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**“COURAGEOUS COURTS:  
SECURITY, XENOPHOBIA AND  
FUNDAMENTAL RIGHTS”**

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**Without Fear or Favour:  
Security, Rights and the Rule of Law in Ireland**

**REPORT BY**

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*“The world is indeed full of peril, and in it there are many dark places, but still there is much that is fair, and though in all lands love is now mingled with grief, it grows perhaps the greater.”<sup>1</sup>*

## **Introduction**

The topic of our mini-conference '**Courageous Courts: Security, Xenophobia and Fundamental Rights**' is multi-faceted. It reflects the times we live in, and the unprecedented challenges we face in a rapidly changing world. Issues associated with migration, tension between States, repercussions of the economic crisis, Brexit and concerns in relation to populism, threaten our key values: human rights, democracy and the rule of law.

Among the core challenges faced by States is terrorism: a growing concern, in light of the increasing plight of terrorist attacks in recent years and months. Terrorism impacts significantly on the human rights of those directly affected, and has wider implications for civil society, jeopardising peace and security and threatening social and economic development.<sup>2</sup> Counter-terrorism measures are employed in order to safeguard the security of States and their citizens, and to promote and protect human rights and the rule of law.

However, as noted in the Report of the Parliamentary Assembly of the Council of Europe Committee on Political Affairs and Democracy on 'Combating international terrorism while protecting Council of Europe standards and values':

“The fight against terrorism must be reinforced while ensuring respect for human rights, the rule of law and the common values upheld by the Council of Europe. It should be underlined that combating terrorism and protecting Council of Europe standards and values are not contradictory but complementary.”<sup>3</sup>

Constitutional Courts are tasked with striking the delicate balance between these ideals in carrying out their roles as guardians of the Constitutions.

## **Extraordinary Government**

The universal recognition of human rights does not mean that such rights cannot be limited under any circumstances. Article 15 of the European Convention on Human Rights permits the governments of States, in exceptional circumstances to derogate, “in a temporary, limited and supervised manner from their obligation to secure certain rights and freedoms under the Convention.”<sup>4</sup> Thus, for example, in November 2015, France notified the Secretary General of the Council of Europe that it was derogating from the Convention in the wake of the terrorist attacks in Paris in 2015.

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<sup>1</sup> J.R.R. Tolkien, *The Fellowship of the Ring* - Haldir, referring to hope in times and places of darkness and terror.

<sup>2</sup> As noted in Office of the United Nations High Commissioner for Human Rights 'Human Rights, Terrorism and Counter-terrorism, Fact sheet no. 32, available at:

<http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>

<sup>3</sup> 'Combating international terrorism while protecting Council of Europe standards and values' Doc. 13958, 26<sup>th</sup> January 2016, Report, Committee on Political Affairs and Democracy.

<sup>4</sup> European Court of Human Rights, Factsheet: Derogation in time of emergency (February 2017). Available at [http://www.echr.coe.int/Documents/FS\\_Derogation\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Derogation_ENG.pdf)

Ireland is not a stranger to this issue, bearing in mind that in *Lawless v. Ireland*,<sup>5</sup> the first case before the European Court of Human Rights, the Court found that the Government of Ireland was justified in declaring that there was a public emergency threatening the life of the nation when, in light of the steady and alarming increase in terrorist activities perpetrated by the unlawful Irish Republican Army ('IRA') and its dissident groups in 1956 and 1957, it called into effect special powers of detention without trial.<sup>6</sup>

Subsequently, in *Ireland v. the United Kingdom*,<sup>7</sup> the first inter state case to be adjudicated upon by the ECtHR, it found that an emergency in accordance with Article 15 existed when, from August 1971 until December 1975, authorities in Northern Ireland carried out extrajudicial powers of arrest, detention and internment in respect of members of the IRA.

### **“Without fear or favour”**

Members of the Irish judiciary, when appointed, swear a declaration pursuant to the Constitution, in open court in the Supreme Court, promising to exercise their judicial office “without fear or favour, affection or ill-will towards any man”<sup>8</sup> and to “uphold the Constitution and the Law”.<sup>9</sup>

The tumultuous history of the Irish State has meant that judges of the Supreme Court, which is the final court of appeal in Ireland, and exercises the judicial review functions of a constitutional court, have been required to carry out their role, in the spirit of this declaration, in a State which “has seen a continuous struggle between the rule of law, and states of exception, beginning with the period under the colonial power of Britain up to more recently when it grappled with paramilitary groups stemming from the Northern Ireland conflict.”<sup>10</sup>

Shakespeare wrote that “What is Past is Prologue”<sup>11</sup>, and in considering the present threats to the rule of law and fundamental rights in constitutional democracies, there is merit in looking at the past.

### **The Past**

When Ireland was under the rule of Britain, violence employed for political ends in the rebellions of the 18<sup>th</sup>, 19<sup>th</sup> and 20<sup>th</sup> century,<sup>12</sup> and during the War of Independence (1919-1921)<sup>13</sup> meant that extraordinary and special provisions outside of the ambit of ordinary law were adopted to maintain social order.<sup>14</sup>

The Irish Free State was founded in 1922 as an autonomous dominion of the British Empire. However, there were those who refused to accept the legitimacy of the State, due to the six counties in Northern Ireland remaining part of Britain under the Anglo-Irish Treaty. A Civil

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<sup>5</sup> *Lawless v. Ireland* (No. 3) [1961] ECHR 2.

<sup>6</sup> Conferred upon Ministers of State under the Offences Against the State Act 1939, as amended by the Offences Against the State (Amendment) Act 1940.

<sup>7</sup> *Ireland v the United Kingdom* (5310/71) [1978] ECHR 1.

<sup>8</sup> *Bunreacht na hEireann*, Article 34.6.1.

<sup>9</sup> *Ibid.*

<sup>10</sup> B Vaughan and S Kilcommins, *Terrorism, Rights and the Rule of Law* (Routledge, 2013) at 12.

<sup>11</sup> *The Tempest*, William Shakespeare, Act 2, Scene 1.

<sup>12</sup> Including the rebellions of 1798 (United Irishmen led by Wolfe Tone), 1803 (led by Robert Emmett), 1848 (Young Ireland), 1867 (Fenian groups in Ireland and America) and 1916 (The Easter Rising of the Irish Volunteers and the Citizens Army); and later the War of Independence 1919-1921.

<sup>13</sup> Fought between the Irish Republican Army and the British security forces in Ireland.

<sup>14</sup> See B Vaughan and S Kilcommins, *Terrorism, Rights and the Rule of Law* (Routledge, 2013), and Hogan and Walker, *Political Violence and the Law in Ireland* (Manchester University Press, 1989).

War took place from 1922 to 1923, ending in a victory for the Free State forces.<sup>15</sup>

In a plebiscite held on 1 July 1937 the people of Ireland enacted a new Constitution, called *Bunreacht na hÉireann* in the Irish language, which replaced the 1922 Constitution of the Irish Free State, and renamed the State 'Ireland', a "sovereign, independent and democratic State".<sup>16</sup> The Constitution can be amended only by national referendum.

Paramilitary groups, primarily the Irish Republican Army continued to carry out armed campaigns in pursuit of a united Ireland from 1939 to 1945, from 1956 to 1962, and from the 1970s when there was a resurgence of paramilitary activity stemming from political violence and civil disturbances in Northern Ireland, which spilled into the Republic of Ireland.

Time does not permit a comprehensive outline of the periods of history in which the security of the nation was threatened, but a mention of certain periods illustrates the backdrop against which it became necessary to take emergency measures in Ireland.

### **Security in the Constitution**

As in other Constitutions, the Irish Constitution makes provision for extraordinary circumstances. Article 38.3.1 of the Constitution, provides for the establishment by law of "special courts...for the trial of offences in cases where it may be determined in accordance with such law that the ordinary courts are inadequate to secure the effective administration of Justice, and the preservation of public peace and order."<sup>17</sup> This was the foundation for the Special Criminal Court, Ireland's non-jury court established to deal with terrorist offences, and now also certain offences involving 'organised crime'.<sup>18</sup>

Article 28.3.3 of the Constitution gives constitutional immunity to "any law enacted by the *Oireachtas* (Parliament) which is expressed to be for the purpose of securing public safety and the preservation of the State in time of war or armed rebellion".<sup>19</sup>

### **Fundamental Rights**

At the same time, the Constitution of Ireland robustly protects human rights. A significant proportion of the Constitution is devoted to the protection of fundamental rights,<sup>20</sup> and it expressly confers on the High Court, the Court of Appeal and the Supreme Court the power to review the constitutionality of legislation.

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<sup>15</sup> Fought between the anti Anglo-Irish Treaty faction of the Irish Republican Army and their ex-colleagues in the Army of the Irish Free State.

<sup>16</sup> The Constitution of Ireland, Article 5.

<sup>17</sup> The Special Criminal Court was established under Part V of the Offences Against the State Act 1939 to deal with terrorist and subversive offences. It was initially established under the **Offences Against the State Act 1939**, to prevent the IRA from undermining Ireland's neutrality during World War II and the 'Emergency'. The current Special Criminal Court dates from 1972 and was intended to handle cases relating to the 'Troubles' which had just begun in Northern Ireland.. Its jurisdiction has evolved to include certain 'organised crime'.

<sup>18</sup> The Special Criminal Court was established under Part V of the Offences Against the State Act 1939.

<sup>19</sup> As amended by the First Amendment of the Constitution, passed on 2<sup>nd</sup> September 1939, following which an emergency was declared under. The need for the amendment arose in light of the imminent outbreak of World War II and the desire of the Government of Ireland to remain neutral, in circumstances where doubt existed as to whether "time of war" could encompass a conflict in which the State was not a belligerent.

<sup>20</sup> Articles 40 to 44 of the Constitution of Ireland.

A declaration of unconstitutionality by the High Court, Court of Appeal, or the Supreme Court amounts to, in the words of former Supreme Court judge, Mr. Justice Henchy, a “judicial death certificate”.<sup>21</sup> The power of judicial review and the fundamental rights provisions of the Constitution have generated a rich source of constitutional jurisprudence.<sup>22</sup>

The Irish Courts have found that in addition to the rights expressly referred to in the Constitution, Article 40.3 of our basic law guarantees personal rights not explicitly referred to in the Constitution.<sup>23</sup>

### **Offences Against the State Act 1939**

With the threat of war in 1939, Ireland wished to remain neutral, and ensure that any campaign of the IRA would not compromise this aim. A state of emergency was declared in 1939,<sup>24</sup> and the Offences Against the State Act, 1939 was passed by the *Oireachtas* (the Irish parliament) to protect state security. The IRA was immediately proclaimed an illegal organisation.<sup>25</sup>

The 1939 Act, as amended, creates a number of offences relating to the activities of unlawful organisations.<sup>26</sup> The 1939 Act and its subsequent amendments were enacted to deal with terrorism from a domestic perspective, and the State’s response to international terrorism was enhanced by the enactment of further, more recent, legislation.<sup>27</sup>

The 1939 Act also provides for the extraordinary measures of a Special Criminal Court,<sup>28</sup> and powers of internment without trial “in time of war or national emergency.”<sup>29</sup>

The Special Criminal Court was established via Government proclamation and Part VI of the Offences Against the State Act 1939, providing for the power of internment, was activated.

### **Internment and *The State (Burke) v Lennon***

It has been noted in respect of legislation of an emergency character, that the Irish Courts have “not been prepared always to accept unquestioningly [such] legislation justified by reference to the threat from terrorism.”<sup>30</sup>

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<sup>21</sup> *Murphy v. Attorney General* [1982] IR 241 at 307.

<sup>22</sup> As observed by Denham CJ in ‘Some Thoughts on the Constitution of Ireland at 75’, ‘Conference on ‘The Irish Constitution: Past Present and Future’ (Royal Irish Academy, Dublin, 2012).

<sup>23</sup> As first identified by Kenny J in the High Court, and upheld by the Supreme Court in *Ryan v. Attorney General* [1965] IR 294.

<sup>24</sup> Emergency Powers Act 1939 was passed. It lapsed on 2<sup>nd</sup> September 1946, although the state of emergency was not rescinded until 1976 when a fresh state of emergency was declared arising out of the Northern Ireland conflict, which was rescinded in February 1995 following the IRA ceasefire.

<sup>25</sup> Section 19. It had been declared illegal in the Irish Free State in 1936.

<sup>26</sup> Offences Against the State Act, 1939, Part III. The 1939 Act establishes the concept of an unlawful organisation and sets out activities which render an organisation unlawful, such as engagement in, promotion or encouragement of treason, advocating or attempting the violent alteration of the Constitution, raising an unlawful military or armed force. The Government may by order declare an organisation to be unlawful by means of a suppression order.

<sup>27</sup> More recently enacted legislation to deal with terrorism includes the Criminal Justice (Terrorist Offences) Act 2005, and the Criminal Justice (Terrorist Offences)(Amendment) Act 2015.

<sup>28</sup> Offences Against the State Act 1939, Part V.

<sup>29</sup> Offences Against the State Act, 1939, Part VI.

<sup>30</sup> See Hamilton ‘The Delicate Balance between Civil Liberties and national Security’ South African Judges Commission, Mozambique August 2006.

The first major constitutional case which arose under the 1937 Constitution was the 1939 case, *The State (Burke) v. Lennon*, which tested the internment provisions of the Offences Against the State Act 1939.<sup>31</sup>

In that case the brother of the applicant, who was interned without trial under Section 55 of the 1939 Act, under a warrant issued by the Minister of State on the grounds that the Minister was satisfied that he was engaged with activities calculated to prejudice the preservation of the security of the State, petitioned the High Court for an order of habeus corpus.

Internment of members of the IRA took place in Ireland during the Second World War, and later during the 1956 to 1962 campaign of the IRA.

Not only was the habeus corpus application successful and the applicant released, Gavan Duffy J. declared Part VI of the Offences Against the State Act, 1939 under which the applicant had been detained and interned, unconstitutional. He took into account Article 9 of the Irish Constitution, dealing with citizenship; personal liberty, which he referred to as “one of the cardinal principles of the Constitution, proclaimed in the Preamble itself”,<sup>32</sup> and the fundamental rights enshrined in Articles 40 to 44 of the Constitution, including the right to personal liberty. Gavan Duffy J stated:

“Article 40... guarantees that no citizen shall be deprived of liberty, save in accordance with a law which respects his fundamental right to personal liberty, and defends and vindicates it, as far as practicable, and protects his person from unjust attack... In my opinion, a law for the internment of a citizen without charge or hearing, outside the great protection of our criminal jurisprudence and outside even the special Courts, for activities calculated to prejudice the State, does not respect his right to personal liberty and does unjustly attack his person.... In my opinion, the saving words in the declaration... cannot be used to validate an enactment conflicting with the constitutional guarantees. The Constitution, with its most impressive Preamble, is the Charter of the Irish People and I will not whittle it away.”<sup>33</sup>

An appeal to the Supreme Court was unsuccessful on a jurisdictional based on a preliminary issue regarding jurisdiction.

The practical consequences of the decision are significant, as following the decision in *State (Burke) v. Lennon*, the Government felt that it had no option but to release all of the other persons interned under the provision. Shortly afterwards, in December 1939, a Magazine Fort at Phoenix Park, Dublin, which was the Defence Forces’ main ammunition depot was raided by the IRA in a military style operation and over one million rounds of ammunition were stolen by over 50 men using four lorries.<sup>34</sup> The Government believed that the main suspects included many of the internees who were released following *The State (Burke) v. Lennon*.<sup>35</sup>

In response, the *Oireachtas* passed the Offences Against the State (Amendment) Bill, 1940, which contained similar powers, but slightly different wording. The President of Ireland sent the Bill to the Supreme Court under Article 26 of the Constitution, which provides for the referral by the President of a Bill passed by both Houses of the *Oireachtas* (parliament) to the Supreme Court, before signing it into law, for a decision as to its constitutionality.<sup>36</sup>

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<sup>31</sup> [1940] 1 IR 136.

<sup>32</sup> *Ibid* at 143.

<sup>33</sup> At pp. 154 to 155.

<sup>34</sup> See Hogan G in *The Origins of the Irish Constitution 1928-1941* (Royal Irish Academy 2012) at 680.

<sup>35</sup> Report of the Committee to Review the Offences Against the State Acts, 1939-1998 ?\*2002), para 4.22.

<sup>36</sup> Re Article 26 and the Offences Against the State (Amendment) Bill 1940 [1940] 1 IR 470.

In *Re. Article 26 and the Offences Against the State (Amendment) Bill*<sup>37</sup> the Supreme Court upheld the constitutionality of the Bill, noting that a number of pre-1937 Acts provided for internment, and finding that the detention of persons provided for in the Bill was not in the nature of punishment but of preventive justice, being a precautionary measure taken for the purpose of preserving the public peace and order and the security of the state. Thus it did not contravene the provision of Art. 38 of the Constitution providing that no person be tried on any criminal charge save in due course of law. As a result of the Supreme Court's decision, the 1940 Act was granted immunity from further constitutional challenge.

Of course, these two cases must be viewed in their historical context.<sup>38</sup> However, they illustrate that at an early stage in the life of the state, the Irish Courts were already tasked with adjudicating on a matter of constitutional importance, in courageous cases concerning the security of the State in which fundamental rights considerations were engaged.

### **Damache v. Director of Public Prosecutions**

A more recent consideration by the Supreme Court of the constitutionality of a provision of the Offences Against the State Act, 1939, in the context of international terrorism, was the 2012 decision of *Damache v. Director of Public Prosecutions*.<sup>39</sup>

The case involved an Algerian-born Irish citizen, Ali Carafe Damache, who was arrested on suspicion of being involved in an international terrorist conspiracy to murder the Swedish cartoonist Lars Vilks whose cartoon depictions of the prophet Mohammad as a dog had provoked a negative reaction from Muslims in various countries. A search of Mr. Damache's home was conducted on foot of a search warrant issued under Section 29 of the Offences Against the State Act 1939 ('the 1939 Act'), as amended,<sup>40</sup> which permitted a member of An Garda Síochána (the Irish police) of a certain rank to issue a search warrant in respect of the investigation of certain offences in circumstances which were not urgent, and where that member was directly involved in the criminal investigation in respect of which the search warrant was issued.

The dwelling home of the applicant was searched on foot of a warrant issued under Section 29(1) of the 1939 Act, and Gardaí seized a number of items from the applicant's home, including a mobile phone. The applicant was ultimately charged with sending a menacing message by telephone.<sup>41</sup> The applicant brought judicial review proceedings in the High Court seeking a declaration that Section 29(1) of the 1939 Act was unconstitutional as it permitted a member of the Gardaí who had been actively involved in a criminal investigation to determine whether a search warrant should issue in relation to that investigation.

The High Court dismissed the applicant's claim. In doing so it found that the legislative provision in question was "one which met the test of proportionality." The Court stated:

"While no formal evidence was adduced in this case which would suggest that evidence was about to be destroyed by the applicant or his wife, the security demands of countering international terrorism are of quite a different order to those which apply in what might be described as routine criminal offences. Serious injury

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<sup>37</sup> [1940] 1 IR 470.

<sup>38</sup> Supra note 24 at 694.

<sup>39</sup> [2012] IESC 11.

<sup>40</sup> Section 29(1) of the Offences Against the State Act 1939 as inserted by section 5 of the Criminal Law Act 1976.

<sup>41</sup> Under section 13 of the Post Office (Amendment) Act 1951 (as amended by the Communications Regulation (Amendment) Act 2007).

and harm can be unleashed at any point in the globe by terrorists who can avail of modern technology to devastating effect. The fact was amply borne out by the attack on the World Trade Centre on 11<sup>th</sup> September, 2011, and many other terrorist acts before and since. The international terrorism of the modern age is a sophisticated computerised and fast moving process where crucial evidence may be lost in the absence of speedy and effective action by police authorities.”<sup>42</sup>

On appeal, the Supreme Court held that Section 29(1) of the Offences Against the State Act, 1939, was unconstitutional.

Denham CJ noted that the *Oireachtas* may interfere with the constitutional rights of a person, but in doing so its actions must be proportionate.<sup>43</sup> She applied the proportionality test, adopted from Canada, and first enunciated in Ireland in the case of *Heaney v. Ireland*<sup>44</sup>, namely:

“The objective of the impugned provision must be of sufficient importance to warrant over-riding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:

- (i) Be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
- (ii) Impair the right as little as possible;
- (iii) Be such that their effects on rights are proportionate to the objective ...”<sup>45</sup>

The Chief Justice found that “at the core of this case [was] to be found the principle of the constitutional protection of the home”<sup>46</sup> under the Constitution, which provides, under Article 40.5 that “[t]he dwelling of every citizen is inviolable and shall not be forcibly entered save in accordance with law”<sup>47</sup> which, she noted “means without stooping to methods which ignore the fundamental norms of the legal order postulated by the Constitution.”<sup>48</sup> The place for which the search warrant was issued was the applicant’s home.

Further, the Court found that “[i]n the process of obtaining a search warrant, the person authorising the search is required to be able to assess the conflicting interests of the State and the individual person”<sup>49</sup> and that in this case, “the person authorising the warrant was not independent.”<sup>50</sup>

The decision had significant practical implications, such as trials collapsing, suspects not being charged, and fast-tracked applications to the Court of Criminal Appeal to ascertain whether convictions under Section 29 of the Offences Against the State Act 1939 were unsafe.<sup>51</sup>

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<sup>42</sup> [2011] IEHC 197.

<sup>43</sup> Ibid, note 26 at para. 52.

<sup>44</sup> [1994] 3 I.R. 593 at p. 607.

<sup>45</sup> Ibid.

<sup>46</sup> Supra note 26 at para. 39.

<sup>47</sup> Article 40.5 of the Constitution of Ireland.

<sup>48</sup> Ibid at para. 55, echoing Henchy J. in *King v. Attorney General* [1981] I.R. 233 at p. 257

<sup>49</sup> Ibid at para. 54.

<sup>50</sup> Ibid.

<sup>51</sup> See ‘The Damache case and ‘Potential Catastrophic Consequences’, IHRC and Law Society 10<sup>th</sup> Annual Human Rights Conference, Topic: The Irish Constitution: Criminal Justice and Human Rights, paper by Mark Lynam BL.



As in the aftermath of *The State (Burke) v. Lennon* more than 70 years earlier, *Damache* “[f]or many observers... resulted in the appalling vista of criminals... now walking free due to a ‘technicality’”.<sup>52</sup>

However, as noted by the Hardiman J. in a subsequent case, “Given the constitutional provisions in other jurisdictions to which [the Court had] referred and the case-law which these provisions have generated, it is unlikely that any European or American lawyer would be surprised at the result in *Damache*.”<sup>53</sup>

### **Extradition and *The Attorney General v Damache***

This brings me to a final case which is, in my view, an example of a ‘courageous’ decision, which illustrates issues which have come before the Irish Courts in the context of international terrorism and extradition.

In the 2015 case of *Attorney General v. Damache*<sup>54</sup>, the U.S.A sought the extradition of Mr. Damache to face trial for two offences relating to international terrorism:

1. conspiracy to provide material support to terrorists; and
2. Attempted identity theft to facilitate an act of international terrorism.

Mr. Damache challenged his extradition on several grounds. It was alleged that Mr. Damache met a U.S. citizen Ms. Colleen LaRose (a.k.a Jihad Jane, who was convicted and sentenced to 10 years imprisonment for terrorism-related crimes) online, and told her that he was a devoted jihadist living in Ireland, and he wanted to travel to Pakistan to fight against U.S and allied troops. It was alleged that Mr. Damache, Ms. LaRose, and others formed a plan to develop a European terror cell, under which a group would travel to an Al Qaeda training camp in Pakistan to train, before returning to Europe to carry out attacks.

Mr. Damache made a number of arguments, many of which were rejected by the High Court, and which are outside the scope of this short presentation.

In the High Court, Donnelly J. noted that, taking an overview of the entire case presented by Mr. Damache, it [was] possible to divide his objections into two separate headings:

- (1) that he would be subjected to inhuman and degrading treatment (protection from which is viewed as an absolute right); or
- (2) that he would be subjected to violations of other fundamental rights (which are fundamental, but not absolute, and would therefore require him to establish a flagrant violation of such rights).<sup>55</sup>

Some of his arguments related to the prison conditions in the U.S.A, in the Administrative Maximum, Florence Colorado (ADX), in which, the Court was satisfied, there was a real risk he would be imprisoned, due to the seriousness of the international terrorist offences of which he was suspected.

In respect of one of Mr. Damache’s arguments concerning his fundamental rights, the Court rejected a submission that the conditions of detention of Muslim prisoners at the ADX are such that his surrender would violate his constitutional right to respect for his religion as

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<sup>52</sup> Ibid.

<sup>53</sup> *DPP v. Cunningham* [2012] IECCA 64.

<sup>54</sup> [2015] IEHC 339.

<sup>55</sup> Ibid. at para 6.4.1.

guaranteed by Article 44.2.1 and 44.2.3 of the Irish Constitution, in addition to Article 9 of the ECHR. The Court was satisfied that Muslims incarcerated in the ADX are allowed to practice their religion, albeit with some restrictions, and it was not satisfied in the circumstances that there were substantial grounds to believe that the conditions at the ADX amounted to an egregious breach of religious rights.<sup>56</sup>

However, the Court accepted Mr. Damache's contention that the conditions of incarceration at the ADX, which involved "prolonged isolation within a cell, limited ability to communicate with other inmates, limited telephone and other contact with family and friends, restricted interaction with staff and professional people and minimal out of cell time within small out of cell recreation space" would breach the constitutional requirement to protect persons from inhuman and degrading treatment and to respect the dignity of the human being.

The Court rejected the State's submission that the decision of the European Court of Human Rights in *Babar Ahmad & Ors v. The United Kingdom*<sup>57</sup> was sufficient to deal with the issue of inhuman and degrading treatment. In *Babar Ahmad*, the ECtHR dismissed the claims of a number of applicants who were arrested in the United Kingdom, and were the subject of extradition requests by the U.S.A in respect of international terrorism offences. They had argued that if extradited and convicted they would be held at ADX Florence, a the same super-max prison as at issue in *Damache*, and subjected to Special Administrative Measures (SAMs) in violation of Article 3 of the Convention.

In *Damache*, the Irish High Court stated:-

"Insofar as this Court is being asked to apply a standard of protection to such an individual's constitutional rights that would fall foul of his or her constitutional right to protection from such inhuman or degrading treatment within this jurisdiction, this is rejected. To hold otherwise would be an abrogation of the duty of the judiciary to uphold the Constitution insofar as there is an obligation to protect the individual from such inhuman and degrading treatment. The question that this Court must resolve is whether the conditions at the ADX to which there is a real risk that Mr. Damache will be subjected violates his constitutional right to protection from inhuman and degrading treatment."<sup>58</sup>

In circumstances where the Court came to its decision on the basis of a breach of the Constitution, it was unnecessary to consider whether there had been a breach of Article 3 rights, and Mr. Damache was released.

It should be noted that an appeal was brought by the Attorney General was brought in respect of the refusal to surrender, which was complicated by the fact that Mr. Damache was arrested in Spain, and that an appeal by the Director of Public Prosecutions is currently before the courts in relation to another aspect of the decision.

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<sup>56</sup> Ibid at para. 11.8.

<sup>57</sup> Applications Nos. 24027/07, 11949/08, 36742/08, 66911/09 and 67354/09, 10th April, 2012) (2013) 56 E.H.R.R. 1, [2012] E.C.H.R. 609.

<sup>58</sup> At para. 11.10.2.

## Courageous Courts

A commentator writing an article on the decision of the U.S. Court of Appeals for the Ninth Circuit in *State of Washington v. Trump*<sup>59</sup> referred to the decision as “An extraordinary act of judicial courage”,<sup>60</sup> which “exemplified the rule of law in a democratic society” displaying “the judicial courage our era requires.”<sup>61</sup>

The United States Supreme Court has since granted a stay on the injunctions in part, reinstating part of the controversial executive order which was at the centre of that decision, pending a full determination later this year.<sup>62</sup> Perhaps, given the public outcry regarding the Executive Order, the Supreme Court decision is equally ‘courageous’.

For there to be ‘courageous courts’, to use the theme of our conference, there must necessarily be judges who behave independently and impartially, guarding human rights and the rule of law “without fear or favour”,<sup>63</sup> even when it might be unpopular to do so.

The article on the decision of the Ninth Circuit to which I just referred noted that “[i]t isn’t every day that a federal court cites *Ex parte Endo*, the 1944 US supreme court decision which invalidated the detention of loyal, law-abiding Japanese-Americans during the second world war. But these aren’t ordinary times.”<sup>64</sup>

It is in times like this that the work of Constitutional Courts becomes most important.

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<sup>59</sup> *State of Washington; State of Minnesota v. Trump*, No. 135105, D.C. No 2:17-cv-00141, which concerned Executive Order 13769 “Protecting the Nation From Foreign Terrorist Entry Into the United States” which inter alia, banned for 90 days the entry into the United States of individuals from seven countries.

<sup>60</sup> J Matz ‘An extraordinary act of judicial courage: inside the latest travel ban court opinion’, *The Guardian*, 10<sup>th</sup> February 2017.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Trump v. International Refugee Assistance Programme* 582 US (2017).

<sup>63</sup> The Constitution of Ireland, Article 34.6.1.

<sup>64</sup> *Ibid.*