Judicial Review: Procedural Drawbacks v Increased Substantive Rights

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Introduction

1. This paper shall address recent developments in judicial review in Ireland with particular emphasis on the theme of increased procedural rigidity set against a landscape of improved substantive rights for applicants (in particular, in respect of unreasonableness/irrationality, duty to give reasons and the right to an oral hearing). Other issues that this paper overviews includes bias, legitimate expectations and and practice and procedure concerning judicial review actions.

Procedural Drawbacks

2. In my view, there are now a number of increased procedural drawbacks pertaining to judicial review. These include:
   (a) The revised Order 84 RSC (included in the appendix to this note).
   (b) Judicial prohibition of the plenary route to circumvent time limits.
   (c) Greater awareness and use of the rule in *Henderson v Henderson* (albeit that this applies to all types of proceedings).

(A) The Revised Order 84 RSC

3. The revised Order 84 RSC is annexed to this note.

(B) Judicial Prohibition of the Plenary Route to Circumvent Time Limits

4. Given the tight time periods in which to institute judicial review proceedings, it might be tempting to institute a plenary action instead in order to circumvent the 3 month rule laid down in Order 84 (especially in circumstances where the intended plaintiff/applicant is well outside this time period). However, this approach has been expressly rejected by the Supreme Court in *Shell E & P Ireland Ltd v McGrath* [2013] IESC 1 where Clarke J stated (at para 7.6):

> *Certainly the dictum of Fennelly J. in Murphy & ors v. Flood seems to approve of O'Donnell as authority for the proposition that judicial review time limits cannot be circumvented by resort to plenary action. However, it seems to me that O'Donnell was rightly decided in any event. It would make a nonsense of the system of judicial review if a party could by-pass any obligations which arise in that system (such as time limits and the need to seek leave) simply by issuing plenary proceedings which, in substance, whatever about form, sought the same relief or the same substantive ends. What would be the point of courts considering applications for leave or considering applications to extend*

time if a party could simply by-pass that whole process by issuing a plenary summons?

5. Clarke J continued at para 7.11-7.12:

> *7.11 The underlying reason why the rules of court impose a relatively short timeframe in which challenges to public law measures should be brought is because of the desirability of bringing finality to questions concerning the validity of such measures within a relatively short timeframe. At least at the level of broad generality there is a significant public interest advantage in early certainty as to the validity or otherwise of such public law measures. People are entitled to order their affairs on the basis that a measure, apparently valid on its face, can be relied on. That entitlement applies just as much to public authorities. The underlying rationale for short timeframes within which judicial review proceedings can be brought is, therefore, clear and of significant weight. By permitting time to be extended the rules do, of course, recognise that there may be circumstances where, on the facts of an individual case, a departure from the strict application on whatever timescale might be provided is warranted. The rules do not purport to impose an absolute time period.*
>
> *7.12 Against that background it does need to be noted that there may well be circumstances in which a defendant, faced with proceedings brought placing reliance on a public law measure, may be justified, in those proceedings, in challenging the validity of the measure concerned even though that party might be, strictly speaking, out of time in maintaining a direct challenge to the relevant measure. However, it does not seem to me that such questions really arise in these proceedings as they are now constituted.*

(C) The Rule in Henderson v Henderson

6. This doctrine is being increasingly used by defendants to prevent secondary or satellite litigation. The Rule in *Henderson v Henderson* is well entrenched in Irish law. It operates as a rule to prevent a potential abuse of process whereby a litigant could have argued a point of law in earlier proceedings and chose not to but, instead, launches subsequent litigation. As Wigram VC stated in *Henderson v Henderson* (1843) 3 Hare 100 (at 115):

> *"The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and to pronounce a judgment, but to every point which properly belongs to the subject of the litigation and which the parties, exercising reasonable diligence might have brought forward at the time."*

7. The rule applies to public law challenges and not simply private law litigation (see *Arklow Homes Ltd v An Bord Pleánala* [2011] IESC 29 (at 14)). Furthermore, the rule in *Henderson v Henderson* applies to settlement agreements (see *Carroll v Ryan* [2003] 1 IR 309 at 319).

8. Notwithstanding the comments of Wigram VC, the doctrine is distinct from *res judicata* and should be considered as a variant of the doctrine of abuse of process.[1] The practical difference between both doctrines is that if established, *res judicata* compels a court to dismiss extant proceedings. In contrast, a court exercises discretion if the Rule in *Henderson v Henderson* is established.[2]

Substantive Improvements

9. In contrast to a stricter procedural regime for judicial review, the Irish courts have in recent years (perhaps due to the increased 'Europeanisation' of Irish law) widened the categories of existing relief that an Applicant can seek. This is evident in the following respect:
   (a) the duty to give reasons,
   (b) the right to an oral hearing and
   (c) a widened test of irrationality/unreasonableness.

(A) Duty to Give Reasons

10. It is now well established, in light of recent judgments, that an administrative body or District/Circuit court is under a general obligation to give a reasoned decision. This principle is evident from both *Mallak v Minister for Justice, Equality and Law Reform* [2012] IESC 59 and *Rawson v Minister for Defence* [2012] IESC 26. The former case related to an asylum seeker and his challenge to the Minister for Justice's refusal to grant a certificate of naturalisation to the Applicant. The Applicant successfully appealed to the Supreme Court the terse statement of the Minister in refusing the said certificate. The letter is reproduced at paragraph 9 of the judgment and stated:

> *"The Minister has considered your application under the provisions of the Irish Nationality and Citizenship Acts 1956 and 1986, as amended and has decided not to grant a certificate of naturalisation.*
>
> *In reaching this decision, the Minister has exercised his absolute discretion, as provided for by the Irish Nationality and Citizenship Acts 1956 and 1986 as amended. There is no appeals process provided under this legislation. However, you should be aware that you may reapply for the grant of a certificate of naturalisation at any time.*

[1] See Delany & McGrath, *Civil Procedure in the Superior Courts* (3rd ed) at para 32-151 and, for example, *Carroll v Ryan* [2003] 1 IR 309.
[2] See *Moffitt v Agricultural Credit Corporation Plc* [2007] IEHC 245.

Having said this, any further application will be considered taking into account all statutory and administrative conditions applicable at the time of the application."

11. Fennelly J in a strongly analytical judgment overviewed the requirement of the duty to give reasons by reference to earlier case law such as *Pok Sun Shum v Ireland* [19986] ILRM 593. He stated (at para 43): *"it seems to me axiomatic that the rule of law requires all decision-makers to act fairly and rationally, meaning that they must not make decisions without reasons."* He further stated:

52. The general principles of natural and constitutional justice comprise a number of individual aspects of the protection of due process. The obligation to give fair notice and, possibly, to provide access to information or, in some cases, to have a hearing are intimately interrelated and the obligation to give reasons is sometimes merely one part of the process. The overarching principle is that persons affected by administrative decisions should have access to justice, that they should have the right to seek the protection of the courts in order to see that the rule of law has been observed, that fair procedures have been applied and that their rights are not unfairly infringed.

...

65. More fundamentally, and for the same reason, it is not possible for the appellant, without knowing the Minister's reason for refusal, to ascertain whether he has a ground for applying for judicial review and, by extension, not possible for the courts effectively to exercise their power of judicial review.
66. In the present state of evolution of our law, it is not easy to conceive of a decision-maker being dispensed from giving an explanation either of the decision or of the decision-making process at some stage. The most obvious means of achieving fairness is for reasons to accompany the decision. However, it is not a matter of complying with a formal rule: the underlying objective is the attainment of fairness in the process. If the process is fair, open and transparent and the affected person has been enabled to respond to the concerns of the decision-maker, there may be situations where the reasons for the decision are obvious and that effective judicial review is not precluded.
67. Several converging legal sources strongly suggest an emerging commonly held view that persons affected by administrative decisions have a right to know the reasons on which they are based, in short to understand them.
68. It has to be regarded as significant that s. 18(1) of the Freedom of Information Act, 1997, though principally concerned with the provision

of information to the public, envisages that public bodies will give reasons for their decisions at the request of an affected person.

12. A similar position was adopted by the Supreme Court in *Rawson v Minister for Defence* [2012] IESC 26 which concerned the dismissal of the applicant from the Defence Force in circumstances where he failed a drugs test for cannabis. The Applicant alleged that he did not smoke cannabis but was a passenger in car with other who smoked the drug and passively inhaled it. The Supreme Court was critical of the lack of reasons stated by the Respondent in its dismissal letter and allowed the appeal by the Applicant on the issue. Clarke J wrote the judgment on behalf of the court and stated:

6.8 While the primary focus of a number of the judgments cited, and indeed aspects of the decision in Meadows itself, were on the need to give reasons as such, there is, perhaps, an even more general principle involved. As pointed out by Murray C.J. in Meadows a right of judicial review is pointless unless the party has access to sufficient information to enable that party to assess whether the decision sought to be questioned is lawful and unless the courts, in the event of a challenge, have sufficient information to determine that lawfulness. How that general principle may impact on the facts of an individual case can be dependant on a whole range of factors, not least the type of decision under question, but also, in the context of the issues with which this Court is concerned on this appeal, the particular basis of challenge. In some cases the material on which a challenge might be considered may be obvious. Where, for example, the challenge is based on a suggestion that the relevant decision maker did not have jurisdiction at all, it will, at least in the majority of cases, be possible to assess that question by reference to a comparison between the decision made and its scope on the one hand and the law (whether statute or otherwise) conferring the decision making power on the other. Where the challenge is based on the process or procedures followed then, again in the majority of cases, any party having standing to challenge the decision will have participated in the process (or will be able to point to an arguably unlawful exclusion) and will be likely to be well familiar with what happened and thus able to assess whether there is any legitimate basis for challenge.

6.9 However, where the possible basis for challenge is concerned with the decision making itself then there is the potential for a greater deficit of ready information. Where the possible basis for challenge is founded on an absence of the correct question being addressed, incorrect considerations being applied or an irrational decision, any party wishing to assess the lawfulness of the decision will need to know something about the decision making process itself. While, as already pointed out, this is not a "reasons" case per se nonetheless the

underlying rationale for the case law on the need to give a reasoned but not discursive ruling, while not strictly speaking applicable, seems to me to have a bearing on a case such as this where the issue is as to whether the decision maker addressed the correct question. White & anor v. Dublin City Council & ors [2004] 1 I.R. 545, is a good example of a case in which a decision was quashed because the decision maker asked himself the wrong question. The case concerned a question as to whether a revision to a planning application required to be re-advertised. Fennelly J. found that the decision maker had, in reality, asked himself whether planning permission should be granted rather than whether some members of the public might reasonably wish to object to the plans as modified. It is clear from the judgment that the court had available to it sufficient materials to enable an analysis to be conducted as to the question addressed by the decision maker.

6.10 However, if a person affected does not have any sufficient information as to the question which the decision maker actually addressed then it surely follows that that person's constitutional right of access to the courts to have the legality of the relevant administrative decision judicially reviewed is likely to be, in the words of Murray C.J. in Meadows, "rendered either pointless or so circumscribed as to be unacceptably ineffective".

(B) The Right to an Oral Hearing

13. In many judicial reviews, the basis of objection is that the Applicant was denied a fair and proper hearing. This issue was of prominence in a number of housing judicial reviews in recent years and formed the backdrop of a significant Supreme Court judgment on the issue: *Donegan v Dublin City Council* [2012] IESC 18 (concerning section 62 of the *Housing Act, 1966*) where McKechnie J wrote the judgment on behalf of the court. He held that

135. Thus where a conflict of facts arises, which is required to be determined in relation to an alleged illegitimate infringement of Article 8, ***it is necessary that there be some independence between the decision-maker and those, on either side, who make, support or seek to rely on the allegations in question.*** *It is clear that any review undertaken in this regard, must be performed by a person who is rationally unconnected to those whom I have mentioned. This however should not be interpreted as requiring that a court must be the body to determine upon the matter. This could not be so; once there are in place procedures to ensure that where such questions of fact arise, there is access to an independent decision-maker acting within a process which is otherwise safeguarded, such will suffice. This requirement will only arise where the factual dispute is genuine, and*

where it is materially central and related to the Convention rights at issue. (Emphasis added).

(C) A Widened Test of Irrationality/Unreasonableness

14. The test for unreasonableness in Ireland has traditionally been quite strict. The orthodox test for judicial review was set out by the Supreme Court in *State (Keegan) v Stardust Compensation Tribunal*[3] where Henchy J put the threshold at a very higher level, the test being whether the impugned decision *"plainly and unambiguously flies in the face of fundamental reason and commons sense."* The Supreme Court posited an equally stringent threshold in *O'Keeffe v An Bord Pleanála*.[4] This judgment created the "no evidence" principle; which in effect means that in order to determine irrationality, a court should establish that a decision making authority had before it no relevant material which would support its decision[5]. Finlay CJ also stated (at 71) that:

> It is clear from these quotations that the circumstances under which the court can intervene on the basis of irrationality with the decision-maker involved in an administrative function are limited and rare. It is of importance and, I would think, of assistance to consider not only as was done by Henchy J. in *The State (Keegan) v. Stardust Compensation Tribunal* [1986] I.R. 642 the circumstances under which the court can and should intervene, but also in brief terms and not necessarily comprehensively, to consider the circumstances under which the court cannot intervene.
>
> The court cannot interfere with the decision of an administrative decision-making authority merely on the grounds that (a) *it is satisfied that on the facts as found it would have raised different inferences and conclusions*, or (b) it is satisfied that the case against the *decision made by the authority was much stronger than the case for it.*

15. The divisive Supreme Court judgment in *Meadows v Minister for Justice* [2010] IESC 3 imported an element of proportionality into the traditional test of irrationality/proportionality where fundamental rights are at issue. In *Meadows*, Murray CJ stated:

> *In reviewing the rationality or otherwise of the decision it remains axiomatic that it is not for the Court to step into the shoes of the decision maker and decide the issue on the merits but to examine whether the decision falls foul of the principles of law according to which the decision ought to have been taken.*

[3] [1986] IR 642.
[4] [1993] 1 IR 39.
[5] *Ibid* at 72.

In doing so the Court may examine whether the decision can be truly "said to flow from the premises" as Henchy J., put it in Keegan, if not it may be considered as being "fundamentally at variance with reason and common sense".

In examining whether a decision properly flows from the premises on which it is based and whether it might be considered at variance with reason and common sense I see no reason why the Court should not have recourse to the principle of proportionality in determining those issues. It is already well established that the Court may do so when considering whether the Oireachtas has exceeded its constitutional powers in the enactment of legislation. The principle requires that the effects on or prejudice to an individual's rights by an administrative decision be proportional to the legitimate objective or purpose of that decision. Application of the principle of proportionality is in my view a means of examining whether the decision meets the test of reasonableness. I do not find anything in the dicta of the Court in Keegan or O'Keeffe which would exclude the Court from applying the principle of proportionality in cases where it could be considered to be relevant.

Other Issues

16. In this section, I propose to discuss a varied number of issues, including:
    a. objective bias,
    b. legitimate expectations,
    c. practice and procedure.

(A) Objective Bias

17. Most jurisprudence in Ireland concerns allegations of objective or apparent bias (as opposed to actual bias). The Irish courts have adopted a strong position in respecting the principles of *nemo iudex in causa sua*[6] and that "not only must justice be done, it must also be seen to done."

18. The issue was comprehensively dealt with by the Supreme Court in *Orange Ltd. v Director of Telecommunications Regulation (No. 2)*[7] and *Bula Ltd. v Tara Mines Ltd. (No. 6)*;[8] in the latter case, Denham J set out what is now the leading quote on objective bias.[9] She stated (at 441):

[6] No man should be a judge in his own cause.
[7] [2000] 4 IR 159.
[8] [2000] 4 IR 412.
[9] Other leading cases on the issue include *O'Reilly v Cassidy* [1995] 1 ILRM 306 and *Dublin Well Women Centre and Others v Ireland* [1995] 1 ILRM 408.

"……it is well established that the test to be applied is objective, it is whether a reasonable person in the circumstances would have a reasonable apprehension that the applicants would not have a fair hearing from an impartial judge on the issues. The test does not invoke the apprehension of the judge or judges. Nor does it invoke the apprehension of any party. It is an objective test - it invokes the apprehension of the reasonable person."

19. This test has been applied by the Supreme Court in two cases relating to Trinity College Dublin, namely: *Kenny v Trinity College Dublin*[10] and *Kelly v Trinity College Dublin*.[11] Kenny related to the development of student accommodation by TCD in Dartry. In earlier proceedings TCD brought a motion seeking to have the plaintiff's claim struck out. Finnegan P refused this motion and thereafter TCD successfully appealed to the Supreme Court. Murray J. gave an *ex tempore* judgment on behalf of the court.

20. The Plaintiff then brought a motion to the Supreme Court in 2007 seeking to vacate the court's previous 2003 order on the basis of objective bias. The grounding affidavit stated:

In the course of the summer 2006, I became aware of the fact that one of the Supreme Court judges who had heard the appeal, namely Murray J., is a brother of a partner in Murray O'Laoire, which had designed the Trinity Hall development, which firm's name appeared on virtually all the documents which were before the Supreme Court, including affidavits from the project architect, Ms G. Boyle, who is identified in her affidavits as being a member of the Murray O'Laoire firm. Also, the Murray O'Laoire name appeared clearly on all the plans which Ms Boyle exhibited and lodged in both the High Court and the Supreme Court.

21. Fennelly J, writing the sole judgment on behalf of the Supreme Court, allowed the appeal on the grounds of objective bias. He stated:

I infer from that passage that the test of objective bias does not necessarily require that the relationship of which complaint is made be between the adjudicator and a party in the case. A witness will suffice. The question is whether a reasonable observer might have a reasonable apprehension that a judge, hearing such allegations being made against the firm of architects in which his brother was a member, although that brother was not in any way directly involved in the subject-matter of the litigation, might find it difficult to maintain complete objectivity and impartiality. Could such an observer be concerned that the allegations were of a nature to cast doubt on the

[10] [2007] IESC 42.
[11] [2007] IESC 61.

integrity of at least one member of the firm and that a judge should not adjudicate on such a dispute? Applying the most favourable interpretation of the facts from the appellant's point of view, and bearing in mind that the Court should be especially careful where it is considering one of its own judgments, I believe that the the test of objective bias should be held, in all the circumstances, to be satisfied. The Court should, accordingly, make an order setting aside the order dated 20th June 2003. No further order is required. The effect of that order is to reinstate the appellant's appeal from the order of the High Court

22. In contrast, the Supreme Court in *Kelly v Trinity College Dublin* refused to allow an argument of objective bias to succeed. The factually complex case concerned an allegation of bullying by the applicant against staff at TCD. Specifically though in the context of bias, he alleged objective bias against Professor Sagarra, a Visitor of the TCD which is part of the university's internal appellate structure. The applicant's argument was that "…by reason of her career and background, she would be naturally biased in favour of the College". Fennelly J (again writing on behalf of the court) dismissed this argument; he held:

I do not think that the applicant has established even an arguable case that Professor Sagara's participation in the decision as one of the Visitors is infected or tainted by objective bias. Firstly, her period of employment by the University had ended on her retirement. I do not accept that former employments or associations are sufficient, in the absence of other evidence, to disqualify a person from participating in disciplinary or similar tribunals related to that former employment. Secondly, her position as Pro-Chancellor is an honorific position, which casts no doubt on her ability to bring a fresh and independent mind to the matters confided to the Visitors…

It would need a considerable and, in my view, unjustified step to disqualify a qualified person from performing the valuable service of adjudicating on disputes merely because of past professional associations or social links or background. A vast number of administrative and adjudicative bodies draw on a pool of persons qualified by their experience, including past and present professional or career links, to bring balanced judgment and common sense to the resolution of disputes. This Court, in the case of Bula Ltd. v Tara Mines Limited and others, cited above, rejected as unfounded a challenge to one of its own judgments which was founded on the past professional associations of two of the judges, who had, when barristers, provided advice or legal representation to one or other of the parties to the litigation.

I can see no basis for attributing bias to Professor Sagarra based on her cited career involvement with the College. In particular, I fail to understand why her undoubted obligation and natural wish to vindicate the best interests of the College should render her more likely to favour a member of staff over a student. I specifically reject the suggestion advanced by the applicant in his affidavit that the Professor has an interest in the outcome of appeal to the Visitors. She has none whatever other than that of seeing that matters are justly and correctly decided.

23. The Applicant also alleged objective bias against Macken J (who is a graduate of TCD and was a law lecturer at the institution). But importantly, this fact was raised by the Supreme Court prior to the hearing without initial objection. However, the applicant changed his view during the course of the hearing and objected. The Supreme Court considered the matter but rejected it. Fennelly J stated:

The Court, having risen to consider the objection, rejected it. It held that the fact that a member of the Court was a graduate of and had formerly taught at the University, whose affairs were in issue, was not a ground establishing objective bias. Judges are drawn from a broad cross-section of society. Their past associations doe not disqualify them from performing their duty as judges.

24. This approach by the Supreme Court indicates the strong need for a practitioner with a potential objection on the grounds of objective bias not to sit on their hands and raise the matter when it suits. Otherwise, one may be deemed to have waived their objection.[12]

25. A recent confirmation of existing principles is *O'Ceallaigh v An Bord Altranais* [2011] IESC 50 where the applicant unsuccessfully appealed the High Court's refusal to grant an order based on objective bias. The allegation related to the Chairperson of the Respondent's Fitness to Practice Committee and the fact herself and the principal expert witness both worked at the Rotunda Hospital. Fennelly J stated:

52. The very most that can be said is that Ms Treanor and Ms Hanrahan worked in the same Hospital and that, for that reason alone, a reasonable, objective and well-informed observer, would reasonably apprehend that the former would be unable to consider the evidence of the latter in a proper, objective and professional way. The appellant

[12] See *Corrigan v Irish Land Commission* [1977] IR 317 and *O'Neill v Irish Hereford Breed Society Ltd.* [1992] IR 455.

seeks to support her case by reference to the fact that, as happened in the case of an earlier inquiry into a nurse, both had been called as witnesses and that Ms Treanor had commissioned a report from Ms Hanrahan. That case is evidence, at the most, of the fact that those two persons acted professionally in a matter in which both had a proper professional interest. I would add that the suggestion of concealment of that case is, in any event, completely unfounded. It was decided and judgment was given in February 2009; the inquiry commenced in May of that year.

53. For my part, I cannot discern any ground upon which the hypothetical objective, well-informed and reasonable observer would reasonably apprehend that Ms Treanor would not be able to bring a proper independent and impartial mind and judgment to the task before her.

(B) Legitimate Expectations

26. In *Glencar Exploration plc v. Mayo County Council (No. 2)* [2002] 1 I.R. 84 Fennelly J. broadly defined the remedy as:

Firstly, the public authority must have made a statement or adopted a position amounting to a promise or representation, express or implied as to how it will act in respect of an identifiable area of its activity. I will call this the representation. Secondly the representation must be addressed or conveyed either directly or indirectly to an identifiable person or group of persons, affected actually or potentially, in such a way that it forms part of a transaction definitively entered into or a relationship between that person or group and the public authority or that the person or group has acted upon the faith of the representation. Thirdly, it must be such as to create an expectation reasonably entertained by the person or group that the public authority will abide by the representation to the extent that it would be unjust to permit the public authority to resile from it. Refinements are extensions of these propositions are obviously possible. Equally they are qualified by considerations of the public interest including the principle that freedom to exercise properly a statutory power is to be respected. However the proposition I have endeavoured to formulate seem to me to be preconditions for the right to invoke the doctrine.

27. In *Lett & Company Ltd. v Wexford Borough Corporation & Ors,*[13] Clarke J stated:

[13] [2007] IEHC 195.

4.7 In the light of those authorities it seems to me that, on the current state of the development of the doctrine of legitimate expectation, it is reasonable to state that there are both positive and negative factors which must be found to be present or absent, as the case may be, in order that a party can rely upon the doctrine. The positive elements are to be found in the three tests set out by Fennelly J. in the passage from Glencar Exploration to which I have referred. The negative factors are issues which may either prevent those three tests from being met (for example the fact that, as in Wiley, it may not be legitimate to entertain an expectation that a past error will be continued in the future) or may exclude the existence of a legitimate expectation by virtue of the need to preserve the entitlement of a decision maker to exercise a statutory discretion within the parameters provided for in the statute concerned or, alternatively, may be necessary to enable, as in Hempenstall, legitimate changes in executive policy to take place. I therefore propose to approach the contentions of the parties as to the existence of a legitimate expectation in this case by first considering the positive elements of the test.

28. It now appears established that the doctrine of legitimate expectation provides for damages where the 'equity of the case requires it'. This issue was recently analysed by O'Donnell J in *Lett & Co. Ltd. v Wexford Borough Council* [2012] IESC 14. The High Court judgment was partially overturned on the level of compensation granted but the substantive judgment was unaffected. On the issue of the possibility of a court awarding damages for breach of a legitimate expectation, O'Donnell J stated:

23 …it seems to me in principle at least, and indeed by analogy with the position in estoppel in private law, that the issue for the Court is that once a legitimate expectation or estoppel has been identified, ***it is necessary to make good the equity so found, and that in such circumstances again in principle, the Court can make an order, whether characterised as damages or restitution, in order to make good the breach identified.***

29. Reference to the phrase such remedy as equity demands was also made by Hamilton J in *Conroy v The Commissioner of An Garda Síochána* (High Court, Unreported, 9th February 1988). This case concerned a legitimate expectation of a Garda to a special pension based on a 100% disability. Hamilton J stated that (at 13): *"I am satisfied that the Plaintiff had a legitimate expectation that he would be awarded a special pension based on 100% disability. He was not awarded such a special pension and I am satisfied that he is entitled to such remedy as the equity of the case demands*".[14] Hamilton J deemed this sum to be £17,500.

[14] Emphasis added.

(C) Practice and Procedure

30. A number of important changes have occurred in the Judicial Review list. These include:
    (a) The allocation of significant list management to the Registrar (including applications for adjournments and hearing dates) at 10 am each morning.
    (b) The abolition of the 'List to Fix Dates'.
    (c) Greater case management.

31. In respect of pleadings, there is a greater emphasis of non-generic pleadings and pleadings closely linked to the actual facts in dispute. Nonetheless, the Supreme Court was critical of overly elaborate pleading in *Babington v Minister for Justice* [2012] IESC 65 where MacMenamin J stated:

> *Form No. 13 referred to above, explicitly reiterates that, in a recital of the grounds upon which relief is sought, the applicant:*
> *"should state precisely each such ground giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground".*
>
> *Regrettably, these explicit stipulations are frequently not complied with, and the same grounds are set out in as many different, varying, (and wearying) reformulations of the same point as can be conceived. Practitioners should realise that, in this entirely counterproductive and unnecessary process, there is a real risk of not being able to see the wood for the trees. A good point does not gain force by repetition. In fact, the contrary is true. What is required is simply a succinct statement of the grounds. It is open to an applicant to furnish particulars of each ground so as to ensure that the court will be aware of the precise details of the case. What is not required, however, is that each ground should be reformulated in a number of different ways. Once the precise grounds are set out, succinctly, practitioners should then, simply set out and identify in respect of each ground, "the facts or matters relied upon as supporting that ground". Thus, no material issue will be omitted.*

Conclusion

32. Clearly, the law concerning judicial review has been in considerable flux in recent years. For the Applicant, there is undoubtedly now a greater scope to challenge an unfavourable decision but from a procedural perspective there is now a greater obligation to act with expedition.

Order 84 RSC
S.I. No. 691 of 2011: Rules of the Superior Courts (Judicial Review) 2011

1. (1) These Rules, which may be cited as the Rules of the Superior Courts (Judicial Review) 2011, shall come into operation on the 1st day of January 2012.

(2) These Rules shall be construed together with the Rules of the Superior Courts.

(3) The Rules of the Superior Courts as amended by these Rules may be cited as the Rules of the Superior Courts 1986 to 2011.

2. The Rules of the Superior Courts are amended by the substitution for rules 18 to 28 inclusive of Order 84 of the rules set out in Schedule 1.

3. The Forms in Schedule 2 shall be substituted for Form No. 13 in Appendix T.

4. Notwithstanding the amendments made by these Rules, an application for leave to apply for judicial review by way of certiorari may, where the grounds for such application first arose on a date before the date on which these Rules come into operation, be made within six months from the date when the grounds for the application first arose.

Schedule 1

"V. Judicial review.

18. (1) An application for an order of certiorari, mandamus, prohibition or quo warranto shall be made by way of an application for judicial review in accordance with the provisions of this Order.

(2) An application for a declaration or an injunction may be made by way of an application for judicial review, and on such an application the Court may grant the declaration or injunction claimed if it considers that, having regard to—

(a) the nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition, certiorari, or quo warranto,

(b) the nature of the persons and bodies against whom relief may be granted by way of such order, and

(c) all the circumstances of the case,

it would be just and convenient for the declaration or injunction to be granted on an application for judicial review.

19. On an application for judicial review any relief mentioned in rule 18(1) or (2) may be claimed as an alternative or in addition to any other relief so mentioned if it arises out of or relates to or is connected with the same matter and in any event the Court may grant any relief mentioned in rules 18(1) or (2) which it considers appropriate notwithstanding that it has not been specifically claimed.

20. (1) No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule.

(2) An application for such leave shall be made by motion ex parte grounded upon—

(a) a notice in Form No. 13 in Appendix T containing:

(i) the name, address and description of the applicant,

(ii) a statement of each relief sought and of the particular grounds upon which each such relief is sought,

(iii) where any interim relief is sought, a statement of the orders sought by way of interim relief and a statement of the particular grounds upon which each such order is sought,

(iv) the name and registered place of business of the applicant's solicitors (if any), and

(v) the applicant's address for service within the jurisdiction (if acting in person); and

(b) an affidavit, in Form No. 14 in Appendix T, which verifies the facts relied on.

Such affidavit shall be entitled: THE HIGH COURT

HIGH COURT

JUDICIAL REVIEW

BETWEEN A.B.... APPLICANT

AND

C.D.... RESPONDENT

(3) It shall not be sufficient for an applicant to give as any of his grounds for the purposes of paragraphs (ii) or (iii) of sub-rule (2)(a) an assertion in general terms of the ground concerned, but the applicant should state precisely each such ground, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground.

(4) The Court hearing an application for leave may, on such terms, if any, as it thinks fit—

> (a) allow the applicant's statement to be amended, whether by specifying different or additional grounds of relief or otherwise,
>
> (b) where it thinks fit, require the applicant's statement to be amended by setting out further and better particulars of the grounds on which any relief is sought.

(5) The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

(6) Where leave is sought to apply for an order of certiorari to remove for the purpose of its being quashed any judgement, order, conviction or other proceeding which is subject to appeal and a time is limited for the bringing of the appeal, the Court may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

(7) If the Court grants leave, it may impose such terms as to costs as it thinks fit and may require an undertaking as to damages.

(8) Where leave to apply for judicial review is granted then the Court, should it consider it just and convenient to do so, may, on such terms as it thinks fit—

> (a) grant such interim relief as could be granted in an action begun by plenary summons,
>
> (b) where the relief sought is an order of prohibition or certiorari, make an order staying the proceedings, order or decision to which the appli- cation relates until the determination of the application for judicial review or until the Court otherwise orders.

21. (1) An application for leave to apply for judicial review shall be made within three months from the date when grounds for the application first arose. [This is as opposed to former rule which allowed 6 months for certiotari]

(2) Where the relief sought is an order of certiorari in respect of any judgement, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgement, order, conviction or proceeding.

(3) Notwithstanding sub-rule (1), the Court may, on an application for that purpose, extend the period within which an application for leave to apply for judicial review may be made, but the Court shall only extend such period if it is satisfied that:—

(a) there is good and sufficient reason for doing so, and

(b) the circumstances that resulted in the failure to make the application for leave within the period mentioned in sub-rule (1) either—

(i) were outside the control of, or

(ii) could not reasonably have been anticipated by the applicant for such extension.

(4) In considering whether good and sufficient reason exists for the purposes of sub-rule (3), the court may have regard to the effect which an extension of the period referred to in that sub-rule might have on a respondent or third party.

(5) An application for an extension referred to in sub-rule (3) shall be grounded upon an affidavit sworn by or on behalf of the applicant which shall set out the reasons for the applicant's failure to make the application for leave within the period prescribed by sub-rule (1) and shall verify any facts relied on in support of those reasons.

(6) Nothing in sub-rules (1), (3) or (4) shall prevent the Court dismissing the application for judicial review on the ground that the applicant's delay in applying for leave to apply for judicial review (even if otherwise within the period prescribed by sub-rule (1) or within an extended period allowed by an order made in accordance with sub-rule (3)) has caused or is likely to cause prejudice to a respondent or third party.

(7) The preceding sub-rules are without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made.

22. (1) An application for judicial review shall be made by originating notice of motion save in a case to which rule 24(2) applies or where the Court directs that the application shall be made by plenary summons.

(2) The notice of motion or summons must be served on all persons directly affected and where it relates to any proceedings in or before a Court and the object of the application is either to compel the Court or an officer of the Court to do any act in relation to the proceedings or to quash them or any order made therein, the notice or summons must also be served on the Clerk or Registrar of the Court and, where any objection to the conduct of the Judge is to be made, on the Clerk or Registrar on behalf of the Judge.

(3) A notice of motion or summons, as the case may be, must be served within seven days after perfection of the order granting leave, or within such other period as the Court may direct. In default of service within the said time any stay of proceedings granted in accordance with rule 20(8) shall lapse. In the case of a motion on notice it shall be returnable for the first available motion day after the expiry of seven weeks from the grant of leave, unless the Court other- wise directs.

(4) Any respondent who intends to oppose the application for judicial review by way of motion on notice shall within three weeks of service of the notice on the respondent concerned or such other period as the Court may direct file in the Central Office a statement setting out the grounds for such opposition and, if any facts are relied on therein, an affidavit, in Form No. 14 in Appendix T, verifying such facts, and serve a copy of that statement and affidavit (if any) on all parties. The statement shall include the name and registered place of business of the respondent's solicitor (if any). [Tighter time periods for Opposition Papers]

(5) It shall not be sufficient for a respondent in his statement of opposition to deny generally the grounds alleged by the statement grounding the application, but the respondent should state precisely each ground of opposition, giving particulars where appropriate, identify in respect of each such ground the facts or matters relied upon as supporting that ground, and deal specifically with each fact or matter relied upon in the statement grounding the application of which he does not admit the truth (except damages, where claimed).

(6) An affidavit giving the names and addresses of, and the places and dates of service on, all persons who have been served with the notice of motion or summons must be filed before the motion or summons is heard and, if any person who ought to be served under this rule has not been served, the affidavit must state that fact and the reason for it; and the affidavit shall be before the Court on the hearing of the motion or summons.

(7) Save in a case to which rule 24(2) applies or where the Court directs that the application shall be made by plenary summons, each party shall, within three weeks of service of the statement referred to in sub-rule (4) or such other period as the Court may direct, exchange with all other parties and file in the Central Office written submissions on points or issues of law which that party proposes to make to the Court on the hearing of the application for judicial review. [Rule as to submissions is too tight in practice and often a direction is requested]

(8) The Court may on the return date of the notice of motion, or any adjournment thereof, give directions as to whether it shall require at the hearing of the application for judicial review oral submissions in respect of any of the written submissions of the parties on points or issues of law.

(9) If on the hearing of the motion or summons the Court is of opinion that any person who ought, whether under this rule or otherwise, to have been served has not been served,

the Court may adjourn the hearing on such terms (if any) as it may direct in order that the notice or summons may be served on that person.

23. (1) A copy of the statement in support of an application for leave under rule 20, together with a copy of the verifying affidavit must be served with the notice of motion or summons and, subject to sub-rule (2), no grounds shall be relied upon or any relief sought at the hearing except the grounds and relief set out in the statement.

(2) The Court may, on the hearing of the motion or summons, allow the applicant or the respondent to amend his statement, whether by specifying different or additional grounds of relief or opposition or otherwise, on such terms, if any, as it thinks fit and may allow further affidavits to be used if they deal with new matters arising out of an affidavit of any other party to the application.

(3) Where the applicant or respondent intends to apply for leave to amend his statement, or to use further affidavits he shall give notice of his intention and of any proposed amendment to every other party.

24. (1) The Court hearing an application for leave to apply for judicial review may, having regard to the issues arising, the likely impact of the proceedings on the respondent or another party, or for other good and sufficient reason, direct that the application for leave should be heard on notice and adjourn the appli- cation for leave on such terms as it may direct and give such directions as it thinks fit as to the service of notice of the application for leave (and copies of the statement of grounds, affidavit and any exhibits) on the intended respondent and on any other person, the mode of service and the time allowed for such service.

(2) The Court may—

(i) with the consent of all of the parties, or

(ii) on the application of a party or of its own motion, where there is good and sufficient reason for so doing and it is just and equitable in all the circumstances,

treat an application for leave as if it were the hearing of the application for judicial review and may—

(I) adjourn the hearing of the application on such terms as it may direct,

(II) give directions as to the time within which submissions in writing of the parties on points or issues of law shall be exchanged between the parties and filed in the Central Office,

(III) on any date to which the application has been adjourned, give directions as to whether it shall require at the hearing of the application for

judicial review oral submissions in respect of any of the submissions in writing of the parties on points or issues of law, or

(IV) give any direction and make any order referred to in sub-rule (3) for which provision is not made in this sub-rule.

(3) On the hearing of an application for leave directed to be on notice or for judicial review (or on any adjournment of such hearing), the Court may give directions and make orders for the conduct of the proceedings as appear con- venient for the determination of the proceedings in a manner which is just, expeditious and likely to minimise the costs of those proceedings which, where appropriate, may include:

(a) directions as to the service of notice of the application or of the pro- ceedings on any other person, including mode of service and the time allowed for such service (and the Court may for that purpose adjourn the hearing or further hearing of the application or notice of motion to a date specified);

(b) directions as to the filing and delivery of any further affidavits by any party or parties;

(c) orders fixing time limits;

(d) directions as to discovery;

(e) directions as to the exchange of memoranda between or among the parties for the purpose of the agreeing by the parties or the fixing by the Court of any issues of fact or law to be determined in the pro- ceedings on the application, or orders fixing such issues;

(f) an order under rule 27(5) or rule 27(7) (and the Court may for that purpose make orders and give directions in relation to the exchange of pleadings or points of claim or defence between the parties);

(g) directions as to the furnishing by the parties to the Court and delivery of written submissions;

(h) directions as to the publication of notice of the hearing of the appli- cation and the giving of notice in advance of such hearing to any person other than a party to the proceedings who desires to be heard on the hearing of the application.

25. (1) On an application for judicial review the Court may, subject to sub- rule (2), award damages to the applicant if—

(a) he has included in the statement in support of his application for leave under rule 20 a claim for damages arising from any matter to which the application relates, and

(b) the Court is satisfied that, if the claim had been made in a civil action against any respondent or respondents begun by the applicant at the time of making his application, he would have been awarded damages.

(2) Order 19, rules 5 and 7, shall apply to a statement relating to a claim for damages as it applies to a pleading.

26. (1) Any interlocutory application may be made to the Court in proceedings on an application for judicial review. In this rule "interlocutory application" includes an application for an order under Order 31, or Order 39, rule 1, or for an order dismissing the proceedings by consent of the parties.

(2) Where the relief sought is or includes an order of mandamus, the practice and procedure provided for in Order 57 shall be applicable so far as the nature of the case will admit.

27. (1) On the hearing of an application under rule 22, or an application which has been adjourned in accordance with rule 24(1), any person who desires to be heard in opposition to the application, and appears to the Court to be a proper person to be heard, shall be heard, notwithstanding that he has not been served with notice of the application.

(2) Where the relief sought is or includes an order of certiorari to remove any proceedings for the purpose of quashing them, the applicant may not ques- tion the validity of any order, warrant, committal, conviction, inquisition or record, unless before the hearing of the motion or summons he has lodged in the High Court a copy thereof verified by affidavit or accounts for his failure to do so to the satisfaction of the Court. If necessary, the court may order that the person against whom an order of certiorari is to be directed do make a record of the judgement, conviction or decision complained of.

(3) Where an order of certiorari is made in any such case as is referred to in sub-rule (2), the order shall, subject to sub-rule (4), direct that the proceedings shall be quashed forthwith on their removal into the High Court.

(4) Where the relief sought is an order of certiorari and the Court is satisfied that there are grounds for quashing the decision to which the application relates, the Court may, in addition to quashing it, remit the matter to the Court, tribunal or authority concerned with a direction to reconsider it and reach a decision in accordance with the findings of the Court.

(5) Where the relief sought is a declaration, an injunction or damages and the Court considers that it should not be granted on an application for judicial review but might have been granted if it had been sought in a civil action against any respondent or respondents begun by plenary summons by the applicant at the time of making his application, the Court may, instead of refusing the appli- cation, order the proceedings to continue as if they had been begun by plenary summons.

(6) Where the relief sought is or includes an order of mandamus, the pro- ceedings shall not abate by reason of the death, resignation or removal from office of the respondent but they may, by order of the Court, be continued and carried on in his name or in the name of the successor in office or right of that person.

(7) At any stage in proceedings in prohibition, or in the nature of quo war- ranto, the Court on the application of any party or of its own motion may direct a plenary hearing with such directions as to pleadings, discovery, or otherwise as may be appropriate, and thereupon all further proceedings shall be conducted as in an action originated by plenary summons and the Court may give such judgement and make such order as if the trial were the hearing of an application to make absolute a conditional order to show cause.

VI. General.

28. The forms in Appendix T shall be used in all proceedings under this Order.

29. Where a certificate referred to in section 96(4) of the Criminal Justice Act 2006 requires to be issued otherwise than on the determination of an appeal, such certificate shall be in the Form No. 28 in Appendix U with such modifi- cations as may be appropriate, and shall be transmitted forthwith by or on behalf of the Registrar to each of the persons referred to in section 96(6) of that Act."