

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

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ENTRANCE EXAMINATION

# Irish Constitutional Law

## August 2023

DATE | **Monday, 14 August 2023**

TIME | 3 hours

EXAMINER | Mr T John O'Dowd (UCD)

EXTERNAL EXAMINER | The Hon Mr Justice Gerard Hogan

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### Instructions

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

This paper is 7 pages long including the cover sheet.

# IRISH CONSTITUTIONAL LAW

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## Q1 | COMPULSORY QUESTION

50 MARKS

Many residents of Ballymagash are gravely concerned about the recent opening on the outskirts of the town of a reception centre for single male asylum seekers, which is designed to accommodate sixty residents for periods of between a few days and six months. Access to the reception centre is via a 1km-long private road only and several dozen protestors have gathered each evening at the junction between that road and the public highway, for demonstrations lasting between one and four hours, to express their opposition to the centre. The protesters walk up and down with placards on public pavements beside a public road.

Among the placards the protestors have displayed are ones with the slogans: “Stop the invasion!”, “We will not be replaced!”, “Keep our women and children safe!”, and “No ghetto here!”. The protestors also regularly block the access road to any motor vehicle trying to get to the centre until they have spoken to the driver, in order to express similar sentiments. Residents walking to or from the centre have also sometimes been jeered at and jostled by protestors. One of the local residents, Niamh, has applied to the High Court for an injunction to prevent the continuation of these protests on the grounds that they are an abuse of the constitutional rights of freedom of expression (and similar rights such as association and assembly); that they are contrary to public order and morality and amount to an invasion of her right to privacy and her right to inviolability of the dwelling. While Niamh’s house is some 300 metres away from the pavement, she and her young children find it upsetting that they have to pass these protestors every day as she escorts her children from her house to their local school nearby.

Bill, an independent county councillor representing the Ballymagash Local Electoral Area, has vociferously supported and several times attended the protests against the reception centre. The group Ballymagash Against Racism has in turn staged regular demonstrations, similar in frequency, timing and duration to those against the reception centre, directly outside Bill’s house. About five such persons parade up and down the public pavement outside Bill’s house for about an hour every day displaying their placards as they do so.

Their placards have included the slogans “Root out racism!” and “Kick out the fascists!” While the protestors outside Bill’s house have not jostled or jeered anyone individually, Bill, his wife and his two adolescent children have felt intimidated, when going to and from the house and while inside it, by the protestors’ presence, the messages conveyed by their placards and their constant loud chanting. Bill’s wife, Clare, has applied to the High Court for an injunction to prevent the continuation of the protests outside her home, on the same legal grounds as Niamh has sought an injunction against the protests in respect of the asylum centre. Clare additionally complains that the protests outside her home are an interference with her right to family life.

The two applications for injunctions by Niamh and Clare respectively have been consolidated and they will be heard by the same High Court judge. What are the principles of constitutional law (in particular, where relevant, Article 40.6.1 and Article 40.5) and human rights law that she should apply when deciding this case?

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Q 2

25 MARKS

Jim recently retired as a Garda Superintendent. He is suspected of offences under section 62 of the Garda Síochána Act 2005 (disclosing information obtained in the course of carrying out the duties of his office, knowing that this is likely to have a harmful effect) which is an arrestable offence. Ann, a Garda Síochána Ombudsman Commission investigator, applied to a District Court judge under section 10 of the Criminal Justice (Miscellaneous Provisions) Act 1997 (as substituted by section 6(1)(a) of the Criminal Justice Act 2006) for a warrant to search Jim's home, car and new place of work. Her information on oath set out grounds for suspecting that evidence of, or relating to, the commission of the offences was to be found in those places. Ann told the judge that computer devices, including mobile phones, were to be searched for, seized and digitally examined.

Having considered the matter, the judge issued the warrant sought, expressly authorising digital as well as physical searches. Ann's superiors in GSOC knew that Jim organises 'swingers' parties', at which he, his partner and other consenting adults have sexual intercourse and perform other sexual acts with each other, all of which is normally recorded and the images shared with dozens of people. They did not tell Ann any of this, as it seemed unrelated to any offence. When the warrant was executed, computers and mobile phones were found and seized, on which GSOC found evidence that Jim had committed section 62 offences, but also many images of swingers' parties and, among these images, evidence that a serving Garda, Louise, both was a 'swinger' and had herself committed offences under section 62.

Advise the Director of Public Prosecutions as to whether the Constitution gives either Jim or Louise any grounds for objecting on constitutional grounds, such as their right to privacy, to the admission of the fruits of these searches of digital devices as evidence against them in any criminal proceedings against them charging them with offence under section 52.

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Q 3

25 MARKS

Joe and Claire were in a long-term relationship for twelve years and had two children together, now aged eight and ten. After Joe's death in 2022, Claire discovered that she was not entitled to a widow's contributory pension (which would be €225.50 per week in her case), simply because she and Joe had never married and thus she was not his widow. A qualifying widow (or widower or surviving civil partner) is entitled to such a "WCP" pension irrespective of whether he or she has or ever had any children. However, in respect of each child who is dependent on him or her, a person who is entitled to the payment is entitled to a corresponding increase in it (which would be an extra €84 per week, in Claire's case.)

Claire works full-time in a middle management role, relying on the children's grandparents to mind them while she is at work, and the level of her weekly income means that she does not qualify for the means-tested One-Parent Family Payment, which (if payable to her at the maximum rate) would provide broadly the same benefits as the WCP. If Claire had been Joe's widow she would have qualified for a once-off payment of €8,000 (the Widowed or Surviving Civil Partner Grant), but because she was merely a surviving cohabitant, and she was not entitled to the One-Parent Family Payment, she was not entitled to the Grant either. The only social welfare benefit to which Claire is currently entitled is €280 monthly, as Child Benefit for her two children.

Advise Claire as to whether she could successfully rely on the Constitution (Article 40.1, Article 41 or any other relevant provision) and on her human rights in a challenge to any of the legislative provisions that set the eligibility criteria for the benefits outlined above.

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Q 4

25 MARKS

Section 9(1) of the Medical Practitioners Act 2007 empowers the Minister for Health to give general policy directions in writing to the Medical Council in relation to the performance of the Council's functions, except any such functions relating to the professional conduct and ethics of, or complaints against, or the sanctions that may be imposed upon, registered medical practitioners. The Minister's officials have advised him that there is a severe shortage of medical practitioners working in Health Service Executive (HSE) institutions who are suitably trained and experienced to provide emergency medical treatment in the event of a new pandemic and that there is an urgent need to divert personnel from other areas into that branch of medicine.

The Minister gave a direction to the Medical Council, declaring that it is in response to a health care emergency and claiming that it is based on the executive power of the State and on section 9(1) of the 2007 Act. The Minister's direction to the Council is that, for the next ten years, it shall not accept any application for registration as a medical practitioner unless the applicant satisfies any one of these conditions: (a) currently has a contract of employment with the HSE or (b) has a bona fide intention to practice medicine primarily outside the Greater Dublin Area (Dublin City, Fingal, South Dublin, Dún Laoghaire–Rathdown, Meath, Kildare and Wicklow) or (c) gives an undertaking to re-qualify as a specialist in emergency medicine and to make himself or herself available to work in that area as the HSE may from time to time direct.

Brenda wishes to be registered as a cosmetic surgeon, for which she has specifically trained, but the Medical Council refuses her application, on the basis of the Minister's direction, because she does not meet any of the three criteria. She maintains that these criteria have essentially nothing to do with her ability to practice medicine.

Advise Brenda. According to the Constitution, can the executive power of the State and the Minister's power under section 9 entitle him to give such a direction? Does the direction, in any event, violate her constitutional rights, such as her right to earn a livelihood?

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Q 5

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) “Since the decision in *Cahill v Sutton* [1980] IR 269 ... it is clear that legislation should normally be challenged only by individuals who can establish that the provisions in question have had a clear and adverse effect upon them in a real and concrete way. This has two aspects. What justifies a court in declaring invalid a provision of general application and which may be accepted and approved of by very many other citizens, is the necessity to do justice to perhaps the single individual who can show that his or her rights (and perhaps no one else’s) have been invaded by the provision in question. But it is also considered important that where the validity of legislation is considered, that that should take place against real and tangible facts giving life and focus to the challenge.” *O’Doherty v Minister for Health* [2022] IESC 32 O’Donnell CJ [113].

Discuss, with reference to relevant cases, how consistently the courts adhere to the principles set out in *Cahill v Sutton* and re-affirmed by the Chief Justice in *O’Doherty*. (25 marks)

**or**

- (b) “Planning legislation ... is of general application and has been a feature of our law ever since the enactment of the Town and Regional Planning Act, 1934, although it did not take its modern, comprehensive form until the enactment of the [Local Government (Planning and Development) Act, 1963]. Every person who acquires or inherits land takes it subject to any restrictions which the general law of planning imposes on the use of the property in the public interest. Inevitably, the fact that permission for a particular type of development may not be available for the land will, in certain circumstances, depreciate the value in the open market of that land. Conversely, where the person obtains a permission for a particular development the value of the land in the open market may be enhanced.” *Re Part V of the Planning and Development Bill, 1999* [2000] 2 IR 321 (SC) 352 Keane CJ.

Does the Supreme Court need to clarify the relationship between property rights, on the one hand, and planning controls and other similar forms of regulation, on the other? If so, how should it do so? (25 marks)

**or**

- (c) “[I]t would be more appropriate to characterise constitutional rights which cannot be found in express terms in the wording of the Constitution itself as being derived rights rather than unenumerated rights ... [because this] conveys that there must be some root of title in the text or structure of the Constitution from which the right in question can be derived. It may

stem, for example, from a constitutional value such as dignity when taken in conjunction with other express rights or obligations. It may stem from the democratic nature of the State whose fundamental structures are set out in the Constitution. It may derive from a combination of rights, values and structure. However, it cannot derive simply from judges looking into their hearts and identifying rights which they think should be in the Constitution. It must derive from judges considering the Constitution as a whole and identifying rights which can be derived from the Constitution as a whole.” *Friends of the Irish Environment v Government of Ireland* [2020] IESC 49 Clarke CJ [8.4], [8.6].

Has the case law, either before or since this turn from the language of “unenumerated” rights to that of “derived” rights, matched the promise apparently conveyed by very many cases (of which *Ryan v AG* [1965] IR 294, *McGee v AG* [1974] IR 284 and *The State (Healy) v Donoghue* [1976] IR 325 are just three prominent examples) that the Constitution will always, in the last resort, give a remedy for anything that the court deciding the case finds to be fundamentally unjust, in whatever form that injustice presents itself? (25 marks)