

THE HONORABLE SOCIETY OF KING'S INNS DEGREE OF BARRISTER-AT-LAW

ENTRANCE EXAMINATION

IRISH CONSTITUTIONAL LAW

August 2022

DATE | **Monday, 15 August 2022**

TIME | 3 hours

EXAMINER | Mr John O'Dowd (UCD)

EXTERNAL EXAMINER | Mr Conleth Bradley SC

Instructions

A candidate must answer Question 1 (50% of marks) and **TWO** other questions (each 25% of marks).

This exam paper is 6 pages long including the cover sheet.

IRISH CONSTITUTIONAL LAW

Q1 | COMPULSORY QUESTION

50 MARKS

Ballymagash Villas Ltd encourages and arranges for overseas buyers to acquire second homes in rural areas in Ireland and provides them with ongoing maintenance and management services; it is by far the largest such firm in Ireland. The Minister for Regional Development is a long-standing and vociferous critic of the company. She has publicly stated that the Government should subject Ballymagash Villas Ltd and businesses like it to “death by a thousand cuts” and that she is always looking for ways to do so. The company’s managing director is suing the Minister for defamation, arising from some of her statements about the way the company’s business is conducted.

In the 2024 Estimates, Dáil Éireann approves the expenditure of up to €20 million on “Other Energy Programmes (National/ International)”, a sub-head of the Estimate for the Office of the Minister for the Environment and Social Innovation. The Appropriation Act 2024 authorises the expenditure of up to €1.04 billion for the salaries and expenses of that Office, including certain services administered by it, and for the payment of certain grants. The subject-matter of any such grant, the amount of that grant, and all the conditions under which that grant may be awarded are left to the discretion of the Minister.

The Minister for the Environment and Social Innovation proposes a scheme for a “turf substitution grant” to be paid persons who agree not to exercise their right to cut sod turf (on their own or on another’s land) for their own personal or household use. Under the programme for government (an agreement between political parties) any scheme under which grants are to be paid for that purpose must be approved by the Government before it comes into operation. The Minister for Regional Development suggests that a turf substitution grant should be payable only (a) to a person who had the right to cut the turf on 1 January 2023 or (b) to the relative (meaning a parent, lineal ancestor, spouse, civil partner, widow, widower, surviving civil partner, child, lineal descendant, uncle, aunt, brother, sister, nephew or niece) of such a person, who subsequently inherits or otherwise acquires that right. After discussing the matter, the Government adopts the Minister for the Environment and Social Innovation’s proposed scheme, amended in the way suggested by the Minister for Regional Development, but with the further proviso (c) that UK, European Union (including Irish), EEA and Swiss nationals who inherit or acquire the right to cut turf after 1 January 2023 may also be entitled, even if not relatives of a previous right-holder.

On this basis, over one hundred of Ballymagash Villas Ltd’s existing or prospective clients do not, or would not, qualify for a turf substitution grant. None think it worth their while to litigate the matter because of the comparatively small sums of money at stake for each of them.

Advise Ballymagash Villas Ltd. if it has standing to bring proceedings challenging, on constitutional grounds, those restrictions on the availability of the grant? Assuming the company

does have standing, is the company likely to be successful in such proceedings? If so, what form of relief might the company obtain? (50 marks)

IRISH CONSTITUTIONAL LAW

Q2

25 MARKS

Jim, a suspected drug dealer, has been under Garda observation for several months, including time spent on the houseboat on which he lives. Foreign police have told the Gardaí that a major dealer has just arrived in Ireland, to meet Jim over the Christmas period and to plan a multi-million-euro drugs deal. Áine, a Garda investigating Jim, believes that vital evidence could be gathered if a recording device were placed on the houseboat. That surveillance would normally be lawful only on foot of an authorisation issued by a District Judge who was satisfied that an officer not below the rank of superintendent had “reasonable grounds for believing” that the surveillance was “necessary for the purposes of obtaining information as to whether [an arrestable] offence has been committed or as to the circumstances relating to the commission of the offence, or obtaining evidence for the purposes of proceedings in relation to” it (Criminal Law (Surveillance) Act 2009 ss 3-5). However, Áine believes that the meeting will have taken place before a judge could issue an authorisation, so that the “information or evidence ... is likely to be destroyed, lost or otherwise become unavailable” (s 7(2)(b)). She applies to Sam, a superintendent, for approval of the surveillance under section 7. He is satisfied that there are reasonable grounds for believing that a judge would issue an authorisation but that the condition of urgency specified in section 7(2)(b) applies. Although an approval normally authorises surveillance for up to 72 hours from the time it is granted (s 7(8)), Sam imposes a condition (as he is empowered by section 7(4) to do) reducing that to 48 hours. The approval authorises Áine to “enter, if necessary by the use of reasonable force, any place for the purposes of initiating or carrying out the approved surveillance, and withdrawing the ... device, without the consent of a person who owns or is in charge of the place” (s 7(5)). “place” includes (a) a dwelling or other building [and] ... (c) a vessel, whether sea-going or not ... ’ (s 1). Áine enters the houseboat and conceals a recording device. Because of a mistake as to when Sam gave his approval, the device is left recording for 60 hours. Nothing relevant to the drugs investigation is recorded, but during the final twelve hours the device records evidence of Jim assaulting his wife. Advise the Director of Public Prosecutions as to whether that evidence would be inadmissible, by reason of anything the Constitution requires, in criminal proceedings against Jim. (25 marks)

IRISH CONSTITUTIONAL LAW

Q3

25 MARKS

Colm and Fíona are a married couple. Each is a citizen of Ireland. Both have viable gametes (spermatozoa and ova), but Fíona is physiologically unable to bear a child. They enter into a surrogacy arrangement with Tetyána, an unmarried woman, which is lawful in the non-EU country of which she is a national and in which she resides. In return for a payment of US\$20,000 Tetyána agrees to their embryo, which was created by in-vitro fertilisation, being implanted into her body and to her bearing that child for them, in her home country. As a result of war in Tetyána's country she comes to Ireland, while pregnant, as a person enjoying temporary protection within the European Union. She gives birth in Ireland to the child she was carrying for Colm and Fíona. Tetyána decides to keep the child and to raise it as her own. Advise Tetyána as to what bearing, if any, the Constitution of Ireland might have on any claim (a) by Colm and Fíona or either of them to guardianship or custody of, or access to, the child, and (b) by Tetyána or the child or either of them to reside in Ireland, if and when Tetyána's status as a person enjoying temporary protection comes to an end. (25 marks)

IRISH CONSTITUTIONAL LAW

Q4

25 MARKS

Rob is employed by a multinational e-commerce company XYZ which refuses to engage with the union branch he has organised, because its worldwide policy is not to deal with trade unions representing its workers unless national law so requires. XYZ says it has resolved a trade dispute relating to many of its workers' terms and conditions by consulting the employee association for the company. Workers that Rob's trade union represents reject the result of that process. The union requests the Labour Court investigate the trade dispute under the Industrial Relations (Amendment) Act 2001, on the basis, inter alia, that it is not XYZ's practice to engage in collective bargaining in respect of its workers. The union asserts that the employee association is not "independent" and is "under the domination and control of an employer" so that negotiating with it cannot be collective bargaining, as defined by the Act. Appended to the union's written submission are purported copies of emails between XYZ's senior executives, seeming to show that they regard the association as a total sham, a mere device to ward off the Labour Court. Rob received these from someone in XYZ whose identity he alone knows. XYZ submits in writing that the association is wholly independent and that it tries in good faith to resolve disputes by negotiating with it. To determine whether the requirements for conducting an investigation have been met, the Labour Court holds a preliminary hearing, in private (as required by the Labour Court Rules 2020 r 73) and without hearing witness testimony (as required by r 61). Counsel for XYZ seeks disclosure of the identity of Rob's source and an adjournment, so that XYZ can investigate the matter further.

The Labour Court decides that the source's identity is not relevant to any issue before it and refuses to adjourn. Questioned by the Labour Court, XYZ executives who are present say that the emails are genuine, but were just "banter" or "shooting the breeze", emulating their CEO's sarcasm and hyperbole. The Labour Court rejects this characterisation of the emails and finds that the requirements for an investigation have been met. After conducting its investigation, the Labour Court makes a recommendation giving its opinion as to how to resolve the trade dispute. XYZ rejects this, so the Labour Court makes a determination to the same effect. If the union applies to the Circuit Court to enforce it, that Court "shall, without hearing the employer or any evidence" (save as to whether XYZ failed to comply within the time allowed) "make an order directing the employer to carry out the determination in accordance with its terms." Advise XYZ: what bearing has the Constitution on its claim to (a) compel Rob to identify his source and (b) have any of the Labour Court's decisions quashed? (25 marks)

IRISH CONSTITUTIONAL LAW

Q5

25 MARKS

Answer **either** (a) **or** (b) **or** (c) below, **but not more than one of them**. Answer by reference to decided cases, which need not include those cited in the question.

- (a) "[T]here may well be cases where, following an appropriate analysis, it can properly be concluded that the scope of a right guaranteed by the Constitution is substantially the same as that of an identical right guaranteed by the ECHR or, indeed, by other human rights instruments such as the constitutions of other respected states. ... [I]t is also worth observing that there may be some merit in the future in Irish judgments using similar language and structure to that adopted by the ECtHR in analysing rights guaranteed by both the Constitution and the ECHR. The appropriate dialogue between a national court and the ECtHR can only be enhanced if judgments are expressed in terms which minimise the risk of misinterpretation by supranational courts where there may be a real possibility that such courts will be required to consider the national judgments in question." *Fox v Minister for Justice* [2021] IESC 61 (14 September) Clarke CJ para 12.15.

If this is a sign of a new approach to overlap between constitutional and Convention rights, which parts of Irish constitutional law are likely to be most affected and how? (25 marks)

or

- (b) "It is undoubtedly the case that education is concerned with the development of the human person, and at the broadest level it is said that the objective of the protection of fundamental rights is to permit the full development of the human person. However, it is precisely because of the importance of education in that process that it receives specific protection under Article 42. However, Article 40.1 is concerned with impermissible differentiations. The difference of treatment here is based on the fact that the plaintiffs ... are educated at home, whereas a hypothetical comparator student also taught by a close relative, is educated within a school

system. This distinction cannot be said to be a differentiation based on human personality.” *Burke v Minister for Education and Skills* [2022] IESC 1 (24 January) O’Donnell CJ para 105.

Does the “human personality” doctrine remain as great a limitation on the scope of Article 40.1 as it has been treated for most of the past half century? (25 marks)

or

- (c) “[In addition to a] classically a legal matter in which a court is competent to make a declaration, [a] court may also make a declaration as to fact, which may have some legal consequences, or which it can be said that the plaintiff has some legitimate interest to seek. ... [T]he jurisdiction to grant a declaration is wide, but far from unlimited. ... What legitimate interest has the appellant in seeking a formal declaration in [the] terms [proposed by McMenamin J] (and which he has not sought in these proceedings), and in what way can it be said that the appellant’s position in law or in fact would be improved by such a declaration?” *PMcD v The Governor of X Prison* [2021] IESC 65 (17 September) O’Donnell J paras 21-22.

Discuss critically the proper role of declaratory relief in constitutional litigation and the views of various members of the Supreme Court on that topic. (25 marks)

Relevant provisions of the Constitution of Ireland

Article 5

Ireland is a sovereign, independent, democratic state.

Article 6

1 All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and, in final appeal, to decide all questions of national policy, according to the requirements of the common good.

2 These powers of government are exercisable only by or on the authority of the organs of State established by this Constitution.

Article 15

2 1° The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.

2° Provision may however be made by law for the creation or recognition of subordinate legislatures and for the powers and functions of these legislatures.

Article 28

2 The executive power of the State shall, subject to the provisions of this Constitution, be exercised by or on the authority of the Government.

4 1° The Government shall be responsible to Dáil Éireann.

2° The Government shall meet and act as a collective authority, and shall be collectively responsible for the Departments of State administered by the members of the Government.

Article 29

1 Ireland affirms its devotion to the ideal of peace and friendly co-operation amongst nations founded on international justice and morality.

Article 34

1 Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.

2 The Courts shall comprise:

- i Courts of First Instance;
 - ii a Court of Appeal; and
 - iii a Court of Final Appeal.
- 3 1° The Courts of First Instance shall include a High Court invested with full original jurisdiction in and power to determine all matters and questions whether of law or fact, civil or criminal.
- 2° Save as otherwise provided by this Article, the jurisdiction of the High Court shall extend to the question of the validity of any law having regard to the provisions of this Constitution, and no such question shall be raised (whether by pleading, argument or otherwise) in any Court established under this or any other Article of this Constitution other than the High Court, the Court of Appeal or the Supreme Court.
- 3° No Court whatever shall have jurisdiction to question the validity of a law, or any provision of a law, the Bill for which shall have been referred to the Supreme Court by the President under Article 26 of this Constitution, or to question the validity of a provision of a law where the corresponding provision in the Bill for such law shall have been referred to the Supreme Court by the President under the said Article 26.
- 4° The Courts of First Instance shall also include Courts of local and limited jurisdiction with a right of appeal as determined by law.

Article 37

1 Nothing in this Constitution shall operate to invalidate the exercise of limited functions and powers of a judicial nature, in matters other than criminal matters, by any person or body of persons duly authorised by law to exercise such functions and powers, notwithstanding that such person or such body of persons is not a judge or a court appointed or established as such under this Constitution.

Article 38

1 No person shall be tried on any criminal charge save in due course of law.

Articles 40-44

FUNDAMENTAL RIGHTS

PERSONAL RIGHTS

ARTICLE 40

1 All citizens shall, as human persons, be held equal before the law.

This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.

2 1° Titles of nobility shall not be conferred by the State.

- 2° No title of nobility or of honour may be accepted by any citizen except with the prior approval of the Government.
- 3 1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
- 2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.
- 3° Provision may be made by law for the regulation of termination of pregnancy.
- 4 1° No citizen shall be deprived of his personal liberty save in accordance with law.
- 2° Upon complaint being made by or on behalf of any person to the High Court or any judge thereof alleging that such person is being unlawfully detained, the High Court and any and every judge thereof to whom such complaint is made shall forthwith enquire into the said complaint and may order the person in whose custody such person is detained to produce the body of such person before the High Court on a named day and to certify in writing the grounds of his detention, and the High Court shall, upon the body of such person being produced before that Court and after giving the person in whose custody he is detained an opportunity of justifying the detention, order the release of such person from such detention unless satisfied that he is being detained in accordance with the law.
- 3° Where the body of a person alleged to be unlawfully detained is produced before the High Court in pursuance of an order in that behalf made under this section and that Court is satisfied that such person is being detained in accordance with a law but that such law is invalid having regard to the provisions of this Constitution, the High Court shall refer the question of the validity of such law to the Court of Appeal by way of case stated and may, at the time of such reference or at any time thereafter, allow the said person to be at liberty on such bail and subject to such conditions as the High Court shall fix until the Court of Appeal has determined the question so referred to it.
- 4° The High Court before which the body of a person alleged to be unlawfully detained is to be produced in pursuance of an order in that behalf made under this section shall, if the President of the High Court or, if he is not available, the senior judge of that Court who is available so directs in respect of any particular case, consist of three judges and shall, in every other case, consist of one judge only.
- 5° Nothing in this section, however, shall be invoked to prohibit, control, or interfere with any act of the Defence Forces during the existence of a state of war or armed rebellion.
- 6° Provision may be made by law for the refusal of bail by a court to a person charged with a serious offence where it is reasonably considered necessary to prevent the commission of a serious offence by that person.
- 5 The dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law.
- 6 1° The State guarantees liberty for the exercise of the following rights, subject to public order and morality: –
- i The right of the citizens to express freely their convictions and opinions.

The education of public opinion being, however, a matter of such grave import to the common good, the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State.

The publication or utterance of seditious or indecent matter is an offence which shall be punishable in accordance with law.

- ii The right of the citizens to assemble peaceably and without arms.

Provision may be made by law to prevent or control meetings which are determined in accordance with law to be calculated to cause a breach of the peace or to be a danger or nuisance to the general public and to prevent or control meetings in the vicinity of either House of the Oireachtas.

- iii The right of the citizens to form associations and unions.

Laws, however, may be enacted for the regulation and control in the public interest of the exercise of the foregoing right.

2° Laws regulating the manner in which the right of forming associations and unions and the right of free assembly may be exercised shall contain no political, religious or class discrimination.

THE FAMILY

ARTICLE 41

- 1 1° The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.

2° The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.

- 2 1° In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.

2° The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.

- 3 1° The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.

2° A Court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that –

- i there is no reasonable prospect of a reconciliation between the spouses,
- ii such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law, and

iii any further conditions prescribed by law are complied with.

3° Provision may be made by law for the recognition under the law of the State of a dissolution of marriage granted under the civil law of another state.

4 Marriage may be contracted in accordance with law by two persons without distinction as to their sex.

EDUCATION

ARTICLE 42

1 The State acknowledges that the primary and natural educator of the child is the Family and guarantees to respect the inalienable right and duty of parents to provide, according to their means, for the religious and moral, intellectual, physical and social education of their children.

2 Parents shall be free to provide this education in their homes or in private schools or in schools recognised or established by the State.

3 1° The State shall not oblige parents in violation of their conscience and lawful preference to send their children to schools established by the State, or to any particular type of school designated by the State.

2° The State shall, however, as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual and social.

4 The State shall provide for free primary education and shall endeavour to supplement and give reasonable aid to private and corporate educational initiative, and, when the public good requires it, provide other educational facilities or institutions with due regard, however, for the rights of parents, especially in the matter of religious and moral formation.

CHILDREN

ARTICLE 42A

1 The State recognises and affirms the natural and imprescriptible rights of all children and shall, as far as practicable, by its laws protect and vindicate those rights.

2 1° In exceptional cases, where the parents, regardless of their marital status, fail in their duty towards their children to such extent that the safety or welfare of any of their children is likely to be prejudicially affected, the State as guardian of the common good shall, by proportionate means as provided by law, endeavour to supply the place of the parents, but always with due regard for the natural and imprescriptible rights of the child.

2° Provision shall be made by law for the adoption of any child where the parents have failed for such a period of time as may be prescribed by law in their duty towards the child and where the best interests of the child so require.

3 Provision shall be made by law for the voluntary placement for adoption and the adoption of any child.

4 1° Provision shall be made by law that in the resolution of all proceedings—

- i brought by the State, as guardian of the common good, for the purpose of preventing the safety and welfare of any child from being prejudicially affected, or
- ii concerning the adoption, guardianship or custody of, or access to, any child,

the best interests of the child shall be the paramount consideration.

2° Provision shall be made by law for securing, as far as practicable, that in all proceedings referred to in subsection 1° of this section in respect of any child who is capable of forming his or her own views, the views of the child shall be ascertained and given due weight having regard to the age and maturity of the child.

PRIVATE PROPERTY

ARTICLE 43

1 1° The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.

2° The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.

2 1° The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.

2° The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.

RELIGION

ARTICLE 44

1 The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion.

2 1° Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.

2° The State guarantees not to endow any religion.

3° The State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status.

4° Legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations, nor be such as to affect prejudicially the right of any child to attend a school receiving public money without attending religious instruction at that school.

5° Every religious denomination shall have the right to manage its own affairs, own, acquire and administer property, movable and immovable, and maintain institutions for religious or charitable purposes.

6° The property of any religious denomination or any educational institution shall not be diverted save for necessary works of public utility and on payment of compensation.

