

**Bilateral Meeting  
Judiciaries of Ireland and Northern Ireland**

**DUBLIN, FRIDAY 28<sup>TH</sup> NOVEMBER 2025**

**Brian Kerr – An Appreciation**

**The Honourable Lord Justice Treacy  
Lord Justice of Appeal, Northern Ireland**

I have in recent weeks been considering how this small island of Ireland, North and South, really does punch above its weight in terms of the number, range and quality of world-class contributors that it has produced across a broad range of fields and disciplines.

From my own jurisdiction of Northern Ireland, I can think of at least three such world class contributors whose works I have enjoyed hugely over the course of my lifetime.

In the field of music and songwriting there is Van Morrison, an iconic lyricist with a style all his own from my hometown of Belfast. Van-the-Man is up there in the Songwriters Hall of Fame, rubbing shoulders with Woodie Guthrie and Bob Dylan.

In the field of poetry and Literature we have Derry man Seamus Heaney, 1995 recipient of the Nobel Prize for Literature for what that panel called his 'works of lyrical beauty and ethical depth.'

In the field of sport, Belfast's own George Best springs to mind. He was nominated by no less a player than Brazil's Pele as the 'greatest player of all time' and was lauded by other international greats including the legendary Maradona.

And of course, our island has recently produced a new soccer superstar who is demonstrating in his own way all the power and the glory of a Number 7 football jersey. This, of course, is the fabulous striker from

Sherriff Street Dublin, Mr Troy Parrott - the man who gave us all so much joy with his recent hat-trick of goals in that critical match against Hungary.

So Ireland, North and South, has produced world class players in many walks of life and this thought got me wondering: who would I nominate as the Northern Irish contender for a place in the Judicial 'Hall of Fame for All-time Greats' if such a thing existed...?? And that brings me to the subject of my talk for this evening – no less a contender than Brian Kerr

It's a privilege to speak about Brian who managed the rare feat of being generally liked in the legal world – not just respected or acknowledged for his towering intellect but, genuinely liked – which is not a common occupational hazard for a judge, as I'm sure most of us know!

I'll look first at his life at the Bar. Brian was called to the Bar of NI in 1970 almost contemporaneously with the start of the Troubles. He served as Junior Crown Counsel from 1978 to 1983 when he took silk. He served as Senior Crown Counsel from 1988 to 1993. As is clear from this timeline, much of his career at the Bar ran alongside the worst years of the Troubles. As Crown Counsel he was involved in many of the most sensitive and high-profile cases of that time. As a result, he gained huge experience handling some of the thorniest legal issues thrown up by societal conflict.

As noted earlier, his tenure as Junior Crown Counsel ended in 1983 when he took silk. There was, therefore, a gap between then and 1988

when he took up the role of Senior Crown Counsel. I suggested to my instructing solicitors, Madden & Finucane, that they approach the newly called BK QC to act as lead counsel in an unpromising appeal in which I was then instructed. It was for a prisoner called McKiernan who was detained in the Maze prison (formerly Long Kesh), and who wished at that very moment to challenge the decision of the prison Governor who had found him guilty of an internal disciplinary offence and punished him by imposing solitary confinement and revoking part of the remission of sentence to which he would otherwise have been entitled.

Unfortunately for this applicant, the legal cards of the day were piled high against him. The Court of Appeal in England had already held [in *R v Deputy Governor of Camphill Prison, ex P King*, 1985 QB 735] that adjudications by Prison Governors were *not* subject to judicial review. In practical terms, that judgment meant McKiernan's challenge was almost bound to fail. The late Gibson LJ dismissed the JR (as he had been asked by our side to do) and an appeal to NICA was lodged.

And then I had a bright idea! If *anyone* was to have a chance of dismantling the *Camphill* roadblock, it had to be Brian Kerr. Luckily for me, for the appellant, and for the development of the law in NI, Brian Kerr QC accepted this brief.

The question for determination by the NICA was whether the remedy of JR was available in respect of disciplinary adjudications of Prison Governors in Northern Ireland.

Lord Lowry in a powerful judgment with which O'Donnell LJ concurred, did not follow the English CA *Camphill* decision. Our CA allowed the appeal, holding that judicial review was available in respect of such adjudications in Northern Ireland [see *Re McKiernan's Application* [1985] NI 385.

I mention the *McKiernan* case because it illustrates several things about BK. First, it shows how the dark shadow of the Troubles was never far away in the context of his legal life. Secondly, it shows how, despite that context and the political sensitivity of an inmate of erstwhile Long Kesh challenging the authority of the Prison Governor, BK still found a way, just the right way, to persuade his fellow jurists *not* to bend the knee to the passing political sensibilities of the day, nor to defer unduly to the English CA decision. That achievement is testimony to his phenomenal advocacy skills persuading the judges to take a step that might have appeared politically uncomfortable, and where the court could easily have taken refuge behind the decision of the Court of Appeal in England. Thirdly, it illustrates how BK was assisted in delivering his vision of the meaning of law in troubled societies, by judges who *also* understood how essential the principled and consistent application of legal rules was for the proper functioning of a 'decent' society. *McKiernan* was decided in 1985, not so long after the dirty protests and the hunger strikes, and at a time when prisoners of any ilk were no-one's 'flavour of the month'. Yet these judges did not baulk at extending the reach of the law into the closed prison world. Not only did they insist

that the writ of the law would run there too, they did so in trenchant terms. And here I should probably let Lord Justice O'Donnell speak for himself:

“If the appellant in the present case therefore has certain civil rights, which may have been infringed by a governor’s adjudication, and if he has a basic right to an unimpeded access to the courts, it appears to me that if such rights are to be removed they should be removed expressly by statute, and not by judicial decree.

In a free society, it appears to me, that anyone whose civil rights may have been infringed, should have not merely the basic right of unimpeded access to the courts, but the basic right of having his rights vindicated by those courts.

There is a clear and compelling principle in this case. Adjudication by a governor is the exercise by him of a quasi-judicial function. A prisoner whose civil rights have been wrongfully infringed in the exercise of those functions, has the right to judicial review. Any restriction on exercise of those rights is a matter for express

statutory enactment and is not a matter for the courts.”

Brian had persuaded the NICA to take the unusual course of departing from the view of the English Court of Appeal on the identical point. The successful outcome meant there were now two Court of Appeal decisions that were wholly in conflict. Imagine the delight of the NICA, of Brian Kerr QC and of myself, a junior, basking in the light of a consummate player, when the House of Lords resolved that conflict in *Leech v Deputy Governor of Parkhurst Prison* [1988] AC 533 by endorsing the approach of Lord Lowry and O'Donnell LJ. One might say NI one, England nil.

*McKiernan* illustrates that BK did not baulk at fighting for an underdog. It illustrates how, when taking on such a case, he still went all-in. He used every last ounce of his expertise, all his advocacy skills, all his familiarity with the mindsets within the courts: he used it all to construct and project, with just the right degree of force and just the right tone, the argument that gave the underdog his best chance. And as *McKiernan* illustrates, sometimes that consummate professionalism paid off.

I also mention *McKiernan* because it did, in fact, lead to a significant increase in the number of JR challenges that came out of our prisons. The high number of prison challenges reflected the large scale of underlying discontent among inmates and their families about aspects of their treatment within the prison system.

Some may say the time and effort expended on prison JRs is disproportionate to the size and perceived 'importance' of the prison population. It is true that the management of prisons may not be a mainstream concern in many societies. But during the Troubles prison life was 'mainstream' for many NI families and perceived injustices inside the prisons were felt well beyond the prison walls. *McKiernan* provided a mechanism for such complaints to be resolved by the operation of law. Law is the quintessential dispute resolution mechanism that must exist and must operate with appropriate judicial 'blindness' as to *who* is complaining, if a democratic society is to have a long-term future. Had Brian Kerr not taken that brief, and had *McKiernan* been decided differently, those complaints, and the grief and rage that derive from unresolved grievance, could not have been dealt with in our courts at all. So where would they have gone? Who can say?

I want now to turn to another case that illustrates something interesting about the character of Brian – his capacity to be riled, constructively riled. This is the decision of the NICA in the case of *McKerr*. This was a very controversial case in which the deceased were alleged to have been unjustifiably killed by police officers operating a "shoot to kill" policy. The coroner's rules provided that those who were suspected of causing a death were not compellable witnesses before the Coroners Court. This had the effect that the police officers who shot the deceased could not be



compelled to give evidence. The rule was challenged on the basis that it was ultra vires the rule making power in the governing legislation.

The NICA, presided over by Hutton LCJ, held that the impugned rule was indeed ultra vires. The implications of the judgment were potentially far-reaching and Brian, now in his role as Senior Crown Counsel, immediately applied for leave to appeal to the House of Lords. Such appeals were not unheard of, but they were regarded as unusual if not exceptional. [How times have changed!] In any case the then LCJ was seemingly appalled by the ‘affrontery’ of Brian’s application and immediately refused it saying that it was so “utterly without merit” that no other disposal could be contemplated.

Those on the winning side came to wish that Brian’s application had been dealt with more gracefully. To this day some of those representing the family of the deceased believe that had the application been refused in a more temperate manner, that *might* have been the end of it. If *that* was the history that had been written that day, inquests would thenceforth have had to be conducted in a more Convention compliant manner, and perhaps some of the ‘legacy’ difficulties that subsequently emerged might never have arisen.

But, that was not to be. Hutton LCJ’s uncharacteristically brusque treatment of Brian’s application got BK’s hackles up. The fact that the rebuff came in full view of a packed court put even more fire in his belly, so he immediately pursued his ‘hopeless’ point directly to the House of

Lords. There his “wholly without merit” point was unanimously accepted, and the decision of the NICA was peremptorily reversed.

If anything, *McKerr* was a lesson to judges not to rough-handle counsel even when they may appear to be pushing hopeless points. In law what *is* the ‘hopeless point’ really isn’t decided until the fat lady sings, and one’s personal ‘certainties’, determined before that song comes, can come back to bite!

*McKerr* was another sweet victory for Brian. I know it meant a lot to him because I was with him in Strasbourg, on opposite sides of a different case, when that result came through. Being on opposite sides in those days never affected the collegiality and friendship of the legal teams who argued these cases. As I recall that day, we all had a fine meal and great craic in the peace and bonhomie of an elegant Strasbourg restaurant, and the NICA’s injudiciousness in the handling of Brian’s *hopeless* point was the butt of many well-deserved jokes that evening ...

In 1993, BK was appointed to the High Court bench. I appeared before him frequently in his very busy JR list and I can attest that his warmth, charm, good humour and conviviality didn’t leave him when he became a judge.

As a High Court judge he was required to sit in some very high-profile criminal cases in the non-jury Diplock Courts that ran in Crumlin Road courthouse. For High Court judges whose practice had been more on

the civil side, presiding over their first major criminal trial can be daunting, but if Brian was daunted, it never showed.

He conducted his first major Diplock trial before seasoned and skeptical senior counsel, who didn't expect much from the new boy (or anyone else for that matter!). By the end of the trial their position had changed - just a little! That may have had something to do with the fact that he threw out the confessions of the defendants upon which the entire prosecution depended acquitting them all. However, it might have had more to do with the fact that at the end of that long, grueling battle, Brian called all counsel involved into his chambers. There he produced an elegant leather champagne holder, fine champagne and equally elegant champagne flutes to drink it from! Defence counsel, prosecution counsel and judge all relaxed together and collectively enjoyed the fact that a long and hard-fought battle was finally over for all of us.

What style! What grace! Brian always displayed that stylish generosity to the counsel he worked with. To my mind that thoughtful and inclusive nature was more than just his style. It reflected BK's perennial awareness of, and appreciation for, the humanity of everyone involved in legal endeavor. Brian knew that every lawyer in a courtroom is playing a part in a structured process that was designed to solve a problem, answer a question, resolve an issue. And he loved that legal process and appreciated all the players in it. BK loved the legal 'game' whatever its outcome happened to be in any given case. That love and appreciation spilled over into stylish celebrations of the endeavour itself

whenever an opportunity arose. No wonder he was so widely admired and liked by colleagues of all kinds on all sides!

Brian's judicial career is too long and too spectacular to cover meaningfully in this appreciation, but I will seek to give a flavour of it by reference to some of its most remarkable moments.

One such moment arose out of the inquest into the 1998 Omagh bombing. The Northern Ireland Human Rights Commission sought to intervene in that case to present its view about the human rights standards that ought to apply. The coroner ruled that the Commission had no statutory power to intervene. The Commission challenged that ruling by JR. Sir Robert Carswell LCJ upheld the coroner's ruling. The Court of Appeal by a majority (McCollum LJ and Sir John MacDermott, Kerr J dissenting) dismissed the Commission's appeal [2001] NI 271. The case went to the House of Lords which, by a majority, upheld the judgment of Kerr J that the Commission does have the power to intervene [In Re NIHRC (NI) [2002] UKHL 25].

That outcome is striking because it is no small matter for any judge to push a difference of opinion to a formal dissent. It is especially difficult, and rare, for the most junior member of a collegiate court to take that step. Rare or not, Brian Kerr did it, and that fact alone speaks volumes about his independence of mind

It came as no surprise to anyone that he was appointed as LCJ in 2004. He did not change when he became LCJ. Whether in the High Court

hearing judicial reviews, which he loved, or presiding as LCJ in the Court of Appeal, he was the perfect judge to appear before. Brian had the ability to listen, with care, curiosity, genuine interest and often with appropriate gentle humour. He was very thoughtful and encouraging towards younger, less experienced members of the Bar. No one ever left his court feeling discouraged. If the merits of the case required a particular result the losing side were let down gently and skillfully. He wore his skill and towering intellect lightly.

On 29 June 2009 he was appointed to the Appellate Committee of the House of Lords. He was the last person to be appointed to the House of Lords. On the 1 October 2009 he became one of the inaugural Justices of the new Supreme Court of the UK. He was the youngest member at age 61 and the only Justice who had previously served as a judge in Northern Ireland. This gave him a unique perspective when dealing with the most serious cases, many of which involved novel and controversial points of public importance including those emanating from Northern Ireland. He retired from the Supreme Court in September 2020 having served for 11 years in the UK's Highest Court.

Asked to specify what had been his most important case, Lord Kerr chose the legal challenge to NI abortion law brought by the NIHRC. The law prohibited abortion, even in cases of rape, incest and fatal fetal abnormality. Four of the seven Justices, including Lord Kerr, ruled this law incompatible with human rights legislation. Out of court he said:

“one only has to read of the dreadful circumstances of the young women who were courageous enough to give ... an account of their experiences in order to be struck how dreadful those experiences were ... it was an extremely important case and one on which I was very pleased to be part of.”

That comment reflects another quality that BK possessed in spades and displayed throughout his illustrious legal life - the quality of empathy. He had the capacity to stand in the shoes of the litigant before him, to feel their pain and to weigh that pain in the balance when considering what needed to happen next. It is true he enjoyed the legal ‘game’, but he never lost sight of the fact that legal wrongs have painful consequences for real people.

I also want to mention Brian’s ‘bigger picture’ awareness. He understood where law and legal endeavour fit within the structures of the state. He understood how the pillars of the state rubbed against each other and how friction could arise. Post retirement he commented that he could understand that ministers might be “irritated by legal challenges which may appear to them to be frivolous or misconceived” but “if we are operating a healthy democracy, what the judiciary provides is a vouching and checking mechanism for the validity [of] laws that parliament has enacted or the appropriate international treaties to which we have subscribed ... the last thing we want is for government to have access to unbridled power.”

**Could there be any more relevant reflection on the times we're living through today?**

I hope I have painted a sketch of the Brian Kerr I knew and admired. I admired him for his skill, his powers of advocacy, his ability to persuade, his understanding of tone, force and emphasis. He was a consummate master of all these elements – a joy to watch and to hear.

I admired him for his independence of mind coupled with his determination; he felt free enough to represent an underdog; he felt free enough to dissent from a majority view held by more senior judges; he felt free enough to push a point home even when a senior judge told him it was 'utterly without merit.' He had faith in his own judgement, and pursued the points he believed in, to their logical and frequently successful conclusions.

I admired him for his dogged pursuit of what he considered to be the 'just' outcome. The importance of his sense of justice to his work has also been commented on by others – for example, Lewis Graham in his study of "Judicial Individuality on the UK Supreme Court" notes that:

"Lord Reed has suggested that he was guided by a 'strong and instinctive sense of justice'" [Lord Reed. "Tribute for Lord Kerr" (UK Supreme Court, 30 September 2020).

And Mr Graham himself appears to concur:

“it seems like Kerr was guided more strongly by the desire to do justice in the case before him than with adherence to some strict legal doctrine

I admired him for his style - but then so did the rest of the world! Brian was born convivial, and he couldn't stop that from coming out. It came out in the gatherings he organized in his chambers after a long and bruising case; it came out in the countless invitations he issued to erstwhile colleagues from NI who found themselves in London during his long tenure in the UK's highest court. Brian loved to meet up, to catch up, to hear the gossip. He was profoundly human in those regards in the same way he was profoundly human in the empathy he felt for those litigants in pain. To put it at its plainest he was just 'a lovely man' - but one imbued with profound legal learning and all the skills of a legal ninja!

So, there you have it folks! That is my commendation of Lord Kerr and those are some of the reasons I think he has earned a spot in the 'Judicial Hall of Fame for All Time Greats.'

**I hope you enjoy discussing that idea over a glass of champagne served in an elegant flute!**