is unconstitutional; that the section should be interpreted in the sense that the Minister is obliged to give reasons; and that the decision of the Minister to grant or refuse a certificate of naturalisation is a decision regarding the acquisition of citizenship of the European Union to which general principles of EU law apply (and, thus, that the Minister was obliged to give reasons). The Supreme Court considered the second point of the appeal first.

Fennelly J., delivering the judgment of the court, reaffirmed the principle that there exists no “right” to citizenship for those who fulfil the statutory criteria.²⁸ However, the court found, this did not mean that he enjoys “inferior legal protection” when pursuing the application, and neither did the fact that

24. Fn.23, para.17.

25. *Mallak v Minister for Justice, Equality and Law Reform* [2011] IEHC 306.

26. Fn.25, para.17.

27. Fn.25, para.31.

28. *Mallak v Minister for Justice, Equality and Law Reform* [2012] IESC 59 at para.46.

he was a non-national.²⁹ On reviewing the evolution of Superior Courts' judgments over a 30-year period, Fennelly J. considered that:

"In the present state of evolution of our law, it is not easy to conceive of a decision-maker being dispensed from giving an explanation either of the decision or of the decision-making process at some stage. The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process."³⁰

Philosophically, the court centred its rationale on the idea of the rule of law, rather than on realising the rights of the individual applicant, citing Hogan J. in *Hussain* to the effect that the legislative provision for absolute discretion cannot mean that "the Minister is free to act in an arbitrary and autocratic fashion".³¹ In this way, it was sought to reconcile the sovereignty claims of the State with the rights of the individual. This replicates the careful approach of the Supreme Court in *In the Matter of Article 26 of the Constitution and in the Matter of ss. 5 and 10 of the Illegal Immigrants (Trafficking) Bill, 1999*,³² of deriving the protection of the rights of non-nationals in certain circumstances from the obligations of a State founded on the rule of law, rather than on the basis of personal rights. Despite this continuing refusal to recognise the "humanity of the stranger"³³ in terms of providing full rights protection for "non-nationals", however, the effect of the judgment is to require a higher level of protection, at least in relation to fair procedures rights, for those within the citizenship process.

CRITICISING THE ADMINISTRATION OF THE CITIZENSHIP REGIME

In *Mallak*, the court noted that the Minister had not suggested that there were any reasons relating to the appellant's character which could justify refusing him naturalisation or that he posed any threat to national security or public policy, and that the applicant's wife had been granted citizenship.³⁴ Refraining from being too openly critical of the Minister, Fennelly J. simply observed that: "One can understand the appellant being mystified."³⁵ A week later, another citizenship case came before the Supreme Court,³⁶ in which a father sought to claim birthright citizenship for his son³⁷ on the basis that he (the father)

29. Note 28 at para.46, referring to *In the matter of Article 26 of the Constitution and in the matter of ss. 5 and 10 of the Illegal Immigrants (Trafficking) Bill, 1999* [2000] 2 I.R. 385.

30. Fn.28, para.66.

31. Fn.28, para.45, citing *Hussain*, para.17.

32. [2000] 2 I.R. 385.

33. Siobhán Mullally, "Defining the Limits to Citizenship: Family Life, Immigration and Non-Nationals in Irish Law", fn.7 at 336.

34. *Mallak v Minister for Justice, Equality and Law Reform* [2012] IESC 59 at paras 75 and 76.

35. Fn.34, para.76.

36. *Sulaimon v Minister for Justice, Equality and Law Reform* [2012] IESC 63.

37. Under the terms of s.6A of the Irish Nationality and Citizenship Act 1956, as amended.

had satisfied the three-year lawful residence period in the State at the date of the son's birth. His application was refused on the basis that he was three days short of the required time period. The case turned on a technical point of immigration law concerning the date on which the father's legal permission to remain had been granted, with the Supreme Court finding in favour of the child that a letter received by the father constituted the permission to remain, rather than the date on which the relevant stamp was placed in the father's passport.

The severity of the criticism which was levelled at the Department and the Minister by the court in *Sulaimon*, in terms of both the handling of the application and the subsequent litigation, was very unusual in the context of judgments on immigration and nationality law. Hardiman J., in delivering his concurring judgment, was particularly vocal, stating:

"I simply do not understand why so great an effort has been made over so long a period to deprive a small boy of citizenship in the country where he has been permitted to reside all his life, a citizenship enjoyed by his father and his sister. If there is a point to the pain and anxiety caused to the child's family, the expense to which they have been put and the taxpayers money which has been spent, it entirely eludes me."³⁸

The correspondence received by the father was described by O'Donnell J. (delivering the judgment of the five-judge court) as "confused and confusing",³⁹ and the conduct of the litigation, during which "highly contrived and artificial arguments" were advanced on behalf of the Minister, was seen as unacceptable.⁴⁰ *Sulaimon* thus provides further evidence of a degree of "push back" from the Supreme Court against the "excessive formalism"⁴¹ sometimes followed by the Department and the Minister in the naturalisation process with a view to denying citizenship to applicants.

THE INFLUENCE OF EUROPEAN HUMAN RIGHTS LAW: EROSION OF NATIONAL DISCRETION?

Cooke J. in the High Court in *Mallak* had dismissed the argument, based on the decision of the Court of Justice of the EU in *Rottmann*,⁴² that the Minister was obliged to make his decision in compliance with the general principles

38. *Sulaimon v Minister for Justice, Equality and Law Reform* [2012] IESC 63, per Hardiman J., para.24.

39. *Sulaimon v Minister for Justice, Equality and Law Reform* [2012] IESC 63, per O'Donnell J., para.10.

40. *Sulaimon v Minister for Justice, Equality and Law Reform* [2012] IESC 63, per O'Donnell J., para.9.

41. This phrase is borrowed by Mullally from European Court of Human Rights article 8 deportation jurisprudence. Siobhán Mullally, "Citizen children, 'impossible subjects' and the limits of migrant family rights in Ireland" (2011) (1) *European Human Rights Law Review* 43 at 50.

42. *Rottmann* (C-135/08) [2010] E.C.R. I-1449.

of EU law.⁴³ The Supreme Court did not consider the EU law point as the case was resolved on the administrative law grounds of the appeal and the court did not therefore go on to consider the constitutional and EU arguments. Nonetheless, one of the most interesting aspects of the judgment is the “several converging legal sources” which Fennelly J. referred to in support of the court’s conclusions on the duty to give reasons. These included Irish legislation,⁴⁴ UK case law⁴⁵ and, most significantly, EU law. Together, art.296 of the TFEU,⁴⁶ art.41 of the EU Charter of Fundamental Rights,⁴⁷ and the Court of Justice decision in *Council v Bamba*,⁴⁸ were taken as reinforcing the general duty to give reasons.

In *Rottmann*, the Court of Justice found that the decision to withdraw national citizenship from a person which has the knock-on effect of the loss of Union citizenship came within the ambit of EU law,⁴⁹ and that the national court should use a proportionality test “to ascertain whether the withdrawal decision at issue ... observes the principle of proportionality so far as it concerns the consequences it entails for the situation of the person concerned in the light of EU law”.⁵⁰ The decision in *Rottmann* was welcomed as a “milestone”⁵¹ in nationality law.⁵² As well as proportionality, rules concerning national citizens which fall within the ambit of EU law must also respect the general principles of EU law, including the prohibition on discrimination on the grounds of race, religion, ethnicity, sex, sexuality, disability and age. Among the many questions raised by *Rottmann* is the extent of the restraint which EU law places on the scope of Member States’ discretion in applying national rules on the acquisition (rather than loss) of nationality. While the full impact and reach of the court’s approach in *Rottmann* remains to be seen, it certainly opens up Member State nationality laws to greater scrutiny, and a proportionality analysis. The intrusion of the “external” influence of EU law into a domain which is perceived to be the paradigm expression of national sovereignty can only be a good thing for individual migrants seeking access points to the politics of EU States.

43. Fn.42, para.31.

44. Section 18(1) of the Freedom of Information Act 1997.

45. *R v Secretary of State exp Fayed* [1998] 1 W.L.R. 763.

46. The second sentence of which provides: “Legal acts shall state the reasons on which they are based ...”.

47. Art.41(2) refers to the “Obligation of the administration to give reasons for its decisions”.

48. *Council v Bamba* (C-417/11), Judgment of the CJEU of November 15, 2012.

49. *Rottmann* (C-135/08) [2010] E.C.R. I-1449, para.42.

50. Fn.49, para.54.

51. René De Groot and Anja Seling, “Court of Justice of the European Union decision of 2 March 2010, Case C-315/08 *Janko Rottman v Freistaat Bayern* case note 2: the consequences of the *Rottmann* judgment on Member State autonomy—the European Court of Justice’s avant-gardism in nationality matters” (2011) 7(1) *Eur Const L.R.* 150 at 451.

52. Jo Shaw, “Concluding thoughts: *Rottmann* in context” in Jo Shaw (ed.), *Has the European Court of Justice Challenged Member State Sovereignty in Nationality Law?* (EUI Florence, RSCAS 2011/62), p.33 at 41.

In a parallel development, the European Court of Human Rights has found that citizenship is a facet of private life and is thus open to a proportionality test. In *Genovese v Malta*,⁵³ the court found that provisions of Maltese law which stated that children born out of wedlock would be eligible for citizenship only if their mother was Maltese were in breach of art. 14 of the ECHR, read in conjunction with art. 8.⁵⁴ This case is most significant for its clear recognition that the impact of the right to citizenship on the child's social identity was such as to bring that right within the general scope and ambit of art. 8. It illustrates that the margin of appreciation allowed to States in defining the terms of naturalisation is not unlimited and could form a platform for a more nuanced development of the case law relating to discrimination in nationality law.

CONCLUSION

Irish law has in recent times enshrined a paradigm of relations between the State and its migrants which centres on control, security and executive power—particularly in the domain of citizenship law. The Supreme Court decisions discussed in this article, with their requirement that non-national applicants be treated with a basic degree of fairness, even in the sovereignty-dominated citizenship sphere, evidence a shift away from this. Whether the promise of *Mallak* in terms of enhancing the transparency of the naturalisation procedure is realised remains to be seen. However, both the judgments examined here reveal an impatience with the way in which individual applicants can be dealt with within the process and the lengths to which the State has been seen to go in order to deny citizenship, even to those who have been settled here on a long-term basis with naturalised family members. In addition, the Supreme Court's openness to external legal sources in considering matters related to citizenship stood in stark contrast to the inward-looking approach of Cooke J. in the High Court, who stated:

“There is, in the view of the Court, one general observation which must first be made by way of preface to any consideration of these issues. It is an exercise of the State's sovereign authority to decide which persons will be permitted to enter its territory and the terms and conditions upon which they may be granted leave to remain or to reside. On the specific matter of citizenship, it is established and recognised in international law that it is one of the fundamental incidents of the sovereignty of a state that it alone can decide which persons will be its citizens; which persons may be admitted to its citizenship and the terms and criteria which it will apply for that purpose.”⁵⁵

53. App. No. 53124/09, Judgment of October 11, 2012.

54. See generally, René De Groot and Olivier Vonk, “Nationality, Statelessness and ECHR's Article 8: Comments on *Genovese v Malta*” (2012) 14(3) *European Journal of Migration and Law* 317.

55. [2011] IEHC 306 at para.9.

The approach of the Supreme Court could be seen as a side-effect of the increasing scrutiny to which national citizenship law may be subject in light of decisions like *Rottmann* and *Genovese v Malta*. In any case, this refreshing openness, together with developments in nationality law in EU law and under the ECHR, could herald the beginnings of the development of a more rights-based approach to citizenship generally.

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THE CONNECTION BETWEEN MENTAL DISORDER AND THE ACT OF KILLING IN THE DEFENCE OF DIMINISHED RESPONSIBILITY

INTRODUCTION

In light of the Court of Criminal Appeal judgment in *DPP v Tomkins*,¹ it is worth highlighting uncertainty in the scope of the defence of diminished responsibility in Irish law. This statutory defence reduces murder liability to manslaughter. It applies under s.6 of the Criminal Law (Insanity) Act 2006 (the “2006 Act”) where a person kills another while suffering from a mental disorder that falls short of founding an insanity defence, but which nevertheless substantially diminishes the person’s responsibility for the act of killing. An uncertain aspect of the defence is the connection required between the mental disorder that the defendant suffered from and his or her act of killing.² The question is whether, or to what extent, the mental disorder must cause or otherwise explain the killing in order for the defence to apply. The scope of the diminished responsibility defence varies greatly depending on the answer to this question. After a brief overview of the diminished responsibility defence and the *Tomkins* case, I set out different potential understandings of the connection between mental disorder and killing and identify what can be learned from *Tomkins* and other cases. I argue that it is important and appropriate for the Court of Criminal Appeal to settle the precise scope of the defence, and simply repeating the language of the statute will not achieve this.

1. [2012] IECCA 82.

2. As identified in Louise Kennefick, “Diminished responsibility in Ireland: historical reflections on the doctrine and present-day analysis of the law” (2011) 62 N.I.L.Q. 269 at 285–286.