



2008-05-01

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Statutory Restrictions on Initiating Judicial Review Proceedings in the Asylum Context

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May 2008

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INTRODUCTION

The purpose of this thesis is to analyse the statutory limits which have been placed on foreign nationals wishing to initiate judicial review proceedings challenging decisions made in the asylum and immigration process and to establish whether the correct balance has been struck between protecting immigrants' rights and the policy objectives of the Government to have judicial review cases in this area dealt with speedily. The restrictions are more onerous than those that an applicant would face when seeking to bring judicial review proceedings under Order 84 of the Rules of the Superior Courts 1986 and a considerable amount of case law and commentary has developed in this area.

The research methodology I will use is based on a review and critical analysis of relevant Irish and international legislation, case law, legal doctrine and reform proposals. This method will enable me to identify and scrutinise the most authoritative current and historical literature available on this subject and to conclude whether a fair balance has been struck between protecting immigrant's rights and the common good, in the restrictions imposed on initiating judicial review proceedings.

As set down in s.5 of the Illegal Immigrants (Trafficking) Act 2000, an application for leave to seek judicial review must be made within 14 days from the date on which the person was notified of the decision and such application must be on notice to the Minister. This period can only be extended where there is "good and sufficient reason" for doing so. Leave is granted only where the Court is satisfied that there are "substantial grounds". There is no appeal to the Supreme Court except with the leave of the High Court and where that Court certifies that its decision "involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court." The Illegal Immigrants (Trafficking) Bill 1999 was the subject of a Supreme Court reference and its constitutionality was upheld.¹

In Chapter 1, I will analyse the time limit of 14 days from the date on which the person was notified of the decision, within which an application for leave to seek judicial review must be made. Similar time limits have been set down in other areas of law such as in planning

¹ *In re Article 26 of the Constitution and sections 5 and 10 of the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360

legislation which I will analyse. There is a potential conflict between this limit and an applicant's rights under the European Convention on Human Rights, which I will consider, along with the recommendations for reform to the limit. Similarly, with the restriction on when the courts can extend this time limit, I will analyse its operation in case law both in asylum cases and where other similar legislation exists and discuss the changes which have been proposed in the Immigration, Residence and Protection Bill 2008.

In Chapter 2, I will analyse the substantial grounds requirements which an applicant must meet in order to obtain leave to seek judicial review. I will also analyse, firstly, whether judicial review should be granted where an alternative remedy is available such as an appeal to an independent tribunal, and secondly, the level of judicial intervention which is desirable, to ensure that blatantly unfair or unreasonable decisions are not permitted to go unchecked, in light of important personal rights and freedoms which may be at stake. The test as it currently stands was laid down in *O'Keeffe v An Bord Pleanála*² and can be summarised as whether the decision flew in the face of reason and common sense or, alternatively whether there was any basis for the decision in question. This test is currently the subject of a Supreme Court appeal.³

In Chapter 3, I will analyse the requirement that an application for judicial review must be made by motion on notice to the Minister and any other person specified for that purpose by order of the High Court and whether this requirement should be mandatory for all cases which come within the legislation.⁴ I will examine the non-suspensive effect of deportation and transfer orders where legal proceedings are initiated. I will also analyse the restriction on appealing a High Court decision, that there is to be no appeal unless the High Court certifies that its own decision involves a point of law of exceptional public importance and that it is in the public interest that an appeal should be taken to the Supreme Court. I shall also consider the right that applicants have to a fair trial and due process and analyse whether the State is fulfilling its obligations according to international standards.

Finally, in Chapter 4, I will consider the proposed reforms to the statutory restrictions which

² [1993] 1 I.R. 39

³ *Meadows v Minister for Justice, Equality and Law Reform and the Attorney General* (Unreported, High Court, Gilligan J., 19th November 2003)

⁴ See s.5 (1) of the Illegal Immigrants (Trafficking) Act 2000 (as amended) for a list of decisions, refusals, notifications, determinations and recommendations which come within the ambit of this legislation. It has been proposed that this list be expanded in s.118 (1) of the Immigration, Residence and Protection Bill 2008.

an applicant faces when seeking to take judicial review proceedings, challenging a negative decision made in the asylum process. There have been many proposed reforms, including the Law Reform Commission Report on Judicial Review Procedure⁵ and the Immigration, Residence and Protection Bill 2008 published 29th January 2008, which, at the time of writing, is at Committee stage in Dáil Éireann. I will analyse the leading submissions related to the restrictions under the Bill, published prior to April 20th 2008.

Judicial Review in the Asylum and Immigration Process

One of the features of Ireland's constitutional system of justice is the system whereby the High Court has power to review the administrative actions of public and private bodies. The judicial review process is not an appeal from the decision in question, but is a way of ensuring that public powers are exercised in accordance with basic standards of legality, fairness and rationality. Judicial review proceedings are initiated by the making of an application to the High Court for leave to seek judicial review pursuant to Order 84 of the Rules of the Superior Courts 1986. The court determining the review will not normally substitute its own decision on the substance for that of the decision-maker. Judicial review is thus a procedural rather than a substantive remedy and it has been determined that the judicial review process complies with Article 13 of the European Convention on Human Rights, which guarantees the right to an effective remedy before national authorities.⁶

A successful application for judicial review can result in a variety of reliefs being granted. An order of *certiorari* quashes the decision made and the court may direct that the decision be reconsidered by the initial decision maker in accordance with the findings of the court. An order of *mandamus* compels a body to perform a duty imposed by law, while an order of *prohibition* restrains a body from embarking on or continuing a given course of action. The rarely sought relief of *quo warranto* determines whether someone in authority has a right to hold such a position. The court may also grant injunctive relief directing or preventing a body from acting on decisions, a declaration that the decision was unlawful or unreasonable and damages.

The judicial review system, although of long standing in Irish law, was not based on or

⁵ (LRC 71 – 2004), February 2004

⁶ *Vilvarajah & Ors v. United Kingdom* [1991] ECHR 47

regulated in any general way by a primary statute.⁷ The effect of section 5 of the Illegal Immigrants (Trafficking) Act 2000 was to enshrine into primary legislation, for the first time, a code of law governing judicial review of decisions made in immigration and asylum matters.⁸ Section 5 offers a statutory guarantee to those in the immigration and asylum processes that they will have the opportunity to have the courts review any step in those processes where there is a substantial basis for doing so, in a coherent, fair and expeditious manner. It was envisaged that the High Court's valuable time would not be taken up with applications which can be disposed of at an early stage, such as those which are frivolous or vexatious and also to enable a decision, which was taken in a proper and lawful manner, to be executed. The legislation was designed to ensure that:

“Where all due procedures have resulted in a determination that there is no basis for a non-national's continued stay in the State, the judicial review process cannot be used to delay that person's departure if no substantial case can be made which would warrant a postponement.”⁹

As can be seen from the lengthy asylum judicial review lists which are before the Court waiting to be determined, the restrictions have not had the desired effect which the Executive sought in having cases determined promptly. Currently, there are delays in some cases of several years for a case to be determined from the time it was initiated until judgment or a settlement agreement is reached, which is clearly undesirable. Stack and Shipsey¹⁰ have commented that:

“Section 5 significantly delays the determination of (*costly*) leave applications, thereby preventing the state from enforcing or relying upon decisions and orders against which no stateable challenge can be raised.”

Under the Immigration, Residence and Protection Bill 2008, section 5 of the Illegal

⁷ Order 84 of the Rules of the Superior Courts 1986 remains part of only a Statutory Instrument (S.I. No. 15/1986)

⁸ Similar legislation had been enacted in for example s.13 of the Irish Takeover Panel, Act 1997 and s.50 of the Planning and Development Act 2000

⁹ John O'Donoghue, Minister for Justice, Equality and Law Reform. Dáil Debates, Dáil Éireann – Volume 514 – 516 February, 2000. Illegal Immigrants (Trafficking) Bill 1999, Instruction to Committee. www.oireachtas.ie

¹⁰ Stack and Shipsey, “*Judicial Review and the Asylum Process*” in Fraser and Harvey ed., *Sanctuary in Ireland, Perspectives in Asylum Law and Policy*, (2003) 168, 175

Immigrants (Trafficking) Act 2000 is to be abolished, to be replaced by similar restrictions and some new measures, which if become law would go some way to deter those wishing to bring frivolous or vexatious proceedings and assist in having cases determined more promptly.

Chapter 1: 14 DAY TIME LIMIT

Section 5(2) of the Illegal Immigrants (Trafficking) Act 2000 states that:

An application for leave to apply for judicial review under the Order¹¹ in respect of any of the matters referred to in subsection (1) shall –

(a) be made within the period of 14 days commencing on the date on which the person was notified of the decision, determination, recommendation, refusal or making of the Order concerned unless the High Court considers that there is good and sufficient reason for extending the period within which the application shall be made.

“Modern legislation shows an increasing impatience with endless legal challenges to decisions of administrative bodies and ministerial decisions. These time limits are measured in weeks rather than months and require an applicant to move with alacrity if he is not to be debarred from making an application for judicial review. Pursuant to many of these schemes, the potential injustice that might be caused by the imposition of strict time limits has been mitigated somewhat by provision being made for extensions of time to be granted where there is “good and sufficient” reason for doing so.”¹²

The Illegal Immigrants (Trafficking) Act 2000 was introduced as part of the response to the delays resulting from judicial reviews of decisions taken under the asylum process arising out of the growth in numbers of immigrants coming to this country. The 14 day time limit is substantially shorter than the general three month limit for all reliefs except *certiorari*, which has a six month time limit for seeking judicial review as set out in Order 84 of the Rules of the Superior Courts 1986, although there is an obligation to act promptly within that time.¹³ The 14 day time limit reflects similar limits introduced by the Oireachtas in other situations where decisions can only be challenged by way of judicial review proceedings and where the need for certainty and finality is particularly strong. For example, in s.82 (3B)(a)(i) of the

¹¹ Order 84 of the Rules of the Superior Courts 1986

¹² Kearns J. *O'Brien v Moriarty* [2005] 2 ILRM 321 at 343

¹³ *De Roiste v Minister for Defence*. Unreported, Mc Cracken J., High Court, 28th June 1999, where Mc Cracken J. stated that the primary provision is that an application for judicial review must be made promptly and it is only a secondary requirement that, in any event, the application must be made within the stated time depending on the nature of the application. Delivering her judgment in the Supreme Court in *De Roiste v Minister for Defence* [2001] IESC 4, Denham J. also stated that the first condition as to time is that the application be brought promptly and that whether this requirement is met will depend on the circumstances. In some circumstances even if the application is brought within months of the decision being challenged it may not be sufficiently prompt.

Local Government (Planning and Development) Act 1963, a time limit of two months was set for bringing an application for judicial review of a decision of a planning authority or An Bord Pleanála commencing on the date the decision is given. Also a limit of seven days was set under s.13(3)(a) of the Irish Takeover Panel Act 1997.

It is interesting to note that the 14 day limit in s.5(1) commences on the date on which the person was notified of the “decision, determination, recommendation, refusal or making of the order concerned” unless the court dispenses with this requirement. What constitutes a “refusal” was considered by the Supreme Court in *S v. Minister for Justice, Equality and Law Reform*.¹⁴ The Applicant was refused asylum under s.17(1) of the Refugee Act 1996 and she then sought the consent of the Minister to make a further application under s.17(7) of the 1996 Act. This request was subsequently refused by the Minister and judicial review proceedings commenced seeking a declaration that the Respondent had erred in law and acted ultra vires the Refugee Act 1996 in refusing consent. The Applicant argued that the reference to a refusal under s.17 of the Refugee Act 1996 captured only a refusal to grant a declaration of refugee status pursuant to s. 17(1), and did not extend to a refusal of consent to reapply under s.17(7). This argument was rejected by the Supreme Court on the basis that there was no ambiguity in the wording of s.5(1) of the 1996 Act, and that applying the ordinary and natural meaning of the word “refusal”, it was clear that the section encompassed a refusal to grant consent pursuant to s.17(7).

The restrictive nature of the 14 day limit has the aim of ensuring the speedy determination of an applicant’s status, so that any person not entitled to remain in the country would be removed expeditiously. However, it is the most criticised aspect of the limits constraining the initiation of judicial review proceedings and continues to be heavily criticised by many concerned parties, as the time limit remains unchanged in the latest Immigration, Residence and Protection Bill which was published on 29th January 2008.¹⁵ In an effort to justify the 14 day time limit in the Dáil debates on the subject of the Illegal Immigrants (Trafficking) Bill 1999, the then Minister for Justice, Equality and Law Reform John O’Donoghue sought to bring the time limit in line with the time in which a failed asylum seeker has to leave the State. He also stated the time limit:

¹⁴ [2005] 1 ILRM 73

¹⁵ At Committee stage of the 2008 Bill it has been proposed that the time limit should be 28 days instead of 14. Select Committee on Justice, Equality, Defence and Women’s Rights. “*List of Proposed Committee Stage Amendments*”, 16 April 2008. www.oireachtas.ie at page 82

“..will ensure that the rights of all concerned in cases of this type are vindicated without undue delay, and that includes ensuring that court time is not unduly spent on applications for judicial review which do not have a substantial basis.”¹⁶

Against the proposition of a 14 day time limit in *In re Article 26 of the Constitution and sections 5 and 10 of the Illegal Immigrants (Trafficking) Bill 1999*,¹⁷ Counsel argued that:

“..the limitation of fourteen days within which to initiate the judicial review procedure renders a person's right of access to the courts so excessively difficult as to be arbitrary, unreasonable and therefore unconstitutional.”

However Counsel on behalf of the Attorney General argued that:

“There are public policy objectives in ensuring that illegal immigrants challenging deportation orders do so as quickly as possible, as otherwise they may tend to become enmeshed further in Irish society only thereafter to be forced to leave. In any case, any effective deportation system must be able to function efficiently and distinguish quickly between genuine refugees and other migrants not entitled to enter or remain in the State. It was also submitted that an inefficient system for processing such asylum applications and implementing deportation in the case of illegal immigrants would act as a ‘magnet’ attracting illegal immigrants from elsewhere and would further undermine the functioning of the system.”¹⁸

Counsel assigned by the Court placed particular reliance on the judgment of Costello J. in *Brady v. Donegal County Council*.¹⁹ In that case the Plaintiff had challenged the constitutionality of the two month time limit imposed by section 82(3A) of the Local Government (Planning and Development) Act, 1963 as amended by section 42 of the Local Government (Planning and Development) Act on the bringing of proceedings to question the validity of planning decisions. The time limit was held to be unconstitutional as there was no

¹⁶ Dáil Debates, Dáil Éireann – Volume 514 – 516 February, 2000. Illegal Immigrants (Trafficking) Bill 1999, Instruction to Committee www.oireachtas.ie

¹⁷ [2000] 2 IR 360 at 376

¹⁸ Ibid. At 379

¹⁹ [1989] ILRM 282

saver clause to allow the time to be extended in any scenario. While he acknowledged that the objective of the time limit to avoid unnecessary costs and wasteful appeals is important, Costello J. concluded that the limitation was unreasonable. Costello J. stated:

“A law which imposes a very short time limit which may well deprive a plaintiff of a judicial remedy before he knew he had a cause of action can obviously cause considerable hardship. But if the plaintiff's ignorance of his rights during the short limitation period is caused by the defendant's own wrong-doing and the law still imposes an absolute bar unaccompanied by any judicial discretion to raise it there must be very compelling reasons indeed to justify such a rigorous limitation on the exercise of a constitutionally protected right.”²⁰

Although this case was successfully appealed in the Supreme Court, a more flexible formula was introduced by s.50(4) of the Planning and Development Act 2000²¹ which lays down an eight week time period to bring judicial review proceedings and the High Court is given discretion to extend the time for the bringing of proceedings where it considers that there is good and sufficient reason for doing so. The discretion to extend such shortened time limits was introduced by amendment into the planning legislation to meet constitutional concerns and has also been included in other areas to which similar restrictions have been applied.

In my opinion, the fourteen day time limit is too short. While State funded legal supports are available to all asylum-seekers at every stage of the process, an applicant may wish to raise complex legal issues in challenging the decision made and the time limit as it stands makes it difficult to the point of being unfair on such a person to adequately prepare a legal challenge. In reality, where the 14 day time limit is not met, the time limit is readily extended by the Court, therefore I would agree with the recommendation of the Law Reform Commission²² that the time limit should be extended to 28 days. Delaney²³ has commented that the courts are willing to grant an extension of time to ensure that justice will prevail, even when the proceedings are brought out of time:

“Clearly, given the relatively shorter time periods laid down in statutory judicial review

²⁰ Ibid at 393

²¹ Substituted by s.13 of the Planning and Development (Strategic Infrastructure) Act 2006

²² “*Report on Judicial Review Procedure*” (LRC 71 – 2004) at page 49, February 2004.

²³ Delaney, “*The Requirement to Act “Promptly” in Judicial Review Proceedings*”, (2005) 23 ILT 229 at 232

schemes and the absence of any specific requirement to act promptly, the issue of applications for judicial review being defeated within these time frames is not a particularly significant one. In view of the very limited time frame laid down in s.5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000, it will certainly not be an issue in such cases and recent practice shows that extensions of time will be relatively readily granted even where applications are brought a further 14 days beyond the period specified. [*S v Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 163 ; *CS v Minister for Justice, Equality and Law Reform* [2005] 1 I.L.R.M. 81]”

The fact that the time limit is so readily extended by the Court leads me to the conclusion that it must in its nature be unfair and unjust. The grounds under which the time limit can be extended by the court are, it is proposed, to be curtailed under s.118(3) Immigration, Residence and Protection Bill 2008. I believe, therefore, that a time limit of 28 days together with these new restrictions on extending the time limit would bring about a fairer balance between the objectives of the Executive and the rights of failed asylum seekers and that the Court would be less inclined to extend such a time limit.²⁴

Retaining the 14 day time-limit may give rise to a violation of rights under the European Convention on Human Rights (ECHR), in particular Article 6, which provides that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. It is conceivable that the courts might entertain a claim that the application of the 14 day time-limit violates Art.6 because it limits an applicant's ability to participate effectively in proceedings or indeed, because it limits his or her access to court.

In *Stubbings v. UK*²⁵ the Court held that in order to be in accordance with Article 6(1) of the ECHR, the limitations applied must not “restrict or reduce the access left to the individual in

²⁴ Several concerned parties have argued that the time limit should be extended, for example the Irish Human Rights Commission in their “*Observations on the Immigration, Residence and Protection Bill 2008*” at page 61, published March 19th 2008. www.ihrc.ie. The Law Society of Ireland “*Submission on the Immigration, Residence and Protection Bill*” at page 76, published 7th April 2008 www.lawsociety.ie, conclude that the time limit is “inadequate”, “unjust” and “unworkable” and should be extended to at least 20 days. Perhaps one of the reasons why the 14 day time limit is not amended is that the doors would be open again to lawyers to attack its constitutionality, which was upheld in *In re Article 26 of the Constitution and sections 5 and 10 of the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360

²⁵ [1997] 23 EHRR 213

such a way or to such an extent that the very essence of the right is impaired.”²⁶ The Irish Human Rights Commission²⁷ has also commented that the time limit together with the restrictions on extending this creates unnecessary difficulties for persons seeking to challenge immigration decisions and may prevent some persons from making such applications, which would be in violation of Article 13 of the ECHR:

“A further key aspect of the case-law of the ECHR is that the scope of the State’s obligation under Article 13 varies depending on the nature of the applicant’s complaint. Where irreversible harm might ensue, it will not be sufficient that the remedies are merely as effective as can be; they must provide much more certain guarantees of effectiveness.”²⁸

Extending the 14 Day Limit

In “conventional” judicial review applications the Court will extend the period within which an application may be made where it considers that there is good reason for doing so. Section 5 of the Illegal Immigrants (Trafficking) Act 2000 is more restrictive as it states that the time limit will not be extended unless the High Court considers that there is “good and sufficient reason” for doing so. The power of the Court to extend the time for the bringing of a judicial review application is of great importance for the protection of the constitutional right of access to the Courts of persons affected by decisions vital to their interests. It enables persons who, having regard to all the circumstances of their case including language difficulties, communication difficulties, difficulties with regard to legal advice or otherwise, who have shown reasonable diligence, to have sufficient access to the courts for the purpose of seeking judicial review. The Supreme Court found in *In re Article 26 of the Constitution and sections 5 and 10 of the Illegal Immigrants (Trafficking) Bill 1999*²⁹ that the discretion of the Court to extend the time to apply for leave where the applicant shows “good and sufficient reason” for doing so was wide and ample enough to avoid injustice where an applicant has been unable through no fault of his or her own or for good and sufficient reason to bring the application within the fourteen day period.

²⁶ Ibid. at para 50

²⁷ IHRC, “*Observations on the Immigration, Residence and Protection Bill 2008*” at page 57, published March 19th 2008. www.ihrc.ie

²⁸ *Chahal v United Kingdom*, Judgement of 15 November 1996, (1997) 23 EHRR 413, para. 151.

²⁹ [2000] 2 IR 360

In *CS v Minister for Justice, Equality and Law Reform*³⁰ the Applicants brought an application for judicial review outside the 14 day time limit, therefore an order extending the time was sought from the High Court. In the course of the hearing before the Supreme Court, it was accepted by the parties that the principal issue concerned the extension of time. The Respondent submitted that there had been no satisfactory explanation provided for how the delay had arisen and that the trial judge had erred in attributing blame to the Refugee Legal Service. It was submitted by the Applicants that the major part of the delay was due to the fault of the Applicants' solicitor and that the fault should not be visited on their head. McGuinness J. referred to the observations of Finnegan J. in *G.K. v. Minister for Justice, Equality and Law Reform*³¹ where he held:

“In determining the extent to which an applicant should be held vicariously liable for the default of his solicitor it is important to bear in mind the serious consequences which could result from an application failing because of delay...Where an applicant is deported, the consequences for him may be very serious indeed in that he may be deported to a State in which his fundamental rights would not be vindicated.”

The Supreme Court in *CS* found that the applicant demonstrated 'reasonable diligence' in seeking access to the Court and therefore there would be good reason to extend the time period.

In the Supreme Court judgment in *G.K. v. Minister for Justice, Equality and Law Reform*³², it was stressed that, where an Applicant seeks an order extending time to apply for judicial review proceedings in relation to a decision governed by s.5 of the Illegal Immigrants (Trafficking) Act 2000, in considering whether there is good and sufficient reason for extending the period within which the application must be made, the Court should have regard to the merits of the substantive case and not simply the merits of the application to extend time. In that case the Applicant had been granted an extension of time to bring judicial review proceedings and this decision was appealed by the Minister. Hardiman J. referred to

³⁰ [2005] 1 ILRM 81

³¹ [2002] 1 ILRM 81 at 87

³² [2002] 1 ILRM 401

*Éire Continental Trading Co. Ltd v. Clonmel Foods Ltd*³³ and the preconditions which were laid down relating to the exercise of the Court's discretion to extend time, the third of which relates to the existence of an arguable case on appeal. Lavery J. also stressed that an applicant ought to show the Court that his proposed appeal has substance and is not merely intended to gain time and to postpone the day of reckoning. A bona fide intention to appeal therefore must be demonstrated and this must be formed within the permitted time.

In considering whether the blame for the delay should be visited vicariously on the applicant so as to prevent their access to the court, McGuinness J. in the *G.K.* case noted that the applicants had suffered many of the disadvantages described by the Supreme Court in *In re Article 26 of the Constitution and sections 5 and 10 of the Illegal Immigrants (Trafficking) Bill 1999*³⁴, including unfamiliarity with the Irish legal system and the fact that the first named Applicant lived some considerable distance from her solicitor's place of business. McGuinness J. also noted that while the first named Applicant had been represented by the Refugee Legal Service (RLS) up to the stage of her appeal, she was thereafter informed that the RLS could do nothing further for her, which would have caused both confusion and distress. In the circumstances, the Supreme Court concluded that the Applicants had failed to establish any basis for extending the time and overturned the High Court decision.

Delaney³⁵ has commented that the test laid down by the Supreme Court in *G.K.* may be unduly restrictive and she supports the argument that in statutory schemes of judicial review the balance has swung too far against those seeking to challenge decisions of State authorities and that perhaps a more equitable formula should be adopted. Delaney³⁶ has also argued that the test suggested by Barr J. in *Solan v. Director of Public Prosecutions*,³⁷ to the effect that where an application is made out of time the applicant is obliged to satisfy the Court that in all the circumstances it is in the interest of justice that time for the making of the application should be extended, would be more equitable. Recent case law has, however, shown that the Court will still look for substantial grounds to be present before the time limit will be extended.³⁸ The applicants in the *U.L.* case sought an extension of time to amend their

³³ [1955] IR 170

³⁴ [2000] 2 IR 360

³⁵ Delaney "Extension of Time for Bringing Judicial Review Procedures Pursuant to s.5 of the *Illegal Immigrants (Trafficking) Act 2000*", [2002] 20 ILT 44 at 48

³⁶ *Ibid.*

³⁷ [1989] ILRM 491 at 493

³⁸ *U.L. v The Minister for Justice, Equality and Law Reform* (Unreported, MacMenamin J., High Court, 28th

statement of grounds under s.5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000. However MacMenamin J. concluded that:

“While in other circumstances a court might be inclined to extend the time, on such facts the essential issue here is that no substantial grounds have been established and consequently, no basis to extend the time for the amendment of the statement of grounds is established.”

In *B v The Governor of the Training Unit Glengariff Parade*³⁹ again the issue to be decided was whether or not the Applicant was entitled to an extension of time to bring judicial review proceedings. The Applicant had not received a copy of his deportation order; however this was due to him not informing the Minister of his new address. As the Applicant had been involved in the immigration process for an appreciable time and was aware that the Minister was considering making a deportation order against him, Fennelly J. determined that the blame should be attributed to the Applicant, for failing to keep the Minister up-to-date on his place of residence and that as the Applicant’s case was devoid of merit an extension of time therefore was not granted. Fennelly J. stated:

“If he had been genuinely concerned to learn of developments, he would indeed have communicated with his former address or made arrangements to have any post forwarded or ensured that his solicitor had his current address. For all these reasons he is in an extremely weak position to ask the court to extend the time or to criticise the Minister for delay...it is reasonable to conclude that he merely wished to prolong his now illegal presence in the State and no wish or intention to take any further proceedings.”⁴⁰

In *B and S v. Minister for Justice, Equality and Law Reform*,⁴¹ the interesting question arose as to whether an appeal against the refusal to extend time could be brought without the leave of the High Court. Counsel for the Appellants submitted that the application for an extension

February 2007
³⁹ [2002] IESC 16

⁴⁰ Ibid.

⁴¹ Unreported, Supreme Court, 30th January 2002. Section 118(4)(c) of the recent Immigration, Residence and Protection Bill 2008 sets down that the decision of the High Court on an application to extend the time limit for bringing judicial review proceedings, can only be appealed with the leave of the High Court.

of time is a separate and distinct application, which must be considered and either allowed or refused prior to the Court's consideration of the actual application for leave to bring judicial review proceedings and prior to any “determination” of the application. Counsel for the Respondents submitted that it was the clear intention and policy of the 2000 Act that there should be no appeal from the determination of the Court in relation to either leave to issue judicial review proceedings or the judicial review proceedings themselves. The Supreme Court ruled that a person who has been refused an extension of time for leave to apply for judicial review, may bring an appeal without first obtaining leave.

Much of the jurisprudence dealing with the issue of extending the time limit for an applicant to initiate judicial review proceedings has come from proceedings taken against planning decisions, where almost identical legislation has been enacted in relation to judicial review proceedings taken against those decisions. In *Blessington and District Community Council Limited v Wicklow County Council and Aosog Centres Limited*⁴² the Applicants sought leave to apply for judicial review of a decision of Wicklow County Council to grant planning permission. The application was far outside the two-month period prescribed by statute for the commencement of judicial review proceedings pursuant to section 19 of the Local Government (Planning and Development) Act 1992; therefore, Kelly J. refused leave to apply for judicial review. In refusing leave on all the non-constitutional grounds, Kelly J. also referred to the judgment of Finlay C.J. in *Brady v Donegal County Council*⁴³ where it had been asserted by the Plaintiffs that the limitation provision of two months which applied for testing the validity of a planning permission was unconstitutional because of the absence of a saver clause which would enable the Court to enlarge the period in favour of a plaintiff in exceptional circumstances. Finlay C.J. held that:

“The whole issue of constitutional validity depends in this case upon the submission with regard to the absence from the subsection of ‘a saver against an exceptional case such as the present one.’ If the present case is not exceptional..then the absence of any saver from this subsection has not damnified the plaintiffs nor would its presence have been of advantage to them.”⁴⁴

⁴² [1997] 1 IR 273

⁴³ [1989] ILRM 282 at 293

⁴⁴ [1997] 1 IR 273 at 290

In *Ni Eili v. The Environmental Protection Agency and Others*⁴⁵ which concerned an application for leave to amend grounds for seeking judicial review by, inter alia, raising questions concerning the constitutionality of certain provisions of the Environmental Protection Agency Act 1992, Kelly J. was of the view that the amendments sought amounted to an additional and entirely new case and that the new grounds were very different to those already advanced and represented a new cause of action. The Court was of the view the Applicant should not be permitted to present a new cause of action effectively by way of an amendment to her existing proceedings as it would run “counter to the will of Parliament as expressed in Section 85(8) of the Act.”⁴⁶ While the two month time limit creates a substantial burden on plaintiffs, Kelly J. was of the view that it would be impermissible to permit new grounds to be introduced. However, if an obvious and substantial injustice would be done and an applicant was deprived of the opportunity to litigate their claim where they had a very strong, indeed almost unanswerable case, the Court would, notwithstanding that the delay in taking proceedings was inexcusable, be more willing to allow amended grounds to be presented, even if the time limit has passed.⁴⁷

Under s.118(3) of the Immigration, Residence and Protection Bill 2008, it has been proposed that the grounds upon which the time limit can be extended, be curtailed. If enacted, the High Court may not extend the time period set except for in a number of specific situations or where there are exceptional circumstances. The Irish Human Rights Commission⁴⁸ (IHRC) and the Law Society of Ireland⁴⁹ are concerned that the grounds upon which the High Court can extend this time limit are being unfairly restricted and they have proposed that the grounds should be the same as those currently set out in Section 5(2)(a) of the Illegal Immigrants (Trafficking) Act 2000.⁵⁰ I consider that these proposals are at risk of a successful constitutional challenge and that they fail to comply with obligations under Article 6(1) and Article 13 of the European Convention on Human Rights.

⁴⁵ [1997] 2 ILRM 458

⁴⁶ Ibid. At 464

⁴⁷ *Guerin v. Guerin* [1992] 2 IR 287

⁴⁸ IHRC “*Observations on the Immigration, Residence and Protection Bill 2008*” at page 13, published 19 March 2008. www.ihrc.ie

⁴⁹ The Law Society of Ireland “*Submission on the Immigration, Residence and Protection Bill*” at page 76, published 7th April 2008 www.lawsociety.ie

⁵⁰ At Committee stage of the 2008 Bill it has been proposed that the High Court retain the ability to extend the time limit where it considers that there is good and sufficient reason for doing so. Select Committee on Justice, Equality, Defence and Women’s Rights. “*List of Proposed Committee Stage Amendments*”, 16 April 2008. www.oireachtas.ie at page 82

Following *Brady v. Donegal County Council*⁵¹ the legislature, concerned that the Planning legislation was constitutionally unsound, gave the High Court discretion to extend the 8 week time limit for the bringing of proceedings, where it considers that there is good and sufficient reason for doing so. This has now been amended by s.13(8) of the Planning and Development (Strategic Infrastructure) Act 2006 with an additional requirement that the High Court must be satisfied, that the circumstances that resulted in the failure to make the application for leave within the period so provided, were outside the control of the applicant for the extension. The grounds where the Court may extend the time in s.118(3) of the Immigration, Residence and Protection Bill 2008 are even more restrictive than those in the Planning legislation and this together with a substantially shorter time limit leaves this section of the Bill at real risk of being declared unconstitutional.

⁵¹ [1989] ILRM 282

Chapter 2: SUBSTANTIAL GROUNDS

In order to obtain leave to seek judicial review an applicant must establish substantial grounds rather than merely showing that he has a stateable case. This is a higher threshold than that which operates in conventional judicial review. As was noted by the Law Commission of England and Wales:⁵²

“Ill-founded applications delay finality in decision making: they exploit and exacerbate delays within the judicial system and are detrimental to the progress of well founded legal challenges.”

Carroll J. interpreted this test in *McNamara v. An Bord Pleanála*⁵³ as “reasonable, arguable, not trivial or tenuous.” McGuinness J. in support of Carroll J.'s interpretation commented in *Zgnat'ev v Minister for Justice*⁵⁴ that:

“As regards the requirement that an applicant for leave to issue judicial review proceedings establish ‘*substantial grounds*’ that an administrative decision is invalid or ought to be quashed, this is not an unduly onerous requirement since the High Court must decline leave only where it is satisfied that the application could not succeed or where the grounds relied on are not reasonable or are ‘*trivial or tenuous*’.”

This requirement to establish substantial grounds at leave stage leads to the position that the Court must engage in a more probing examination of the arguments than would be required under conventional judicial review proceedings and strengthens the argument that this results in a double hearing of the case.

Smyth J. in the decision of *P. v Minister for Justice Equality and Law Reform*⁵⁵ indicated that it is appropriate in the leave stage to consider the prospects of success, and to grant leave only if satisfied that the Applicant's case is not merely arguable but is strong; that is to say, is likely to succeed. Simons⁵⁶ has commented that this approach “brings the High Court at the

⁵² Law Commission for England and Wales, “*Administrative Law: Judicial Review and Statutory Appeals*” (No 226 1994) at paragraph 5.1.

⁵³ [1995] 2 ILRM 125 at 130

⁵⁴ [2002] 2 ILRM 215

⁵⁵ Unreported, High Court, Smyth J., 2nd January 2001

⁵⁶ Simons “*Judicial Review under the Planning Legislation – The Case for Abolition of the Leave Stage*”

leave stage tantalizingly close to a final determination”. Rogan⁵⁷ has argued that the test may not be necessary at all:

“In ordinary judicial review applications, the court always has jurisdiction to strike out frivolous or vexatious actions. As pointed out by Kelly J. in *O’Leary v. Minister for Transport, Energy and Communications* ([2000] 1 ILRM 391) “the judicial review procedure is designed so as to ensure that cases which are frivolous, vexatious or of no substance cannot be begun”. It is thus arguable that the substantial grounds requirement is unnecessary and given the special human rights context, the strict time limits and the difficulties of the Refugee Legal Service, the requirement in fact, interferes with the right of access to the courts, goes beyond the aim of the Act to expedite such cases and indeed may not fulfil it at all.”

Interestingly, while the Immigration, Residence and Protection Bill 2008 has retained the requirement that substantial grounds be established,⁵⁸ it has provided that where in the opinion of the Court, the grounds put forward for contending that an act, decision or determination is invalid or ought to be quashed are frivolous or vexatious, the Court may, (whether on application or on its own motion) by its order, so declare and shall direct by whom and in what proportion the costs are to be borne and paid.⁵⁹ The section goes on to state that where the Court forms an opinion of this kind, it may direct that the costs or a part of the costs of the proceedings shall be borne by the legal representative of the applicant.⁶⁰

Alternative Remedy

An interesting question is whether an applicant should be entitled to take judicial review proceedings challenging an administrative decision made where it is possible to appeal this decision to an independent body such as the Refugee Appeals Tribunal.⁶¹ Judicial review is discretionary and may be refused where there is an adequate alternative remedy.⁶² In *F.O.*,

(2001) 8(2) IPELJ 55 at 57

⁵⁷ Rogan “*Faster, Higher, Stronger? Section 5 and 10 of the Illegal Immigrants (Trafficking) Act 2000.*” ISLR (2002) Vol 10, page 21

⁵⁸ S.118(2)(b)

⁵⁹ S.118(7)

⁶⁰ S.118(8)

⁶¹ This Tribunal is to be abolished and replaced by the Protection Review Tribunal should the Immigration, Residence and Protection Bill 2008 be enacted.

⁶² *The State (Glover) v. McCarthy* [1981] ILRM 46; *Memorex v. Employment Appeals Tribunal* [1992] I.R. 184; *McGoldrick v. An Bord Pleanála* [1997] 1 IR 497

*Y.O. v. Minister for Justice, Equality and Law Reform*⁶³ it was argued by the Applicant that the Office of the Refugee Applications Commissioner made a fundamental error of law and fact in stating that Nigeria had been designated a “safe country of origin” by the first named Respondent. The application for asylum was not appealed however to the Refugee Appeals Tribunal. The question arose therefore, as to whether an applicant should be allowed to challenge decisions by way of application for judicial review when an adequate remedy is available elsewhere. An order of *certiorari* would not be worthless as it would enable the primary decision to be re-addressed in the light of all the evidence and an insufficiency of fair procedures at first instance is not cured by a sufficiency on appeal. Mc Govern J. stated “It is undesirable that parties should challenge decisions by way of application for judicial review when an adequate remedy is available elsewhere.”⁶⁴ However, he granted leave on the basis that the Refugee Applications Commissioner considered the application for refugee status on the basis of a fundamental error of fact.

In *Stefan v. The Minister for Justice Equality and Law Reform*⁶⁵ the Supreme Court held that whereas judicial review was discretionary and could be refused where there was an adequate alternative remedy, the Court nevertheless retained jurisdiction to exercise its discretion to achieve a just result. Kelly J. had granted *certiorari* of the decision at first instance that the Applicant’s application for refugee status in the State be refused, on the basis that the translation of the questionnaire filled in by the Applicant was incomplete and it was ordered that the matter be remitted back to the Minister. Reference was made to *The State (Abenglen) Properties v. Corporation of Dublin*⁶⁶ where Henchy J. stressed that he would refuse *certiorari* in this case because the alleged errors of law were not made in excess of jurisdiction and an alternative remedy existed. He stated (at 405):

⁶³ Unreported, High Court, McGovern J., May 16th 2007

⁶⁴ Ibid. See also *M.I.O v Minister for Justice, Equality and Law Reform* [2007] IEHC 441 where leave was refused as there was no fundamental flaw or procedural failure found and the matter it was determined could adequately be dealt with by the appeals process.

⁶⁵ [2002] 2 ILRM 134

⁶⁶ [1984] IR 38. In *Harding v. Cork County Council (No.2)* [2007] 2 ILRM 63, Clarke J. considered that an appeal is likely to be regarded as an adequate remedy unless a) the matters complained of in respect of the first stage of the process are such that they taint the second stage or affect over all jurisdiction, or (b) that the process at the first stage is so flawed that it can reasonably be said that the person had not been afforded his or her entitlement to a proper first stage of the process in any meaningful sense.

“where Parliament has provided a self-contained administrative and quasi- judicial scheme, postulating only a limited use of the Courts, *certiorari* should not issue when, as in the instant case, use of the statutory procedure for the correction of error was adequate (and, indeed, more suitable) to meet the complaints on which the application for *certiorari* is grounded.”

O'Higgins CJ. in *Abenglen* was of the view that if the decision impugned was made without jurisdiction or in breach of natural justice then, normally, the existence of a right of appeal or a failure to avail of such should be immaterial. Similarly, if an appeal can only deal with the merits and not with the question of the jurisdiction involved, the existence of such ought not to be a ground for refusing relief. Other than these, there may be cases where the decision exhibits an error of law and a perfectly simple appeal can rectify the complaint. O' Higgins C.J., who also refused *certiorari*, stated:

“The question immediately arises as to the effect of the existence of a right of appeal or an alternative remedy on the exercise of the courts discretion. It is well established that the existence of such a right or remedy ought not to prevent the court from acting. It seems to me to be a question of justice. The court ought to take into account all the circumstances of the case, including the purpose for which *certiorari* has been sought, the adequacy of the alternative remedy and, of course, the conduct of the applicant.”⁶⁷

In *McGoldrick v. An Bord Pleanála*⁶⁸ Barron J. stated

“The real question to be determined where an appeal lies is the relative merits of an appeal as against granting relief by way of judicial review. It is not just a question whether an alternative remedy exists or whether the applicant has taken steps to pursue such remedy. The true question is which is the more appropriate remedy considered in the context of common sense, the ability to deal with the questions raised and the principles of fairness; provided, of course, that the applicant has not gone too far down one road to be estopped from changing his or her mind.”

⁶⁷ [1984] IR 381 at 393

⁶⁸ [1997] 1 IR 497 at 509

In the *Stefan* case it was held that the decision was made in breach of fair procedures as material evidence was not before the decision-maker because of the omission in the translation. Also it was held that the Appeals Authority process would not be appropriate or adequate so as to withhold *certiorari* and the appeal was dismissed. In similar cases, I consider that while retaining always the power to quash, the Court should be slow to grant *certiorari* unless satisfied that there has been a fundamental breach of fair procedures and that the appeal remedy is unable to deal with the matter.

Section 50(4) of the Planning and Development Act 2000 now provides that the High Court is empowered to stay judicial review proceedings pending the making of a decision by An Bord Pleanála in relation to a parallel statutory appeal. Such a provision should be inserted into asylum legislation, so as to give the High Court the ability to stay judicial review proceedings challenging the decision made in an applicant's initial application to the Office of the Refugee Applications Commissioner (ORAC) pending the determination of an appeal taken to the proposed Protection Review Tribunal. Should the decision at ORAC stage be overturned on appeal, any proceedings in the High Court challenging the initial decision would be rendered moot.

In *Kayode Ogunyemi v The Minister for Justice, Equality and Law Reform*⁶⁹, the Applicant was seeking *inter alia* an order quashing the decision of the Refugee Appeals Tribunal that the Applicant's appeal against the recommendation of the Refugee Applications Commissioner be refused. McGovern J. analysed whether or not the Applicant had established substantial grounds in his application for leave. A major issue in the determination of the Applicant's claim before the Refugee Appeals Tribunal was the issue of his credibility. Counsel for the Applicant referred to *VI. v. The Minister for Justice, Equality and Law Reform and the Refugee Appeals Tribunal*,⁷⁰ in which Clarke J. refers to his judgment in the *Gashi*⁷¹ case where he indicated that for the purpose of a leave application it was arguable that a higher degree of scrutiny was required than that set out in *O'Keeffe v. An Bord Pleanála*.⁷² In other words he was suggesting that the "anxious scrutiny test" applied. McGovern J. stated that:

⁶⁹ Unreported, High Court, McGovern J., June 30th 2006

⁷⁰ Unreported, High Court, Clarke J., May 10th 2005

⁷¹ *Gashi v Minister for Justice, Equality and Law Reform and Others* (Unreported, High Court, Clarke J., December 3rd 2004)

⁷² [1993] I.R. 39

“While there seems to be some divergence of judicial opinion on this subject I am inclined to agree with the view expressed by Clarke J. on this issue since applications for leave to apply for judicial review in asylum matters have been put on a statutory basis which is separate and distinct from other applications for judicial review where fundamental human rights issues may not be considered.”⁷³

However, even applying the “anxious scrutiny” test Mc Govern J. concluded that the Applicant had not, in this case, discharged the burden of proving that there were substantial grounds for contending that the decision of the Refugee Appeals Tribunal (RAT) was invalid or ought to be quashed. Mc Govern J. was satisfied that the report of the RAT weighed up all the issues and arguments and reached conclusions which were determined by what was perceived to be a lack of credibility on the part of the Applicant on certain crucial issues. Mc Govern J., therefore, refused leave to apply for judicial review.

Anxious Scrutiny

An interesting question which the Supreme Court has yet to fully consider is the level of scrutiny which an administrative decision by the Executive should be subject. The test of anxious scrutiny does not, at the moment, form part of Irish law but has been subject to certain statements in the Supreme Court to the effect that if constitutional rights are at stake, then the existing test of unreasonableness may fall short of what is likely to be required for their protection. While the judicial review process is not as vigorous or penetrating as an ordinary appeal on the merits, it may operate as a form of limited appeal, where the decision made was disproportionate or irrational.

There is no definition of what anxious scrutiny may be beyond a general indication of a court being required to take serious care where an applicant’s life or liberty may be at risk as a consequence of a refusal of relief. Irish courts have generally shown no appetite to review decisions of regulatory bodies, especially where the decision is made by an expert body which has particular expertise and a body of experience.⁷⁴ This does not mean that the Court

⁷³ Unreported, High Court, McGovern J., June 30th 2006

⁷⁴ *Camara v The Minister for Justice, Equality and Law Reform* Unreported, High Court, Kelly J., 26 July

will stand “in awe of or accord undue deference to any authority however distinguished.”⁷⁵ In New Zealand the High Court stressed that it will only interfere with a credibility finding by a specialist tribunal such as the Refugee Status Appeals Authority in clear cases of unreasonableness or serious errors of fact.⁷⁶

The test which currently exists in Ireland is the *O’Keeffe*⁷⁷ test, which can be summarised as whether the decision was fundamentally at variance with reason and common sense, or alternatively whether there was any basis for the decision in question. Judicial review is primarily concerned with determining whether the decisions were made in accordance with the law and in conformity with natural and constitutional justice. Only if a decision-making authority has acted wholly irrationally, should the court intervene and quash the decision made. The burden of proof would then shift from the applicant to the respondent to justify its actions.

In *Z. v. Minister for Justice, Equality and Law Reform*⁷⁸ McGuinness J. seemed to signal a somewhat cautious approach to the question of a varying standard of review. She reiterated the contention that judicial review is concerned not with the decision but with the decision-making process and affirmed the *O’Keeffe* test of reasonableness. She decided that the standard of review with regard to reasonableness should not differ and in all cases the courts were committed to “careful scrutiny”⁷⁹ of decisions. She did however believe that where constitutional rights are at stake, the standard of judicial scrutiny as set out in *O’Keeffe* may fall short of what is likely to be required for their protection.

The potential for a change of direction was offered by the House of Lords in *R v. Secretary of State for the Home Department ex p. Bugdaycay*⁸⁰ where Lord Bridge spoke in terms of the “most anxious scrutiny”⁸¹ being required in judicial review proceedings where human rights were at issue. Lord Templeman opined “where the result of a flawed decision may imperil life or liberty a special responsibility lies on a court in the examination of the decision

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⁷⁵ *Mohsen v The Minister for Justice, Equality and Law Reform* Unreported, High Court, Smyth J., 12 March 2002

⁷⁶ *Sakran v Minister of Immigration* CIV 2003-409-001876

⁷⁷ *O’Keeffe v An Bord Pleanála* [1993] 1 IR 39

⁷⁸ [2002] 2 ILRM 215

⁷⁹ *Ibid* at 236

⁸⁰ [1987] 1 A.C. 514

⁸¹ *Ibid.* at 531

making process.”⁸² In *R. v. Ministry of Defence, ex parte Smith*⁸³ the Applicants sought to challenge the decision to exclude them from the armed forces on the grounds of homosexuality. The English Court of Appeal regarded itself as bound to a *Wednesbury* type rationality test (slightly heightened because of the human rights context) when considering whether a blanket policy to exclude homosexuals from the armed forces was justifiable.

The test of irrationality in this case was determined to be that a court was not entitled to interfere with the exercise of an administrative decision on substantive grounds, save where the court was satisfied that the decision was unreasonable in the sense that it was beyond the range of responses open to a reasonable decision-maker. As there were human rights aspects to this case, the Court emphasised that: “The more substantial the interference with human rights, the more the court would require by way of justification before it was satisfied that the decision was reasonable.”⁸⁴ The Court ruled that the decision made was not irrational as it was not beyond the range of responses open to a reasonable decision-maker. The Court was reluctant to intervene in a “policy laden” decision.

A number of recent cases in this jurisdiction have questioned the appropriateness of the *O’Keefe* test, in relation to cases where fundamental rights are at stake. In *A.O. and D.L v Minister for Justice, Equality and Law Reform*⁸⁵ Keane C.J. was satisfied that the decisions made in this case were not manifestly contrary to reason and common sense. However, Fennelly J. dissenting expressed his view that a higher degree of scrutiny should apply where constitutional rights are at stake. He agreed with the view of Denham J. in *Laurentiu v. Minister for Justice*,⁸⁶ where she stated that:

“Where, as was the position in the instant case, constitutional rights were at stake, such a standard of judicial scrutiny must necessarily fall well short of what is likely to be required for their protection.”

The European Court of Human Rights has developed a proportionality test to determine whether rights, enshrined in the European Convention on Human Rights, have been breached.

⁸² Ibid. at 528

⁸³ [1997] AC 514

⁸⁴ Ibid. at 554

⁸⁵ [2003] 1 IR 1

⁸⁶ [1999] 4 IR 26 at 62

Any interference with these rights must be proportionate and a fair balance struck between the rights of the individual and the policy objectives of the Government. As Lord Hope stated in *R v. Shayler*⁸⁷

“A close and penetrating examination of the factual justification for the restriction is needed, if the fundamental rights enshrined in the Convention are to remain practical and effective for everyone who wishes to exercise them.”

The majority of administrative decisions made in the asylum process are not policy based. The decisions involve fact finding and risk assessment of an Applicant's fear of persecution, rather than the balancing of policy considerations against established rights. Decisions made in the asylum process have become reasonably detailed and the reasons for reaching the decisions made can, therefore, be adduced more easily and clearly. This is necessary to have due account of the European Convention on Human Rights and to show that a fair balance has been struck between Convention rights and the common good. However, should the *O'Keefe* test be successfully challenged more demanding standards would be put on decision-makers to fully furnish the sources of information and reasons for the decisions made.

The issue of the test applicable is the subject of an appeal to the Supreme Court, leave in that regard having been granted by Gilligan J. in *Meadows v. Minister for Justice & Ors.*⁸⁸ identifying the question:

“In determining the reasonableness of an administrative decision which affects or concerns constitutional rights or fundamental rights is it correct to apply the standard as set out in *O'Keefe v An Bord Pleanála?*”

The Supreme Court may look at using the doctrine of proportionality and whether the correct balance has been struck by the decision maker, not merely whether it was within the range of rational or reasonable decisions.⁸⁹ While decisions taken pursuant to the lawful operation of

⁸⁷ [2002] 2 WLR 754

⁸⁸ Unreported, High Court, Gilligan J., 19th November, 2003

⁸⁹ *R(Daly) v. Home Secretary* [2001] 2 WLR 1622

immigration control have been upheld as proportionate⁹⁰ the question should be asked in deciding whether a measure is proportionate:

“whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.”⁹¹

The courts have been increasingly focusing on the doctrine of proportionality in for example *Gashi v Minister for Justice High Court*⁹² where Clarke J found that the Minister must make his decision “in a manner which is not disproportionate to the ends sought to be achieved.” Also in *Spartariu & Spartariu v Minister for Justice*,⁹³ the Applicants were a Romanian couple and the husband was lawfully residing and working in the State. The Minister refused the wife leave to remain, giving the standard reason that it was necessary to uphold the immigration and asylum laws in the State. Peart J. granted leave on the basis that:

“there has not been carried out the exercise of considering and balancing the competing interests and factors, as appears to have been required by the ECHR, in order to satisfy that the measure is necessary in a democratic society, and therefore proportionate to the objective to be achieved.”⁹⁴

It could be argued that, the approach of Peart J., in applying the more recent jurisprudence of the European Court of Human Rights (ECtHR) is more in keeping with the duty under the European Convention on Human Rights Act 2003, to take proper account of the Convention and the ECtHR case law.

In the recent case of *N v. Minister for Justice, Equality and Law Reform*⁹⁵ however, Mc Carthy J. was satisfied to proceed on the basis of existing law as set down in *O’Keeffe* as it has not been overruled or departed from by the Supreme Court. He stated:

⁹⁰ *Klodiana Kacaj v. Secretary of State for the Home Department* [2001] INLR 354

⁹¹ *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 80

⁹² Unreported, High Court, Clarke J., December 3rd 2004

⁹³ Unreported, High Court, Peart J., April 7th 2005

⁹⁴ *Ibid.*

⁹⁵ [2008] IEHC 8. Judgment of McCarthy J., High Court, 18th January 2008

“It might be argued that judicial review could be granted on the sole ground that so-called “heightened scrutiny” is applicable to the decision, whatever the apparent merits of that decision at this stage. Having regard to the present state of the authorities as to the application of this new or different test I respectfully do not agree and, accordingly if and insofar as judicial review is sought solely upon the test to be applied, I will not grant it upon that basis.”

A different approach was taken by Charleton J. in *N & Ors v. Minister for Justice, Equality and Law Reform*⁹⁶ where the applicants were challenging a refusal by the Respondent to grant subsidiary protection, pursuant to Directive 2004/83/EC. In the course of refusing leave to take judicial review, Charleton J. stated at para. 57 that:

“The reality of the multiplicity of written decisions on judicial review matters emanating from the High Court displays strong evidence for the proposition that judges in considering the actions of the statutory bodies under the Refugee Act, 1996, exercise a heightened level of scrutiny when compared to other forms of judicial review that concerns administrative decision makers.”

He went on to say that:

“...a decision on the country of origin information of the applicant and the availability of protection within its territory should be scrutinized if a judicial review is taken and the decision should only stand if it be a rational one that is fairly supported by the country of origin information.”

The courts of the United Kingdom, which apply a largely identical regime in respect of judicial review, have evolved the doctrine of “*anxious scrutiny*” whereby a higher level of scrutiny is applied to cases involving fundamental human rights. This matter should soon come before the Supreme Court in this jurisdiction. As the European Convention on Human Rights has now been given full effect in this jurisdiction, decisions made by the Minister will, in any case, require a careful consideration of Convention rights, rather than merely giving minimal reasons for decisions made or relying on standard policy considerations.

⁹⁶ Judgment of Charleton J., High Court, delivered 24th April 2008.

Chapter 3: NOTICE

Under section 5(2)(b) of the Illegal Immigrants (Trafficking) Act 2000, an application for judicial review must be made by motion, on notice to the Minister and any other person specified for that purpose by order of the High Court. Prior to 2000, judicial review proceedings were taken *ex parte*, that is without notice to the other side and the Minister was not represented in Court at the preliminary stage. It was felt that the Minister should have the opportunity to offer argument and facts at an early stage on the question of whether the application is based on substantial grounds, therefore this requirement was introduced. For public policy reasons it is appropriate for those making public decisions to be in a position to defend their actions at an early stage and the requirement to put the Minister on notice was designed with this point in mind.

The requirement has resulted in a situation where cases are run and by and large, determined, at the leave stage, with a resultant shortage of High Court jurisprudence at the substantive stage. Stack and Shipsey⁹⁷ believe that the requirement must remove a large part, if not all of the benefit to the Respondent as the necessity to hear the rebutting arguments of the Minister requires an extended time for hearing of the application for leave. Stack and Shipsey⁹⁸ also criticise the fact that the Minister may be restrained from acting on foot of a decision for several months where leave has been refused in the High Court.

Planning legislation contains similar notice requirements and in *KSK Enterprises Ltd v An Bord Pleanála*⁹⁹ Finlay C.J. analysed the statutory provisions in relation to the notice requirements in applications for judicial review in planning matters. There he held that the requirements of the amended section 82 of the Local Government (Planning and Development) Act 1963, were satisfied by the filing in the Central Office of the High Court, and the service on all necessary parties of the notice of motion within two months of the date of the impugned decision, and that if the notice of motion was not served on all the parties provided for mandatorily by statute, the application could not be deemed to have been made within the two months limited by section 82. On the facts of this case, the Applicant had only served An Bord Pleanála within the time limited and by not serving the other Respondents the

⁹⁷ “*Judicial Review and the Asylum Process*” in Fraser and Harvey ed., *Sanctuary in Ireland, Perspectives in Asylum Law and Policy*, (2003) 168 at 171

⁹⁸ *Ibid.*

⁹⁹ [1994] 2 IR 128

application was time-barred and could not be maintained.

The Law Reform Commission¹⁰⁰ has recommended aligning the notice requirements under s.5 with conventional judicial review proceedings so that a judicial discretion will exist to conduct *inter partes* applications for leave on notice “only in exceptional cases.” Simons¹⁰¹ has commented that:

“The fact that the respondents are on notice of the application for leave to apply has the result that the application for leave now generally takes the form of an *inter partes* hearing. Thus one benefit of the *ex parte* procedure, namely the attempt to spare public authorities the necessity of taking any steps in relation to trivial or unstateable cases by filtering out same at an *ex parte* hearing, is lost.”

The recommendation by the Law Reform Commission along with the comments by Simons are very logical in my opinion, however the Immigration, Residence and Protection Bill 2008 has identical notice requirements to those which exist under section 5(2)(b) of the Illegal Immigrants (Trafficking) Act 2000.

Recently Finlay Geoghegan J. has also proposed that in certain cases applications for leave would be heard as a ‘telescopic hearing’ so that the leave and substantive cases are heard together. This proposal, if it becomes common practice would be of great assistance in reducing the lengthy list of cases which are before the Court awaiting a date for hearing.¹⁰²

Legal Proceedings Non - Suspensive of Deportation

An interesting point came before the Supreme Court in *Cosma v Minister for Justice, Equality and Law Reform*¹⁰³ where it was considered whether injunctive relief should be granted restraining the deportation of the applicant pending the determination of her appeal from the decision of the High Court. Although the provisions of s.5(3) of the Illegal Immigrants (Trafficking) Act 2000 did not apply in this case, as the applicant was challenging

¹⁰⁰ Law Reform Commission “*Report on Judicial Review Procedure*”, (LRC 71 – 2004), February 2004

¹⁰¹ Simons “*Judicial Review under the Planning Legislation – The Case for Abolition of the Leave Stage*” (2001) 8(2) IPELJ 55 at 56.

¹⁰² For further discussion on the proposal of ‘telescopic hearings’, see chapter on Reforms below.

¹⁰³ Unreported, Supreme Court, 10th July 2006

the refusal of the Minister to revoke a deportation order in respect of her application under s.3 (11) of the Immigration Act 1999, which is not covered by s.5, the Supreme Court considered whether it should use its inherent power to grant an interlocutory order pending the hearing of the appeal to protect the applicant's rights. Reference was made to Ord. 58, r.18 of the Rules of the Superior Courts 1986 which provides that:

“An appeal to the Supreme Court shall not operate as a stay of execution or of proceedings under the decision appealed from, except so far as the High Court or the Supreme Court may order; and no intermediate act or proceeding shall be thereby invalidated, except so far as the High Court or the Supreme Court may direct.”

McCracken J., refused to grant an injunction, stating:

“If the court were to grant an injunction such as is being sought by the appellant, the effect would be to thwart the operation of the perfectly valid deportation order and would, at least to some degree, prevent the operation of a perfectly valid and unappealable High Court order.”¹⁰⁴

This was applied by the High Court in the recent case of *Akujobi v Minister for Justice, Equality and Law Reform*,¹⁰⁵ where MacMenamin J. was also faced with an application to restrain the Minister from deporting the Applicant, who had not challenged the validity of the deportation order made against him. He stated “where, as here, the original order for deportation has not been impugned in any proceedings, it stands unchallenged and thus no injunction should be granted at all.”¹⁰⁶

This is in line with the position taken by the Supreme Court in *Adebayo & Ors v. Commissioner of An Garda Síochána*¹⁰⁷ where it was held that if the subject of a deportation order does not lodge judicial review proceedings within fourteen days of the serving of the order the person may no longer get an injunction for preventing their deportation. Therefore where the fourteen day period under the Act of 2000 has expired, the State is entitled to deport a person notwithstanding that an application for leave to bring judicial review

¹⁰⁴ Ibid.

¹⁰⁵ Unreported, High Court, Mac Menamin J, 12th January 2007

¹⁰⁶ Ibid.

¹⁰⁷ [2006] IESC 8

proceedings, with the accompanying application for an extension of time had been made, unless an interim injunction had been obtained from the Court preventing the deportation. In this case Geoghegan J. also determined that deportation does not interfere with the Applicant's constitutionally protected right of access to the courts to enforce his legal rights, as the judicial review application can proceed normally in the Applicant's absence. The right of access to the courts it was held is merely a right to initiate litigation in the courts.

Under Article 39 of the Procedures Directive (Council Directive 2005/85/EC), there is no express requirement for states to offer an administrative or in-country appeal, simply to ensure that applicants for asylum have the right to an effective remedy before a court or tribunal. No attempt was made to present a set of rationally justifiable circumstances in which it might be appropriate to allow an applicant to remain pending the outcome of an appeal. Under s.118(9) of the Immigration, Residence and Protection Bill 2008 which transposed this directive, an application by a foreign national for leave to apply for judicial review of a transfer under s.104 of the Bill or of a removal of the foreign national from the State or leave to apply for an extension of time, shall not of itself suspend or prevent his or her transfer or, as the case may be, removal from the State. However, the Court may suspend the transfer or removal for such period as it is satisfied is necessary for the foreign national to give instructions to his or her legal representative in relation to the application where it is satisfied that the giving of such instructions would otherwise be impossible.¹⁰⁸

Leave to Appeal to the Supreme Court

Article 34.4.3° of the Constitution of Ireland 1937 provides that “the Supreme Court shall, with such exceptions and subject to such regulation as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court, and shall also have appellate jurisdiction from such decisions of other courts as may be prescribed by law.” This Article clearly contemplates that exceptions to and regulation of the Supreme Court's appellate jurisdiction may be prescribed by law, however, an Act of the Oireachtas seeking to achieve this must be “clear and unambiguous”.¹⁰⁹ Section 5 of the Illegal Immigrants (Trafficking)

¹⁰⁸ This section of the Bill has been much criticised. See chapter on Reforms below for further comment. At Committee stage of the 2008 Bill it has been proposed that deportation should be suspended pending the determination of the application for leave. Select Committee on Justice, Equality, Defence and Women's Rights. “*List of Proposed Committee Stage Amendments*”, 16 April 2008. www.oireachtas.ie at page 82

¹⁰⁹ Walsh J. *The People (AG) v. Conmey* [1975] IR 341 at 360

Act 2000 stipulates that there is to be no appeal unless the High Court certifies that its own decision involves a point of law of exceptional public importance and that it is in the public interest that an appeal should be taken to the Supreme Court.¹¹⁰ The formula in s.5 mirrors that in s.19 of the Local Government (Planning and Development) Act 1992 and in the Supreme Court case of *Irish Hardware Association v. South Dublin County Council*¹¹¹ Keane C.J. stated:

“It would be in the teeth of it if this court were to construe the provisions as enabling an appeal in every case to be brought from either the refusal to grant such a certificate or, indeed, the grant of the certificate. That would involve this court in at least some consideration of the merits of the substantive decision in the High Court, entirely contrary to the philosophy which clearly prompted the relevant provisions.”

Therefore it is clear that the High Court alone has power to issue a certificate to appeal a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken. Where no such certificate is issued, the Supreme Court has no jurisdiction to entertain an appeal from the High Court. A comprehensive distillation of the principles to be derived from the significant body of case law in this area was referred to and applied by Clarke J. in *Arklow Holdings v. An Bord Pleanála & Ors.*¹¹²

Where leave is refused in an application for judicial review i.e. in circumstances where substantial grounds have not been established, a question may arise as to whether, logically, the same material can constitute a point of law of exceptional public importance such as to justify certification for an appeal to the Supreme Court. Simons¹¹³ has commented that:

“It is difficult to understand how an insubstantial ground of challenge could ever be said to amount to a point of law of exceptional public importance.”

The Law Reform Commission¹¹⁴ recommended the appointment of a single Supreme Court

¹¹⁰ These requirements are cumulative, *Raiu v Refugee Appeals Tribunal* (Unreported, High Court, Finlay Geoghegan J., 26th February 2003)

¹¹¹ [2001] 2 ILRM 291 at 298

¹¹² [2008] IEHC 2 at para 3.2. Judgment of 11th January 2008

¹¹³ Simons “*Leave to Appeal to the Supreme Court*” [2002] 9(1) IPELJ 3

¹¹⁴ “*Report on Judicial Review Procedure*”, (LRC 71 – 2004) at page 34, February 2004. See Chapter on Reforms below for further discussion.

judge to review a refusal of a certificate of appeal to guard against these concerns.

Order 58, rule 3(1) of the *Rules of the Superior Courts 1986* states that:

“the notice of appeal shall in every case be a ten-day notice and subject to the provisions of this Order, shall be served not later than twenty-one days from the passing and perfecting of the judgement or order appealed against.”

While there is no time limit laid down in the Illegal Immigrants (Trafficking) Act 2000 for lodging appeals it is important that parties act promptly, when seeking to appeal a High Court judgment. In *Ní Ghruagáin v An Bord Pleanála*¹¹⁵ for example, an application for leave to appeal three months after judgment, was refused on grounds of delay. Therefore, where the application is not made promptly and no explanation is offered to justify the delay, it would seem unlikely that the High Court will accede to a request for an appeal to the Supreme Court.

The case of *AB v Minister for Justice Equality and Law Reform*¹¹⁶ concerned the interpretation of s.5(2) of the Illegal Immigrants Trafficking Act 2000, where the Appellant wished to appeal against an order refusing an extension of the 14 day time limit. Keane C.J. commented strongly on the apparent incongruity of enacting provisions restricting the right of appeal in respect of the substantive judicial review decision, while imposing no limits in respect of the decision in respect of an extension of time:

“It would be remarkable if the Oireachtas, in seeking to attain those objectives, had severely circumscribed the right to appeal to this court from decisions by the High Court on the merits of applications for judicial review, but had allowed an unrestricted right of appeal where an applicant was, by definition, already out of time.”¹¹⁷

Nonetheless, he proceeded:

¹¹⁵ Unreported, High Court, Murphy J., June 19th 2003

¹¹⁶ [2002] IR 296

¹¹⁷ Ibid. At 302

“However, it is to the words used by the legislature that we must have regard in ascertaining its intention and if, as so construed, these provisions mean that the right of appeal is indeed unrestricted in such cases, it is not the function of the courts to remedy such a *casus omissus*, if that is what it is. That would be a weighty consideration in every case: in this case, there is the additional factor that the right of appeal to this court provided for in *Article 34.4.3* may only be removed or abridged by a statutory provision which is clear and unambiguous..”¹¹⁸

Delaney¹¹⁹ has commented that:

“Given the fact that the time period within which an application for review may be made is so short, it seems inevitable that applicants will need to seek an extension in many cases and they will undoubtedly utilise the unfettered right of appeal if such extension is refused by the High Court. Whether this was the result intended by the legislature or not, it therefore seems inevitable that the Supreme Court’s time will be taken up in hearing appeals against a refusal to extend the time for seeking judicial review in cases of this nature.”

It emerges from the foregoing that any legislative attempt to limit either the right or the scope of the constitutionally conferred right of litigants to appeal decisions of the High Court must be expressed in clear and unambiguous terms. There must not be any lack of clarity or ambiguity.

The Supreme Court in *Clinton v An Bord Pleanála*¹²⁰ considered the point of whether the Applicant was confined in the appeal to the single ground of appeal arising from the certified point of law which had been identified, or whether he was entitled to raise other grounds. Section 50(4)(f)(i) of the Planning and Development Act 2000 also mirrors the requirements of obtaining a certificate to appeal to the Supreme Court in s.5 of the Illegal Immigrants (Trafficking) Act 2000. In written submissions on behalf of the applicant it was submitted

¹¹⁸ Ibid. At 303

¹¹⁹ Delaney “*Regulation of the Supreme Court’s Appellate Jurisdiction must be Clear and Unambiguous*” [2002] 20 ILT 73 at 78

¹²⁰ [2007] 1 ILRM 422

that the appeal is not confined to the single ground of appeal arising from the point of law, the subject of the High Court certificate, for three reasons. First, that the constitutional position is that an appeal to the Supreme Court from every decision of the High Court is a matter of right, unless limited by statute and a statutory provision limiting such right of appeal ought to be strictly construed. It was submitted that the statutory language in this case is not sufficiently clear and unambiguous to warrant an interpretation which would limit the appeal to the “*certified point of law*”. Secondly, once an appeal is properly before the Supreme Court, the Court cannot be expected to allow a decision that it knows to be erroneous to stand, merely because the source of the error is not to be found in the important point of law that brings the matter before the Court. Thirdly, the Supreme Court cannot be precluded from consideration of grounds of appeal that may admit a constitutionally sound interpretation of a post-1937 statute, where to foreclose such consideration means that the same statute must be struck down.

An Bord Pleanála filed written legal submissions, referring to case law on the appropriate construction of s.50(4)(f) of the Planning and Development Act 2000, in essence submitting that the appeal was limited to the certified question. Reference was made by the Court to *People (Attorney General) v Giles*¹²¹ where Walsh J. held that although the granting of the certificate gives the right of appeal the certificate does not limit the scope of the appeal and the Supreme Court were satisfied in *Clinton* that the Appellant is not confined to arguing the certified point.

Stack and Shipsey¹²² have commented that:

“In addition to any principled objection to the restriction on appeal, section 5 may also be criticised for being clumsy in its effects. Once a single point of law of exceptional public importance is identified, section 5 ceases to govern the appeal, which is then taken in accordance with the ordinary procedures for appeal. As a result, all issues can thereafter be canvassed on appeal. This could lead to the very unsatisfactory position of an applicant succeeding on appeal on a ground which was individual to his case, even though the vast preponderance of applicants had no right

¹²¹ [1974] I.R.422, 430

¹²² “*Judicial Review and the Asylum Process*” in Fraser and Harvey ed., *Sanctuary in Ireland, Perspectives in Asylum Law and Policy*, (2003) 168, 174

to appeal because they had failed to identify a point of law of exceptional public importance.”

However, it would have been easy for the Oireachtas to specify that the appeal was limited to that point and the legislature has chosen not to do so. Interestingly new planning legislation came into force on October 17, 2006 and under Section 13 of the Planning and Development (Strategic Infrastructure) Act, 2006 which substituted a new s.50 of the Planning and Development Act, 2000. S.50A (10) provides:

- (11) On an appeal from a determination of the Court in respect of an application referred to in *subsection (10)*, the Supreme Court shall—
- (a) have jurisdiction to determine only the point of law certified by the Court under *subsection (7)* (and to make only such order in the proceedings as follows from such determination), and
 - (b) in determining the appeal, act as expeditiously as possible consistent with the administration of justice.”

This development may be an approach taken to any possible future amendment to the current restrictions to appeal. Recommendations were made by the Law Reform Commission¹²³ discussed below, proposing that specific grounds of appeal should be certified by the High Court when granting a certificate and where an applicant has been refused leave in the High Court and also refused a certificate of appeal, that a facility be available to such applicant whereby a single judge of the Supreme Court can review the matter so as to preclude any potential for injustice. The restriction remains unchanged in s.118(5) of the Immigration Residence and Protection Bill 2008.

International Standards

“International law has little to say with respect to the procedural aspects of due process”.¹²⁴ The Executive Committee of the United Nations High Commissioner for Refugees set down at its twenty-eighth session in October 1977 that if an applicant is not successful in their application for asylum or refugee status at first instance, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different

¹²³ “*Report on Judicial Review Procedure*”, (LRC 71 – 2004), February 2004.

¹²⁴ Goodwin-Gill and McAdam. *The Refugee in International Law*, 3rd Ed. at 533, (New York, 2007)

authority, whether administrative or judicial, according to the prevailing system. With an appeals mechanism to the Refugee Appeals Tribunal currently and the opportunity to initiate judicial review proceedings on both the initial decision and the decision on appeal I believe this country adequately meets its international obligations in this respect.

Article 6(1) of the European Convention on Human Rights is broadly speaking, the Convention's fair trial provision, however, it is questionable whether the protection under Article 6(1) of the ECHR extends to immigration decisions. Despite the fact that a decision to deport a person can certainly lead to a violation of his or her rights protected under the Convention, such applications have consistently been rejected as inadmissible by the Court. In *Maaouia v. France*¹²⁵ the Court concluded that decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations, within the meaning of Article 6(1) of the Convention. However, increasing reference is being had to Article 6(1) in recent case law.

In *Edobor v. Refugee Appeals Tribunal*¹²⁶ there was a delay of approximately 15 months between the oral hearing of the Applicant's appeal and the issue of the tribunal decision. Kearns J. referred to the European Court of Human Rights decision of *McMullen v. Ireland*¹²⁷ and highlighted the principle that administrative tribunals which perform judicial type functions have an obligation to deal with appeals as soon as may be. Article 6 of the Convention emphasises that a State is obliged to organise its legal system so as to allow its courts to comply with the 'reasonable time' requirement. As an applicant only has 14 days from the date of the Tribunal's determination to bring judicial review proceedings, there is a clear onus on the members of the Tribunal to act expeditiously and promptly. In this case the Tribunal failed to provide any explanation for the inactivity and accordingly the judgment of the High Court in favour of the Applicant was upheld.

In *Atanasov v Refugee Appeals Tribunal*¹²⁸ a point of law came before the Supreme Court, as to whether an appellant before the Refugee Appeals Tribunal is legally and/or constitutionally entitled to access previous decisions of the Tribunal in which similar and, therefore, relevant issues of law arose. The Applicants claimed that failure to afford them access to previous

¹²⁵ [2001] 33EHRR 1037

¹²⁶ [2005] 2 ILRM 113

¹²⁷ [2004] ECHR 404

¹²⁸ [2007] 1 ILRM 288

decisions of legal significance was a breach of their rights to fair procedures and/or natural justice and, furthermore, infringed the requirement of equality of arms under Article 6(1) of the European Convention on Human Rights (ECHR). Geoghegan J. determined that where an applicant in advance of a hearing by the Refugee Appeals Tribunal (RAT) has requested access to relevant precedents and has been refused, this breaches the applicant's rights to fair procedures and natural and constitutional justice. He acknowledged the argument made that the requirement of equality of arms under article 6(1) of the ECHR would require that such information should be available to both sets of legal advisors. However, in deciding on constitutional grounds, he held that it was unnecessary to consider the matter under the ECHR. This decision has been welcomed by the Law Society of Ireland.¹²⁹

Interestingly in the new Immigration, Residence and Protection Bill 2008 under section 95 a protection applicant may, but only at the time of making an appeal under section 84, apply in the prescribed manner to the chairperson of the Protection Review Tribunal, for the provision to him or her any decision of the Tribunal which is legally relevant to his or her appeal.¹³⁰ Therefore, it is clear that the fair trial requirements under the European Convention on Human Rights are becoming increasingly important and relevant in the asylum and immigration context.

¹²⁹ Clissman stated that: "The non-availability of access to previous RAT decisions has always been a serious bone of contention between Irish asylum lawyers and the tribunal. Since the High Court decision in *Atanasov*, many lawyers have been submitting requests for previous relevant tribunal decisions – 'Atanasov requests' – with the notice of appeal." "*Atanasov v RAT opens access to persuasive precedents*" Law Society Gazette, Aug/Sep 2006 at 13

¹³⁰ At Committee stage of the 2008 Bill it has been proposed that the chairperson of the Protection Review Tribunal shall make available to the public all decisions of the Tribunal in such manner as he deems appropriate. Select Committee on Justice, Equality, Defence and Women's Rights. "*List of Proposed Committee Stage Amendments*", 16 April 2008. www.oireachtas.ie at page 63

Chapter 4: REFORMS

There have been many proposed reforms to the statutory restrictions imposed on persons wishing to initiate judicial review proceedings in asylum matters, I intend to summarise here the most persuasive proposals.

Regarding the requirement to put the Minister on notice of proceedings, the Law Reform Commission in its Report on Judicial Review Procedure¹³¹ felt that this requirement was at the root of the problem of “double hearings”, i.e. that the leave and substantive cases were practically identical, which results in lengthy delays in the determination of cases. The Commission recommended the creation of judicial discretion whether to hear proceedings on an *ex parte* or *inter partes* basis at the leave stage. Given the fact that Respondents in many cases concede leave in an effort to speed up the time taken to fully determine proceedings and to minimise costs it is my opinion that this judicial discretion should be introduced. While decisions made in the course of the asylum process can be of significant importance I consider that it would be of interest to both parties to introduce this recommendation, as the judge could still direct that the Minister be given notice of cases which are of greater importance. This proposal would work particularly well where many cases with similar grounds are initiated by several applicants and a test case has been identified, which when determined, will determine the outcome of all cases put behind this test case.

On the 6th December 2007, several hundred cases were listed before the High Court in the asylum judicial review list, which had not yet been assigned a hearing date. Given the large number of cases involved, Finlay Geoghegan J. directed that in cases where parties were seeking a priority hearing date, they should consider whether the hearing should proceed as a telescopic hearing, i.e. that the leave application and substantive case be heard together. She directed that the applicant’s solicitors in such a case should write to the respondent, who should reply indicating their attitude. If the respondents were agreeing to a telescopic hearing, they would need to have a draft Statement of Opposition available at the hearing, so that if the Court was satisfied an applicant could show substantial grounds for leave, the case would proceed to substantive determination. Finlay Geoghegan J. also cautioned the respondents that if they did not agree to this form of hearing and in such a case the Court was satisfied

¹³¹ (LRC 71 – 2004), February 2004.

that the applicant had established grounds for leave, there could be cost implications for the respondents. The justification for this form of hearing appears to be that it will be of benefit to both parties in that cases will be fully determined more quickly.

This issue is closely allied to the problem of “double hearings”, which as has been suggested results in inefficient use of court time. While this procedure would be beneficial in cases which require urgent determinations such as transfer order or imminent deportation cases, respondents would be much more reluctant to agree to this in cases where applicants raise numerous grounds in the Statement of Grounds which the respondent would need to address in detail in a draft Statement of Opposition for the purpose of a telescopic hearing. Often the Court allows an applicant to introduce a wholly new ground during the course of the leave hearing and therefore in a telescopic hearing the respondent could be prejudiced by this.¹³² In short the respondent could well be ambushed in such a hearing.

Regarding the ability of an applicant to introduce new grounds into proceedings, the Law Reform Commission¹³³ recommended adopting the more flexible approach in *Ó Síodhacháin*¹³⁴ based on the imperative of doing justice within the law. In so doing the Commission pointed to the potential for injustice arising from an absolutist standpoint to the time limit with regard to applications for amendments to the grant of leave. However, the Commission concluded this must not be used as a mechanism to avoid the constraints of the requirements which are applied to all applications for leave and should instead be limited to genuine freshly discovered grounds. This recommendation appears to have been taken on board under s.118(3)(a) of the Immigration, Residence and Protection Bill 2008, in relation to when the Court can grant an extension of time to the fourteen day time limit to bring proceedings.

¹³² *Ó Síodhacháin v. Ireland Supreme Court (ex tempore)* 12 February 2002. A flexible approach was adopted by Keane CJ. in holding that although the application to amend the grant of leave had been made outside the specified time limit, there was not such a period of delay which would be sufficient to exclude an amendment of the grounds, which if it is necessary to do justice between the parties, should be granted, and should have been granted in the High Court. A stricter approach was taken by the Supreme Court more recently in the case of *SM v Minister for Justice, Equality and Law Reform* [2005] IESC 27. The Supreme Court upheld the High Court decision as the applicant, having instituted proceedings within the prescribed period, could not subsequently be permitted to amend her grounds outside the time limit in order to advance what was effectively a new cause of action as there was no good and sufficient reason to do so.

¹³³ “*Report on Judicial Review Procedure*”, (LRC 71 – 2004) at page 25, February 2004.

¹³⁴ *Supreme Court (ex tempore)*, 12 February 2002

The 14 day time limit, although onerous, was found by the Law Reform Commission¹³⁵ not, in the majority of cases, to be acting as a barrier to the applicant. The vast majority of applicants are not falling at the time limits hurdle; however, the Commission found that this was due to the liberal application of the power of the Courts to extend the time limit. The Commission noted that applicants may also be going through a certain degree of trauma and may not even know of their right to seek judicial review due to language barriers and unfamiliarity with the legal system. Taking into account the fact that a failed immigration applicant should not be able to use judicial review proceedings to delay the implementation of decisions taken during the process, the Commission recommended increasing the time limit to 28 days to reflect the current situation.¹³⁶

The Law Reform Commission¹³⁷ was satisfied that on the whole, the higher standard of “substantial grounds” should be retained in statutory judicial review proceedings. The reasons for its retention focus on the policy behind such legislation and particularly the damage that could be done to public interests and public funds, if there was no filtering mechanism to prevent the initiation of wholly unmeritorious proceedings, with no obstacle to such cases proceeding to the substantive hearing. This is so particularly in light of the recommendation that the mandatory requirement in statutory judicial review proceedings that the leave stage be held on notice should be amended. The requirement of establishing that substantial grounds exist has been further copper-fastened by the possibility of judges directing that the costs, or a part of the costs of the proceedings, shall be borne by the legal representative of the applicant under s.118(8) of the Immigration, Residence and Protection Bill 2008.

An interesting point was made by McKechnie J. in *Kenny v. An Bord Pleanála (No.2)*,¹³⁸ that where leave is refused it must be the case that the applicant has failed to establish the requirement of raising substantial grounds. Having failed to meet this threshold he questioned the logic that if a point of law of exceptional public interest can be identified, then surely a substantial ground exists and leave should have been granted. If this was the case then no appeal would ever go to the Supreme Court at leave stage as any point of law of exceptional public interest identified would have already resulted in leave being granted. While the onus is heavy on the applicant to meet the requirements of obtaining an appeal, it is the same High

¹³⁵ “*Report on Judicial Review Procedure*”, (LRC 71 – 2004) at page 26, February 2004.

¹³⁶ “*Report on Judicial Review Procedure*”, (LRC 71 – 2004) at page 49, February 2004.

¹³⁷ “*Report on Judicial Review Procedure*”, (LRC 71 – 2004), February 2004.

¹³⁸ [2001] 1 IR 704

Court judge who determined that substantial grounds have not been put forward who will have to decide whether or not a point of law of exceptional public importance exists. The Law Reform Commission¹³⁹ recommended the appointment of a single Supreme Court judge to review a refusal of a certificate of appeal to guard against these concerns and insulate the process so as to negate criticisms arising from the possibly embarrassingly contradictory position imposed on the High Court.

On 29th January 2008 the Immigration, Residence and Protection Bill was published. The 2008 Bill incorporates the European Communities (Eligibility for Protection) Regulations 2006 which transposed the EU Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who otherwise need International Protection (“Qualifications Directive”).¹⁴⁰ It also effects transposition into Irish domestic law of the EU Council Directive on Minimum Standards on Procedures in Member States for the Granting and Withdrawing of Refugee Status (“Procedures Directive”). Under s.131(f) of this Bill, s.5 of the Illegal Immigrants (Trafficking) Act 2000 is to be repealed and replaced by a new section to legislate for judicial review proceedings. Section 118, largely based on s.5 of the 2000 Act retains:

- The 14 time limit within which judicial review proceedings must be taken.¹⁴¹
- The need for applications to bring judicial review proceedings to be made on notice to the Minister.
- The need to satisfy the High Court that substantial grounds exist that the act, decision or determination is invalid or ought to be quashed.
- The fact that the determination of the High Court of an application for leave to apply for judicial review is final and an appeal shall lie from that determination only with the leave of the High Court, which leave shall be granted only where the High Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court.

¹³⁹ Report on Judicial Review Procedure (LRC 71 – 2004) at page 34, February 2004.

¹⁴⁰ The Qualification Directive specifies that the standards laid down in the Directive are minimum standards and by virtue of this national legislation can adopt more favourable standards (Article 3)

¹⁴¹ At Committee stage of the 2008 Bill it has been proposed that the 14 day time limit should be extended to 28 days. Select Committee on Justice, Equality, Defence and Women’s Rights. “*List of Proposed Committee Stage Amendments*”, 16 April 2008. www.oireachtas.ie at page 82

Some interesting changes have been proposed in this Bill however. Firstly, under s.5 of the 2000 Act the time period of fourteen days can only be extended by the High Court where there is “*good and sufficient*” reason for doing so. In what appears to be an attempt to alter the fact that an extension of time is granted so readily by the Court, the Bill has specified a limited number of situations where an extension of time may be granted.

Under s.118(3) of the Bill, the High Court may not extend the fourteen day period unless the applicant satisfies the Court that they:

- (1) (i) did not become aware until after that period’s expiration of the material facts on which the grounds for his or her application are based, or
(ii) became aware of those facts before that period’s expiration but only after such number of days of that period had elapsed as would have made it not reasonably practicable for the applicant to have made his or her application for leave before that period’s expiration;

- (2) with reasonable diligence, could not have become aware of those facts until after the expiration of that period, or, as the case may be, that number of days had elapsed;

- (3) made their application for leave as soon as was reasonably practicable after the applicant became aware of those facts; or

that there are other exceptional circumstances relating to the applicant and under which, through no fault of the applicant, his or her application could not have been made within that period.¹⁴²

Another interesting proposal regarding the extension of time seeks to overturn the principle set down by the Supreme Court in *B and S v. Minister for Justice, Equality and Law Reform*¹⁴³ that a person who has been refused an extension of time for leave to apply for

¹⁴² At Committee stage of the 2008 Bill it has been proposed that the High Court retain the ability to extend the time limit where it considers that there is “good and sufficient reason for doing so.” Select Committee on Justice, Equality, Defence and Women’s Rights. “*List of Proposed Committee Stage Amendments*”, 16 April 2008. www.oireachtas.ie at page 82

¹⁴³ [2002] 2 ILRM 161

judicial review may bring an appeal without first obtaining leave. Section 118(4)(c) of the Bill sets down that the decision of the High Court on an application to extend the time limit for bringing judicial review proceedings can only be appealed with the leave of the High Court and shall be granted only where the High Court certifies that its decision involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court. This indeed is important as one of the main aims of the Bill is to ensure that judicial review cases are determined rapidly and do not end up sitting in a Court list for several years.

A question mark hangs over the constitutionality of this provision because in the *B and S* case McGuinness J. placed a high value on the power to extend the time limit, acknowledging that the constitutionality of section 5 had hinged on it in *In re Article 26 of the Constitution and sections 5 and 10 of the Illegal Immigrants (Trafficking) Bill 1999*.¹⁴⁴ Geoghegan J. stated that an extension may be “absolutely vital”¹⁴⁵ and hence the automatic right of appeal to the Supreme Court would make an immense difference in protecting rights. His sentiments were echoed by Fennelly J. who considered “the power of the court to extend the time ... is of potentially decisive importance for the protection of the constitutional right of access to the courts of persons affected by decisions vital to their interests”.¹⁴⁶ Only Keane C.J. seemed more cautious, highlighting the significance of the need for expedition in bringing to conclusion such matters.

There are several other innovations in this Bill which attempt to prevent the misuse of the judicial process by a foreign national solely for the purposes of frustrating their removal from the State. For example under s.118(9) an application by a foreign national for leave to apply for judicial review of a transfer under s.104 of the Bill or of a removal of the foreign national from the State or leave to apply for an extension of time, shall not of itself suspend or prevent his or her transfer or, as the case may be, removal from the State. However, the Court may suspend the transfer or removal for such period as it is satisfied is necessary for the foreign national to give instructions to his or her legal representative in relation to the application where it is satisfied that the giving of such instructions would otherwise be impossible.¹⁴⁷

¹⁴⁴ [2000] 2 IR 360

¹⁴⁵ [2002] 2 ILRM 161 at 188

¹⁴⁶ *Ibid.* at 190

¹⁴⁷ At Committee stage of the 2008 Bill it has been proposed that deportation should be suspended pending the determination of the application for leave to apply . Select Committee on Justice, Equality, Defence and

Pursuant to Article 39 of the Procedures Directive (Council Directive 2005/85/EC), there is no express requirement for states to offer an administrative or in-country appeal, simply to ensure that applicants for asylum have the right to an effective remedy before a court or tribunal.

This provision is of concern to solicitors given the practical difficulties that arise with progressing a case where the client is outside the jurisdiction and more particularly from an applicant's perspective, given the potential dangers faced by them on their return to their country of origin.¹⁴⁸ The Irish Human Rights Commission has submitted that:

“The IHRC considers that it is clear from the jurisprudence of the ECtHR¹⁴⁹ that the Irish authorities cannot rely automatically on the arrangements made under the Dublin Convention and should engage in a thorough assessment as to whether there is a real risk that the return of the person to a “safe third country” will indirectly expose that person to a substantial risk of treatment contrary to Article 3 ECHR.”¹⁵⁰

This section in the Bill merely reflects the current position that where a person initiates judicial review proceedings, the transfer order is not automatically suspended. The applicant must be granted an injunction by the Court before the transfer order is suspended. There is a risk in my opinion of this section being challenged in the European Court of Human Rights under Article 13 where the only available remedy to an applicant to assert their rights is to instigate judicial review proceedings.¹⁵¹ Case law of the European Court of Human Rights pursuant to Article 13 in *Conka v. Belgium*¹⁵² and *Hilal v. the United Kingdom*¹⁵³ confirms a

Women’s Rights. “*List of Proposed Committee Stage Amendments*”, 16 April 2008. www.oireachtas.ie at page 82

¹⁴⁸ The Law Society of Ireland “*Submission on the Immigration, Residence and Protection Bill*” at page 80, published 7th April 2008 www.lawsociety.ie “From a practitioners perspective, non-suspensive judicial review raises problems with pursuing a case where the client is outside the jurisdiction including reasonable opportunity for consultation with clients, problems with interpretation, translation of documentation, ensuring the accuracy of instructions. It also has the potential to infringe the equality of arms principle. Fundamentally, there is a risk that there will be a breach of the principle of non-*refoulement*.”

¹⁴⁹ In *T.I. v. United Kingdom*, No. 43844/98 Judgment of 7 March 2000” (April 2000) the ECtHR observed that the indirect removal of a person to an intermediary country, which is also a State party to the ECHR, did not affect the responsibility of the United Kingdom to ensure that the applicant was not, as a result of its decision to expel the applicant, exposed to treatment contrary to Article 3 of the ECHR

¹⁵⁰ Irish Human Rights Commission “*Observations on the Immigration, Residence and Protection Bill 2008*” at page 55, published March 19th 2008. www.ihrc.ie

¹⁵¹ *Jabari v Turkey* [2000] ECtHR judgment of 11 July 2000

¹⁵² [2002] 34 EHRR 1298

¹⁵³ [2001] 33 EHRR 31

right to remain in the territory until a final decision is issued once an arguable case is raised on a Convention provision. While many may argue that the Minister should expressly provide for judicial review with suspensive effect, this, I consider, is not necessary as the Courts will nonetheless be able to injunct any potential transfer or deportation.

A rather controversial proposal under s.118(7) and (8) is that where, in the opinion of the Court, the grounds put forward for contending that an act, decision or determination is invalid or ought to be quashed are frivolous or vexatious, the Court may, (whether on application or on its own motion) by its order, so declare and shall direct by whom and in what proportion the costs are to be borne and paid. The section goes on to state that where the Court forms an opinion of this kind, it may direct that the costs or a part of the costs, of the proceedings shall be borne by the legal representative of the Applicant.¹⁵⁴ This section if it becomes law would have a significant deterrent factor for solicitors who attempt to bring proceedings where substantial grounds do not exist.

Whether or not the High Court will be willing to strike out a case for being frivolous or vexatious remains to be seen. I would be sceptical that the Courts would order a solicitor to personally bear the costs of a case. Orders under Order 99 Rule 7 of the Superior Courts, similar to English wasted costs orders, have been rarely made in Ireland and it is likely that the Irish courts will continue to be hesitant about making such orders. In *Kennedy v. Kileen*¹⁵⁵ the High Court concluded that the facts of the case fell far short of the exceptional circumstances which might justify a wasted costs type order. The Court held that such orders should be confined to cases where clearly a legal representative acting in litigation had been in serious default. The Law Reform Commission in its Report on Judicial Review Procedure¹⁵⁶ recommended that the leave stage be retained because of the High Court's reluctance to use its inherent jurisdiction to strike out frivolous or vexatious proceedings.

Order 19, rule 28 of the *Rules of the Superior Courts 1986* provides that a court may order a pleading to be struck out on the grounds that "it discloses no reasonable cause of action or answer" and that, in any case, where the action or defence is shown by the pleadings to be

¹⁵⁴ At Committee stage of the 2008 Bill it appears to be proposed that both subsections should be scrapped. Select Committee on Justice, Equality, Defence and Women's Rights. "List of Proposed Committee Stage Amendments", 16 April 2008." www.oireachtas.ie at page 82

¹⁵⁵ [2007] 1 ILRM 375

¹⁵⁶ "Report on Judicial Review Procedure", (LRC 71 – 2004) at page 10, February 2004.

“frivolous or vexatious”, the court may order that the action be stayed or dismissed or that judgment may be entered accordingly. In *Garibov & Anor v Minister for Justice, Equality and Law Reform*¹⁵⁷ Herbert J., examined what the Courts should consider in deciding whether or not a case was unmeritorious. He analysed whether:

“the decision to commence these judicial review proceedings was a proportionate reaction in the applicants to the situation arising from the decisions and actions of the respondents, their servants and agents; the decision to commence these judicial review proceedings was clearly based upon identified, existing and relevant constitutional, statutory and additionally or alternatively legal rules and principles; the decision to commence these judicial review proceedings was on its face manifestly, (as distinct from arguably) frivolous or obviously unstateable and for the purpose of delay; any alternative course of action was reasonably available to the applicants which would not have exposed the respondents to the risk of incurring legal costs; the applicants had afforded the respondents a reasonable opportunity, insofar as the particular circumstances of the case would permit of addressing and responding to their claims before commencing these proceedings.”

In this case, which was a costs hearing, Herbert J. found nothing in the conduct of the applicants or in the manner in which this application was prosecuted by them which would permit the court to deprive the applicants of those costs or to award costs to the respondents. The Law Society has commented that the provision may also breach the European Convention on Human Rights under the “equality of arms” provision under Article 6 of the ECHR.¹⁵⁸

¹⁵⁷ [2006] IEHC 371

¹⁵⁸ The Law Society of Ireland “*Submission on the Immigration, Residence and Protection Bill*” at page 78, published 7th April 2008 www.lawsociety.ie

Conclusion

It is clear that the restrictions placed on those wishing to initiate judicial review proceedings challenging decisions made in the asylum process are not having the effect which the Executive desired. This can be seen from the lengthy asylum court list and even more so from the list to fix dates¹⁵⁹ which, in recent times has had approximately 800 cases waiting to be assigned a hearing date in Court, with the inevitable result that some cases are put back into the list to fix dates time and time again with no progress on the case. This is clearly undesirable for all concerned, as applicants are left in limbo, unsure as to whether they will be deported or allowed to stay, while at the same time building connections in the State and the respondent is unable to act on decisions made. The legislature has a difficult and delicate balancing act to achieve in the new Immigration, Residence and Protection Bill in deterring potential applicants who have weak grounds from initiating judicial review proceedings and little chance of success, while at the same time ensuring that human rights are respected and legitimate applicants are given a fair chance of challenging a negative decision.

The proposals in the Bill in my opinion go too far in restricting a potential applicant's ability to initiate proceedings, in particular the short time limit. I believe this should be 28 days, with a restriction on the Court's ability to extend this limit amended as proposed in the Bill. I consider that with judicial discretion to hear leave applications on an *ex parte* or *inter partes* basis and Court orders affixing legal representatives with costs where frivolous and vexatious cases are initiated along with innovations such as telescopic hearings, the number of cases taken will be reduced and the cases currently awaiting determination will be concluded in a shorter timeframe. In my opinion the High Court should have discretion to stay judicial review proceedings pending the making of a decision by the proposed Protection Review Tribunal¹⁶⁰ as the decision could be overturned at this stage leaving such proceedings against the Office of the Refugee Applications Commissioner moot. I also consider that on appeal to the Supreme Court, cases should be confined to the point of law, which has been identified and certified by the High Court as a point of law of exceptional public importance and that it is in the public interest that an appeal should be taken to the Supreme Court, rather than allow additional grounds to be raised.

¹⁵⁹ A list of cases put into a single list which is usually listed near the end of a court term to assign hearing dates in the next term.

¹⁶⁰ Currently the Refugee Appeals Tribunal

The Immigration, Residence and Protection Bill 2008, should it be enacted, will have a significant effect on the statutory restrictions which have been placed on foreign nationals wishing to initiate judicial review proceedings. Whether the proposed changes will survive a constitutional challenge and stand up to international standards remains to be seen.

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