THE HIGH COURT

[2015 No. 582JR]

BETWEEN:

BARRY WHITE

APPLICANT

– AND –

THE BAR COUNCIL OF IRELAND

– AND –

THE MINISTER FOR JUSTICE AND EQUALITY

– AND –

IRELAND

– AND –

THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr Justice Max Barrett delivered on 22nd July, 2016.

Part 1

Tradition

1. Mr White is a retired High Court judge. He wants to return to practice as a barrister. He anticipates that this will lead to him acting as an advocate, principally in the Circuit Court, and also in onward appeals. He therefore looks set to breach a tradition that retired barristers-turned-judges who return to practice as barrister-advocates do not appear before a court of equal or lower jurisdiction than that in which they used formerly to sit as a judge. This tradition has been represented in the within proceedings, at least by the parties opposed to Mr White, as a rule of law. However, for the reasons identified by the court hereafter, it is in truth but a tradition, and so not legally binding upon Mr White.

2. The principal decision regarding this tradition is that of Kennedy C.J. in *In the Matter of the Solicitors (Ireland) Act, 1898 and in the Matter of an Application by Sir James O'Connor* [1930] I.R. 623. The Chief Justice's decision in that matter concerned an application by a onetime judge who wanted to return to practice as a solicitor. Having posited, at 630-31, that there was a common "*understanding*" that upon such an individual being appointed a judge, the practice of law by him (or, of course, her) is abandoned forever, Kennedy C.J. observes as follows at 631-2:

> *"There is good and powerful reason in support of such a rule, for it is beyond doubt that if a man should step down from the privileged position of the Bench and throw off what is a sacred office to engage in the rough-and-tumble of litigious contest, and compete with the practitioners for the feed business of the Court, perhaps challenge decisions which he pronounced, or even fail to support them in argument, he will shake the authority of the judicial limb of government, and mar the prestige and dignity of the Courts of Justice upon which the whole structure of the State must always lean…. [H]e would still be regarded as laying down the law with judicial authority, and he would tend to overbear inferior Courts, while it would be a scandal were he to explain his own judgments for the purpose of advancing a client's cause."*

3. Some of these points do not present as practical concerns in the case of Mr White. This is because he has already indicated, in a letter of 5th October, 2015, to the Department of Justice and Equality that, should he return to practice as a barrister engaged in advocacy, he will not in the course of that practice: *"(a)…refer to his prior judicial status in any practice-related context…(b)…appear in any case which he has heard as a judge or was connected with as a judge…(c)…appear in any case where one of his decisions as a judge is substantively in issue…(d) provide advice about the interpretation of any of his previous judicial decisions that is intended to elaborate or…clarify such a decision…* [or] *(e)…use in practice any confidential information obtained by him while a judge."* These sensible undertakings have the combined effect that no practical instance could conceivably arise in which Mr White will, to borrow from the above-quoted wording of Kennedy C.J. *"challenge decisions which he pronounced, or even fail to support them in argument".*

4. There are a number of preliminary points to note about the decision of Kennedy C.J. in *O'Connor*. First, his decision is not a judgment of the Supreme Court. It is a decision of the Chief Justice sitting as the arbiter of matters pertaining to the solicitors' profession, in much the same way that the President of the High Court does today. Second, the case is not a *lis*, *i.e*. there is no controversy arising between parties. Third, as Kennedy C.J. himself acknowledges, at 630, it is a decision that is not supported by "*any modern precedent*" to the time when the decision was made. In other words, Kennedy C.J. could not state that his ruling reflected existing law. Fourth, it is what might be described as a form of 'decision of first impression', being a decision that merely sets out the facts and which then concludes, in truth all but advocates, that a particular vision of justice and morality suggest a certain end to be desirable, and hence correct. Fifth, it is a decision that does not involve inductive or deductive reasoning of the type that customarily informs court judgments, but largely speculative reasoning that, again, is ungrounded in case-law. The effect of the foregoing points is that it is not at all clear that this Court is bound by the decision in *O'Connor*. But, even if it were, the import of *O'Connor*, at least so far as barristers-turned-judges are concerned, appears in any event to have been widely misconstrued. In an illuminating *Irish Jurist* article on the *O'Connor* decision ("*Chief Justice Kennedy and Sir James O'Connor's Application*" (1988) Ir. Jur.

144), the then Dr Gerard Hogan, one of the foremost lawyers of his generation, a distinguished expert on constitutional law, and now a member of the Court of Appeal, offered the following view, at 152:

> *"The **conventional** understanding…is that a former judge may not practise in the court of which he was a member, or in any inferior court. Thus according to this **convention**, a former member of the Circuit Court would be entitled only to appear before the High Court or the Supreme Court [*and now also the Court of Appeal*]. It might just be theoretically possible for a former ordinary judge of the High Court to return to the bar on this understanding that he would only be briefed to appear before the [*Court of Appeal or the*] Supreme Court, but this prospect seems wholly unrealistic….It should be pointed out, however, that, in the case of barristers, at least, this would appear to be merely an understanding and there exists no strict **legal** impediment [*emphasis in original*] in the way of a former judge who wished to resume practice at the bar. Unlike the solicitor's profession, the Bar is self-regulating and a barrister would appear to enjoy a common law right of audience in all courts. Moreover, since the Supreme Court has held that a barrister who becomes a judge reverts to the status of barrister upon his vacation of judicial office, it seems that, **convention** apart, a former judge enjoys an unqualified legal right of audience in all courts should he resume his practice at the bar."*
> [Emphasis added, save where indicated].

5. This Court respectfully accepts as correct the now Hogan J.'s observations in the above-quoted text as to (i) the traditional (and so not legally binding) nature of the understanding that has persisted since the decision in *O'Connor* concerning the return by a barrister-turned-judge (following retirement from the bench) to practice at the bar, and (ii) the true legal situation presenting in this regard. Thus, while the precedential force of *O'Connor* is, at best, uncertain, this Court has no need to seek to circumvent or distinguish it: as Hogan J. indicates, the legal position, even post-*O'Connor*, is that there is but a "*conventional understanding*" that a barrister-turned-judge who retires from the bench may not practise in the court of which he was a member or in any inferior court.

6. That Hogan J. is correct in this last regard seems borne out if one looks across the Irish Sea to the neighbouring jurisdiction, from whose legal system the structure of our own legal system originally derives. As recently as 2006, a detailed and informed submission by a Working Party of the Judges' Council to the Lord Chancellor, concluded, at 9, that "*The Working Party does not believe that at present any member of the judiciary is legally prohibited from returning to practice after retirement"* and described the general non-return by judges to professional practice following resignation or retirement from judicial office as but a "*convention*". In fact, the convention is somewhat more stringent across the water than it is in Ireland. There, a complete non-return to practice has been the convention. Here, the convention (tradition) has been more nuanced, allowing for retired barristers-turned-judges to practise in courts superior to the court in which they sat as a judge. But what is striking is that in our neighbouring jurisdiction, a jurisdiction whose court apparatus is so similar to our own, the general non-return to practice by former judges has been recognised as a convention only, and so, as in Ireland, not legally binding.

7. On a separate and subsidiary note, the court cannot but observe that the decision in *O'Connor*, though eloquently crafted in the style of its time, is premised on notions that strike a discordant tone in our more meritocratic and egalitarian age. In truth, its antiquated and stratified social mindscape offers fertile ground for manifold distinction, were it necessary to distinguish the decision (though, of course, for the reasons stated above, it is not). So, for example, Kennedy C.J. refers to the role of judge as a "*sacred office*". Being a judge is undoubtedly a responsible job, and it is a privilege to be given the job, but ultimately it is just a job. The idea that it is a "*sacred office", i.e.* connected with some god or dedicated to a religious purpose, and so deserving of veneration, is, with every respect to a rightly respected judge, fanciful. Kennedy C.J. also refers to the "*rough and tumble of litigious contest*" as though practice as a barrister is less than what it is, *viz.* an honourable pursuit. And his rather disdainful reference to a former judge having to "*compete with…practitioners for the feed business of the Court*" is imbued with antediluvian pretensions of judicial superiority that belong to yester-year and have no place in our modern republic of equals. To the extent that inequality presents, it is judges who serve and the public, through the medium of law, who are master. As to the notion that Mr White, were he to return to practice, would "*tend to overbear inferior Courts*", the truth of the matter is that, in our less deferential age, Mr White should expect to be given no quarter by counsel or court upon return to practice. In this last regard, the notion of any court or judge being overborne by the sight of a former judge acting as an advocate sits entirely askance with, *inter alia*, the judicial oath of office prescribed in Art. 34.6.1º of the Constitution whereby every judge swears duly and faithfully to execute the office of judge "*without fear or favour, affection or ill-will towards any" and to "uphold the Constitution and the laws*" of our great republic. This is an oath that is viewed with real seriousness by judges; it is an oath that is a bed-rock of our demonstrably independent judiciary; and it is an oath which offers a particular protection so far as any concern as to preferential treatment, want of judicial independence, let alone objective bias, might (wrongly) be perceived to arise from the appearance before a court of a onetime judge of any level.

8. The decision in *O'Connor* gets a passing nod in the dissenting judgment of Lavery J. in *O'Byrne v. Minister for Finance and Attorney General* [1959] I.R. 1 when he observes, at 40, that judges "*have effectively to surrender the right to practise their profession should they cease to be judges, either by removal or retirement*". Two points might be noted in this regard. First, the dissenting judgment of Lavery J. forms no part of the decision of the Supreme Court in O'Byrne and so is not binding on this Court. Second, Lavery J. carefully refers to judges having "*effectively to surrender the right to practise*", a form of wording which shrinks from describing this arrangement as an obligation and is far more suggestive of its being but a tradition. Moving closer in time, the decision in *O'Byrne* gets favourable mention in the Supreme Court decision in *Curtin v. Dáil Éireann* [2006] 2 I.R. 556. Even so, there is no seal of approval given by the Supreme Court to the observations of Lavery J. in his dissenting judgment, and not a single mention of the decision of Kennedy C.J. in *O'Connor* – and, in truth, not surprisingly, for *Curtin* was a case concerned with the removal of a disgraced judge, not the future career prospects of a judge who, as in the case of Mr White, consistently discharged the role of judge with honour, and only retired upon reaching mandatory retirement age.

Part 2

What the Bar Council Did and How the Minister Responded

9. Given that the court has concluded that (i) neither *O'Connor* nor any later decision presents a legal impediment to Mr White's return to practice, and (ii) the practice whereby barristers-turned-judges who retire from the bench have not returned to practice as advocates before any court of equal or lower jurisdiction to that in which they formerly sat as judge is but a tradition (both of which conclusions are consistent with the views expressed by Hogan J. in the above-quoted *Irish Jurist* article), the court turns now from the rather lofty concerns addressed in Part 1 of this judgment to the somewhat more mechanical issues contended to arise from Mr White's interactions with the Bar Council and the Minister for Justice following his retirement. As will be seen in the text that follows, the court considers that, in the circumstances arising, the Bar Council has not erred in law, but the Minister has. This is a conclusion that, as counsel for the Bar Council presciently observed in the course of argument, considerably reduces the number of issues that the court must now address from the number argued before it.

10. Regulation 5(3) and (4) of the Criminal Justice (Legal Aid) Regulations, 1965, provide as follows:

> *"(3) Where, at any time after the compilation of a list in pursuance of this Regulation, the* [Bar] *Council is notified by a counsel of his willingness to act for persons granted certificates for free legal aid…the Council* ***shall*** *notify the Minister of such wish and the Minister* ***shall*** *amend accordingly the list kept by him pursuant to this Regulation by adding thereto… the name of the counsel…*
>
> *(4) A counsel who is willing to act for persons granted certificates for free legal aid and who wishes to have his name included in the list kept by the Minister pursuant to this Regulation…shall notify the Council in writing and upon receipt of the notification the Council shall notify the Minister and the Minister shall amend accordingly the list kept by him pursuant to this Regulation and shall notify the counsel of the amendment".* [Emphasis added].

11. The court notes, in passing, the Minister's contention that the reference to "*counsel*" in reg. 5 is a reference to a barrister engaged in advocacy. However, this proposition, with respect, is not borne out by a consideration of s.132 of the Finance Act, 1998. This relatively recent provision (a) amends the Criminal Justice (Legal Aid) Act, 1962, the enactment on which the Regulations of 1965 are grounded, and (b) introduces a new provision into the Act of 1962, which new provision refers to a 'barrister' in a context where the still-extant provisions of the Act of 1962 refer to 'counsel', thus clearly indicating that the Oireachtas considers each of the terms 'barrister' and 'counsel' to be a euphemism, one for the other, at least in this statutory context. So the reference to "*counsel*" in reg.5 must be, it appears to the court, a reference to a 'barrister', though logically, not least as one is dealing with Irish legislation, it must be construed as a reference to a barrister who is qualified to practise in Ireland, such barristers being subject, as it happens, to twin regulation by way of judicial oversight and supervision, on the one part, and the Disciplinary Committee of the Benchers of the Honorable Society of King's Inns, on the other.

12. The above-quoted provisions in the Regulations of 1965 are clearly mandatory in nature. As mentioned, they have been adopted pursuant to the Criminal Justice (Legal Aid) Act 1962, which has as its long title *"An Act to Make Provision for the Grant by the State of Free Legal Aid to Poor Persons in Certain Criminal Cases"* and which, in s.10, provides, *inter alia,* that *"The Minister may make regulations for carrying this Act into effect and the regulations may, in particular, prescribe…the manner in which solicitors and counsel are to be assigned pursuant to such certificates"*. The significance of being added to the defence counsel list pursuant to reg. 5 is that if one wants to make a living from criminal defence advocacy (Mr White's area of particular professional expertise from his former days as a practising barrister) the practical reality is that one has to be on the defence counsel list.

13. On 14th November, 2014, Mr White notified the Bar Council that he wished to be placed on the defence counsel list. Consistent with the mandatory requirements of reg. 5, the Bar Council, in a letter of 5th December, 2014, notified the Minister of Mr White's wish in this regard. So the Bar Council did precisely what is required of it by law. On 29th May, 2015, a response issued to Mr White on behalf of the Minister, the critical element of which stated as follows:

> *"The Minister has taken the view that a barrister's name could only be added to the defence counsel list where that person is subject to regulation, i.e. subject to regulation by the Bar Council as the Council is currently the only regulatory body for counsel.*
>
> *The Department informed the Bar Council on 13 February 2015 that the notification of 5 December 2014 did not constitute notice of your wish to be placed on the Criminal Legal Aid panel pursuant to the Criminal Legal Aid Regulations 1965 as the Bar Council only has authority to forward the names of those subject to regulation by the Bar Council."*

14. Following further submissions by Mr White's solicitors on behalf of their client, the above-quoted conclusions were confirmed in a further letter of 9th October, 2015, again sent on behalf of the Minister.

15. The court notes (i) the interchangeable usage of the terms 'counsel' and 'barrister' in the above-quoted text, (ii) the fact that the above-quoted text appears to have represented something of a novel departure by the Minister in that it emerged in the evidence before this Court that the defence counsel list has hitherto included people who do not satisfy the requirements that the above-quoted text envisions, and (iii) that the above-quoted text is wrong in its assessment of applicable law.

16. As to (iii), there is no mention in the Regulations of 1965, or indeed the Act of 1962, that a barrister must be subject to regulation. Of course, as the court has noted above, reg. 5 must sensibly be construed as referring to a barrister who is qualified to practise in Ireland. Moreover, even if the Minister is right that the regulations must be construed as being limited to barristers subject to regulation, there is no requirement in the Regulations of 1965, or in the Act of 1962, as to regulation by the Bar Council. In this regard the Minister appears, with respect, to disregard the fact that twin regulation by way of judicial oversight and supervision, on the one part, and the Disciplinary Committee of the Benchers of the Honorable Society of King's Inns, on the other, exists for barristers who are not subject to regulation by the Bar Council. All of the foregoing being so, the Department's notification of 13th February, 2015, is legally unfounded and the suggestion that the Bar Council erred is legally incorrect. The only party to have erred, and who stands in breach of the mandatory requirements of reg. 5(3), is, with respect, the Minister. In reading into the applicable legislation the additional requirement that an applicant counsel must be regulated by the Bar Council, the Minister has imposed a restriction on Mr White in the practice of his profession that goes beyond what is contemplated by the Regulations of 1965, and the Act of 1962, in a manner that offends against the final judgments in cases such as *O'Neill v. Minister for Agriculture* [1998] 1 I.R. 539, *Humphrey v. Minister for the Environment & Ors* [2001] 1 I.R. 263, and *McGowan v. Labour Court & Ors* [2013] 3 I.R. 718. By failing to amend the defence counsel list consequent upon the notification from the Bar Council, by effectively 'grafting on' to the Regulations of 1965 an additional requirement that a barrister be regulated by the Bar Council before s/he may be admitted to the defence counsel list, the Minister has acted unreasonably, arbitrarily, contrary to law, in a manner which is not effective to achieve the purpose or aim of the Act or Regulations, and *ultra vires*.

17. The court notes in passing that it does not consider a literal interpretation of the Regulations of 1965, and specifically reg. 5, to yield any absurdity or to require, on the basis of such absurdity or otherwise, the invocation or application of s.5(2) of the Interpretation Act, 2005. Consistent with the observations of Denham J. (as she then was) in *D.B. v. Minister for Health* [2003] 3 I.R. 12, 21, the court has given the words of the Regulations of 1965 their natural and ordinary meaning. And it has afforded them a reading which, consistent with *East Donegal Co-operative Livestock Mart Ltd. v. Attorney General* [1970] I.R. 317 and, for example, the observations of Griffin J. in *Murphy v. Corporation of Dublin* [1979] I.R. 115, 121, accords with the Constitution, in particular the constitutional right to earn a livelihood, as considered below.

The Constitutional Right to Earn a Livelihood

18. The right to earn a livelihood was recognised by Kenny J. in *Murtagh Properties Limited v. Cleary* [1972] I.R. 330 as one of those unspecified or undefined rights arising under Article 40.3 of the Constitution to which he had referred in his previous judgment in *Ryan v. Attorney Genera*l [1965] I.R. 294. Other early instances of this right being recognised are provided by *Murphy v. Stewart* [1973] I.R. 97 and *Yeates v. Minister for Post and Telegraphs* [1978] I.L.R.M. 22. The right has been identified variously as a stand-alone unspecified personal right under Article 40.3.1º and/or as one of the bundle of rights arising from private property and protected by Article 40.3.2º. (See, for example, *Attorney General v. Paperlink Ltd* [1984] I.L.R.M. 373, *Hand v. Dublin Corporation* [1991] 1 I.R. 409, Cox v. Ireland [1992] 2 I.R. 503 and *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 I.R. 321). The relevant principles which emerge from the case-law can briefly be summarised, for present purposes, as follows:

> (1) the right encompasses the "*right to earn one's livelihood by any lawful means"* (per Finlay C.J. in *Lovett v. Gogan* [1995] 3 I.R. 132, 141, adopting with approval the ruling of O'Hanlon J. in *Parsons v. Kavanagh* [1990] I.L.R.M. 560, 566) and *"the right of every citizen to earn his or her living from any lawful vocation, trade, business or profession"* (per Murray J. in Casey v. Minister for Arts [2004] 1 I.R. 402, 419);
>
> (2) the right is "*a narrow one*" (per McKechnie J. in *Nurendale Ltd t/a Panda Waste Services v. Dublin City Council* [2009] IEHC 588, para.193), "*not*", McKechnie J. continues, "*a right to earn a livelihood from performing a particular job or task*" but "*merely a right not to be prevented from working*". Similarly, it is "*inaccurate…to state without qualification that each citizen has the constitutional right to carry on the occupation in which he is actually earning his living"*;
>
> (3) the freedom to exercise this constitutional right "*is not an absolute one*" (per Costello J. in *Attorney General v. Paperlink Ltd* [1984] I.L.R,M. 373, 384);
>
> (4) the question of whether that right is being infringed or not "*must depend upon the particular circumstances of any given case*" (per Walsh J. in *Murphy v. Stewart* [1973] I.R. 97, 117). In particular, it entails an assessment of the proportionality of the interference with the right, having due regard to the relevant provisions of the Constitution. (In this last regard see *Nottinghamshire County Council v. K.B*. [2011] IESC 48);
>
> (5) the right "*to earn one's livelihood by any lawful means carries with it the entitlement to be protected against any unlawful activity on the part of another person or persons which materially impairs or infringes that right"* (per O'Hanlon J.in *Parsons v. Kavanagh* [1990] I.L.R.M. 560, 566, as approved by the Supreme Court in *Lovett v. Gogan* [1995] 3 I.R. 132, 141);
>
> (6) the scope of a person's right to earn a livelihood is necessarily qualified having regard to the rights of others (see *Casey v. Minister for Arts* [2004] 1 I.R. 402, 420);
>
> (7) the mere fact that *"a person has a right to a particular livelihood…does not mean that he has a right to receive employment from any particular employer"* (per Geoghegan J. in *Greally v . Minister for Education (No. 2)* [1999] 1 I.R. 1, 10; see also the judgment of McCracken J. in *Shanley v. Galway Corporation* [1995] 1 I.R. 396, 407);
>
> (8) insofar as an interference with rights protected by Art. 40.3 of the Constitution is justified by the exigencies of the common good, it cannot be regarded as an unjust attack on such rights contrary to Art. 40.3 (see e.g., *Madigan v. Attorney General* [1986] I.L.R.M. 136, 161; see also Keane J. in *Iarnród Éireann v. Ireland* [1996] 3 I.R. 321, 361).

19. The Minister has placed particular reliance on, in effect, point (2) above, emphasising that a right to earn a livelihood is a right not to be prevented from working, and that Mr White has not been prevented from working; his name has simply not been placed on the defence counsel list, with the result that he cannot do criminal defence work that is legally aided if someone were minded to offer him a criminal brief. There is always other work, the Minister maintains, that Mr White can do. This, the court finds, may be true as a matter of logic. But, in reality, it is a line of argument that makes little sense. Yes, Mr White can, say, go out and open a high street shop today if he wants to do so, but the truth of the matter is that there is a knack to operating a high street shop that, as best the court knows, Mr White does not possess. And yes, technically he could act in some line of legal work which would not bring him before the High Court or lower courts as an advocate; but the truth is that his particular specialisation as a practising barrister is in criminal defence advocacy before the Circuit Court and onward appeals. He knows the 'ins and outs' of criminal trial proceedings, he knows how best to defend someone accused of a criminal offence, he knows, to borrow a colloquialism, 'the tricks of the trade' so far as criminal defence work, a specialised line of work, is concerned. If Mr White was a younger lawyer in, say, his twenties or thirties, there would be real truth to the notion that he could train himself into a new line of work or even abandon the law altogether and pursue a different career. But he is a gentleman in his seventies, and before serving as a judge he had for long specialised in criminal defence advocacy before the Circuit Court and beyond; the notion that he could train himself into a new line of work and raise himself at this time to the standard of expertise necessary to place himself at the forefront of a different line of legal work is a theoretical possibility but a practical nonsense. When the Minister, purportedly acting pursuant to legislation, acts to deprive a man in his seventies of the meaningful possibility of 'earning his crust' by way of criminal defence advocacy before the Circuit Court and in onward appeals, in circumstances where in reality that is the only *métier* which that man now possesses, it seems to the court that the Minister unlawfully circumscribes that man's constitutional right to earn a livelihood. Here, of course, the Minister has, for the reasons stated above, acted unlawfully in any event. However, that wrong is compounded by the fact that, in the circumstances here arising, the Minister's actions represent an unlawful circumscription of Mr White's constitutional right to earn a livelihood. The court's view in this respect is not altered by the fact that Mr White has not proved in these proceedings that he has been required to bring them by virtue of absolute financial necessity on his part.

20. The court notes in passing that along with violations of his constitutional right to earn a livelihood, Mr White claims a related breach of his constitutional property rights to arise. It is not necessary to assess separately any alleged infringement of the property rights of Mr White because of the recognised inter-relationship, touched upon above, between the right to earn a livelihood protected by Art. 40.3.1º of the Constitution and the property rights specifically protected by Article 40.3.2º. So to the extent that Mr White establishes, and he has established, an interference with his constitutional right to earn a livelihood, then, for the same reasons, *mutatis mutandis*, he has established a breach of his related constitutional property rights.

21. Finally, and in a different vein but one related nonetheless to the constitutional right to earn a livelihood, the court notes in passing that if *O'Connor* fell rightly to be considered as (and the court, for the reasons stated elsewhere above, does not consider that it is) a decision establishing as a rule of law, as opposed to recognising as a tradition, that barristers-turned-judges cannot, following retirement from the bench, appear as barrister-advocates in courts that are of equal or lower jurisdiction than the court in which they sat as judges, this Court would, *inter alia*, have relied upon Art. 50.1 of the Constitution to depart from that decision. It

would have done so on the basis that if *O'Connor* fell rightly to be considered as recognising a law that held force in Saorstát Éireann concerning the post-retirement actions of barristers-turned-judges, that law did not survive the coming into operation of the Constitution, being a law that is inconsistent with the constitutional right to earn a livelihood that such individuals enjoy, a constitutional right that was initially recognised decades after *O'Connor* was decided and our understanding of which has evolved still further in the decades since its initial recognition. However, the court's observations in this regard are *obiter* as, for the reasons indicated previously, and by reference to Hogan J.'s logic in the above-mentioned *Irish Jurist* article, the court considers the decision in *O'Connor* to recognise a non-legally binding tradition, no more.

Part 4

Reliefs Sought

22. Mr White comes to court at this time seeking various reliefs. The court identifies these various reliefs below and indicates whether or not it is satisfied to grant them.

I

23. Relief Sought: an order of certiorari quashing the decision of the Bar Council affirming its decision to subject Mr White's return to practice at the Bar as a member of the Law Library to application of Rule 5.2.1 of the Code of Conduct of the Bar of Ireland which prevents him, following retirement, to practise in a court of equal or lesser jurisdiction than the court of which he was a judge which decision was communicated by letter dated 28th September, 2015.

24. This relief is declined. Rule 5.2.1 only impacts on Mr White if he were to elect to become a member of the Law Library, thereby making himself subject to the Code of Conduct for the Bar of Ireland. Hitherto, Mr White has seen his joining the Law Library as being a pre-requisite to being placed on the criminal defence list, with the 'Catch 22' arising that, if he joins the Law Library, Rule 5.2.1 means that he cannot engage in such criminal advocacy as he wishes to undertake. However, the court has concluded above that Mr White does not need to be a member of the Law Library to be placed on the criminal defence list, so this ground of relief is redundant. The court will not grant an order forcing the Law Library, in effect a private members' club, to admit Mr White even though he will not 'sign up' to Rule 5.2.1. To grant such an order would, in the circumstances presenting, impinge without any lawful justification on the constitutional right to freedom of association, extant under Article 40.6.1º.iii of the Constitution, of those who are members of the Law Library and who are satisfied to adhere to its existing rules. It may be that in the light of the within judgment, Rule 5.2.1 of the Code of Conduct for the Bar may come to be seen as anachronistic, but there is no general requirement in our law that the privately agreed rules applicable to members of a private members' club, lawfully exercising the constitutional right to form associations, cannot be, or remain, anachronistic.

II

25. Relief Sought: an order of certiorari quashing the decision of the Minister communicated by letters dated 29th May, 2015 and 9th October, 2015, to refuse to include Mr White's name on the panel of counsel eligible to be paid for services provided under the Criminal (Legal Aid) Regulations, 1965.

26. For the reasons identified elsewhere above, this relief will be granted.

III

27. Relief Sought: a declaration that Rule 5.2.1 of the Code of Conduct of the Bar of Ireland as being ultra vires the Bar Council.

28. Given the court's conclusion regarding the first relief sought (I), it is not necessary for the court to consider, or appropriate for it to order, this relief.

IV

29. Relief Sought: a declaration that Rule 5.2.1 of the Code of Conduct of the Bar Council is unlawful as being a restraint of trade.

30. Given the court's conclusion regarding the first relief sought (I), it is not necessary for the court to consider, or appropriate for it to order, this relief.

V

31. Relief Sought: a declaration that Rule 5.2.1 of the Code of Conduct is unlawful by reason of its disproportionate interference with the Applicant's right to earn a livelihood under Articles 40.3 and/or 43 of the Constitution.

32. Given the court's conclusion regarding the first relief sought (I), no interference of the type described arises, let alone a disproportionate interference. This relief is therefore declined.

VI

33. This ground of relief sought has been withdrawn.

VII

34. Relief Sought: a declaration that the decision of the Minister to require membership of the Law Library and/or compliance with Rule 5.2.1 of the Conduct of the Bar of Ireland as a condition of eligibility for inclusion on the panel of counsel entitled to be paid for services provided under the Criminal (Legal Aid) Regulations, 1965 constitutes a decision to give force of law to the Code of Conduct of the Bar Council contrary to the requirements of Article 15.2 of the Constitution.

35. For the reasons outlined above, the court finds that the Minister has erred in her interpretation of the Regulations of 1965. That is an interpretative error which does not have as its consequence that the Minister has engaged in impermissible law-making contrary to Article 15.2. This ground of relief is therefore declined

VIII

36. Relief Sought: a declaration that the decision of the Minister to require membership of the Law Library and/or compliance with Rule 5.2.1 of the Code of Conduct of the Bar of Ireland as a condition of eligibility for inclusion on the panel of counsel entitled to be paid for services provided under the Criminal (Legal Aid) Regulations, 1965 results from restrictive practices which constitute unlawful restraint of trade and/or anti-competitive practices and is null and void.

37. For the reasons outlined above, the court finds that the Minister has erred in her interpretation of the Regulations of 1965. That is an interpretative error, no more. There is no evidence to suggest that the Minister has engaged in any restrictive practices that constitute an unlawful restraint of trade and/or an anti-competitive practice. Nor does any reason occur as to why the Minister would even wish so to behave. This ground of relief is therefore declined.

IX

38. Relief Sought: a declaration that the decision of the Bar Council to make Mr White's readmission to the Law Library subject to compliance with Rule 5.2.1 of the Code of Conduct of the Bar of Ireland is unreasonable in law in the circumstances of this case.

39. This relief is declined for the reasons identified regarding the first relief sought (I).

X

40. Relief Sought: a declaration that the decision of the Minister to refuse to include Mr White's name on the panel of counsel eligible to be paid for services provided under the Regulations of 1965, as communicated by the letters of 29th May, 2015, and 9th October, 2015, was taken in breach of the requirements of constitutional justice and/or fair procedures and is therefore unlawful.

41. There is no suggestion of any unfairness of procedures on the part of the Minister. So far as infringements of Mr White's constitutional rights are concerned, the court considers that the relief that it is prepared to grant pursuant to the fourteenth ground of relief sought (XIV) below suffices. This ground of relief is therefore declined.

XI

42. Relief Sought: a declaration that there is no requirement in law for Mr White to be a member of the Law Library and subject to the regulatory or disciplinary provisions of the Code of Conduct of the Bar of Ireland before he may be eligible for inclusion on the panel of counsel entitled to be paid for services provided under the Regulations of 1965.

43. For the reasons stated elsewhere above, this relief will be granted.

XII

44. Relief Sought: a declaration that the decision of the Minister to refuse to include Mr White's name on the panel of counsel entitled to be paid for services provided under the Regulations of 1965 was taken ultra vires and is bad in law.

45. For the reasons stated elsewhere above, this relief will be granted.

XIII

46. Relief Sought: a declaration by way of an application for judicial review that the decision of the Minister to refuse to include Mr White's name on the panel of counsel entitled to be paid for services provided under the Regulations of 1965 is unreasonable in law.

47. For the reasons stated elsewhere above, this relief will be granted.

XIV

48. Relief Sought: a declaration that the decision to refuse to include Mr White's name on the panel of counsel entitled to be paid for services provided under the Regulations of 1965 results in a disproportionate interference with his constitutional rights protected under Arts. 40.1 and/or 40.3 and/or 43 of the Constitution.

49. For the reasons stated elsewhere above, this relief will be granted.

XV

50. Relief Sought: a declaration that the decision to refuse to include Mr White's name on the panel of counsel entitled to be paid for services provided under the Regulations of 1965 results in a disproportionate interference with his rights protected under Articles 8 and/or 14 and/or Article 1 of Protocol 1 of the European Convention on Human Rights.

51. The argument that there has been a breach of Mr White's Convention rights was not especially focused upon by Mr White's counsel, at least in their oral submissions. No Convention right has been identified to the court which is substantively different from the constitutional rights that the court has considered. All this being so, and given the court's findings as to the interference with Mr White's constitutional rights, it does not appear necessary to consider the Convention dimension of matters further.

XVI

52. Relief Sought: a declaration pursuant to s.5 of the European Convention on Human Rights Act, 2003, that Rule 5.2.1 of the Code of Conduct of the Bar of Ireland is incompatible with the Convention.

53. Given the court's conclusion regarding the first relief sought (I), it is not necessary for the court to consider, or appropriate for it to order, this relief.

XVII

54. Relief Sought: damages for breach of constitutional rights.

55. Consistent with the judgment of Walsh J. in *Meskell v. Córas Iompair Éireann* [1973] I.R. 121, 132-33, it is open to the court to award damages to Mr White for the infringement of his constitutional right to earn a livelihood. But in the within proceedings, it has not been established by Mr White that he has suffered any loss by virtue of all that has occurred. Thus although letters have been placed before the court from certain solicitors indicating, in effect, that 'all else being equal' they would have given work to Mr White following his retirement, those same solicitors clearly do not perceive all else to be equal. On the contrary, the letters recognise a perceived bar to Mr White's returning to practice. So, in truth, the promise of work those letters contain is illusory. 'I would have given you work if I could, but I don't perceive that I can, so in consequence I will not' is not a sound basis on which the recipient of such a message may claim, or be awarded, damages where the perception arising is subsequently found to have been a misperception. This ground of relief is therefore declined. However, this may not be the disappointment that it might seem to those uninvolved in these proceedings. It is clear from all the correspondence and evidence before the court that the overriding ambition of Mr White since his retirement has been that he be placed by the Minister on the criminal defence list and return to his specialised line of practice before the Circuit Court and beyond. This is an ambition that he will now be able to fulfil.

XVIII

56. This ground of relief sought has been withdrawn.

XIX

57. Relief Sought: damages pursuant to s.3 of the European Convention on Human Rights Act, 2003.

58. Given the court's conclusion regarding the fifteenth relief sought (XV), it does not seem necessary for the court to consider this ground of relief. However, for the same reasons identified as regards the seventeenth relief sought (XVII), the court would in any event have declined to grant this relief.

XX –XXII

59. Certain further ancillary reliefs have been sought. As to relief XXII (costs), the court will hear the parties on this aspect of matters following their consideration of this judgment.