Cúirt Uachtarach na hÉireann
Supreme Court of Ireland

JUDICIAL INDEPENDENCE IN THE CASE LAW OF THE COURT OF JUSTICE OF THE EUROPEAN UNION[1]

Delivered by Mr Justice Brian Murray
at EUBA Annual Conference 2025: Litigation in the EU Courts, Trinity College Dublin on 7 November 2025

1. I hope it is not unduly self-referential to begin this lecture by observing that a little over a decade ago I published an essay about aspects of judicial independence in Irish constitutional law.[2] One of the points that came forcefully across when looking at it again for the purposes of preparing this paper, was how much uncertainty attended this central feature of our constitutional scheme. Fast forward to today, many of those uncertainties have been, if not resolved, then certainly overtaken. But in the most unexpected of ways.

2. Over the course of the past seven years, and through the accumulated effect of dozens of cases, the Court of Justice of the European Union (*"CJEU"*) has embedded in the law of the Union a new and remarkably robust theory of judicial independence. That theory is designed to ensure that judges of Member State courts who may decide cases in the field of European Union (*"EU"*) law meet identified standards of autonomy and of actual and perceived impartiality. The development has had, broadly speaking, four strands.

[1] Address to the Annual Conference of the EU Bar Association, 7 November 2025.
[2] See Murray '*Judges: Institutional Independence and Financial Security'* in *Ruane and ors.* '*Law and Government: A Tribute to Rory Brady'* (Round Hall 2014) at pp. 73-88.

3. First, the court derived from a cocktail of earlier cases in the broad area of EU administrative law, provisions in the Treaty on European Union (*"TEU"*) and the Charter of Fundamental Rights (*"CFR"*) an EU law concept of judicial independence. Then, and second, it has formulated the constituents of that principle in terms that are at the same time wide, but prescriptive. From there, and thirdly, it has theorised judicial independence in a way that requires all Member States to protect that interest within their own legal systems. Finally, it has enforced that mandate in a way that makes it impossible for national governments to ignore the principle it has thus formulated.

4. These cases and those four stages have combined, I believe, to render this the most systemically significant development in the constitutional law of the EU in recent years. It may yet represent that court's most enduring gift to constitutionalism in general, and in particular to the burgeoning – and increasingly pressing – study of the rule of law. My object here is to explain why all of this is so important, having regard in particular to the impact of these developments on our own legal system.

5. In Ireland, of course, we have had a constitutionally fixed mandate of judicial independence since the foundation of the State, and indeed some elements of our present constitutional framework in this area go back to the Act of Settlement 1701. Today, the umbrella provision is in Article 35.2 of the Constitution which mirrors Article 69 of the Free State Constitution. It declares baldly that judges shall be independent in the exercise of their functions.

6. The constituents of that very general declaration have been broken down in the international literature and by constitutional courts in other jurisdictions into four elements – security of tenure, financial security, institutional independence and *adjudicative independence,* or the freedom of judges to perform their role in the administration of justice without interference from the other branches of government. In Ireland, security of tenure and financial security are specifically addressed in the regulation of removal from office and remuneration of judges by, respectively,

Articles 35.4 and Article 35.5 of the Constitution, while the courts in decisions such as *Buckley v. Attorney General*[3] have aggressively policed legislation that purports to direct judges in the discharge of their judicial functions.

7. The third element – the institutional independence of the judiciary – refers to the status or relationship of the judges to other institutions. The idea is that the independence of a court must be reflected in its institutional and administrative arrangements with the executive and legislative branches. The principle thus secures, in particular, the independence of courts with respect to matters of administration bearing directly on the exercise of their judicial function.[4] This ensures that the courts should be in a position to discharge their functions autonomously and, thus, have a degree of control over their own operations. It is trickier and more amorphous than the other three and, as it happens, has featured in two significant and recent decision of the Irish Supreme Court.

8. Suffice to say that in this respect, as with others in our constitutional law, the small size of our jurisdiction and consequent underdevelopment in the case law, renders the parameters of some of these guarantees uncertain. The paucity of case law in this area is, perhaps, also attributable to a combination of caution on the part of successive governments in interfering with the judicial function, the reluctance of judges to themselves litigate issues around the conditions of their own offices and the fact that many issues arising from legislation that may impact on judicial independence might not always affect the position of others in such a way as to prompt them to litigate these questions.

9. Indeed, it is telling that one of the very few cases in which the Courts in this jurisdiction have recently considered those issues was an Article 26 Reference[5]. In the other – *Delaney v. Personal Injury Assessment Board*[6]

[3] *Buckley v. Attorney General* [1950] IR 67.
[4] *Valente v. The Queen* [1985] 2 SCR 673, 708, cited with approval in *Re Article 26 of the Constitution and the Judicial Appointments Commission Bill 2022* [2023] IESC 34 at para. 163.
[5] *Re Article 26 of the Constitution and the Judicial Appointments Commission Bill 2022* [2023] IESC 34
[6] *Delaney v. Personal Injury Assessment Board* [2024] IESC 10, [2024] 1 ILRM 189.

– the problem appears to have laid not in an overreach by the legislature, but in a surfeit of caution. The Oireachtas had left the formulation of personal injury guidelines to the judges rather than removing that task from the judicial sphere, yet it was that very allocation of function that was thought by some members of the Court to interfere with the institutional independence of the judges.

10. In any event, those limitations of scale contrast with the vast jurisdiction of the CJEU. And there are other constraints that limit the development of our law in this arena, from which the CJEU is liberated. Issues that are less likely to arise in *inter partes* litigation, can present themselves there through the enforcement powers of the European Commission. The structure of EU law is such that inter-State relationships underpinned by principles of mutual trust and confidence will present questions of how the courts of one state should respond to concerns about the protection of judicial independence in another Member State, affording a unique point of entry for consideration of the legal requirements and implications of that value.

11. It was thus inevitable that once the CJEU developed for itself a role in defining and enforcing judicial independence, that doctrines and principles would emerge that the courts in Ireland and indeed in many other jurisdictions have never had the occasion to consider. That is in part why the developments in the CJEU have had such a profound impact in Member States which themselves already had clear and developed constitutional guarantees of judicial independence.

12. The manner in which the CJEU intruded into this arena may well prove the political theorem that power – like gas and work – expands to fill the available space. In that short period of seven years – influenced, it should be observed, by a similar and roughly contemporaneous dynamic in the European Court of Human Rights (*"ECtHR"*) [7] - the court has generated a

[7] See Smulders '*Increasing Convergence Between the European Court of Human Rights and the Court of Justice of the European Union in their Recent Case Law on Judicial Independence: The Case of Irregular Judicial Appointment'* (2022) 59 *CMLR* 105. *Savikas v. Lithuania* April App. No. 66365/09 Judgment of 15 October 2013;

substantial body of cases in which it has developed from practically nothing, a highly sophisticated theory of judicial independence. It is possible in the time available to only skate across the surface of this. But I need to describe it shortly to understand what it means for our own legal system.

13. In *Wilson*[8] in 2006 the CJEU, in assessing the legality of certain proceedings of the Luxembourg Bar Council, identified independence as inherent in the process of adjudication. In that context, it sketched the constituents of this principle of independence in a manner that has proven surprisingly influential and durable. Later cases dipped in and out of various iterations of what we would categorise as, in reality, an issue of administrative law. But from 2018, the principle was elevated to a constitutional level, and the process of crystalising its parameters and defining its effect proceeded at a breakneck place. As is well known, the Polish Rule of Law crises provided a dramatic accelerant to that process.

14. The critical point of departure was when the CJEU decided that EU law imposed a general obligation on Member States to ensure the judicial independence of all national Courts functioning in the field of EU law. This was decided not in a Polish case, but in *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas* (*"the Portuguese Judge's Case").*[9] That was a reference from a Portuguese court in a challenge brought to reductions in judicial salaries introduced following the financial crises of the first decade of the 2000's. The reductions formed part of resulting austerity measures of general application. The CJEU rooted the obligation to ensure judicial independence in the combined effect of somewhat generalised statements in Articles 2 and 19 TEU, although reference was also made to Article 47 CFR, and in particular the concepts of effective judicial protection of individual rights. That meant, it was found, that

Andri Ástráðsson v. Iceland App. No. 26374/18 Judgment of 1 December 2020; *Reczkowicz v. Poland* App. No. 43447/19 Judgment of 22 July 2021: *Dolinska-Ficek and Ozimek v. Poland* Appl. App. No. 49868/19 and 57511/19 Judgment of 8 November 2021: *Advance Pharma SP. ZO.O v. Poland* App. No. 1469/20 Judgment of 3 February 2022.

[8] Case C-506/04 *Graham J. Wilson v. Ordre des avocats du bureau de Luxembourg* ECLI:EU:C:2006:587.

[9] Case C-64/16 *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas ECLI*:EU:C:2018:117.

where a court could rule on questions concerning the interpretation or scope of EU law, the Member State in question had to ensure that the court is '*independent.'*

15. The CJEU prescribed that independence in conspicuously broad terms, picking up on what had been described in *Wilson* as its '*external'* aspect. This requires that the court concerned exercise its functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever. That entailed protection against removal from office and restricted the ability of States to reduce judicial remuneration. The second aspect of judicial independence thus understood, which the CJEU has later stressed is internal in nature, is linked to *'impartiality'*. That is, it seeks to ensure that an equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. That aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law.[10]

16. The end point of the *Portuguese Judge's Case* was summarised with characteristic economy and elegance by Advocate General Hogan in *Repubblika v. Il-Prim Ministru*:[11] salaries must be commensurate with the nature of judicial function, they cannot be reduced other than by generally applicable taxation, and while it is possible to reduce salaries as part of emergency cost reduction measures, the reductions must apply across the public service, the reductions must be proportionate and the original salary levels must be restored once the fiscal crises justifying them has passed.

17. I do not think that it is over dramatic to describe the *Portuguese Judges* decision as revolutionary, and insightful. It has been described recently by the Chief Justice as one of the most consequential decisions made by

[10] Joined Cases C-422/23, C-459/23, C-486/23 and C-493/23 *Daka* ECLI:EU:C:2025:592
[11] Opinion of AG Hogan Case C-896/19 *Repubblika v. Il-Prim Ministru* ECLI:EU:C:2020:1055.

the court this century,[12] and indeed President Lenaerts has described the decision as within the same category as *Van Gend en Loos*, *Costa,* and *Simmenthal*.[13] The court may or may not have been influenced in its analysis by the then raging rule of law crises in Poland, but I mean no disrespect when I observe that the decision presented a highly creative and imaginative interpretation of Articles 2 and 19 TEU: Article 2 records the rule of law as one of the foundations of the Union, and Article 19 the obligation of Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by EU law. Article 47 CFR (which of course operates in a limited space) refers merely to access to an '*independent'* tribunal. It is, to say the least, not obvious that these references mandate the conclusion that EU law requires that the salaries of judges operating in the field of EU law across the Union can only be reduced under the stringent conditions suggested in the judgment.

18. The *Portuguese Judges* case was decided in February 2018, and in July of that year the court delivered judgment in *L.M.* or, as it is known here, *Celmar*.[14] This did directly engage the rule of law in Poland and arose from a reference made by the High Court here in proceedings in which it was sought to return a fugitive to that jurisdiction on foot of a European Arrest Warrant (*"EAW"*). There the CJEU came to attach striking consequences to a failure to ensure that independence. It found that effective judicial protection meant that a court issuing an EAW or trying those surrendered on foot of such a warrant had to meet these standards of independence, and that rendition might be refused to a State on account of a real risk of systemic or generalised deficiencies affecting the independence of its judiciary. In that case, it fleshed out further the requirements of independence. It said that this required rules particularly as regards the composition of a judicial body and the appointment, length of service and grounds for abstention, rejection, and dismissal of its members. The

[12] O'Donnell CJ, 'Civil Legal Aid Review: An Opportunity to Develop a Model System' (24 February 2023) pp. 8-9.
[13] Lenaerts 'Upholding the Rule of Law through Judicial Dialogue': Speech at Kings College London (21 March 2019).
[14] Case C-216/18 *PPU Minister for Justice and Equality v. L.M.* ECLI:EU:C:2018:586.

disciplinary regime for judges must have guarantees that prevent its abuse, or its deployment as a system of political control.

19. Subsequent cases reiterated that bodies that did not meet the requirements articulated by the CJEU for independence, could not make references pursuant to Article 267 TFEU (*Banco de Sandtander*[15] *LG v. Krajowa Sadownictwa*[16]and *Getin Noble Bank*[17]). In other decisions, it has been found that a national court must, in at least some situations, in accordance with the principle of the primacy of EU law, treat as void an order made by a body which does not constitute an independent and impartial tribunal previously established by law (although more recent decisions have qualified that requirement[18]).

20. At the same time, the court extended its theory of judicial independence – and the consequences it has identified where the resulting constraints are breached – to the process for the *appointment* of judges. In a number of the cases,[19] the court said that the procedure for the appointment of judges necessarily constitutes an inherent element of the concept of a tribunal established by law, and that the independence of a tribunal within the meaning of Article 47 CFR could be measured *inter alia* by the way in which its members are appointed. It has said that judicial independence '*presupposes the existence of rules governing the appointment of judges'.*[20] It has decreed that those rules must be such as to '*dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it.'*[21]

[15] Case C-274/14 *Banco de Sandtander* ECLI:EU:C:2020:17.
[16] Case C-718/21 *L.G. v. Krajowa Rada Sadownictwa (Maintien en fonctions d'un juge* ECLI:EU:C:2023:1015.
[17] Case C-132/20 *BN and Others v. Getin Noble Bank SA* ECLI:EU:C:2022:235. Monciunskaite 'The Shifting Landscape of Judicial Independence Criteria Under the Preliminary Reference Procedure: A Comment on the CJEU's Recent Case Law and the Trajectory of Article 267 TFEU (2025) 17 *Hague Journal on the Rule of Law* 95.
[18] Case C-489/19 *W.Z.* ECLI:EU:C:2021:798, at paras. 155-156.
[19] Case C-562/21 *X and Y v. Openbaar Ministerie* ECLI:EU:C:2022:100 at para. 57.
[20] Case C-824/18 *A.B. v. Krajowa Rada Sadownictwa and Others* ECLI:EU:C:2021:153 at para. 121.
[21] Case C-610/18 *European Commission v. Republic of Poland* ECLI:EU:C:2019:531 at para. 79.

21. Thus, in *Simpson* the court decided that an irregularity in the appointment of judges could in and of itself entail an infringement of the right to an effective remedy where the irregularity was of such a kind and of such gravity as to create a real risk that other branches of the State could exercise undue discretion undermining the integrity of the outcome of the appointment process, thereby giving rise to a real doubt in the minds of individuals as to the independence and the impartiality of the judge or judges concerned.[22]

22. The court has applied those principles not merely to the appointment of judges, but also to the secondment of duly appointed judges from one court to another. In *W.B.,* it found that Articles 19(2) and 2 TEU mean that the provisions of a Directive addressing the presumption of innocence and the right to be present in criminal trial proceedings, should be construed so as to preclude legislation pursuant to which the Polish Minister for Justice could on the basis of criteria that had not been made public, second a judge from one criminal court to a higher criminal court for a fixed or indefinite period and could terminate that secondment at any time.[23] The rationale may or may not have been limited to criminal proceedings in which the Executive both seconded the judge and prosecuted the case: the court was particularly concerned that secondment gave rise to a risk of its being used as a means of exerting political control over the content of judicial decisions.[24] In other cases, the court expressed this in emphatic terms: a secondment decided by the Minister for Justice on the basis of criteria not known in advance and revocable at any time by a decision which is not reasoned by that Minister, may give rise to substantial grounds for concluding that there is a real risk of breach of the right to a fair trial.[25] Later cases have even suggested

[22] Case C-542/18 *Simpson v. Council of the European Union* ECLI:EU:C:2020:232 at para. 75.
[23] Case C-748/19 *W.B.* ECLI:EU:C:2021:931 at para. 69. See, also, C-487/19 *W.Z.* ECLI:EU:C:2021:798 at para. 110.
[24] Case C-748/19 *W.B.* ECLI:EU:C:2021:931 at para. 73. See, by analogy, Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Asociaţia Forumul Judecătorilor din România' and Others* EU:C:2021:393 at para. 198.
[25] Opinion of AG Bobek Case C-748/19 *W.B.* ECLI:EU:C:2021:403 at paras. 182-183 and Case C-204/21 *Commission v. Poland* ECLI:EU:C:2023:442 at para. 144.

that the same principles governed not merely the secondment of judges from one court to another, but the assignment of judges within a court.[26]

23. That is necessarily a fast gallop across wide terrain. I have also glossed over issues of scope that may vary as between cases in which Article 19 TEU is the source of the principle, and those arising under Article 47 CFR, or, for that matter, Article 267. But at a general level – and unsurprisingly – much of what is said in these cases reflects the scope of our own rules around judicial independence as I have described them earlier. Rules intended to prevent interference, to prevent the pressurising of judges by the Executive through unjustified removal from office or threats thereof, or arbitrary reductions in remuneration underpin the concept of judicial independence envisaged by our own Constitution, and for that matter the pre-independence constitutional settlement.

24. But within the general guidelines that have characterised judicial independence in Irish law, the CJEU has filled in details that may well have been inherent in the constitutional guarantees, but which we have not had the opportunity to articulate. Whether we would have got to all these aspects of judicial independence ourselves in due course is, in short, an open question. But it is important to stress that these principles intrude into our system at two levels: first, because they are binding obligations as a matter of EU law. And second because – as the Supreme Court stressed in the course of its judgment *In Re Article 26 and the Judicial Appointments Commission Bill 2022* – we will look to decisions of the CJEU (and indeed other constitutional courts) for guidance on questions such as the nature of judicial independence and the rule of law when these issues arise within our own legal system, whether in the course of constitutional adjudication or otherwise.[27]

[26] Case C-197/23 *S S.A. v C sp. z o.o* ECLI:EU:C:2024:533 at para. 82.
[27] *In Re Article 26 and the Judicial Appointments Commission Bill 2022* [2023] IESC 34, [2024] 2 ILRM 1. See, in particular, the judgment of Dunne J. at para. 81.

25. There are some particularly significant aspects of the EU case law when matched against the content of our own constitutional law. They include the following.

26. The first is the extension of judicial independence to the process for the appointment of judges, and the conclusion that decisions of a judge whose appointment was made in breach of the relevant rules may be invalid in accordance with the conditions to which I have referred. It is to be stressed here that the CJEU case law on judicial appointments is '*permissive'* [28] and, in particular, that it does not out rule appointment processes in which selection is made by the Executive or the Legislature.[29]Yet, some of the language in several of the CJEU's decisions suggests the possibility that in the future as one commentator has observed, these may '*concretise into a less permissive standard'*.[30] In this regard, it should be observed, that at the time these decisions issued, the courts here had never related the guarantees of judicial independence in the Constitution, to the judicial appointment process. That issue subsequently arose directly *In Re Article 26 and the Judicial Appointments Commission Bill 2022*.[31] There, the court expressed itself satisfied that the then existing process of judicial appointment was fully compliant with EU law.[32]

27. The second is the application of these principles to the process of judicial secondment and, indeed, as has been recently suggested, assignment of judges within a Court.

28. The third is the acknowledgement by the CJEU that these rules are capable of engaging the process of judicial discipline.

---

[28] See O'Brien '*European Influences on the Court's Judgment in Re Article 26 and the Judicial Appointments Commission Bill 2023'* (2022-2023) 43(2) *DULJ* 2.
[29] Case C-896/19 *Repubblika v. Il-Prim Ministru* ECLI:EU:C:2021:311 at para. 56.
[30] See O'Brien '*European Influences on the Court's Judgment in Re Article 26 and the Judicial Appointments Commission Bill 2023'* (2022-2023) 43 *DULJ* 2, referring in particular to comments in the decision in *Repubblika* at paras. 65-71.
[31] *In Re Article 26 and the Judicial Appointments Commission Bill 2022* [2023] IESC 34, [2024] 2 ILRM 1.
[32] ibid, at para. 102.

29. Fourth, the confirmation by the CJEU that removal of judges can only be justified on '*legitimate and compelling grounds'* and in circumstances that satisfy a proportionality test[33] is particularly important in filling in the very general terms of the provisions of the Constitution governing the removal of judges. None of this is evident from a reading of Article 35.4.1 of the Constitution, although it would reflect a widely held understanding of the limitations inherent in the provision.[34] There was, however, also a view that the grounds for judicial removal under Article 35.4 were not quite so constrained.[35]

30. Finally, the CJEU in the *Portuguese Judges* case, said that judges must be paid a level of remuneration that reflects the importance of their functions.[36] The court's recent decision in Joined Cases C-146/23 *Sąd Rejonowy w Białymstoku* and C-374/23 *Adoreikė* confirmed this.[37]

31. It would be wrong of me to say whether any aspects of our present law fall foul of these propositions, all of which were developed in a particular context. However, it is very important that those features of the Luxembourg rules governing judicial independence that have never been articulated here are clearly understood by the Legislature and Executive, and indeed by those responsible for regulating judicial appointments, dismissal, and the distribution amongst judges of court business. They may also be of importance in relation to other decision-making bodies functioning in the State which classify themselves as courts or tribunals for the purposes of Article 267 TFEU who might not previously have been thought to be captured by all of these principles. It must be remembered that each of the District, Circuit, and High Court, as well as the Court of

[33] Case C-585/18, C-624/18 and C-625/19 *A.K. and Others v. National Council of Judiciary and Supreme Court* ECLI:EU:C:2019:982.
[34] See Murray '*The Removal of Judges'* in Carolan (ed) '*Judicial Power in Ireland'* (IPA 2018) pp. 62-88 at p. 75-81.
[35] *id.*
[36] Case C-64/16 *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas ECLI*:EU:C:2018:117 at para. 45.
[37] Joined Cases C-146/23 *Sąd Rejonowy w Białymstoku* and C-374/23 *Adoreikė* ECLI:EU:C:2025:109 at para. 49. See, also, Case C-49/18 *Escribano Vindel v. Ministerio de Justicia* ECLI:EU:C:2019:106 at para. 66.

Appeal and the Supreme Court, are operating in the field of European Law, and are, thus, subject to the constraints identified by the CJEU.

32. At a very general level, these developments have increased awareness of the importance of judicial independence as a value, and indeed on a purely utilitarian basis the potential implications of being found in breach of the principles articulated in the decisions has prompted changes in the law in some member states. In Germany, it has resulted in a switch from the pre-existing position where EAWs are issued by prosecutors, to that authority being vested in judges. In Sweden, the *Portuguese Judges* case has been considered as part of an Inquiry on the Constitution,[38] investigating how to further strengthen the independence of the judiciary. It is important that at some level, a similar exercise is undertaken here. This is not simply a question of the interests or preferences of individual judges. A breach of the European, or for that matter domestic, rules governing judicial independence risks undermining the integrity and validity of individual judicial decisions, and, thus, a potentially significant disruption to the legal system as a whole.

[38] See, for further discussion, Ovádek, 'The Making of landmark rulings in the European Union: the case of national judicial independence' (2022) 30(6) *Journal of European Public Policy* 1119; Pech and Kochenov, *'Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case'* (Swedish Institute for European Policy Studies 2021) 96.